20160173
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
SEPTEMBER 27, 2016
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Brandon and Constance Jalbert, Plaintiffs and Appellees, vs. Eagle Rigid Spans, Inc., Defendant and Appellant.	**Supreme Court No.: 20160173** **District Court No.: 21-2013-CV-00016**

APPEAL FROM THE SOUTHWEST
JUDICIAL DISTRICT COURT,
HETTINGER COUNTY, NORTH DAKOTA

HONORABLE WILLIAM HERAUF

BRIEF OF APPELLEE BRANDON AND CONSTANCE JALBERT

APPEAL TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA FROM THE JUDGMENT ENTERED BY THE HETTINGER COUNTY DISTRICT COURT

By: Christina M. Wenko
ND State Bar ID No.: 06884
Mackoff Kellogg Law Firm
38 Second Avenue East
Dickinson, North Dakota 58601
Ph: (701) 456-3210
email: cwenko@mackoff.com
Attorney for the Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT OF THE ISSUES

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING ERS' MOTION FOR A NEW TRIAL BECAUSE THERE WERE NO SCHEUDLING IRREGULARITIES THAT PREVENTED ERS FROM RECEIVING A FAIR TRIAL

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING ERS' MOTION FOR A NEW TRIAL BECAUSE THE JURY DID NOT AWARD EXCESSIVE DAMAGES UNDER THE INFLUENCE OF PASSION OR PREJUDICE

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING ERS' MOTION FOR A NEW TRIAL BECAUSE THERE WAS SUFFICIENT EVIDENCE TO JUSTIFY THE VERDICT

IV. THE TRIAL COURT DID NOT ERR IN FAILING TO REDUCE THE JALBERTS CLAIMED EXPERT WITNESS FEES BECAUSE THE EVIDENCE SUPPORTED A FULL REIMBURSEMENT

STATEMENT OF THE CASE

[¶1] Plaintiffs and Appellees Brandon ("Brandon") and Constance ("Connie") Jalbert ("Jalberts") commenced this action against Defendant and Appellant, ERS Spans, Inc. ("ERS") alleging breach of contract, fraudulent misrepresentation and fraud in the inducement, equitable estoppel, breach of warranty, negligence, consumer fraud, constructive fraud, and revocation of acceptance, which arose out of a contract for construction of an 80X200 building to be used in their family farming operation. (Doc. ID. 1; App. p. 12). The matter was initially scheduled for trial beginning on November 12, 2014 and ending on November 13, 2014. (Doc. ID. 1; App. p. 4). After a mistrial, the trial court rescheduled the trial to begin on October 13, 2015 and end on October 14, 2015. Id. At the second trial, the jury found in favor of Jalberts on their breach of contract and breach of warranty claims and awarded $650,000.00, plus pre-judgment interest at six (6%) percent. (Order For Judgment; Doc. ID. 345; App. p. 38; Order for Amended Judgment; Doc. ID. 357; App. p. 40).

[¶2] The trial court issued its Order on the jury verdict on October 20, 2015, ordering that Jalberts are entitled to judgment against ERS in the amount of $650,000.00, plus interest and costs and disbursements. Judgment in favor of Jalberts in the amount of $877,407.78 was entered against ERS on November 6, 2015. Upon entry of judgment, ERS filed a motion for a new trial, which the trial court denied. (Order Denying Def's Motion for New Trial; Doc. ID. 381; App. p. 41). ERS now appeals. (Notice of Appeal; Doc. ID. 386; App. p. 42).

STATEMENT OF THE FACTS

[¶3] Brandon and Connie are farmers. (Tr. Vol. 1, P. 141, 19-21). They own a family farming operation in southwestern North Dakota. (Tr. Vol. 1, P. 141, 5). At a farm show, Brandon visited with a salesman with ERS, George LaFave ("LaFave") about what a building he was looking to build, and LaFave informed Brandon that ERS could build what he was looking for. (Tr. Vol. 1, P. 144, 4-7, 23-25; P. 145, 1-6).

[¶4] On October 5, 2010, Brandon contracted with ERS to build an 80X200 building. (Tr. Vol. 1, P. 146, 2-15). The parties signed a contract in the amount of $374,879.00, which included a concrete floor and in-floor electric hot water heat. (Doc. ID No. 121). Construction was to begin in the fall of October 2010, but it did not start until June of 2011. (Tr. Vol. 1, P. 152, 19-25, P. 153, 1-2). The Jalberts were not able to get in the building to begin using it until January/February 2012. (Tr. Vol. 1, P. 156, 4-6).

[¶5] In late 2011, Brandon communicated with LaFave about the issues he had with the building, and LaFave agreed that things needed to be fixed. (Tr. Vol. 1, P. 163, 18-25; P. 1-25; P. 165, 1-4). Bruce Meidinger ("Meidinger"), President of ERS, visited the Jalbert property to inspect the building and made assurances that it could all be fixed. (Tr. Vol. 1, P. 174, 14-19). Meidinger told the Jalberts he would take of the issues and would talk with his engineer and see what the problem was and come back and figure it out. (Tr. Vol. 1, P. 175, 1-14). The Jalberts never heard back from ERS. (Tr. Vol. 1, P. 175, 15-16).

[¶6] The Jalberts commenced this action in the spring of 2013. (Doc. ID. No. 1). The matter was initially scheduled for trial beginning on November 12, 2014 and ending on November 13, 2014 pursuant to Stipulated Scheduling Order signed by both parties.

