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STATE OF NORTH DAKOTA

Case No.: 2010-0027
District Court No. 07-C-01721
IN THE SUPREME COURT
STATE OF NORTH DAKOTA

AMERICAN BANK CENTER
Plaintiff/Appellant,

v.

DAVID L. WIEST,
Defendant/Third-Party Plaintiff/Appellee,

v.

HOWARD PALMER,
Third Party Defendant/Appellee,
AND
LOUIS BURCKHARDSMEIER,
Third Party Defendant.

APPEAL FROM THE JUDGMENT ENTERED NOVEMBER 16, 2009,
PURSUANT TO FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
ORDER FOR JUDGMENT DATED SEPTEMBER 17, 2009,
IN THE CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT

THE HONORABLE FRANK L. RACEK, PRESIDING

BRIEF OF THE APPELLEE, DAVID L. WIEST

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¶1 **TABLE OF AUTHORITIES**

Other Authority

¶2 JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under N.D. Const. art. VI, § 8, and N.D.C.C. § 27-05-06. The appeal was timely under N.D.R.App.P. 4(a). This Court has jurisdiction under N.D. Const. art. VI, § 2, and N.D.C.C. §§ 27-02-04 and 28-27-01.

Bolinske v. Herd, 2004 ND 217, P6 (N.D. 2004).

¶3 STATEMENT OF THE ISSUES

ISSUE NO. 1: The trial court properly found Howard Palmer fraudulently induced David Wiest to enter into the loans with American Bank Center and properly imputed fraud from Howard Palmer to the American Bank Center.

ISSUE NO. 2: The trial court properly granted rescission of the $250,000.00 loan agreement between Wiest and the Bank.

ISSUE NO. 3: The trial court properly found a fiduciary relationship existed between Palmer and Wiest.

¶4 **Statement of the Case**

American Bank Center (Bank), Plaintiff, commenced an action against David L. Wiest (Wiest) for the collection of two promissory notes in late March of 2007. Wiest filed his Answer admitting that he signed the promissory notes, but alleged he was fraudulently induced to enter into the promissory notes by statements of Howard Palmer (Palmer), a Vice President and Loan Officer for the Bank, advising the Wiest of facts that were not true and Palmer knew they were not true. Wiest subsequently filed an amended Answer and Third-Party Complaint against Lou Burckhardsmeier (Burckhardsmeier) on December 17, 2007. The Third-Party Complaint alleged Burckhardsmeier and Palmer induced Wiest into entering into the promissory notes through fraud. A trial was held before the Honorable Frank Racek on July 14-17, 2009. Post-trial briefs were submitted to the court following trial. The Findings of Fact, Conclusions of Law and Order for Judgment were filed on September 17, 2009. The trial court held that Wiest was induced by actual fraud on the part of Palmer, as agent of the Bank, in obtaining Wiest's consent to sign the $250,000 Promissory Note and as a result the Bank could not collect on it. The court found the Bank could collect on a portion of the $200,000 promissory note which was expended by the Bank at Wiest's direction. Lastly, the court found that Wiest did not have a third-party claim against Palmer because he was acting as an agent of the Bank. This appeal followed by the Bank. Wiest asks this Court to affirm the decision of Judge Racek.

¶5 **Statement of Facts**

¶6 Wiest is an orthopedic surgeon who has practiced in Fargo since 1986. P. 17 L 13-18. The Third-Party Defendant, Palmer has been in the banking business since 1979. At all times material herein he was employed by the Bank as a commercial loan officer and Vice President. Palmer originally worked at the banking location in Bismarck, and subsequently worked at the Minot location. Palmer left the employment of the Bank in July 2006. P. 18 L 3-8. Burckhardsmeier was the owner of Burckhardsmeier Financial Solutions ("BFS"). Burckhardsmeier has been a car salesman, truck salesman, and since 1998 he has operated as a venture capitalist and financial consultant. P. 125, L 9. Burckhardsmeier had a number of customers that were mainly affiliated with the trucking business. P. 152 L 15 – P. 154 L 1. Wiest knew Burckhardsmeier for approximately 10 to 15 years as someone who has lived in the neighborhood, attended the same church, and who had children at the same school. P. 18 L 6.

¶7 In the spring of 2004, Wiest had his first business dealing with Burckhardsmeier. Burckhardsmeier needed short-term financing for a customer known as Greenberg. Burckhardsmeier asked Wiest to personally loan Greenberg, $280,000, which would be collateralized by trucks and equipment. Exhibit 1 (Appellee's Appendix (hereinafter referred to as Appendix) P. 1); P. 18 L 25; P 19 L 2. Greenberg paid $317,500 to Wiest early in 2005, and an additional $37,500 was repaid in December 2005. P. 20 L 13. In February 2005, Burckhardsmeier managed a second loan for the Greenbergs with Wiest. Wiest personally loaned $150,000 to the Greenbergs and $160,000 4 months later. P. 21 L 25 – P. 22 L 22.

¶8 In the late 1990s, Wiest had been a minority shareholder in a business called Glass Recycling Midwest. This business collected glass containers that would otherwise be placed in a landfill and processed them into other material. P. 25 L 13. Glass Recycling Midwest was manufacturing a product that was used in making sandpaper. This enterprise was marginal, and required a number of cash infusions from Wiest and other investors. In 2002, Wiest and his partners decided to exit the recycling business and sold the business to the person who owned the building that the recycling business occupied. P. 26 L 4.

¶9 Sometime around 2004 Wiest mentioned to Burckhardsmeier, after a high school basketball game, that this subsequent owner wished to retire and may be interested in trying to sell the recycling business. In 2004, Burckhardsmeier arranged to have the recycling business sold to Duane Miller, a Bismarck CPA. P. 96 L 17. The business was renamed Glass Blast Media (GBM), and was located in West Fargo. Wiest was not involved in this transaction. Miller deferred to Burckhardsmeier to run GBM operations. P. 26 L 14-24; P. 27, L 4.

¶10 Wiest, Dr. Howard Berglund, an orthopedic surgeon associate of his, and Craig Johnson, a Fargo attorney, purchased a burner unit used to process glass for recycling. P. 27 L 13. They purchased it at an auction sale and had less than $10,000 invested in the burner unit. Early in 2005, Burckhardsmeier approached Wiest and his partners to purchase the burner unit. P. 129 L 11; P. 131 L 15. In March of 2005 they sold the burner unit to GBM for $180,000.00. When it came time to settle, Wiest and Bergland were paid $10,000 each and given a note for the balance, and Craig Johnson received

$50,000. Each of these three individuals also received a 5 percent interest in GBM. P. 27 L 15; P. 28 L 25. Burckhardsmeier was a financial consultant for GBM. P36-37.

