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JUL 24 2012

STATE OF NORTH DAKOTA

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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

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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

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APPELLANT'S BRIEF

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## I. ISSUES PRESENTED

There were three specified issues before the Administrative Law Judge; 1) whether Brendan Muldoon was an employer as defined by N.D.C.C., Section 65-01-02(17) of Aaron Maves et al; 2) whether Mr. Muldoon willfully violated N.D.C.C., Section 65-05-33 by failing to secure workers compensation coverage in 2008 for Aaron Maves et al; and 3) whether Mr. Muldoon was personally liable for premiums and penalties owed to WSI Appellant's Appendix (App.) pp. 106-115).

## II. STATEMENT OF THE CASE

On October 10, 2008, Workforce Safety & Insurance (WSI) issued a Notice of Decision to Patrick Lauth, d/b/a/ Patrick Lauth Contracting in which WSI found that Mr. Lauth, doing business as Patrick Lauth Contracting LLC, hired employees and willfully failed to secure worker's compensation coverage for its employees with Workforce Safety & Insurance (App. pp. 95-97). Mr. Lauth failed to respond WSI's informal decision and, consequently, after the passage of 30 days, it became final (See: N.D.C.C., Section 65-01-16). Mr. Muldoon was not a party to this matter and was not aware of it.

Subsequently, on June 28, 2010, WSI issued an Order finding that both Mr. Muldoon and Mr. Lauth had willfully and intentionally failed to secure worker's compensation coverage for their employees while they did business as Patrick Lauth Contracting and Patrick Lauth Contracting, LLC (App. pp. 98-102). Mr. Muldoon requested reconsideration and demanded formal hearing on July 15, 2010 (App. p. 105). Once again, Mr. Lauth did not reply. A formal administrative hearing was held on February 22 and 23 and March 11, 2011, before John Allen, Administrative Law Judge (App. p. 137). ALJ Allen issued

Findings of Fact, Conclusions of Law and Order on July 2, 2011, (App. pp. 116-128). Mr. Muldoon requested reconsideration on July 25, 2011, (App. pp. 129-131). ALJ Allen issued a Reconsideration Order dated August 8, 2011, (App. pp. 132-136). Mr. Muldoon appealed to the District Court. The District Court, Honorable Steven L. Marquart presiding, affirmed the Administrative Law Judge's decision, and Mr. Muldoon has appealed to this Court.

### III. STATEMENT OF FACTS

Brendan Muldoon graduated from Concordia College with a degree in Political Science in 1999 (App. p. 138 - Hearing Transcript p. 37). In 2000, Mr. Muldoon obtained a North Dakota real estate license (App. p. 157 - Hearing Transcript p. 338). Afterwards, Mr. Muldoon sold residential and commercial real estate and became owner of a few rental properties individually and as a partner in MHD Properties and Newton Development (App. p. 157 - Hearing Transcript pp. 338-339). Mr. Muldoon employed a secretary/bookkeeper, Nicole Hofer, for whom he obtained workers compensation coverage (App. p. 158 - Hearing Transcript p. 346). Mr. Muldoon understood that Ms. Hofer was his employee when his accountant, Jeremy Ulmer, assessed her work duties and explained it to him (App. p. 145 - Hearing Transcript p. 215, l 25; p. 216, l 4.)

In 2007, Mr. Muldoon hired Patrick Lauth, an independent contractor, to install carpet and perform miscellaneous duties in an apartment building owned, in part, by Mr. Muldoon (App. p. 158 - Hearing Transcript p. 348). Mr. Lauth performed work on property owned by Mr. Muldoon, property owned by Mr. Muldoon's father as well as property owned by others (App. p. 158 - Hearing Transcript p. 349). Mr. Lauth was referred to Mr. Muldoon by RKAK Property Management

(Id.). Prior to working with Mr. Muldoon, Mr. Lauth had worked with Lee Allen, another property owner in the Fargo area (App. p. 159 - Hearing Transcript p. 352).