(Doc. ID. No. 1; App. p. 4 and Doc. ID No. 13). After ERS' counsel suffered health complications during voir dire, the trial court declared a mistrial and rescheduled the trial to begin on October 13, 2015 and end on October 14, 2015. (Doc. ID No. 104).

[¶7] At the second trial, the trial court heard multiple witnesses testify as to the damages claimed by the Jalberts. Connie testified that she paid ERS $344,116.58. (Tr. Vol. II, P. 397, 5-11). The Jalberts proceeded to install and pay for the remaining items in the building including $102,529.38 for concrete and $42,400 for in floor heat despite these items being included in the initial contract price. (Tr. Vol. II, P. 396, 19-25; P. 397, 1).

The Jalberts also paid for plumbing installation in the amount of $8,220, and door installation in the amount of $14,842.25. (Tr. Vol. II, P. 397, 12-22). Connie also testified that they spent $599,914.41 on the building. (Tr. Vol. II, P. 398, 1-2).

[¶8] John Mercer ("Mercer"), a professional engineer, testified at trial that the building was not structurally sound when he applied the International Building Code. (Tr. Vol. 2, P. 301; 25; P. 302, 1-2). Scott Kolling ("Kolling"), a general contractor, testified at trial that the building had too many structural deficiencies and should be torn down. (Tr. Vol. 2, P. 456; 13-22). Ultimately, the jury found in favor of Jalberts on their breach of contract and breach of warranty claims and awarded $650,000.00, plus pre-judgment interest at six (6%) percent. (Order For Judgment; Doc. ID. 345; App. p. 38; Order for Amended Judgment; Doc. ID. 357; App. p. 40).

STATEMENT OF THE STANDARD OF REVIEW

[¶9] A motion for a new trial under Rule 59 of the Rules of Civil Procedure is left to the sound discretion of the trial court. Kraft v. Kraft, 366 N.W.2d 450, 453 (N.D. 1985). The decision to grant or deny a new trial will not be set aside on appeal unless there is an affirmative showing of a manifest abuse of discretion. Holte v. Carl Albers, 370 N.W.2d 520, 524 (N.D. 1985). "An abuse of discretion by a trial court in granting or denying a motion for a new trial is defined as an unreasonable, arbitrary, or unconscionable attitude on the part of the court." Kraft, 366 N.W2d at 453. In other words, "a trial court abuses its discretion when it acts in an arbitrary, unreasonable or unconscionable manner, misinterprets or misapplies the law, or its decision is not the product of a rational mental process leading to a reasoned determination." Nieuwenhuis v. Nieuwenhuis, 2014 N.D. 145 ¶ 29; 851 N.W.2d 130.

LAW AND ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING ERS' MOTION FOR A NEW TRIAL BECAUSE THERE WERE NO SCHEUDLING IRREGULARITIES THAT PREVENTED IT FROM RECEIVING A FAIR TRIAL.

A. ERS was not prejudiced at trial because it was given notice that the trial was scheduled for two days and failed to timely object.

[¶10] The trial court did not abuse its discretion by proceeding with a two day trial nor was ERS prevented from having a fair trial as a result of the trial court's decision. It is well established that "a district court has broad discretion over the presentation of evidence and the conduct of trial, but it must exercise its discretion in a manner that best comports with substantial justice." Manning v. Manning, 2006 ND 67, ¶ 30, 711 N.W.2d 149. A court may impose reasonable restrictions on the length of a hearing and the number of witnesses allowed. Gullickson v. Kline, 2004 ND 76, ¶ 16, 678 N.W.2d 138. More simply stated, "the trial judge has broad discretion over the trial timetable." United States v. Bein, 728 F.2d 107, 114 (2d Cir. 1984). To show abuse of that discretion, appellants must demonstrate arbitrary action substantially impairing the defense. Id.

[¶11] First of all, through the entire litigation, ERS was put on notice that this matter had been scheduled for a two day trial. The record in this case documents that notice quite well. For instance, the original Scheduling Order in this case was filed with the Clerk of Court on September 23, 2013. (Doc. ID No. 13). The trial court set the trial based upon the parties' stipulated Scheduling Order, which was signed by both parties. Id. The Scheduling Order states that the parties agreed that the trial was estimated to be two days. Id. As a result of that stipulated Scheduling Order, the trial court issued a Notice of Pretrial and Jury Trial on December 6, 2013, which indicated that the trial was

scheduled for two days to begin on November 12, 2014. (Doc. ID No. 15). The record is clear that ERS did not object to a two day trial upon receiving the Notice of Pretrial.

[¶12] Secondly, the parties amended the Scheduling Order dated September 23, 2013, and a Stipulation to Extend Discovery Deadlines was filed on May 14, 2014. (Doc. ID. No. 24.) Shortly thereafter on June 20, 2014, the Jalberts filed their Second Amended Plaintiffs' Witness List and Exhibit List. (Doc. ID No. 29 and 30). The record is devoid of any filing with the trial court that ERS raised a concern with the trial court over the number of witnesses and exhibits and the fact that it was concerned about a two day trial. The trial was set for November 12, 2014, so ERS had approximately six months to do so. Yet, ERS did nothing and proceeded to trial.