¶11 In late in the May of 2005, Burckhardsmeier contacted Kevin Johnson, the owner of Gateway Building Systems and the brother of Attorney Craig Johnson, and requested that Gateway build a 100 x 200 steel building for GBM in West Fargo, North Dakota. P. 253 L 11; P 254 L20. Burckhardsmeier paid Gateway a $50,000 deposit for the building. P. 255 L 6. The building was completed in December 2005. P. 256 L 12. There were to be periodic progress payments made as the construction proceeded. P. 255 L 4. GBM was unable to make any of the payments. P. 255 L 19. The ultimate purchase price of the building was to have been approximately $1,000,000. P. 256 L 24. GBM was unable to complete this purchase. Eventually, Craig Johnson, Kevin Johnson, Wiest, and Bergland formed WBJ for the purpose of buying and owning this building and rented it to GBM. P. 30 L 1-25; P. 209 L 6-17.

¶12 When WJB was looking to finance the building, Burckhardsmeier introduced the WJB partners to Palmer, a Vice President of Commercial Lending at American Bank Center (Bank). P30 L1- P31 L1. Palmer proposed a "PACE" loan which is a loan partially subsidized by the North Dakota Development Fund. This was the best financing proposal for WBJ, and a $1,000,000 PACE loan was completed for the purchase of the building. P. 30 L1 – P. 31 L 1.

¶13 Burckhardsmeier had a long standing lending relationship with Palmer that was not disclosed to Wiest. Burckhardsmeier was operating as the financing consultant not only for GBM, but also for J&S Express, Hightman Manufacturing, Travis Peterson, River Oaks

Express, Johnson Trucking, Mattson Innovations, Trucks Unlimited, A &T Trucking, Custom Cruiser, Starkey Road, Leonard Greenberg, and Pure Class. P. 152 L 15 – P. 154 L 1. Between principally December 9, 2004 and March 22, 2006 (less than 16 months), Burckhardsmeier arranged through Palmer fifty-five different loans to various individuals and entities with whom Burckhardsmeier was associated. These original loans totaled $12,684,962.96. All of the loans were to have been collateralized. P. 152 L 15 – P. 154 L 1; P. 282 L 5; P. 405-420; Exhibit 78 (Appendix P. 219).

¶14 Burckhardsmeier arranged for "investors" in his various business enterprises basically to make good on promises to other "investors." P. 261. Burckhardsmeier had a number of customers, mainly in the trucking business, who were struggling financially. Burckhardsmeier would entice people or banks to loan money to Burckhardsmeier or one of the various companies he was consulting. Repayment of the sums "invested" required Burckhardsmeier to find other "investors" or other financing to cover these debts. When no more "investors" could be found, the entire enterprise collapsed. Exhibit 308 (Appendix P. 225); P. 177 L 11.

¶15 One of the ways Burckhardsmeier raised money was pledging trucks and trailers as collateral that were not owned by the entity pledging them, or that had already been pledged as collateral on other obligations. Exhibits 52 (Appendix P. 165), 53 (Appendix P. 182), 54 (Appendix P. 198), 51 (Appendix P. 18), 66 (Appendix P. 205), 68 (Appendix P. 208); P. 146.

¶16 In addition to financing a number of these trucking operations, Burckhardsmeier also tried to arrange to get work for these companies to make them appear viable. Because

GBM needed to haul glass from landfills, they became a huge source of business for Burckhardsmeier's other trucking operations. P. 179 L4-25. Burckhardsmeier arranged for the trucks to haul glass back to GMB on return routes from the Minneapolis area. P. 167 L15. The glass was stockpiling without customers, and ultimately, Craig Johnson directed that no further glass be hauled to Fargo for storage. P. 168, 225.

¶17 The specifics related to the two notes at issue in this case begin in approximately August 2005. P. 269 L8. Burckhardsmeier needed additional capital to keep all these various entities afloat, and keep the many Burckhardsmeier related loans at the Bank current. P. 269 L 20. In late October of 2005, Palmer, on behalf of the Bank, and Burckhardsmeier approached Wiest in Fargo. P. 32 L 14. During the course of the meeting Palmer and Burckhardsmeier requested that Wiest apply for a loan at the Bank in the amount of $250,000.00 for the purpose of providing interim financing for the purchase of a number of semi-trucks and trailers by GBM. P. 32-33; P. 365 L 10-12. Both Palmer and Burckhardsmeier told Wiest that the financing would only be in place for less than a month. P. 32 L 25; P. 561 L 23-25. They assured Wiest it was a very safe venture because they were in the process of forming a new corporation which would obtain an SBA loan through the Bank and the loan proceeds from the SBA loan would be used to pay off Wiest's loan. P. 32 L 25; P. 33 L 3; P. 35 L 17. Palmer and Burckhardsmeier advised Wiest that the purpose of purchasing these trucks was to haul glass processed by GBM. P. 32 L 13-24. Wiest understood the loan would be secured by the trucks worth $430,000 and the trucks and trailers would be the primary source of repayment for the loan in the event of a default. P. 34 L 23-25.

¶18 Palmer assured Wiest that the Bank would hold the titles to the trucks and trailers. P. 561 L 8. At the time the loan (Exhibit 3, Appendix P. 6)) was taken out, a security agreement was executed by GBM pledging specific vehicles as collateral for that loan. Exhibit D54 (Appendix P. 198). Burckhardsmeier knew that this property was not owned by BFS at the time he proposed to pledge it to Wiest. P. 141 L 23. Palmer never asked Burckhardsmeier for the titles, which should have already been in Burckhardsmeier's possession if BFS owned the property, nor did he check ownership of the property. P. 277 L 16.