In April, 2008, Mr. Muldoon agreed to help Mr. Lauth open a checking account so that he would not have to continue functioning on a cash-only basis (App. p. 159 - Hearing Transcript p. 353). In order to prevent Mr. Lauth's activities from harming his credit, Mr. Muldoon retained authority to sign all checks drawn on the new account (App. p. 160 - Hearing Transcript p. 358). Mr. Lauth had explained to Mr. Muldoon that he had damaged credit which prevented him from opening a bank account and that he had trouble managing his books (App. p. 164 - Hearing Transcript p. 386, ll 5-11).).

Subsequently, in May of 2008, Mr. Muldoon helped Mr. Lauth file incorporation papers with the North Dakota Secretary of State, creating a limited liability company, Patrick Lauth Contracting LLC (App. p. 161 - Hearing Transcript p. 363). Following organization of Mr. Lauth's LLC, Mr. Muldoon assisted him in opening up another checking account in the name of Patrick Lauth Contracting, LLC (App. p. 161 - Hearing Transcript p. 364). Mr. Muldoon further assisted Mr. Lauth by having his secretary, Ms. Hofer, write payroll checks to Mr. Lauth's employees and basically manage his LLC checking account (App. p. 162 - Hearing Transcript p. 368).

Mr. Muldoon explained that he had set up Mr. Lauth's initial checking account because he had been informed by U.S. Bank that, until Mr. Lauth organized his business as an LLC with the Secretary of State's Office, Mr. Muldoon's name had to be on the checking account (App. p. 163 - Hearing Transcript p. 384). Mr. Lauth had explained to

Mr. Muldoon that he had damaged credit, that he could not get a bank account and struggled with handling his books (App. p. 164 - Hearing Transcript p. 386). Mr. Muldoon explained that Mr. Lauth had never asked him to help finance his LLC (App. p. 164 - Hearing Transcript p. 389). He further explained that Mr. Lauth owned the LLC even though Mr. Muldoon had authority to sign checks (App. p. 165 - Hearing Transcript p. 390). Mr. Muldoon relied on Mr. Lauth to secure an accountant's advice regarding employee relationships, payment of worker's compensation and job service premiums, and withholding of income tax (App. p. 165 - Hearing Transcript p. 392). Mr. Muldoon put his address on the LLC application because he understood that the Secretary of State's Office wanted a consistent address and Mr. Lauth did not have one (App. p. 166 - Hearing Transcript p. 394). Mr. Muldoon denied profiting in anyway from Mr. Lauth's business activities (App. p. 167 - Hearing Transcript p. 398). Mr. Lauth and his employees performed work for others as well as Mr. Muldoon, Newton Development and MHD Properties (App. p. 167 - Hearing Transcript p. 401). Mr. Muldoon explained that his role in Newton Development and MHD Properties included setting up repairs and maintenance (App. p. 168 - Hearing Transcript p. 402). He also explained that he utilized the services of other contractors besides Mr. Lauth (App. p. 168 - Hearing Transcript p. 403). He explained that paying Mr. Lauth and/or his LLC by the hour was a common practice in the real estate business and was the practice he used with other contractors (App. p. 168 - Hearing Transcript pp. 404-405).

Mr. Muldoon did not have any role in hiring, firing, or controlling any of the people who worked for Mr. Lauth (App. p. 169 - Hearing Transcript p. 406). Mr. Muldoon explained to Mr. Lauth that he needed to consult with an accountant to determine whether he needed worker's compensation coverage (App. p. 169 - Hearing Transcript pp. 406, 407). Mr. Muldoon went so far as to enter in to a written agreement with Mr. Lauth stating that his role would only be to provide bookkeeping services (App. p. 169 - Hearing Transcript p. 408). Both Nicole Hofer and Erin Haug, a licensed North Dakota attorney, were aware of the written agreement (App. p. 169 - Hearing Transcript p. 409).