[¶13] Trial commenced approximately five months later on November 12, 2014. Then due to circumstances outside the control of the Jalberts, a mistrial was entered after ERS' then counsel, Michael J. Morley, suffered health complications during voir dire and could not continue. During the rescheduling of the trial, the Calendar Clerk notified both parties on December 16, 2014 that the trial court had dates on April 28 and 29, 2015 open up and inquired if these dates would work for both parties. (Doc. ID No. 370). On December 17, 2014, counsel for ERS informed the Calendar Clerk that those dates would not work due to a scheduling conflict, but that October 13 and 14, 2015 would work for ERS. Id. The email correspondence also indicated that counsel for ERS had visited with ERS about the dates because the email read, "I have confirmed the October 13-14 trial date with my client, witnesses and expert." Id.

[¶14] The email confirms that ERS discussed the new proposed trial dates. ERS knew that a site visit had been previously scheduled. (Doc. ID. No. 62-64, 67). Yet, ERS said

nothing and *once again* agreed to a two day trial. (Doc. ID No. 104). In addition, the trial court reissued a Notice of Jury Trial on Friday, December 19, 2014, which states "This case is set for two days" putting ERS on notice that this matter was scheduled for a two day trial to begin on October 13, 2015. Id. After the trial court issued its Notice, ERS did not move for a continuance, request to have the trial date reset.

[¶15] It was only at the Pretrial Conference on October 7, 2015, one week before trial, where ERS raised a concern over the trial being scheduled for two days. (Tr. Hr. Oct. 7, 2015, P. 2 19-25; P. 1-4). At the Pretrial Conference, the trial court determined that it would proceed with the two day trial because there was no indication that it had been set for three days. (Tr. Hr. Oct. 7, 2015, P. 9, 24). In fact, counsel for ERS informed the trial court that upon his review of the record and prior scheduling orders that the documents indicated that this matter was set for a two day trial. (Id., P. 2, 19-22). Counsel for ERS went on to admit that it was a calendaring error on his secretary's part. Id. Counsel for ERS also admitted that he "did not realize this was scheduled for a two day trial" and admitted that was his mistake. (Tr. of Hr., Oct. 7, 2015, P. 10, 13-15).

[¶16] The trial court also made it clear at the Pretrial Conference that the case was "going to end up outside the Administrative Rule 12 two-year deadline." (Tr. Hr. Oct. 7, 2015, P. 9, 24-25, P. 10, 1-2). Administrative Rule 12 governs the North Dakota Docket Currency Standards for District Courts. Pursuant to Section 2(a) of Rule 12, "judgments in general civil cases must be entered within 24 months of the date the complaint was filed or within 90 days of the end of the trial, whichever is earlier." N.D. Admin. R. 12.

[¶17] In this case, the Complaint was filed on April 26, 2013. (Doc. ID No. 1). The initial trial in this matter was scheduled for two days beginning on November 12, 2014.

(Doc. ID No. 15). The second trial was not held until October 13, 2015, which was two years and five months after the Complaint was filed. (Doc. ID No. 104). It should also be noted that the trial court also made a determination that it was unrealistic to "keep a jury sequestered . . . so that they don't get outside influence in a small county and try to have a different trial date later on." (Tr. Hr. Oct.7, 2015, P. 10, 5-9).

[¶18] Despite the evidence in the record, ERS now wants this Court to find that it was unfairly prejudiced by a two day trial. ERS cites Wahl v. N. Improvement Company, 2011 ND 146, 800 N.W.2d 700, in support of its argument. While ERS alleges that Wahl supports its position for a new trial, it simply does not, and the facts are similar to this matter. In Wahl, just as in this case, the party requesting a new trial *never* objected to the prior scheduling order. Also, just as in this case, the party rose concerns only short time before trial. Id. at ¶ 7.

[¶19] In this case, if ERS had concerns about the two day trial, it had over ten months to bring it to the trial court's attention. Yet, ERS did nothing. Just as in Wahl, "the parties knew the scheduled number of days and had ample time to plan their presentation of evidence accordingly." Id. What the decision in Wahl suggests is that parties are responsible for knowing the rules and being prepared for trial. The fact that ERS thought the trial was scheduled for three days when all the information from the Court states that it was scheduled for two days is an oversight on behalf of ERS. ERS is deemed to know when it was served notice. It was ERS' responsibility to make a timely objection or request a continuance. There was nothing arbitrary and capricious about proceeding with the two day trial, and the trial court did not misinterpret or misapply the law in doing so. Its decision was "the product of a rational mental process leading to a reasoned

determination." Nieuwenhuis, 2014 ND ¶ 29. There is no merit in ERS' claim that it was prejudiced, and the ruling of the trial court should be affirmed.

B. ERS was not prejudiced when the trial court canceled the site visit because it presented photographs and testimony about the building.

[¶20] The trial court did not abuse its discretion or in any way act in an arbitrary or capricious manner in cancelling the site visit, which would have caused ERS substantial prejudice at trial. Just as ERS' argument that it was not aware of the two day trial fails, so does its argument that it was prejudiced as a result of not having a site visit.

[¶21] ERS' claim that it was prejudiced at trial because it was not allowed to have an on-site visit is without merit. N.D.C.C. Section 28-14-15 states:

> *When in the opinion of the court* it is proper for the jurors to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which must be shown to them by some person appointed by the court for that purpose. While the jurors are thus absent, no person, other than the person so appointed, may speak to them on any subject connected with the trial.

N.D.C.C. § 28-14-15 (emphasis added). The trial court has the discretion to grant a site visit when it deems it proper. It is not an automatic and guaranteed right.