¶19 Palmer and Burckhardsmeier were scrambling to raise additional capital to continue to service the enormous debt that Burckhardsmeier's related companies had piled up at the Bank. P. 250 L 8. An examination of the Bank records indicate the loan proceeds were used to pay overdrafts in the GBM checking account and the balance was disbursed to the companies controlled by Burckhardsmeier. Exhibit 51 (Appendix P. 18). On November 1, 2005 Wiest signed a note at the Bank. Exhibit 3 (Appendix P. 6). Wiest orally authorized the deposit of these funds in GBM's account to purchase the trucks and trailers Burckhardsmeier and Palmer represented would be the collateral for the note. P. 161 L 1. In order to pay the overdrafts, Palmer drove the deposit check from Minot to Bismarck and deposited the check in GBM's account that was overdrawn by $38,000. Exhibit 4 (Appendix P. 8), 72 (Appendix P. 216); P. 275 L 6; P. 321. The check was never made payable to Wiest. Exhibit 51 (Appendix P. 18); P. 144; P. 275. Both Palmer and Burckhardsmeier knew that this money would not go to purchase trucks and equipment. P.

277 L 16; P. 279 L 7. At the time the loan was closed, titles were not collected for Wiest's loan by Palmer and Palmer claimed he later learned the trucks were property of Star Trailer Sales in Mankato, MN. Exhibit 73 (Appendix P. 218).

¶20 Wiest never signed an authorization for the disbursement of the $250,000. Exhibit 71 (Appendix P. 216). Although Wiest did believe that the money ultimately would be placed in GBM's account, it was his specific instruction that it would be used to purchase vehicles and that the Bank would secure the titles. P. 119 L 25; P. 120 L 11. Palmer never informed Wiest that he had not collected the titles from Burckhardsmeier on the first Two hundred fifty thousand dollar ($250,000) loan as he represented. P. 433 L 18.

¶21 Less than 2 months later, on December 28, 2005, Palmer, acting for the Bank, closed a $288,000 loan to GBM which was purchased by the North Dakota State Development Credit Corporation to GBM. Exhibit 51 (Appendix P. 18); P. 46. As collateral for that loan, GBM pledged the exact same trucks and equipment which were to have been pledged to Wiest as collateral for his loan. Exhibit 66 (Appendix P. 205). GBM never owned these vehicles. P. 142 L 8. The loan was sold to the North Dakota Development Fund as a purchase money security interest. P. 142 L 23; P. 278 L 15-24. The funds for the $288,000 loan were not disbursed in accordance with the instructions of the NDSDCC. P. 388 L 12 – P. 389 L 2. Palmer disbursed the loan proceeds to various accounts which precluded a purchase money security interest from ever being perfected. Exhibit 36 (Appendix P. 17); P. 331 L 23; P. 432-438. Palmer knew these proceeds were not being used to purchase trucks and equipment. P. 332 L 1. Ultimately, the Bank had to repurchase this loan because the collateral was never procured. P. 187 L 8;

P. 421 L 3; P. 480 L 12.

¶22 Subsequently in January 2006, Palmer traveled to Fargo for a meeting with Craig Johnson, Kevin Johnson, Wiest, and Bergland. P. 67 L 23. At that time Palmer proposed that each of these four individuals take out a line of credit for $200,000 from the Bank to cover various operating expenses for GBM. P. 40 L 21. Palmer stated some of the funds would be used to increase each of the members' ownership percentage in GBM to 15 percent, and funds were needed to pay building expenses which was now owned by WBJ. P. 43 L 2. These two items amounted to about $47,500 per individual. P. 43 L 16; P. 113 L 12. The remainder of the line of credit was to be available to pay future expenses. P. 326. As a result of Palmer's presentation, Wiest, Dr. Howard Berglund, Craig Johnson, and Kevin Johnson each took out a $200,000 line of credit from the Bank. Neither Palmer nor Burckhardsmeier informed the members of WBJ of all of the loans of GBM. P. 60 L 3; P. 68, L 3; P. 81 L 13-14.

¶23 For each of Wiest's two loans at the Bank, the loan for $250,000 and the loan for $200,000, Palmer was required to make a presentation to the bank's loan committee. Exhibit 52 (Appendix P. 165), 53 (Appendix P. 182). Palmer concocted an elaborate story for the $250,000 loan that Wiest was involved in hauling potatoes and sugar beets, that he had a large trucking operation, including dispatchers. Exhibit 52 (Appendix P. 165), 53 (Appendix P. 182). Palmer stated that the reason for Wiest's success in trucking was that he paid his truck drivers more than other operators. Exhibit 52 (Appendix P. 165), 53 (Appendix P. 182). Palmer listed each and every truck and trailer that Wiest was to purchase with the $250,000. Exhibit 52 (Appendix P. 165), 53 (Appendix P. 182). At

trial, Palmer stated that he knew Wiest would never be purchasing the trucks with the money. Palmer stated that Wiest was to put the money into GBM, and Burckhardsmeier was to convey the truck titles to Wiest. P. 272-274; P. 313-319. The presentation by Palmer to the loan committee was devoid of almost any truthful statement. Wiest had never been in the trucking business, had never been involved in beets or potatoes, and did not have any drivers or dispatchers. P. 62 L 13; P. 61 L 10.

¶24 When Palmer prepared the loan committee presentation for Wiest's line of credit, he again referenced the exact same collateral that he knew Wiest had never received for the first Two hundred fifty thousand dollar ($250,000) loan, and that was offered to be pledged for the loan to the North Dakota Development Fund as a purchase money security interest. Exhibits 52 (Appendix P. 165), 53 (Appendix P. 182). The loan presentations made by Palmer on behalf of Dr. Howard Bergland, and Craig Johnson contained similar material misrepresentations. Exhibits 64 (Appendix P. 228), 83 (Appendix P. 240).

¶25 Palmer also prepared the loan package that was to be sold to the North Dakota Development Fund that included the exact same collateral as was in Wiest's original loan which he knew or should have known was already pledged to Wiest. Exhibit D-68 (Appendix P. 208).

¶26 On March 8, 2006, Palmer sent Burckhardsmeier an e-mail addressed to "gentlemen, owners, investors" concerning titles to the trucks and trailers that were supposed to have been pledged to Wiest and then to the North Dakota Development Fund. Exhibit D-73 (Appendix P. 218); P. 392 L 1. The email acknowledged the trucks continued to be subject to a lien of Mankota Trailer Sales. Id. P. 388 L12 – P. 389 L2.