On two occasions, when Mr. Muldoon learned that Mr. Lauth was representing to potential customers that he and Mr. Muldoon were partners, he corrected Mr. Lauth and Mr. Lauth acknowledged that they were not in fact business partners (App. pp. 170 - Hearing Transcript pp. 411-412).

Mr. Lauth also acknowledged to Lee Allen that he and Mr. Muldoon were not business partners. He explained that Mr. Muldoon had his secretary, Nicole Hofer, do Mr. Lauth's books for no charge; that Mr. Lauth charged Mr. Muldoon his full rate for his services; and that Mr. Muldoon was just trying to help him out (App. p. 154 - Hearing Transcript p. 315). A few weeks later, Mr. Lauth reiterated to Mr. Allen that Mr. Muldoon was simply helping him out (App. p. 154 - Hearing Transcript p. 316). Mr. Allen explained that his conversations with Mr. Lauth took place when Mr. Lauth tried to sell Mr. Allen some tools, belonging to Mr. Allen, which he had taken from a job site (App. p. 156 - Hearing Transcript p. 331).



On July 11, 2008, Brandon Morin, an employee working for Patrick Lauth Contracting, LLC, submitted a First Report of Injury with North Dakota Workforce Safety & Insurance (App. p. 87). WSI determined that the LLC maintained no workers compensation coverage.

#### IV. LAW AND ARGUMENT

##### A. Burden of proof

WSI has charged Mr. Muldoon with willfully violating N.D.C.C., Section 65-05-33. WSI has the burden of proof in this matter. See: Wanner v. North Dakota Workers Compensation Bureau, 2002 ND 201, 654 N.W.2d 760.

##### B. Employer/employee Relationship

N.D.C.C. Section 65-01-02(17) provides, in part, as follows:

'Employer' means a person who engages or received the services of another for remuneration unless the person performing the services is an independent contractor under the 'common law' test.

WSI has never applied the common law test to Brendan Muldoon and, consequently, has failed to prove an employer/employee relationship ever existed between Mr. Muldoon and Aaron Maves et al.

Mr. Muldoon did not have any role in hiring, firing, or controlling Mr. Lauth's employees (App. p. 169 - Hearing Transcript p. 406, ll 9-21.)

No one from WSI asked Mr. Muldoon why he helped Mr. Lauth or ever spoke to him at all (App. p. 169 - Hearing Transcript p. 407, ll 17-20).

WSI never asked Mr. Muldoon about his relationship, if any, with Mr. Lauth's employees (App. p. 170 - Hearing Transcript p. 413, l 21; App. p. 171 - Hearing Transcript p. 414, l 3).

Instead, WSI served a Notice of Decision dated October 10, 2008, on Patrick Lauth d/b/a Patrick Lauth Contracting (App. pp. 94-97). Mr. Muldoon was not served with WSI's informal decision, was never a party to that proceeding and is not bound by that decision. See: Cridland v. ND Workers Compensation Bureau 1997 ND 223, 571 N.W.2d 351. WSI's position seems to be that Mr. Muldoon was involved enough to pay for Mr. Lauth's willful failure to secure workers compensation coverage but not involved enough to be a party to the proceeding which determined an employment relationship. Mr. Muldoon was entitled to, although never permitted to, contest the employer/employee relationship asserted by WSI.

When Mr. Muldoon's counsel asked Stacey Kautzman, a paralegal in WSI's Special Investigation's Unit, whether the 20-part test required under N.D.C.C., Section 65-01-02(17) and provided in N.D. Admin. Code Section 92-01-02-49, had ever been applied to Mr. Muldoon, ALJ Allen ruled the question irrelevant (App. p. 139 - Hearing Transcript pp. 43-44). Subsequently, when counsel asked Mr. Muldoon whether WSI had ever applied the 20-part common law test to him, ALJ Allen again ruled the question irrelevant (App. p. 170 - Hearing Transcript pp. 412-413). In fact, no one from WSI ever asked Brendan Muldoon about his relationship with Mr. Lauth's employees (App. p. 171 - Hearing Transcript p. 414). None of Mr. Lauth's employees testified or ever, in the course of WSI's investigation, identified Brendan Muldoon as their employer.