[¶22] On October 20, 2014, ERS filed a Motion in Limine for a Jury View of the Property. (Doc. ID No. 64). At the Pretrial Conference on October 7, 2015, the trial court acknowledged that had it "known originally that it was a 45 minute one way trip, [I] would have not granted the on-sight inspection." (Tr. Hr. Oct. 7, 2015, P. 2, 9-11). The trial court also indicated that in consideration of the second trial it did take that into account because here was not an extra hour and half in which to waste driving when there were more important things such as testimony from experts and other parties. (Tr. Hr. Mar. 7, 2016, P. 6, 15-23). The trial court ultimately decided to cancel the site visit due to

time constraints. However, before the trial court made its decision to cancel the onsite visit, the trial court specifically asked whether the parties would be presenting pictures and video. (Tr. Hr. Oct. 7, 2015, P. 5, 4-13)

[¶23] At trial, both parties presented a myriad of photographs of the exterior and interior of the building. (Doc. ID No. 133-38, 142, 144-45, 157-266). Multiple witnesses testified about the building. There was sufficient evidence presented for the jury to draw its own conclusions about the building, and ERS was given every opportunity to explain to the jury through photographic evidence what it could have done at a site visit. Not having a site visit was not a substantial impairment to ERS' case, and the trial court's decision was proper under the circumstances in this case. There is nothing in the record that suggests that the trial court did not make a well reasoned decision, within its discretion pursuant to N.D.C.C. Section 28-14-15 and under the well settled principle that a trial court has broad discretion in matters regarding the presentation of evidence. Mayo v. Mayo, 2000 ND 204, ¶ 39, 619 N.W.2d 631; N.D.R.Ev. 611.

C. ERS was not prejudiced with the trial court's management of witnesses and evidence because ERS had ample time to present its case and cross-examine witnesses.

[¶24] The trial court did not abuse its discretion or in any way act in an arbitrary or capricious manner in its management of witness and evidence at trial, which would have caused ERS substantial prejudice which would warrant a reversal of its decision denying ERS a new trial. In exercising its discretion, "the court may impose reasonable restrictions upon the length of the trial or hearing and upon the number of witnesses allowed." Wahl, 2011 ND at ¶ 6. In Hartleib v. Simes, the appellant, like ERS in this case, argued on appeal that the opposing party was granted more time to present

witnesses. 2009 ND 205, ¶ 15, 776 N.W.2d 217. This Court concluded that the party did not "explain which additional witnesses they would have called or what those witnesses would have added to their case, nor did they make an offer of proof at trial." Id.

[¶25] Similarly, at trial ERS never tried to call a witness, present an exhibit, or even ask a question that the trial court rejected on the grounds that ERS was taking too much time, let alone make an offer of proof (or even outline in its brief) what evidence it wished to present that the trial court did not allow due to time constraints. The reason is simple: It did not happen. The trial court never prevented ERS from asking a question or offering an exhibit due to time concerns. The transcripts of the trial support that fact. Just like this Court held in Hartleib, without a sufficient offer of proof, this Court is unable to review whether a failure to allow presentation of evidence was prejudicial. Id. (citing Thompson v. Olson, 2006 ND 54, ¶ 7, 711 N.W.2d 226.)

[¶26] Contrary to what ERS alleges in its Brief, this case is not distinguishable from Hartleib. ERS states in its Brief that this was a complex litigation. (Appellant's Br. ¶ 24). At trial, this matter was strictly a breach of contract/warranty case. The trial court did not allow the Jalberts to proceed on the other claims identified in their Complaint. (Doc. ID. No. 1). In this case, the parties had two days to present a breach of contract/breach of warranty case. Those were the sole issues at trial.

[¶27] As the plaintiffs, the Jalberts were required to prove their case. In doing so, the Jalberts called multiple witnesses. ERS chose to call two witnesses and had one-half day to do so. Other than a general, after the fact, suggestion that its direct examination of Bruce Meidinger and Darryl Byle was unfairly rushed and short changed, ERS has not explained why it was rushed or short changed or what evidence it did not get to present.

(Appellant's Br. ¶ 28). ERS just complains that it was not given the proportionally allocated time that the trial court discussed at the beginning of trial, but once again fails to explain why this was prejudicial. (Appellant's Br. ¶ 28).

[¶28] ERS also has not explained what it would have done with additional time. At the end of every one of his direct and cross-examinations, defense counsel indicated that he had no further questions. (Tr. Vol. II, P. 221, 24; P. 333, 15; P. 350, 25; P. 362, 21; P. 382, 6; P. 384, 9; P. 425, 21-22; P. 462, 4; P. 464, 15; P. 533, 22-23; P. 579, 13; P. 625, 21; P. 652, 12-13. P. 653, 18). When asked by the trial court if it had any further witnesses to present, ERS indicated it did not. (Tr. Vol. II, P. 17-21). In fact, at the hearing on ERS' motion for new trial, the trial court indicated that "had there been additional testimony it could have come in." (Tr. Hr. Mar. 7, 2015, P. 6, 24-25, P. 7, 1-2). The trial court also stated that it did not "recall anyone saying what testimony was lacking or what testimony did not get in front of the jury." (Tr. Hr. Mar. 7, 2015, P. 7, 3-6).

[¶29] "A court abuses its discretion only when the court employs a procedure which fails to afford a party a meaningful and reasonable opportunity to present evidence on the relevant issues." Thompson, 2006 ND at ¶ 6. There is nothing in the record that suggests that the trial court employed any procedure that prohibited ERS from a meaningful and reasonable opportunity to present evidence.