Palmer was getting a great deal of pressure from the North Dakota Development Fund to supply the titles for this loan. Although the email was addressed to the owners and inventors, the e-mail was not shared by Burckhardsmeier with the members of WBJ. P. 280 L 16. Palmer suggested that Bergland, Wiest, Craig Johnson, and Kevin Johnson take out a letter of credit for $72,000 each to cover this loan in lieu of providing the titles to the trucks and trailers. Exhibit D-73 (Appendix P. 218); P. 280 L 16. At this time, Palmer knew GBM did not own these trucks, and if GBM did not own these trucks, they could not meet the equity requirements for an SBA loan. Exhibit 310 (Appendix P. 226), 311 (Appendix P. 227); P. 388 L 20; P. 281 L 22; P. 396 L 23.

¶27 Palmer continued to inform Wiest that he was working on an SBA loan application for the refinance of GBM. P. 388 L 19; P. 388 L 1. Wiest never knew the extent to which GBM was indebted. Palmer said it was critical that there be no "red flags" that could endanger the SBA financing, so it was important that all of GBM's obligations be current. P. 45 L 14-25. On March 31, 2006 Palmer got Wiest to authorize an advance of $48,023 from his line of credit which was to cover overdrafts for GBM as well as make a number of payments on the loans for Burckhardsmeier's related entities. Exhibit 22 (Appendix P. 11). P. 69 L 12-P. 70 L 24.; P. 300 L 19; P. 301 L 18. Also, on May 31, 2006 Palmer got Wiest to authorize advances in the amount of $54,339.54 all of which were to avoid "red flags." Exhibit 25 (Appendix P. 14); P. 116 L 22; P. 301 L 19. This money was used to make payments on various loans held at the Bank for Burckhardsmeier's related entities, not GBM expenses as Wiest authorized. P. 71-72.

¶28 Wiest made payments on his line of credit totaling $98,381.35. Exhibit 21

(Appendix P. 10), 23 (Appendix P. 11), 25 (Appendix P. 14). Advances on this line totaled $277,422.54. Exhibit 33 (Appendix P. 15). On the $250,000 loan for trucks, GBM made two payments on this loan for Wiest, one in the amount of $15,855.62, and another for $37,780.42. Exhibit 5 (Appendix P. 9).

¶29 In July 2006, Palmer and Burckhardsmeier met with Wiest, Bergland, Craig Johnson, and Kevin Johnson to attempt to get additional funding from these four individuals. When they declined, Palmer returned to Minot to find the Bank was conducting an audit of Palmer's files. The Bank asked him to take a leave of absence until it had been completed and Palmer resigned. He took a job with Wells Fargo. P. 362 L 12; P. 491 L 14.

¶30 At all times material herein Palmer was in the employment of the Bank, and was operating as one of its loan officers. P. 329 L 12. Palmer, in processing the loans involving Burckhardsmeier's various businesses, violated a number of the internal rules of the Bank including:

1. Not properly perfecting security interests. P. 189 L 14; P. 475 L 6; P. 478 L 11.
2. Not disclosing to the loan committee the association between the various entities that Burckhardsmeier was representing. P. 475 L 7; P. 479; P. 484 L 15-P. 485 L25.
3. Not getting loan committee approval when a customer went over One hundred thousand dollars ($100,000) aggregate in loans. P. 494 L 4; P. 503 L 5.

4. Not truthfully stating the facts and purpose of the loans in loan committee presentations. P. 436 L 9; P. 481 L 24; P. 474 L 15; P. 482 L 2.

5. Not properly disbursing loan proceeds to perfect security interests. P. 480 L 9.

6. Not informing the loan committee that the funds were ultimately disbursed for a different purpose than that which was represented in the loan approval documents. P. 478 L 1; P. 508 L 25.

¶31 Subsequent audits by the Bank revealed most of the collateral Palmer was to secure for these loans was never perfected existed as property of the various debtors. P. 491 L 12 - P. 493 L 23. Ultimately the Bank charged off $9,482,857.06 of these loans. Exhibit 78 (Appendix P. 219). The Bank has been able to recover $290,151.30 (approximately 3 percent) from collateral. The Bank ended up charging off almost all of Palmer's book of business. Other than the $1,000,000 building loan to WBJ is still performing and was not charged off by the Bank. Kevin Johnson paid a loan in full; Dr. Bergland has a loan that is still performing and has not been charged off; and some of the other loans were actually lines of credit that were never advanced. P. 452 L 3; P. 452 L 25. All of the charged off loans were affiliated with Burckhardsmeier or companies he purported to consult. Exhibit 78 (Appendix P. 219); P. 406 L3.

¶32 **Statement of Standard of Review**

¶33 Actual fraud is a question of fact. N.D.C.C. § 9-03-10. A trial court's determination of fraud will not be set aside on appeal unless clearly erroneous. D.G. Porter, Inc. v. Fridley, 373 N.W.2d 917, 921 (N.D. 1985). The review of the trial court's findings is limited by the clearly erroneous standard of Rule 52(a), N.D.R.Civ.P. See Russell Land Co. v. Mandan Chrysler-Plymouth, 377 N.W.2d 549, 552 (N.D. 1985). On appeal it is not the function of this court to substitute its judgment for that of the trial court, and the trial court's findings cannot be reversed merely because this court may have viewed the facts differently if they had been the trier of fact. See Id; In Interest of Kupperion, 331 N.W.2d 22, 26 (N.D. 1983); Rolfstad v. Hanson, 221 N.W.2d 734, 737 (N.D. 1974); Kee v. Redlin, 203 N.W.2d 423, 431 (N.D. 1972). In reviewing the findings due regard is given to the trial court's opportunity to assess the credibility and observe the demeanor of the witnesses. See N.D.R.Civ.P. 52(a); Russell Land Co., 377 N.W. 2d. at 552; Interest of Kupperion, 331 N.W. 2d at 26; Tower City Grain Co. v. Richman, 232 N.W.2d 61, 65 (N.D. 1975). A finding is not clearly erroneous under Rule 52(a), N.D.R.Civ.P., unless it has no support in the evidence, or although there may be some supporting evidence, the reviewing court is left with a definite and firm conviction that a mistake has been made. See Great Plains Supply Co. v. Erickson, 398 N.W.2d 732, 735-36 (N.D. 1986); Bashus v. Bashus, 393 N.W.2d 748, 750 (N.D. 1986); Graber v. Engstrom, 384 N.W.2d 307, 309 (N.D. 1986); Russell Land Co., 377 N.W. 2d at 552. Miller Enters. v. Dog N' Cat Pet Ctrs., 447 N.W.2d 639, 644 (N.D. 1989).

