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I. Introduction

[¶1] The parties have submitted their respective briefs. In their brief, Plaintiffs and Appellees Neal A. Leno and Susan A. Leno (collectively "the Lenos") make several arguments as to why the judgment of the District Court should be affirmed. A number of the assertions made by the Lenos in their brief merit response from Defendant and Appellant K & L Homes, Inc. ("K&L").

II. Appellant's Response to Appellees' Arguments

A. The District Court erred by failing to instruct the jury on comparative fault as requested by Appellant K& L Homes, Inc.

[¶2] The issue before the Court is whether the district court should have given the comparative fault jury instructions and special verdict form requested by trial counsel for K&L in light of the Lenos' claim for breach of the implied warranty of workmanlike construction. The issue turns on the statutory construction given to N.D.C.C. § 32-03.2-01 and N.D.C.C. § 32-03.2-02. While the definition of fault contained in N.D.C.C. § 32-03.2-01 explicitly applies to "breach of warranty" without limitation, the definition of "fault" in N.D.C.C. § 32-03.2-02 contains only a reference to breach of warranty for product defect. The Lenos interpret the items listed in the definition of fault contained N.D.C.C. § 32-03.2-02 as an exclusive list, thereby creating an irreconcilable conflict with N.D.C.C. § 32-03.2-01. However, to do so violates several basic tenets of statutory interpretation.

[¶3] The Lenos' primary argument that the district court was correct in not instructing the jury on comparative fault is based on the rule of statutory construction that the particular provision governs the general under N.D.C.C. § 1-02-07 and, therefore, the provisions of N.D.C.C. § 32-03.2-02 control over N.D.C.C. § 32-03.2-01. However, the

Lenos' construction of the North Dakota's comparative fault statutes must be rejected because: (1) it creates a conflict between N.D.C.C. § 32-03.2-01 and N.D.C.C. § 32-03.2-02 where no conflict exists; and (2) the construction results in N.D.C.C. § 32-03.2-01 being superfluous and without any effect. Accordingly, the Lenos' construction of the comparative fault statutes must be rejected in favor of K&L's interpretation, which harmonizes and gives effect to each and every provision of North Dakota's comparative fault laws.

1. The Lenos' interpretation creates a conflict between N.D.C.C, § 32-03.2-01 and N.D.C.C, § 32-03.2-01 where none exists.

[¶4] The Lenos argue an irreconcilable conflict exists between N.D.C.C. § 32-03.2-01 and N.D.C.C. § 32-03.2-02. Leno Br. at p. 19. Further, the Lenos argue the maxim of statutory construction found in N.D.C.C § 1-02-07 and which the particular governs the general controls. The Lenos argue that, since breach of warranty is not included in the definition of fault found in N.D.C.C. § 32-03.2-02, the Court properly refused to instruct on comparative fault. However, the Lenos conclude there is a conflict between N.D.C.C. § 32-03.2-01 and N.D.C.C. § 32-03.2-02 without any attempt at harmonizing the sections. The Lenos overlook the fundamental tenet requiring statutes be construed as a whole and harmonized to give meaning to related provisions in order to avoid conflicts. *Great Western Bank v. Willmar Poultry Company*, 2010 ND 50, ¶ 17, 780 N.W.2d 437. Therefore, an interpretation which concludes there is a conflict between N.D.C.C. § 32-03.2-01 and N.D.C.C. § 32-03.2-02 without any attempt to harmonize the section violates this most basic rule of statutory construction. A closer review of the statutes and North Dakota case law reveals the Lenos' interpretations are erroneous.

[¶5] N.D.C.C. § 32-03.2-02 provides, in part:

Contributory fault does not bar recovery in an action by any person to recover damages for death or injury to person or property unless the fault was as great as the combined fault of all other persons who contribute to the injury, but any damages allowed must be diminished in proportion to the amount of contributing fault attributable to the person recovering. . . Under this section, **fault includes** negligence, malpractice, absolute liability, dram shop liability, failure to warn, reckless or willful conduct, assumption of risk, misuse of product, failure to avoid injury, and product liability, including product liability involving negligence or strict liability or breach of warranty for product liability.

N.D.C.C. § 32-03.2-02 (in pertinent part) (emphasis added). The Lenos' interpret the definition of fault in N.D.C.C. § 32-03.2-02 as an exhaustive list of those claim or causes of action that constitute "fault." The statute explicitly provides that the definition of fault "includes" the itemized claims. The word "includes" is ordinarily not a term of limitation, bur rather a term of enlargement. *E.g., Great Western Bank*, 2010 ND 50, ¶ 11, 780 N.W.2d 437. *Great Western, supra,* is instructive on this issue. The case turned on the definition of what constituted "supplies" for purposes of the agricultural supplier's lien statutes, N.D.C.C. § 35-31-01. Under the statute, the term "supplies" was defined as follows:

As used in this chapter, the term "supplies" includes seed, petroleum products, fertilizer, farm chemicals, insecticide, feed, hay, pasturage, veterinary services, or the furnishing of services in delivering or applying the supplies.