[¶30] Ultimately, "a trial court has 'broad discretion over the trial timetable' and the exercise of that discretion will not be overturned unless it is an arbitrary action that substantially impairs the defense." Bein, 728 F.2d at 114 (emphasis added). In every one of the cases cited by ERS, this Court upheld the trial court's decision, despite the

appellant's complaint about the shortness of the trial. Moreover, ERS has presented no basis to suggest that its defense was substantially impaired. Again, if ERS thought its defense would be substantially impaired in a two day trial then it should not have agreed, on two separate occasions, to a two day trial. (Doc. ID. No. 13, 15, 104, 370). It cannot go back now and try to un-ring the bell. Because there is no evidence in the record to suggest that the trial court abused its discretion to the substantial impairment of ERS, this Court should affirm the order of the trial court denying ERS' motion for a new trial.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING ERS' MOTION FOR A NEW TRIAL BECAUSE THE JURY DID NOT AWARD EXCESSIVE DAMAGES UNDER THE INFLUENCE OF PASSION OR PREJUDICE

[¶31] The evidence presented in this case supports the conclusion that the jury in this case did not award excessive damages under the influence of passion or prejudice. "A motion for a new trial on the ground of excessive damages appearing to have been given under the influence of passion and prejudice is addressed to the sound judicial discretion of the trial court." Mont.-Dakota Util. Co. v. Culver, 80 N.W.2d 541, 545 (N.D. 1957). Where the ground of the motion is passion or prejudice, this Court has said that the trial court is to consider and weigh the evidence. Dahlen v. Landis, 314 N.W.2d 63, 67 (N.D. 1981). "The weighing of the evidence by the trial court does not permit the court to substitute its judgment for that of the jurors." Id. "The determination of the amount of damages is peculiarly within the province of the jury." Id.

[¶32] It appears from ERS' Brief that it is still stuck on a concept, inconsistent with the law, that the jury was somehow limited to awarding the contract price as damages. (Appellant's Br. P. 34.) This is in direct conflict with the Jury Instructions agreed upon by the parties and given by the trial court. (Docket ID No. 120). The Jury Instructions

specifically state: "The damage that can be recovered by plaintiffs for the defendant's breach of contract **are not limited** to the contract price." (Docket ID No. 120) (emphasis added).

[¶33] There is case law in North Dakota relating to construction contracts and the calculation of damages. In Swain v. Harvest States Cooperative, the contract price (paid by the initial owner of the home) was only $39,300. 469 N.W.2d 571, 572 (N.D. 1991). Yet, the Swain decision affirmed the portions of the trial court's damages findings that awarded the owner $46,816 in repair costs, $5,928 in moving and storage expenses, and $3,200, thereby establishing that damages for breach of a construction contract can exceed the initial contract price. Id. at 575. The jury was well within its purview to award damages in an amount that exceeded the contract amount because the amount awarded by the jury was the amount of damages proximately caused by ERS' breach.

[¶34] When the Jalberts tear down the building, they will lose all of the building, not just the portions they paid ERS for, plus the cost of demolition, all due to ERS' breach. If ERS had not breached the contract and the implied warranty, the Jalberts would not incur these costs. Thus, all of these costs were proximately cause by ERS' breaches of the contract. In fact, the jury could have awarded even more damages because it did not take into account inflation. The Jalberts paid approximately $600,000 in 2010-2012. (Tr. Vol. II, P. 398, 1-2). The Jalberts will more than likely pay more in 2016 to demolish and replace the defective building.

[¶35] Also, the evidence would have supported $80,000 for demolition cost, i.e., negative value of the building. (Tr. Vol. 2, P. 457; 22-25; P. 458, 1-5). Thus, if the jury had taken inflation into account and awarded the full possible cost of demolition (negative value), its

verdict would have been well in excess of $680,000. However, the fact that the evidence would have supported a damages verdict higher than the one the jury entered does not mean the verdict it did enter was not supported by the evidence, just as the fact that ERS wishes the verdict would have been lower does not mean the jury's verdict was not supported by the evidence or that it was influenced by passion or prejudice.

[¶36] As to ERS' allegations that the jury was in some how swayed by counsel's argument regarding insurance fraud, it was ERS who made the calculated decision, through its examinations, to attack Brandon's credibility. It was ERS, who on cross-examination of Brandon, insinuated with its questioning that Brandon received insurance proceeds for wind damage to the building and then intended to recoup those funds from ERS. (Tr. Vol. 1, P. 207; 15-25, P. 208; 1-25, P. 209; 1-16). Yet, on redirect examination of Brandon, he testified that he paid money to ERS in excess of what he received from the insurance company. (Tr. Vol. 1, P. 218; 20-25, P. 219; 15-24, P. 220; 1-25).

[¶37] Furthermore, it was more than appropriate for counsel for the Jalberts to argue this point in the rebuttal closing, after defense counsel, rather than leaving well enough alone, reasserted his theory, which the jury apparently found implausible, about Brandon's conduct in his closing argument. If ERS believed counsel's closing argument to be a mischaracterization of his final argument or his cross-examination of Brandon, then ERS should have objected at trial to preserve the issue. ERS did not do so and cannot now claim it to be an issue or grounds for a new trial.