¶34 **Argument**

¶35 Wiest's consent in entering into the promissory notes with the Bank was not free because it was obtained through the fraudulent misrepresentations of Palmer. Apparent consent is not real or free when obtained through: 1. duress; 2. menace; 3. fraud; 4. undue influence; or 5. mistake. N.D.C.C. § 9-03-03. Consent is deemed to have been obtained through duress, menace, fraud, undue influence, or mistake only when it would not have been given except for one or more of them. N.D.C.C. § 9-03-04. Actual fraud within the meaning of this title consists in any of the following acts committed by a party to the contract, or with the party's connivance, with intent to deceive another party thereto or to induce the other party to enter into the contract:

> **1.** The suggestion as a fact of that which is not true by one who does not believe it to be true;
> **2.** The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true though that person believes it to be true;
> **3.** The suppression of that which is true by one having knowledge or belief of the fact;
> **4.** A promise made without any intention of performing it; or
> **5.** Any other act fitted to deceive. N.D.C.C. § 9-03-08

¶36 **1. The trial court properly found Palmer fraudulently induced Wiest to enter into the loans with the Bank and properly imputed fraud from Palmer to the Bank.**

¶37 Evidence of fraud was peppered through the facts in this case from Palmer's presentations to Wiest and the other members of GBM, to Palmer's loan committee presentations to the Bank regarding Wiest, and Palmer's entire portfolio with the Bank. An agent represents the agent's principal for all purposes within the scope of the agent's

actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from the transactions within such limit, if they had been entered into on the agent's own account, accrue to the principal. N.D.C.C. § 3-03-01. The general rule is that agent never can have authority, either actual or ostensible, to do an act which is, and is known or suspected by the person with whom the agent deals to be, a fraud upon the principal. N.D.C.C. § 3-02-07. Fraud and deceit may be imputed from an agent to principal. Dewey v. Lutz, 462 N.W.2d 435, 443 (N.D. 1990). A banking corporation is liable to innocent third persons where the representation is made in the course of its business and by an agent while acting within the general scope of his authority, even though, in the particular case, he is secretly abusing his authority and attempting to perpetrate a fraud upon his principal, or some other person, for his own ultimate benefit. Id. In such a case, the bank is chargeable with the knowledge of its agents, and the exception to the rule of imputed knowledge does not apply. Erickson v. Brown et al, 2008 ND 57, P17, 747 N.W.2d 34, 43; Dewey, 462 N.W.2d at 443 (citing Emerado Farmers' Elevator Co. v. Farmers' Bank, 20 N.D. 270, 127 N.W. 522 (1910); 18B AM.JUR.2d CORPORATIONS §§ 1680-1682)); see Diemert v. Johnson, 299 N.W.2d 546, 549 (N.D. 1980) (holding trial court committed clear error in not considering the agency relationship between the real estate agent and seller when buyer alleged fraud); see also Woods Farmers Coop Elevator Co. V. Z-Mega Farms Ltd. Ptnrshp, 95 F.3d 693, 698 (8th Cir. 1996) (applying North Dakota agency law).

¶38 Palmer and Burckhardsmeier induced Wiest to enter into the $250,000 loan in October 2001 by making statements of a fact that were not true, when they did not

believe those facts were true asserting facts which were untrue, when they had no reasonable grounds to believe it to be true; the assertion of facts which are likely to mislead for want of communication of a fact; as well as promises without any intention to perform. When Wiest was visited by Palmer and Burckhardsmeier, Palmer was acting as a loan officer for the Bank. P. 18 L 3-8. During the course of that meeting, Palmer and Burckhardsmeier requested that Wiest apply for a loan at the Bank in the amount of $250,000 to provide interim financing for the purchase of semi-trucks and trailers by GBM. P. 32 L 192; P. 197 L 7. Wiest was assured by Palmer that the financing would be for a short term, not more than a month, and that the value of the trucks would more than adequately secure the loan. P. 32 L 25; P. 33 L3; P. 35 L 17. Palmer assured Wiest that if the titles for the trucks and trailers would be held by the Bank and adequately secure the loan. P. 561 L 8.

¶39 At the time a $250,000 loan was taken out Palmer did not advise Wiest that the purpose of the loan was to cover a large overdraft which had accumulated in the company's bank account at the related Bismarck branch of the Bank (Exhibit 4 (Appendix P. 8), 72 (Appendix P. 216); P. 275 L6; P. 321); of the total amount of outstanding debt which GBM owed to the Bank; that Palmer had no intention of disbursing the loan funds in a manner which would insure perfection of the security interest in the trucks and trailers (P. 277 L. 16; P. 279 L 7); and that Palmer's underlying purpose was to have Wiest fund the corporate operations to the extent necessary to qualify GBM for an SBA 504 loan. P. 250 L 8. The SBA 504 loan would have provided sufficient funding to pay off the nearly $1,300,000 in short term debt

GBM had accumulated in loans made by Palmer and as a result take Palmer and Bank off the hook for the inadequately collateralized $1,300,000 outstanding loans made by the Banks to GBM prior to October of 2005. P. 388 L 1, 19.

¶40 At the time the January 2006, $200,000 line of credit loans were taken out by Wiest and the other GBM investors, Palmer failed to disclose to Wiest and the other investors that no titles were ever obtained to perfect the Bank's security interest in the trucks which were to be allegedly purchased by GBM with Wiest's $250,000 loan (P. 433 L 18); of the existence of the $288,000 North Dakota State Development Credit Corporation (NDSDCC) loan made in late December which was secured by the same trucks and trailers as Wiest's loan (P. 68 L 16; P. 67 L 8; Exhibit 51 (Appendix P. 18), Exhibit 73 (Appendix P. 218)); the fact that the December loan was disbursed in such a manner that the purchase money security interest required by the NDSDCC was not disbursed in a manner as to allow perfection of the collateral (P. 68 L 16); and that the equipment as shown on GBM's balance sheet was either not paid for or nonexistent (P. 69 L 3). Wiest testified that if he had been aware of these facts, he would have refused to enter into the $200,000 line of credit transaction. P. 70 L 22.