N.D.C.C. § 35-31-01(emphasis added). This Court held that, because the word "includes" is a term of enlargement, the defined term "supplies" included items not specifically listed in the statute, in that case young turkeys, or "poults." Id. at ¶ 12. This interpretation of the word "includes" is consistent with *Leet v. City of Minot*, 2006 ND 191, ¶ 21, 721 N.W.2d 398; *Amerada Hess Corp. v. State*, 2005 ND 155, ¶ 8, 704

N.W.2d 8; and *Lucke vs. Lucke*, 300 N.W.2d 231, 234 (N.D. 1980). In *Amerada Hess*, the Court cited North Dakota's Legislative Drafting Manual 107 (1987) which provides "[a]n exhaustive definition uses the word means while a partial definition uses the word includes." 2005 ND 155, ¶ 13, 704 N.W.2d 8.

[¶6] Under *Great Western, supra,* and others, the legislature's use of the term "includes" in N.D.C.C. § 32-03.2-02 implies a nonexhaustive list of those claims which constitute fault. Therefore, there is no conflict with N.D.C.C. § 32-03.2-01, which provides:

> As used in this chapter, "fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to tort liability or dram shop liability. The term also includes strict liability for product defect, **breach of warranty**, negligence or assumption of risk, misuse of a product for reasonable care to avoid an injury or to mitigate damages.

N.D.C.C. § 32-03.2-01(emphasis added). Harmonizing these related sections as a whole, giving meaning to each provision, shows there is no conflict. Fault, for purposes of N.D.C.C. § 32-03.2-02 includes the items defined as "fault" listed in N.D.C.C. § 32-03.2-01, as well as those claims defined as "fault" in N.D.C.C. § 32-03.2-02. Since the Lenos were claiming breach of the implied warranty of workmanlike construction at trial, the district court erred by failing to instruct the jury on comparative fault and by failing to utilize the requested special verdict form allowing allocation of fault to both the Lenos and K&L.

2. The Lenos' interpretation of the comparative fault statutes renders N.D.C.C, § 32-03.2-01 mere surplusage, without meaning or operative effect.

[¶7] The Lenos argue the definition of "fault" contained in N.D.C.C. § 32-03.2-01 does not apply to the modified comparative fault section, N.D.C.C. § 32-03.2-02. Instead, the Lenos argue, N.D.C.C. § 32-03.2-01 applies to the rest of the Chapter 32-03.2. Leno Br. at 19. This Court does not adopt statutory interpretations which make one part of a statute or related statutes meaningless or mere surplusage. *E.g., State v. Laib*, 2002 ND 95., ¶ 11, 644 N.W.2d 878. The Lenos' interpretation does just that, render N.D.C.C. § 32-03.2-01 meaningless surplusage, without any operative effect.

[¶8] North Dakota Century Code Chapter 32-03.2 contain a total of thirteen sections. In addition to N.D.C.C. § 32-03.2-01 and N.D.C.C. § 32-03.2-02, three of these sections refer to the term "fault." These sections are N.D.C.C. §§ 32-03.2-02.1 (governing motor vehicle accidents involving property damage of less than $5,000) ; 32-03.2-08(governing the review of award economic damages awards by the court), and 32-03.2-12(governing the procedural requirements of post trial motions for review of jury verdicts). Under N.D.C.C. § 32-03.2-02.1, property damage awards for motor vehicle accidents involving claims of less than $5,000 "**may not be diminished in proportion to the amount of contributing fault** attributable to the person recovering. . . ." N.D.C.C. § 32-03.2-08 applies to "[a]wards in excess of two hundred fifty thousand dollars **before reduction for contributory fault**. . . ." N.D.C.C. § 32-03.2-08(1). Likewise, under N.D.C.C. § 32-03.2-12, "[m]otions for periodic payments, **reductions of awards for contributory fault** . . . must be made to the judge who presided over the trial of the action. . . ." N.D.C.C. § 32-03.2-12.

[¶9] These three sections specifically refer to reduction jury verdicts for contributory fault. The only section in Chapter 32-03.2 which sets forth how to reduce for contributory fault is N.D.C.C. § 32-03.2-02. In other words, these three sections specifically refer to N.D.C.C. § 32-03.2-02. If, as the Lenos' argue, it has no application to the modified comparative fault statute, N.D.C.C. § 32-03.2-01 is quite literally an orphan in its own chapter. Under the Lenos' interpretation, there are no sections of Chapter 32-03.2 to which the definition of "fault" in N.D.C.C. § 32-03.2-01 applies. The Lenos' interpretation gives no meaning or effect to N.D.C.C. § 32-03.2-01, violating one of the main tenets of statutory construction. In order to harmonize these sections, the Court should adopt the construction offered by K&L, holding the definition of N.D.C.C. § 32-03.2-01 applies to modified comparative fault under N.D.C.C. § 32-03.2-02. Accordingly, the district court erred by failing to instruct the jury on modified comparative fault and by failing to give a special verdict form allowing apportionment of fault to both K&L and the Lenos.

