

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
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CLERK OF SUPREME COURT

'AUG 31 2012

STATE OF NORTH DAKOTA

BRENDAN MULDOON,)
)
 Appellant,)
)
 vs.)
)
 NORTH DAKOTA)
 WORKFORCE SAFETY & INSURANCE)
 FUND,)
)
 Appellee, and)
)
 PATRICK LAUTH CONTRACTING, LLC)
)
 Respondent.)
)

APPEAL FROM THE DISTRICT COURT MEMORANDUM OPINION AND ORDER DATED
MARCH 19, 2012; ORDER FOR JUDGMENT DATED MARCH 22, 2012; AND JUDGMENT
DATED MARCH 27, 2012, ENTERED APRIL 16, 2012

CASS COUNTY DISTRICT COURT - EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE STEVEN L. MARQUART, PRESIDING
CASS COUNTY CIVIL NO.: 2011-CV-02909
SUPREME COURT CIVIL NO.: 20120273

APPELLANT'S REPLY BRIEF

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Appellant Brendan Muldoon respectfully submits the following Reply Brief:

Whether Mr. Muldoon willfully violated the terms of N.D.C.C. Section 65-05-33, as alleged by Workforce Safety & Insurance, depends on whether he was the employer of Aaron Maves et al and whether he was Patrick Lauth's partner in Patrick Lauth Contracting, LLC. Despite WSI's obfuscatory approach to this matter, it is easy to see that Mr. Muldoon was neither the employer of Mr. Maves et al nor was he Mr. Lauth's partner.

N.D.C.C. 65-01-02(17) defines "employer" by referencing the 20-part test provided in N.D. Admin. Code Section 92-01-02-49. That test was never applied to Mr. Muldoon (Appellant's App. p. 170 (HT p. 413 L 21 - p. 414 L 3)). In fact, the Administrative Law Judge ruled that the issue of whether WSI had ever applied the 20-part test to determine whether Mr. Muldoon was an employer was irrelevant (Appellant's App. p. 139 (HT p. 43 L 22-25 - p. 44 L 23)).

Not only did WSI fail to use its own statutory test to determine whether Mr. Muldoon was an employer, it is apparent that, when that test is fairly applied, Mr. Muldoon does not meet the statutory definition of an employer. Mr. Muldoon did not hire, fire, or control the employees of Patrick Lauth Contracting, LLC (Appellant's App. 169 (HT p. 406 ll. 9-16)). He did not provide training to Mr. Lauth's employees (Appellant's App. p. 169 (HT p. 406 ll. 17-21)). Mr. Lauth was simply one of a number of contractors used by Mr. Muldoon and his business partners (Appellant's App. 168 (HT. p. 402 L 25 - p. 403 L 7)). There was no continuing relationship between Mr. Muldoon and Mr. Lauth's employees (Appellant's App. 169 (HT p. 406 ll. 17-21)). Mr. Muldoon did

not determine set hours of work for Mr. Lauth's employees (Appellant's App. 169 (HT p. 406 ll 17-21)). Mr. Muldoon did not determine the sequence of work by Mr. Lauth's employees (Appellant's App. 169 (HT p. 406 ll 17-21)). Mr. Muldoon did not require reports and did not pay wages or expenses to Mr. Lauth's employees (Appellant's App. 169 (HT p. 406 ll 17-21)). Mr. Muldoon did not furnish tools or equipment (Appellant's App. p. 169 (HT p. 406 ll 17-21)). Mr. Muldoon had no investment in Mr. Lauth's business (Appellant's App. 167 (HT p. 398 ll 6-7)). Mr. Muldoon did not realize a profit or loss from Mr. Lauth's business (Appellant's App. 164 (HT p. 388 ll 6-7)). Mr. Lauth's employees performed work for others (Appellant's App. 168 (HT p. 405 ll 13-23)). Mr. Muldoon was not even aware if the people working for Mr. Lauth were employees or independent contractors (Appellant's App. 165 (HT p. 391 ll 19-21)). In short, Mr. Muldoon does not satisfy the definition of an employer of Aaron Maves et al.

Not only did the ALJ refuse to consider whether Mr. Muldoon was an employer under the 20-part statutory test, he also ignored uncontroverted evidence that Mr. Muldoon helped Mr. Lauth open a bank account and formalize his business purely out of kindness. Paul Deboer, Mr. Lauth's banker, testified that, "Brendan basically wanted to help [Mr. Lauth] out. . . ." (Appellant's App. p. 149 (HT p. 270 ll 22-25; p. 271 ll 1-22)). Lee Allen, a Fargo businessman, testified that Mr. Lauth had told him that Mr. Muldoon was helping him as a favor with no financial motive. In response to questions from Mr. Muldoon's counsel, Mr. Allen explained:

- Q. And you asked what he meant by partner and -- what percent ownership Mr. Muldoon had in the partnership?

A. Right

Q. And -- and what was Mr. Lauth's reply?

A. Well, you know, he said, 'I got a partner.' And I said, 'Really? What kind of a partner?' He says, 'Well, I do his work for him and he lets me use a stall in his garage.'

I said well -- you know, I asked him, I said, 'What do you mean? He's a financial partner?'

He says, 'No, he does my books. He has his secretary do my books.' And I said, well -- and for no charge.

And I asked him, 'Are you getting a break or giving him a break on his repairs?'

He said, 'No, I'm charging him full rate. He's just trying to help me out.'

(Appellant's App. p. 154 (HT p. 314 L 23 - p. 316, L 5)).

Erin Haug, a licensed North Dakota attorney, also testified that Mr. Muldoon simply wanted to help Mr. Lauth (Appellant's App. 172 (HT p. 458, ll 8-9)); Appellant's Supp. App. pp. 1-2).

WSI's determination that Brendan Muldoon was the employer of Aaron Maves et al. is based entirely on its refusal to apply its own statutory test and its refusal to consider uncontroverted evidence that Mr. Muldoon's actions were gratuitous, not profit driven. WSI's results-driven approach to its decision-making is inherently unfair and cannot be condoned. Mr. Muldoon respectfully asks this Court to reverse WSI's order.

Dated this 31st day of August, 2012.

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CERTIFICATE OF SERVICE

I, Stephen D. Little certify that on the 31st day of August, 2012, a true and correct copy of the Appellant's Reply Brief with an attached Certificate of Service were mailed to the following:

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