¶41 Following the January 2006 meeting and the execution of the $200,000 line of credit, Palmer and Burckhardsmeier contacted Wiest on at least two separate occasions and requested that he make advances on his line of credit to pay bills of GBM and make payment on the Burckhardsmeier related loans. Exhibits 22 (Appendix P. 11), 25 (Appendix P. 14). Both Wiest and Palmer testified that Palmer requested these payments be made so the Burckhardsmeier related loans remained current, which was a

necessary element to remain qualified for the SBA 504 loan as well as keep Palmer's loan portfolio looking current for the Bank's credit committee. P. 72 L 1. At the same time, the evidence, including Exhibit 73 (Appendix P. 218), showed that on March 8th Palmer was aware that the trucks and trailers were subject to other liens and that the $288,000 loan made by the NDSDCC had not been made in accordance with its terms. Further, by including this equipment on GBM's financial statements, Palmer knew that any financial statements used in an SBA loan application would be false. P. 388 L 12 – P. 389 L 1.

¶42 At all times during the course of these transactions Palmer was the Vice President of the Bank and was acting within the general scope of his authority, i.e. making loans on behalf of the Bank. P. 195, 196; P. 329 L 12. As a result, the Bank is chargeable with the knowledge and fraud of Palmer.

¶43 **2. The trial court properly granted rescission of the $250,000 loan agreement between Wiest and the Bank.**

¶44 An essential element of a contract is consideration. N.D.C.C. § 9-01-02. Failure of consideration arises when a valid contract has been formed, but the performance bargained for has not been rendered. Check Control v. Shepherd, 462 N.W.2d 644, 647 (N.D. 1990) (citing First National Bank of Belfield v. Burich, 367 N.W.2d 148, 152 (N.D. 1985)). This should be distinguished from lack of consideration, which prevents an enforceable contract from ever being formed. Id. (citing Harrington v. Harrington, 365 N.W.2d 552, 555 (N.D. 1985)). The determination of whether there has been a failure of consideration is a question of fact. Id. A failure of consideration may be

either partial or total. Id. A total failure of consideration occurs when a party failed to perform a substantial part of its obligation so as to defeat the very object of the agreement. Id. The remedy for a total failure of consideration is to excuse the non-breaching party from the performance of its obligations under the agreement. Id. Where a partial failure of consideration occurs, the proper remedy is to grant appropriate damages to the non-breaching party. Id.

¶45 Wiest's consideration for the October, 2005, $250,000 loan was that first priority security interest would be obtained by the bank for certain trucks fully securing Wiest's note. Because proceeds were used to pay an overdraft and the Bank took no steps to secure the loan as presented to Wiest, Wiest was exposed to liability on the entire amount. Wiest would not have agreed to take out the note with the Bank if there was not adequate collateral to secure the note. P. 58 L 12; P. 120 L 15. At the time the January, 2006, $200,000 loan was taken out Wiest and the investors were not aware of the $288,000 borrowed by GBM through the NDSDCC in December of 2005 or the lack of titles to secure both the Wiest loan and the NDSDCC loan. P. 68 L 20; P. 433 L 18. Wiest repaid the funds he used for his own benefit. Exhibit 21 (Appendix P. 10). The remainder of the funds were advanced at the request of Palmer, after Palmer was fully aware of the lack of collateral for the NDSDCC loans. P. 388 L 12 - P. 389 L 2; P. 392 L 7; Exhibits 23 (Appendix P. 12).

¶46 The Bank relies on N.D.C.C. § 9-03-25 which provides that acceptance of a benefit of a transaction is equivalent to consent to the transaction. This section, however, is not an analogous to the present situation where consent to a contract is

obtained by fraud, rather N.D.C.C. § 9-03-25 is more akin to a situation where there is an implied contract. See BJ Cadramas, Inv. v. Oxbow Energy, LLC, 2007 N.D. 12, ¶ ¶11-13, 727 N.W. 2d 270, 274-75 (2007).

¶47 A party to a contract may rescind the contract if the consent of the party rescinding or of any party jointly contracting with the party rescinding was obtained through fraud or undue influence exercised by or with the connivance of the party as to whom the party rescinding rescinds or of any other party to the contract jointly interested with such party. N.D.C.C. § 9-09-02(1). Rescission in equity is also allowed under N.D.C.C. § 32-04-21(1). The Uniform Commercial Code does not preclude an action in tort based upon fraudulent misrepresentation inducing the sale and that such a tort action cannot be controlled by the terms of the contract itself. Krank v. A.O. Smith Harvestore Products, Inc. et al., 456 N.W.2d 125, 131 (N.D. 1995).

¶48 The principle that both parties must be restored to their pre-contractual positions applies to equitable rescission actions. Barker v. Ness, 1998 N.D. 223, ¶ 16, 587 N.W.2d 183, 187 (1998). The court has the power to determine the amount owing or which must be paid by way of compensation by one who maintains an action for cancellation of a contract to the one against whom it is brought. Donovan v. Dickson, 164 N.W. 27, 31 (N.D. 1917). Once the trial court renders a formal rescission, it must restore each side to its respective pre-contractual position. Id. (citing Dobbs, § 4.8, at 463). N.D.C.C. § 32-04-23 states: "[o]n adjudging the rescission of a contract, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require."

¶49 Typically, the plaintiff must give notice to the defendant of the rescission and must make an offer to restore in compliance with N.D.C.C. § 9-09-04; Schaff v. Kennelly, 61 N.W.2d 538, 546 (N.D. 1953); Alton's v. Long, 352 N.W.2d 198, 199 (stating N.D.C.C. § 9-09-04 sets forth the statutory requirements governing rescission). However, an offer to restore is not required when nothing exists to restore or the party seeking rescission has received nothing of value. Volk v. Volk, 121 N.W.2d 701, 706 (N.D. 1963). In pursuing equitable relief, there is no requirement to offer restoration. Barker, 1998 ND 233 at P15. (citing Kracl v. Loseke, 236 Neb. 290, 461 N.W.2d 67, 73 (Neb. 1990)), see also Knaebel v. Heiner, 663 P.2d 551, 554 (Alaska 1983) (stating because equitable rescission rather than legal rescission was sought, restoration was not required prior to suit by the plaintiff). "[I]n equity the suit is not on rescission, but for rescission, it is not a suit based upon the rescission already accomplished by the plaintiff, but a suit to have the court decree a rescission." Id. (quoting DOBBS, § 4.8, at 463). In equity the suit is not on rescission, but for rescission, it is not a suit based upon the rescission already accomplished by the plaintiff, but a suit to have the court decree a rescission. Id. (quoting DOBBS, § 4.8, at 463).