B. The district court's failure to instruct the jury on comparative fault and to give the requested special verdict form allowing apportionment of fault was not harmless error.

[¶10] The Lenos argue the district court's failure to instruct the jury on comparative fault was harmless error under Rule 61 of the North Dakota Rules of Civil Procedure. However, jury instructions must correctly and adequately inform the jury of the applicable law and must not mislead or confuse the jury. *Rittenour v. Gibson*, 2003 ND 14, ¶ 15, 656 N.W.2d 691. Only if, when considering the instructions as a whole, the jury was fairly advised of the law on the essential issues of the case will an

error in the instruction be considered harmless. *See, Rittenour*, 2003 ND 14, ¶ 15, 656 N.W.2d 691. In this case, the Lenos' fault was a central issue in K&L's presentation of the case. The failure of the district court to give the jury the requested instructions on fault or the special verdict form apportioning fault cannot be considered harmless.

[¶11] During trial, K&L raised significant facts showing fault on the part of the Lenos from which a jury could conclude was at least in part the cause of the structural problems occurring at the home. K&L's expert testified the home K&L's expert, Skaret, testified at trial that the cracking of walls and floors in the Lenos' home was the result of soil expansion caused by excessive moisture being admitted into those soils due to the landscaping edging installed by the Lenos. Trial Tr. p. 429 (lines 5 - 9). Civil Engineer Steve Nagel testified that the damage was caused by heaving of the floor slab caused by expansion of the underlying clays soils due to the introduction of water due to the landscaping edging installed by the Lenos. Trial Tr., pp. 456 - 457. Indeed, one of the Lenos' own experts, Gary Arman, admitted the placement of plastic lawn edging around the home could be a contributing factor to the problems in the Lenos' home. Trial Tr., p. 182 (lines 8 - 14). However, the instructions given by the Court did not allow any apportionment of fault between K&L and the Lenos. The jury was left without any guidance or mechanism through which to apportion fault to the Lenos.

[¶12] Once the jury determined there was a breach of the implied warranty of workmanlike construction which was "a" proximate cause of the problems experienced in the Lenos's home, the jury was only asked to determine "what amount of damages the Lenos were **entitled to** as a result of K&L's breach of contract or implied

warranty?" *See, Special Verdict Form, App. at 85* (emphasis added). Without the opportunity to apportion fault, the jury would have been left with the impression that this was an "all or northing" case. In other words, the jury could well have interpreted the instructions and verdict given by the district court to require them to award the Lenos all the requested damages even if it believed the Lenos were at fault or failed to mitigate their damages. Indeed, there was no mechanism for the jury to apportion fault to the Lenos. Likewise, there was no special verdict interrogatory requesting the jury determine whether the Lenos were at fault and if such fault was a proximate cause of their injuries. While it is true K&L argued thee Lenos were entirely responsible for their damages, the jury could well have concluded the Lenos were partially at fault and should have been given that opportunity. Where the error in an instruction affects the jury's view of liability or the duties of the parties, it affects the substantial rights of the parties. *Rittenour*, 2003 ND 14, ¶¶ 23 - 25, 656 N.W.2d 691. In such cases, reversal is warranted. Id. at ¶ 26. The failure to instruct on comparative fault wasn't to the benefit of K&L's defense on liability. It impacted the substantial rights of K&L and therefore, was not harmless error.

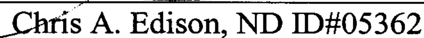
VI. <u>Conclusion</u>

[¶13] The district court erred by failing to instruct the jury on North Dakota's comparative fault laws as requested by K&L. At the time of trial, the Lenos' primary claim against K&L was an alleged breach of the implied warranty workmanlike construction which is explicitly and unambiguously defined as fault by N.D.C.C. § 32-03.2-01. The Lenos' construction of North Dakota Century Code Chapter 32-03.2 fails

to harmonize N.D.C.C. § 32-03.2-02 with N.D.C.C. § 32-03.2-01, resulting a conflict which does not exist and renders N.D.C.C. § 32-03.2-01 meaningless. This construction should be rejected by this Court in favor of one that harmonizes all provisions of the chapter. Accordingly, breach of warranty under N.D.C.C. § 32-03.2-01 should be considered "fault' under N.D.C.C. § 32-03.2-02. For these reasons, the judgment entered against K&L must be reversed and the case remanded for further proceedings in accordance with the Court's ruling.

[¶14] Dated this 29th day of March, 2011.

STORSLEE LAW FIRM, P.C.
Attorneys for Appellant/Defendant
K & L Homes, Inc.
1900 Burnt Boat Drive, Suite 101
Bismarck, ND 58503
Ph: 701.222.1315



BY: ______________________
Chris A. Edison, ND ID#05362

CERTIFICATE OF SERVICE

[¶15] I certify that a true and correct copy of the foregoing document was, on the 29th day of March, 2011, electronically served on Paul R. Sanderson, attorney for plaintiff/appellee, at the following email address:

psanderson@zkslaw.com

CHRIS A. EDISON