[¶38] The ultimate decision before the trial court in determining whether ERS was entitled to a new trial is whether the verdict was supported by the evidence presented to the jury. Whether excessive damages have been awarded under the influence of passion

and prejudice is addressed in the discretion of the trial court. Mont.-Dak., 80 N.W.2d at 67. At the hearing on ERS' motion for a new trial, the trial court stated that it heard the testimony from experts as well as lay people, and it "heard of the expectations that come from parties who enter into a contract." (Tr. Vol. 2, P. 4; 7-10). In addition, the trial court stated that "if you take the evidence in light of the plaintiff's claim, it could come down at any point because its showing severe stress fractures." (Tr. Vol. 2, P. 4; 10-15).

[¶39] ERS makes a broad generalization that the jury was confused by Connie's testimony and the amounts that were paid in the construction of the subject building. (Appellant's Br. ¶ 36). There is no evidence to support ERS' generalization that the jury was in any way confused. The jury heard the evidence and rendered its verdict in the amount of $650,000 finding ERS responsible for breaching the contract and its implied warranty. There is absolutely no merit to ERS' contention that the Jalberts were improperly given a financial windfall. (Appellant's Br. ¶ 36). The Jalberts were simply awarded an amount that they would have received had ERS fully performed under the contract.

[¶40] If the jury had actually been operating under passion for the Jalberts or prejudice against ERS, it would have awarded an amount greater than $650,000. As noted above, the evidence would have supported a larger verdict than the one the jury returned. When the jury returns a verdict less than what the evidence would have supported, it is not acting under passion or prejudice. Under ERS' theory that the damages cannot exceed the contract price, it can be inferred that the ERS thinks that the Jalberts should just eat the $255,777.83 they additionally invested in the building now that the building should be torn down. That must be the cost of doing business with ERS. There has been no new evidence or

argument presented by ERS that would support a reversal of the trial court's decision to deny the motion for a new trial.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING ERS' MOTION FOR A NEW TRIAL BECAUSE THERE WAS SUFFICIENT EVIDENCE TO JUSTIFY THE VERDICT.

[¶41] This Court has made it clear that a motion for a new trial on the ground of insufficiency of the evidence to support the verdict invokes the discretion of the trial court. Maier v. Holzer, 123 N.W.2d 29, 32 (N.D. 1963). "The trial court is vested with a margin of discretion to weigh the evidence, not as a "thirteenth" juror but as the presiding judge, and, within certain limitations to act upon its own judgment regarding the weight and credibility of the evidence." Cook v. Stenslie, 251 N.W.2d 393, 395 (N.D. 1977) However, this discretion is not unlimited. In Maier, this Court held that "a court may not set aside a verdict upon the weight of the evidence upon a mere difference of opinion between the court and the jury." 123 N.W.2d at 32.

[¶42] There was sufficient evidence presented to the jury as to the value of the value of the building versus what the actual value of the building would be. This evidence came in the form of the costs of construction. Connie testified as to the amount of money that was paid to ERS. (Tr. Vol. 2, P. 396; 14-18). Connie also testified as to the amount of additional money invested in the building for the electrical work, concrete floor, heat in the floor, plumbing and the doors. (Tr. Vol. 2, P. 394, 23-25, P. 295; 1, P, 396; 23-25; P. 397; 1; P. 397; 16-22). It is reasonable and logical for the jury to conclude that the cost of total construction was approximately $600,000, which represents the value of the building, especially when the purpose of the building was to store farm equipment and grain, not to be resold. Moreover, it can also be concluded from the evidence presented

that the building actually has a negative value of approximately $50,000-$80,000 because it has to be torn down and rebuilt. (Tr. Vol. 2, P. 456; 13-22).

[¶43] Similarly, if someone buys property with a condemned building intending to demolish it to construct a new building, the existing building itself has negative value, because it will cost money to demolish it. The same principle applies here. The jury seems to have concluded that the building is structurally unsound and must be demolished so a structurally sound building can be constructed for the purposes the Jalberts intended. Thus, it was reasonable for the jury to conclude that it would cost $650,000, the amount paid by the Jalberts several years ago (before the affect of inflation over those years), plus the cost of demolition of the existing unsound building, to give the Jalberts what they paid for, including but not limited to what they paid ERS.

[¶44] At trial, the most hotly contested issue was whether the building would have to be demolished and replaced, as the Jalberts established, or whether it simply needed minor "punch list" repairs, as ERS tried to suggest. The jury's verdict establishes that the Jalberts won this central issue. There is no dispute that the Jalberts paid the ERS $344,116.58. (Tr. Vol. 2, P. 396; 14-18). Because the jury made the reasonable conclusion based on upon the testimony that the building could not be repaired, it awarded not only the cost of the building but the additional costs of replacing what the Jalberts put in to the building plus the cost of demolition in order to make them whole under the contract.

[¶45] As noted above, for some reason, ERS is still stuck on the incorrect concept that the jury was limited to awarding the contract price as damages. This is in direct conflict with the Jury Instructions agreed upon by the parties and given by the trial court. (Doc. ID No. 120). The Jury Instructions specifically state: "The damage that can be recovered by

plaintiffs for the defendant's breach of contract **are not limited** to the contract price." (Doc. ID No. 120) (emphasis added).