As stated, the issue identified for hearing was whether Brendan Muldoon, not Patrick Lauth Contracting, LLC, was the employer of Aaron Maves et al. ALJ Allen found an employment relationship without

applying the statutory test or obtaining evidence from any of the purported employees that such a relationship even existed. Instead, he boot-strapped the earlier determination that Patrick Lauth, d/b/a, Patrick Lauth Contracting, LLC was an employer onto Mr. Muldoon without giving him any chance to contest the alleged employer/employee relationship.

### C. Credibility

The ALJ's determination of the substantial truth in considering the issues specified necessarily required a determination of the credibility of the various witnesses. WSI placed its reliance on Patrick Lauth. Without Mr. Lauth's assertion that Mr. Muldoon was his "partner" and Brandon Morin's employer, WSI had no case against Mr. Muldoon. When WSI determined that Aaron Maves et al. were employees of Patrick Lauth Contracting, LLC, it served that decision on Mr. Lauth personally, without regard to any "partner." Thus, on the one hand, we have the word of Mr. Lauth, a felon convicted of crimes involving dishonesty who admitted under oath that he had lied, had stolen and cheated. Mr. Lauth had convictions for selling marijuana and issuing a check without sufficient funds (App. p. 140 - Hearing Transcript p. 62, ll. 22-23). While Mr. Lauth freely admitted being a liar, a cheat and thief, he denied cheating Mr. Muldoon (App. p. 175 - Hearing Transcript p. 488, l. 17; p. 489, l. 5). At the same time, Mr. Lauth admitted that he was a "big thief" and that he had "robbed" Mr. Muldoon (App. p. 144 - Hearing Transcript p. 186, l. 16; p. 187, l. 4). On the other hand, we have the word of Mr. Muldoon, a respected businessman without a

blemish on his record. Mr. Muldoon's testimony was supported by Paul Deboer, a banker; Nicole Hofer, a personal assistant; Erin Haug, a licensed attorney; and Lee Allen, another businessman.

Mr. Lauth told Mr. Muldoon that he could neither read nor write (he has a GED) and he needed help in cutting checks for the LLC's employees (App. p. 145 - Hearing Transcript p. 214, l 15; p. 215, l 2). Mr. Muldoon had no involvement in cutting the checks for Mr. Lauth's employees; Ms. Hofer cut the checks based on her communications with Mr. Lauth (App. p. 146 - Hearing Transcript p. 223, l 23; p. 224, l 5).

Ms. Hofer ordered Mr. Lauth's business cards - naming him as the owner of Lauth Construction, LLC - with his prior approval (App. p. 147 - Hearing Transcript p. 239, l 13; p. 240, l 1.)

On at least two occasions, Mr. Muldoon learned that Mr. Lauth was representing to third parties that they were business partners. On each occasion, Mr. Muldoon confronted Mr. Lauth in the presence of Ms. Hofer and admonished him to cease misrepresenting that they were partners. Mr. Lauth acknowledged that the two were not partners and claimed that he had simply misspoken (App. p. 148 - Hearing Transcript p. 257, l 1; p. 258, l 1; App. p. 170 - Hearing Transcript p. 410, ll 10-21; p. 412, ll 4-10).