> A court of equity has wide and extensive powers. If there were no provisions in the statutes speaking upon the powers of the court of equity, such court would nevertheless have, and does have, inherent power to grant such relief in cases in which the equitable power of the court is invoked as to the court shall seem proper in order to do justice between the parties . . . to place the parties in status quo and do equity between them.
> Barker v. Ness, 1998 ND 223, P12 (citations and quotations omitted).

¶50 In this case, Wiest received nothing in consideration for the signing of the notes. When Wiest was fraudulently induced to enter into the $250,000 loan in October of 2005, the loan proceeds were used to pay GBM overdrafts and other bills and not used to purchase trucks and trailers as Wiest was advised. Wiest received no consideration for that transaction.

¶51 The same holds true for the $200,000 line of credit, Wiest used a portion of the proceeds to pay obligations of WJB and to purchase stock in GBM. The Trial Court found that the advances totaled $277,422.54. "[I]ncluding a $50,000 payment toward a previous loan made by Wiest, $17,500 to GBM it increase Wiest's ownership interest in GBM, $60 in fees and Wiest authorized payments to third-party vendors of GBM . . . totaling $55,000." Bank's Appendix P 86. Another $47,500 was advanced to WBJ and $20,000 to BFS. Id. Of these amounts, Wiest made payments of $98,381.35, leaving a balance of $76,678.65. Exhibit 21 (Appendix P. 10), 23 (Appendix P. 12), 25 (Appendix P. 14), 33 (Appendix P. 15). Equitable rescission would require this balance to be repaid, as the funds were advanced at Wiest's direction. Id. In this case, this court should affirm the trial court's decision, allowing Wiest to rescind both loans as he was fraudulently induced to enter into the loans.

¶52 **3. The trial court properly found a fiduciary relationship existed between Palmer and Wiest.**

¶53 Palmer owed a fiduciary duty to Wiest because Wiest placed faith, confidence and trust in Palmer and the Bank. P. 70 L 12; P. 80 L 14; P. 120 L 11. The trial court recognized that in certain situations, a banking relationship may create a duty to

disclose material facts. See First National Bank & Trust of Williston v. Bracken, 468 N.W. 2d 633, 637 (N.D. 1991) (where the court recognizing that while a bank may not have a general duty to disclose a customer's financial condition to anyone, the duty to in part full, fair, and truthful information may arise if the bank responds to an inquiry about a customer's credit status or if there is a fiduciary relationship). This court also found that a fiduciary relationship may arise in a situation where the customer places his faith and confidence and trust in the bank with a resulting domination or control exercised by the bank over the borrower's affairs, or if the party reposing the confidence was in a position of dependence, weakness, or lack of knowledge. Id.

¶54 The Supreme Court of South Dakota held in Buxcel v. First Fidelity Bank, that in certain situations a fiduciary duty can arise in banking relationships creating a duty to disclose material facts. 601 N.W.2d 593, 597 (S.D. 1999). In Buxcel, the Plaintiffs, Clifford and Elain Buxcel, were looking to make additional income. Id. at 594. First Fidelity Bank, the defendant in the action, encouraged the Buxcel's to purchase a grocery store of its banking customers that were looking to sell their business. Id. A Senior Vice President and manager of First Fidelity told the Buxcel's that Dean's Market represented the Buxcels could earn a good living and present owners of Dean's Market were selling the business because they wanted to retire. Id. at 595. The reality was that the store was heavily indebted to First Fidelity, the store had a long-term record of poor performance, and First Fidelity wanted to sell the grocery as a going concern rather than liquidating through a foreclosure action. Id. First Fidelity were persuaded to obtain an SBA loan that guaranteed 90% of First Fidelity's loan and

conducted an internal appraisal valuing the grocery at $160,000. The Buxcels made several improvements to the store but faced serious financial trouble within months of taking over and eventually defaulted on their note. Id. Upon foreclosure, the SBA valued the store at $41,000. Id.

¶55 The Buxcels sued First Fidelity claiming it intentionally failed to disclose the complete and troubled financial history of the market. Id. At trial, the jury was instructed no duty existed for First Fidelity to disclose the seller's financial information before the sale of the store, and granted a motion for a directed verdict on the Buxcel's breach of fiduciary claim finding as a matter of law that no fiduciary duty was created. Id. at 596.

¶56 On appeal, the Court held the trial court erred in failing to instruct the jury that First Fidelity had a duty to disclose with the facts presented in the case. The court noted that as a general rule, a party to a transaction has no duty to disclose material facts to another, special circumstances may arise that would create the duty. Id. (citing Klein v. First Edina Nat'l Bank, 196 N.W.2d 619, 622 (Minn. 1972)). The court found special circumstances existed under the facts presented in the case that created a confidential or fiduciary duty requiring First Fidelity to disclose the true financial history of the grocery store. Id. at 597.

¶57 The court looked to several factors showing the bank assumed an active role and was integrally involved in the sale of the grocery store including the grocery store's poor performing loan history over a 14-year period of time, the bank's internal notes stating it would be in the bank's best interest to sell the bank as a going concern instead

of liquidating, the first meeting discussing the purchase of the store was at the bank, and the banker presented the acquisition and financing package to the Buxcels which included an offer, agreement, appraisal, cash flow, and SBA application. Id. at 597-98. The banker testified he had financed grocery stores in the past and knew they were a hard business, and that the bank had written off the previous loan to the previous owners of the grocery until the Buxcels came along with the backing of the SBA. Id. at 598. The Bank wrote a letter to the SBA in its application which stated the current owners lost interest in the business, and the store needed to be arranged and a good cleaning, and with proper management had potential. Id. The Court stated: "In shepherding this SBA loan application, bank clearly acted on behalf of Buxcels and certainly invited reliance by Buxcels. A duty to disclose arose when this bank negotiated an SBA loan for this prospective buyer of this sunken ship, also known as a grocery store." Id. The court found the Buxcels clearly placed their trust and confidence in First Fidelity and that they relied on the banker, and believed he was representing their interest, and found under these circumstances a duty to disclose arose. Id. at 599.