[¶46] Connie did testify that the electrical work was not covered under the contract with ERS. This was not to mean that the Jalberts could not recover damages related to the electrical work if the jury found the building to be beyond repair and the Jalberts would then lose the electrical work when they demolish and rebuild, due directly to the failure of ERS to provide the structurally sound farm building the contract authored, as well as the implied warranty, called for. It is only logical that the jury awarded the cost of the electrical work to the Jalberts as the building will need to be torn down because the jury found that the building as constructed by ERSwas structurally deficient.

[¶47] The same principle applies to all of the other costs associated with the building, including the cost of the concrete floor, the plumbing, the floor heat, and the doors. Because the jury concluded ERS constructed a structurally deficient building that cannot be repaired and will need to be torn down, it logically compensated the Jalberts for their costs associated with rebuilding the building. There is nothing passionate or prejudicial about that. The jury's verdict is also grounded in law as the "statutory measure for breach of contract . . . allows compensation for detriment proximately caused thereby." Northern Pac. Ry. v. Morton County, 131 N.W.2d 557, 568 (N.D. 1964).

[¶48] It was also logical that the jury awarded the Jalberts damages for the demolition of the building because it was a direct and proximate cause of ERS' breach of contract or in the ordinary course of things would be likely to result from ERS' breach. Again, the damages in the case were not limited to the contract price with ERS. (Doc. ID. No. 120). If ERS had built a structurally sound building and the Jalberts would have been made whole under the

contract, there would be no need to tear down the building.

[¶49] "The objective in awarding damages for breach of contract is to place the non-breaching party in the position he would have been if the contract had been fully performed." Lindberg v. Williston Indus. Supply Corp., 411 N.W.2d 368, 371 (N.D. 1987), see also, N.D.C.C. 41-01-06(1); Vallejo v. Jamestown College, 244 N.W.2d 753 (N.D. 1976). That is what the jury did in this case. The jury made the Jalberts whole. There is no evidence or argument presented by ERS that suggests the award of damages cannot be sustained based upon the evidence presented to the trier of fact. Thus, this Court should affirm the trial court's order denying ERS' motion for a new trial.

IV. THE TRIAL COURT DID NOT ERR IN DETERMINING THAT A REDUCTION IN THE JALBERTS CLAIMED EXPERT WITNESS FEES WAS NOT APPROPRIATE.

[¶50] The trial court did not err when it determined that the Jalberts were entitled to full reimbursement of their expert fees. Section 28-26-06 of the North Dakota Century Code gives the trial court the discretionary authority to make that determination. Section 28-26-06(5) provides:

> The fees must be reasonable fees as determined by the court, plus actual expenses. The following are nevertheless in the sole discretion of the trial court:
>
> a. The number of expert witnesses who are allowed fees or expenses;
> b. The amount of fees to be paid such allowed expert witnesses, including an amount for time expended in preparation for trial; and
> c. The amount of costs for actual expenses to be paid the allowed expert witnesses.

N.D.C.C. § 28-26-06(5).

[¶51] In Peterson v. Hart, this Court held that "the amount of fees to be paid to an expert must be left to the sound discretion of the trial court." 278 N.W.2d 133, 137 (N.D. 1979). In Keller v. Vermeer Mtg. Co., this Court reiterated that under § 28-26-06,

N.D.C.C., the disbursements complained of lie within the trial court's discretion. "Actual expenses, including travel expenses, also may be allowed if they are reasonable." 360 N.W.2d 502 508 (N.D. 1984). This Court made it clear that a trial court's decision on fees and costs will not be overturned on appeal unless an abuse of discretion is shown. Buzzell v. Libi, 340 N.W.2d 36, 42-43 (N.D. 1983).

[¶52] To determine whether an expert's fees are reasonable, this Court analyzes the trial court's decision analyzing the following seven factors:

1) The common-law area of expertise;
2) Education and training that is required to provide expert insight that is sought;
3) Prevailing rates of other comparably respective available experts;
4) Nature, quality and complexity of discovery responses provided;
5) The fee actually being charged to the party who retains the expert;
6) Fees traditionally charged by the expert on related matters; and
7) Any other factor likely to be of assistance to the Court in balancing the interests implicated.

Wahl, 2011 N.D. at ¶18.

[¶53] The trial court did not err in awarding the Jalberts all their expert witness fees. One of the factors that the trial court can consider in determining whether an expert's fees are reasonable are "any other factor likely to be of assistance to the court in balancing the interests implicated." Id.

[¶54] On December 4, 2015, the trial court heard argument on the Jalberts' request for costs. At that hearing, the trial court acknowledged that there were "problems in discovery." (Tr. Hr. Dec. 4, 2015, P. 4, 20-21). Those problems were well documented. In this case, the Jalberts requested through discovery copies of any and all construction drawings, blueprints, engineer's reports and building plans that ERS relied on in constructing the building. (Doc. ID No. 146). ERS responded that the drawings were

just used among themselves to clarify the proposal and acceptance and were no longer available. (Doc. ID No. 147).

[¶55] Later on September 15, 2014, approximately two months before the first scheduled trial in this case, the Jalberts, once again, requested copies of any and all blueprints, design specs, architectural drawings that were used in the design of the building more specifically the rigid frames that were originally approved by James Martin. (Doc. ID No. 148). ERS responded to the Jalberts' request by stating that it would provide the information, in the near future, to the extent it is available. (Doc. ID No. 149).