Paul Deboer, the banker Messrs. Muldoon and Lauth contacted regarding opening a checking account for Mr. Lauth's contracting company, recalled that, "Brendan basically wanted to help the guy out. . . ." (App. p. 140 - Hearing Transcript p. 270, l 22; p. 271, l 22). Mr. Lauth was the owner of the account, while Mr. Muldoon was merely a signer with limited access (App. p. 150 - Hearing Transcript p. 275, ll 17-24). Mr. Deboer explained the terms of the account to Mr. Lauth

(App. p. 151 - Hearing Transcript p. 282, ll 17-21). Mr. Lauth would have been unable to open the account if he had a bad credit history, without Mr. Muldoon's help (App. p. 151 - Hearing Transcript p. 283, ll 10-18). In fact, Mr. Lauth had a bad credit history and could not open an account in his own name. (App. p. 141 - Hearing Transcript p. 83, l 14). If Mr. Lauth's account had become overdrawn, it would have affected Mr. Muldoon's credit (App. p. 151 - Hearing Transcript p. 283, l 24; App. p. 152 - Hearing Transcript p. 285, l 15).

Mr. Lauth explained to Lee Allen on two separate occasions that Mr. Muldoon's secretary (Ms. Hofer) was providing him with bookkeeping services at no charge and that Mr. Lauth was charging Mr. Muldoon full rate for work performed (App. p. 154 - Hearing Transcript p. 314, l 23; p. 316, l 12).

After Mr. Lauth stopped working with Mr. Allen, he stopped by Mr. Allen's on his way to a pawn shop where he hoped to raise \$1100.00 to cover a bad check. Mr. Lauth intended to pawn some tools and offered to sell them to Mr. Allen, instead. Mr. Allen recognized a compressor, an orange hose and a nail gun as his own tools which had gone missing after Mr. Lauth had laid some carpet in one of his rental properties. Mr. Lauth ended up selling Mr. Allen's tools and redeeming his bad check. (App. p. 155 - Hearing Transcript p. 329, ll 7-19; App. p. 156 - Hearing Transcript p. 331, ll 9-20).

Ms. Haug also understood that Mr. Muldoon simply wanted to help Mr. Lauth (App. p. 174 - Hearing Transcript p. 468, ll 8-9).

The ALJ cannot simply ignore the corroborating testimony of a banker, a businessman, and a licensed attorney.

#### D. Muldoon's Relationship with Lauth

Before Brandon Morin ever sustained a work-related injury and before WSI ever found Patrick Lauth personally liable for workers compensation premiums, interest and penalties, Mr. Lauth described his relationship with Mr. Muldoon to Lee Allen. Mr. Lauth explained that Mr. Muldoon's secretary (Nicole Hofer) managed Mr. Lauth's checking account, that Mr. Muldoon was helping Mr. Lauth as a favor, and that Mr. Lauth was charging Mr. Muldoon the same rate he charged his other customers. Mr. Lauth later reiterated to Mr. Allen that Mr. Muldoon was merely helping him as a favor when Mr. Allen visited Mr. Lauth at one of Mr. Lauth's worksites at Mr. Lauth's request.

Mr. Allen's testimony confirmed the testimony of Mr. Muldoon, who said he had no ownership interest in Patrick Lauth Contracting, LLC, had no control of Mr. Lauth's activities or the activities of any employee of the LLC, received no profit from the LLC, paid Mr. Lauth in the same manner as other contractors performing work for Newton Development and MHD Properties and was simply trying to do Mr. Lauth a favor. Mr. Lauth wanted a company, so he had Nicole Hofer research the requirements of incorporation (App. p. 142 - Hearing Transcript p. 112, ll 16-19).

Mr. Lauth's control of the LLC is evidenced by the fact that, when he thought that the amount he charged for his own labor should be increased, he simply gave himself a raise (App. p. 143 - Hearing Transcript p. 162, ll 11-14). Mr. Muldoon had no role or interest in Mr. Lauth's business decisions.

While Chuck Doppler, WSI's special investigator, believed that Mr. Muldoon's motive in setting Mr. Lauth up in business was to make a profit from that business, he found no evidence of profit by Mr. Muldoon (App. p. 153 - Hearing Transcript p. 302, ll 18-24).