¶58 The Iowa Supreme Court considered a similar case, in First Nat. Bank in Lenox v. Brown, 181 N.W. 2d 178, 180 (Iowa 1970). In Brown, the defendant signed a promissory note to purchase a one-half interest in a business, after being encouraged to do so by the president of the plaintiff bank. Id. The bank did not disclose that the business was heavily indebted to the bank and the business assets were encumbered by several liens. Id. When the defendant borrowed the money from the bank and used it to

purchase the interest in the business, the Banker used a portion of the purchase price to pay down the business loans. Id. at 481. When the defendant discovered the bank loans and the liens he left the business and failed to pay the note. Id. The Iowa Supreme Court in upholding the trial court's judgment held that because the banker had superior knowledge and familiarity with the operative facts the plaintiff had an duty of disclosure. Id. at 182. Further by failing to disclose the facts, the bank "lured defendants into a borrowing transaction by failing to reveal its own interest." Id. at 184. The court, in affirming the trial court's decision, found that the bank breached a duty to the defendant which amounted to fraud in the inducement, allowing the right of avoidance on the part of the defendant. Id.

¶59 In this case, there are any numbers of factors that indicate that Palmer was far more than a lender representing the Bank. Palmer presided over all the meetings with Wiest and the GBM investors, and formulated the lending strategy for financing GBM and all the related companies. P. 212 L 3; P. 219 L 21. Wiest placed his trust and confidence in Palmer. P. 70 L 12-16; P. 120 L 15. Palmer was intimately involved in the discussions with Wiest as well as the other investors regarding what were the necessary requirements for GBM's financial success. P 219 L21. Palmer had complete knowledge of the nature and amount of the loans taken out by GBM, and all of the Burckhardsmeier related companies, including the lack of collateral. P. 152 L 15 – P. 154 L 5; P. 405-420. Exhibits 51 (Appendix P. 18), 78 (Appendix P. 219). Palmer knew that the required collateral was not present on the Wiest loan, the $288,000.00 NDDF loan and the dozens of loans he had made to the Burckhardsmier related companies.

Exhibits 66 (Appendix P. 205), 78 (Appendix P. 219). P. 277 L 16; P. 279 L 7; P. 332 L 1; P. 382 L 6; P. 386 L 5-10. Palmer was aware that the trucks pledge to NDDF did not belong to GBM, and that GBM would not meet the equity requirements for an SBA loan. P. 370 L 24; P. 388 L 6-11. Wiest did not receive a copy the March 8, 2006 email, which showed that Palmer was aware that GBM would not be acquiring the trucks and that Palmer was fully aware that the trucks were not assets of GBM. Exhibit 73 (Appendix P. 218). This occurred prior to the advances that Palmer requested Wiest make on his line of credit to prevent "red flags". Exhibits 22 (Appendix P. 11), 25 (Appendix P. 14). P. 45 L 14-25; P.72 L 13-20; These payments only benefitted the Bank and were given Wiest's lack of knowledge of the true facts, of no benefit to Wiest. Exhibit 22 (Appendix P. 11), 25 (Appendix P. 14); P. 69 L 12 – P 70 L 24; P. 74 L 14 – 21; P. 116 L 22; P. 300 L 19; P. 301 L 118-19; P. 388 L 12 - 25. By these actions Palmer was apparently attempting to persuade Wiest and the other investors to save the Bank's "sunken ship."

¶60 Palmer's role went well beyond that of a lender and as a result Palmer had a duty to make full disclosure to Wiest and the other investors of the nature and amount of the loans taken out by GBM, the lack of collateral for the loans, the involvement of all of the Burckhardsmeier related companies and loans with the Bank so that Wiest and the other investors could make an informed decision based on the actual facts of GBM's precarious financial position. The trial court found that this breach amounted to fraud in the inducement and the remedy for such a breach was avoidance on the part of Wiest. Brown, 181 N.W.2d at 184. Bank's Appendix, p 85.

¶61 The Bank attempts to distinguish Dewey v. Lutz arguing that the Bank was unaware of Palmer's activities and that Wiest's actions in paying on the various promissory notes, Exhibits 22 (Appendix P. 11) and 25 (Appendix P. 14), prevented the Bank from discovering Palmer's fraud. Appellant's Brief ¶ 63. That however is not the case. Dawn Maus, a lending officer who had been with American Bank Center for 25 years and who was chairman of the loan committee throughout the calendar year 2006, testified that red flags began to pop up in the Bank on Palmer's loans 3-4 months prior to July. P. 474 L 14; P. 486.

¶62 It is clear at the time the Bank had reasonable suspicion that something was wrong with Palmer's loans, including Wiest making payments on all of the Burckhardsmeier related loans to "prevent red flags." Further, the Bank was the beneficiary of Palmer's fraud in that it received the proceeds from Wiest loans to clear overdrafts and make payments on the Burckhardsmeier related loans.

¶63 **Conclusion**

¶64 The trial court properly found a fiduciary relationship existed between Palmer and Wiest because Palmers actions went beyond a traditional lending relationship between banker and customer, Wiest placed his trust and confidence in Palmer, and Palmer had a duty to disclose his relationship with Burckhardsmeier and the lack of collateral for the loans. The trial court properly granted rescission of the $250,000.00 loan agreement between Wiest and the Bank because Wiest was induced to enter the loan through the fraud of Palmer. The fraud was properly imputed from American Bank Center because Palmer was employed by the Bank and acting as an agent on its behalf.

David L. Wiest respectfully requests this Court to affirm the Judgment of the District Court for the reason it is supported by the evidence in the record.

Dated this 19 April, 2010.

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¶65 **CERTIFICATE OF SERVICE**

I hereby certify that on the 19th day of April, 2010, true and correct copies of the Brief of Appellant and the Appellant's Appendix were served electronically upon the following:

Richard Olson, attorney for American Bank Center at olsonpc@minotlaw.com

David J. Hogue, attorney for Howard Palmer at dhogue@srt.com

A true and correct copy of the Brief of Appellant and the Appellant's Appendix was mailed to Lou Burckhardsmeier on April 19th, 2010 at the following address:

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/s/ Joseph A. Turman
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¶66 **CERTIFICATE OF COMPLIANCE**

The undersigned, as attorney for Appellee, David L. Wiest, and as the author of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the brief was prepared with proportional typeface (Times New Roman) and that the brief, excluding the table of contents, the table citations, and certificate of compliance, does not exceed 10,500 words.

Dated this 19 April, 2010.

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