[¶56] Mercer testified that he had to make adjustments to his measurements after he received the report from Byle, ERS' engineer. (Tr. Vol II, P. 251, 17-24). Approximately three weeks prior to the first trial scheduled in this matter in November 2014, ERS produced its design drawings. (Tr. Vol II, P. 281; 12-25; P.282; 22-24). At trial, Mercer testified that he finally received the shop drawings from ERS, and it was "kind of an 11th hour thing." (Tr. Vol. II, P. 275, 7-9). Mercer also testified that Phase Three of his analysis occurred after he received the shop drawings from ERS. (Tr. Vol. II, P. 275, 7-9). More specifically, Mercer testified that after receiving discovery and Byles' report, he was able to reanalyze the erection sequence and assembly of the frames, which Mercer had not known. (Tr. Vol. II, P. 272, 18-25).

[¶57] Because ERS was not forthcoming in its initial response to the Jalberts' Request for Production, the Jalberts had no choice but to instruct Mercer to review the new information and provide his analysis in time for trial. Had ERS fully disclosed the

information initially requested, the Jalberts would not have had to incur additional expert fees for the additional review right before trial.

[¶58] Another factor that the trial court can consider in determining whether an expert's fees are reasonable is the area of expertise and education and training that is required to provide expert insight that is sought. Wahl, 2011 N.D. at ¶ 18. First, the Jalberts wholeheartedly disagree with ERS' generalization that this was a "straightforward agricultural construction case." (Appellant's Br. ¶ 60). In fact, ERS' assertion that this was a "straightforward agriculture construction case" is not even consistent with what it has alleged in its Brief to this Court. In determining whether ERS was prejudiced by a two day trial, ERS wants this Court to see this case as a "complex construction case." (Appellant's Br. ¶ 24). Yet, when it comes to making a determination regarding expert fees that ERS should have to pay the Jalberts, ERS wants this Court to see this case as a "straightforward agricultural construction case." (Appellant's Br. ¶ 60). ERS wants to have its cakes and eat it too. The fact remains that this case centered on a proprietary frame system designed and used by ERS. (Tr. Vol. II, P. 237, 9-15). The structure constructed was an 80X200 steel frame building with a dividing wall with a side for cold storage and a heated side with a floor heating system. The building was not a simple pole barn.

[¶59] As the plaintiffs, the Jalberts were required to prove their claims for breach of contract and breach of implied warranty. In order to do that, the Jalberts had to retain a professional engineer with the requisite experience to evaluate a unique truss system and give an expert opinion as to its structural integrity. The testimony heard at trial evidences this complex nature of the work completed by Mercer. Professional engineers are

expensive, and they are even more expensive when they have been in the field for a very long time. Mercer is a registered engineer in North Dakota for forty years with reciprocity in seven other states. (Tr. Vol. II, P. 223, 9-12, P. 262; 6-7).

[¶60] Ultimately, the trial court also concluded that this was a "scenario where the plaintiffs ended up with a bad building and it took a lot of costs and experts to be able to demonstrate their particular case." (Tr. Hr. Dec. 4, 2015, P. 4, 21-25). After considering the itemization provided in the Jalberts' response, the trial court ultimately concluded that the expert fees were not unreasonable under the circumstances. (Tr. Hr. Dec. 4, 2015, P. 4, 24-25, P. 5, 1-4). The trial court did not err in making this decision nor did it abuse its discretion. Thus, the trial court's order denying ERS' motion for a new trial should be affirmed.

CONCLUSION

[¶61] For the reasons stated above, the Plaintiff-Appellee respectfully requests that this Court affirm the trial court's order denying Defendant-Appellant Eagle Rigid Spans, Inc. motion for a new trial.

Dated this 27th day of September, 2016.

MACKOFF KELLOGG LAW FIRM
Attorney for Appellee
38 Second Avenue East
Dickinson, ND 58601
Ph: (701) 456-3210
Fax: (701) 227-4739
email: cwenko@mackoff.com

/s/ Christina M. Wenko
By: Christina M. Wenko, Attorney ID# 06884

CERTIFICATE OF COMPLIANCE

[¶62] The undersigned hereby certifies, in compliance with N.D.R.App.P. 32(a)(7)(A), that the *Brief of Appellee* was prepared with proportional typeface, 12 pt. font, and the total number of words in the above Brief, including footnotes, but excluding words in the table of contents, the table of citations, and any addendum, the certificate of compliance and certificate of service, totals 7,761 words.

Dated September 27, 2016.

MACKOFF KELLOGG LAW FIRM
Attorney for Appellee
38 Second Avenue East
Dickinson, ND 58601
Ph: (701) 456-3210
Fax: (701) 227-4739
email: cwenko@mackoff.com

/s/ Christina M. Wenko
By: Christina M. Wenko, Attorney ID# 06884

CERTIFICATE OF SERVICE

[¶63] I, Christina M. Wenko, certify that I served the following documents as indicated below:

1. **Brief of Appellee; and**
2. **Certificate of Service.**

On September 27, 2016 by sending a true and correct copy thereof by electronic means only to the following email address, which best to my knowledge, is the actual email address of the person intended to be served, to wit:

Kraig A. Wilson #05618
Sean F. Marrin #07847
MORLEY LAW FIRM, LTD.
PO Box 14519
Grand Forks, ND 58208-4519
Phone: 701-772-7266
kwilson@morleylawfirm.com

Patrick Ward #03626
ZUGER, KIRMIS, SMITH
PO Box 1695
Bismarck, ND 58502-1695
Phone: 701-223-2711
pward@zkslaw.com

/s/ Christina M. Wenko
By: Christina M. Wenko, Attorney ID# 06884