Mr. Muldoon understood from conversations with Mr. Deboer that his name had to be on the first checking account in order to open the account (App. p. 164 - Hearing Transcript p. 388, ll 16-22).

Of course, this was also what Mr. Lauth explained in a sworn statement to WSI in which he claimed to own 100% of the LLC (App. p. 88). Similarly, it was Mr. Lauth, not Mr. Muldoon, who agreed to serve as the LLC's registered agent with the Secretary of State (App. p. 83 - Muldoon Deposition Transcript, Exh. 2). Mr. Muldoon gave his address and phone number for the LLC because he understood from the Secretary of State's Office that they needed dependable contact information and that the contact information had no bearing on ownership of the LLC (App. p. 166 - Hearing Transcript p. 394, ll 5-18; p. 396, ll 16-23). Both the documentary evidence as well as the testimony of Messrs. Muldoon, DeBoer and Allen and Ms. Haug confirm that Mr. Muldoon's involvement was limited to helping Mr. Lauth obtain a checking account and, when the bank required Mr. Muldoon's name on the account and considering Mr. Lauth's past experience in overdrafts and rather cavalier attitude toward money, putting Nicole Hofer in charge of writing Mr. Lauth's checks. The cash deposit used to open the first, temporary, account was Mr. Lauth's, not Mr. Muldoon's. Lauth did not have a bank account so he dealt in cash. If Mr. Muldoon had invested in Mr. Lauth's business, there would be some record of it.

Mr. Muldoon had no interest of any kind in the LLC. Mr. Muldoon made no profit from Mr. Lauth's business and had no interest in for whom Mr. Lauth performed work (App. p. 167 - Hearing Transcript p. 398, ll 6, 7; p. 401, ll 20-23; p. 405, l 15; App. p. 169 - Hearing Transcript p. 406, l 8). He simply helped Mr. Lauth, again as a favor, get his business up and running. That was Paul Deboer's, Nicole Hofer's, Lee Allen's, and Erin Haug's understanding as well. These are the same services provided by accountants and lawyers on a daily basis, not because it requires a certificate or license, but because it requires some knowledge of bookkeeping and the procedures starting an actual business. Mr. Muldoon did not hire, supervise or profit from any of Mr. Lauth's employees. Mr. Muldoon never fully understood the relationship of the people working for Mr. Lauth (App. p. 165 - Hearing Transcript p. 391, ll 11-14). Even Stacey Kautzman admitted that not a single one of Mr. Lauth's employees named Mr. Muldoon as his employer. It was Mr. Lauth, not Mr. Muldoon, who determined whom to hire, directed their activities, and determined their rate of pay. It was Mr. Lauth, not Mr. Muldoon, who determined which projects the LLC would work on and the manner and amount of pay set for each project. When Mr. Lauth performed a "side job" for someone other than Newton Development or MHD Properties, he did not consult with Mr. Muldoon or seek his approval. Mr. Muldoon had no interest in the LLC's work other than its work on properties owned by Newton Development or MHD, the same interest he had in the work of any other contractor and the same interest his partners in Newton Development and MHD had. Mr. Muldoon



used other contractors besides Mr. Lauth and paid them in the same manner and in the same general amount (App. p. 168 - Hearing Transcript p. 402, l 25; p. 403, ll 2 & 16; p. 404, l 22.)

Mr. Muldoon would occasionally learn that Mr. Lauth was representing himself as Mr. Muldoon's partner, clearly trading on Mr. Muldoon's reputation as a successful businessman. Whenever Mr. Muldoon would learn of Mr. Lauth's misrepresentations, he corrected him. Nicole Hofer confirmed that Mr. Muldoon corrected Mr. Lauth and that Mr. Lauth agreed that he and Mr. Muldoon were not partners. Mr. Muldoon went so far as to have Mr. Lauth affirm, in writing, that the two were not partners. Erin Haug confirmed the existence of that agreement in her testimony. Mr. Muldoon prepared a written agreement with Mr. Lauth stating the limited nature of help Mr. Muldoon was providing (App. p. 169 - Hearing Transcript p. 408, ll 6-14). Mr. Muldoon read the agreement to Ms. Haug, a licensed North Dakota attorney, who told him that he should have no liability for Mr. Lauth's actions (App. p. 172 - Hearing Transcript p. 460, ll 16-25; App. p. 173 - Hearing Transcript p. 462, ll 3-9; p. 463, ll 11-13; p. 464, l 23; p. 465, l 6; App. p. 174 - Hearing Transcript p. 467, ll 18-25).

None of Mr. Lauth's actions demonstrate that he believed that he worked in a partnership and had obligations to his partner. When Mr. Muldoon advised Mr. Lauth to hire an accountant, Mr. Lauth misrepresented that he already had one (App. p. 165 - Hearing Transcript p. 392, ll 12-16). The fact that Mr. Lauth used and presumably disposed of vehicles and tools without accounting to Mr.

Muldoon demonstrates a total lack of accountability. The fact that Mr. Muldoon did not hold Mr. Lauth accountable demonstrates that there was no partnership.

#### E. Statutory Requirements

Not only was Mr. Muldoon not the employer of Aaron Maves et al, which WSI has not even tried to prove using its own statutory test, his involvement in the LLC was so minimal, helping Mr. Lauth get it set up and then turning him loose, that no reasonable person could think that he willfully failed to pay workers compensation premiums for the LLC's employees. As WSI determined in its informal decision, it was Mr. Lauth d/b/a Patrick Lauth Contracting, LLC who employed Aaron Maves et al. Mr. Muldoon did not know who was working for Mr. Lauth or the terms and conditions of what WSI found to be employment. Other than advising Mr. Lauth to check with an accountant regarding workers compensation and unemployment compensation premiums and federal and state taxes, again as a favor, Mr. Muldoon had no involvement in Mr. Lauth's decision-making regarding the LLC. When Mr. Lauth misrepresented to Mr. Muldoon that he was meeting with his accountant to insure compliance, Mr. Muldoon dropped the matter. How, then, does Mr. Muldoon become responsible for Mr. Lauth's wrongful acts? Surely willful failure to comply with legal obligations requires some knowledge of the obligation and a manifest intent to ignore it.

#### **V. Conclusion**

It is uncontested that the first issue specified for hearing was whether Brendan Muldoon was an employer as defined under N.D.C.C., Section 65-01-02(17) of the various individuals identified in WSI's Order (App. pp. 106-115). That section requires the use of the 20-part

"common law" test set out in N.D. Admin. Code Section 92-01-02-49. According to WSI's version of the facts, the Agency first learned of Mr. Muldoon's gratuitous involvement in Mr. Lauth's business when it deposed Lauth on May 15, 2009 (App. p. 89). Why WSI chose to depose Mr. Lauth seven months after it found him to be Brandon Morin's employer (App. p. 94-97) and six months after he defaulted is unexplained. It is uncontested that WSI never asked Mr. Morin or any other Lauth employee if Mr. Muldoon was also his employer or, in any way, applied the 20-part test required by N.D.C.C., Section 65-01-02(17) to determine whether an employer/employee relationship existed between Mr. Muldoon and Messrs. Morin et al. Furthermore, it is uncontested that when Mr. Muldoon's counsel sought to inquire whether the 20-part test had ever been applied to Mr. Muldoon and, in any event, what the results might be, the Administrative Law Judge prohibited the inquiry, ruling it "irrelevant" (App. p. 139 - Hearing Transcript pp. 43-44; App. p. 170 - Hearing Transcript pp. 412-413).

Mr. Lauth performed work for a number of people, including Mr. Muldoon, Newton Development, MHD Campus Properties and William Muldoon - all of whom paid for his services in the same, industry standard, manner (App. p. 158 - Hearing Transcript p. 349; App. p. 167 - Hearing Transcript p. 401; App. pp. 168 - Hearing Transcript pp. 404-405).

The ALJ's sole rationale for finding Mr. Lauth more credible than Mr. Muldoon seems to be that Mr. Lauth was more facile (App. p. 123). Facility is not credibility. The fact that Mr. Muldoon struggled at times to recall events instead of glibly responding is clearly an indicia of credibility. Mr. Muldoon's sole intent in helping Mr. Lauth set up a bank

account and establish and run his business in a business-like manner was simply to do Mr. Lauth a kindness. That gratuitous intent was confirmed by Paul DeBoer, Lee Allen, and Erin Haug (App. p. 149 - Hearing Transcript pp. 270-271; App. p. 150 - Hearing Transcript p. 275; App. p. 151 - Hearing Transcript 283; App. p. 154 - Hearing Transcript p. 315, 358; App. p. 163 - Hearing Transcript p. 384; App. p. 164 - Hearing Transcript p. 386; App. p. 169 - Hearing Transcript p. 408; App. pp. 172-174 - Hearing Transcript pp. 460-467). The ALJ ignored their testimony completely.

The ALJ cannot simply ignore evidence that is favorable to Mr. Muldoon. If the ALJ did not believe the testimony of Lee Allen - a respected businessman with no financial, familial or other interest in the matter - that Mr. Lauth, a convicted criminal, had told him on two separate occasions that Mr. Muldoon was simply doing him a favor, the ALJ must explain why. Similarly, if the ALJ did not believe the testimony of Erin Haug, a licensed attorney, that Mr. Lauth had confirmed that he and Mr. Muldoon were not partners, or Paul DeBoer, a banker, that Mr. Muldoon had simply wanted to help Mr. Lauth out, he must explain why. See: Bruder v. Workforce Safety & Insurance, 2009 ND 23, para. 9; 761 N.W.2d 588.

WSI has asserted that Brendan Muldoon employed Aaron Maves et al and willfully failed to pay workers compensation premiums on them. WSI's assertion is based entirely on the word of Patrick Lauth. Even Stacey Kautzman admitted that not a single one of Mr. Lauth's employees named Mr. Muldoon as his/her employer. The testimony of Mr. Lauth was contradicted by Mr. Muldoon, Mr. DeBoer, Mr. Allen, and Ms. Haug. All of them agreed that Mr. Muldoon was simply trying to help Mr. Lauth

get his business started on a business-like basis. To avoid being entangled in Mr. Lauth's "ah shucks" business practices, Mr. Muldoon had Ms. Hofer make sure that Mr. Lauth's bank account remained solvent and admonished Mr. Lauth repeatedly not to represent that the two were partners.

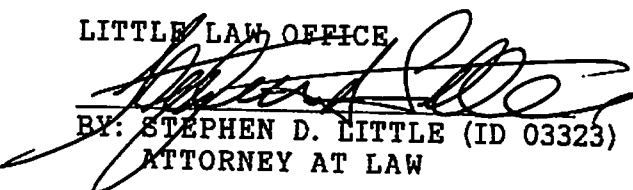
As harmful as the other witnesses' statements are to Mr. Lauth's credibility, his own statements are even more damning. Well before WSI went after him, Mr. Lauth volunteered to Lee Allen that he had no business relationship with Brendan Muldoon and that Mr. Muldoon was merely doing him a favor by keeping his books.

In conclusion, WSI failed to comply with its own statutes and administrative rules, and the ALJ ignored that failure. Similarly, the ALJ failed to explain why evidence favorable to Mr. Muldoon was disregarded. The ALJ cannot pick and choose evidence worthy of belief in an unreasoned manner. No one can reach a fair conclusion by ignoring evidence and legal requirements. The greater weight of the evidence does not support the ALJ's decision.

In hindsight, Mr. Muldoon was naive to believe that Mr. Lauth had changed his dishonest ways. Hopefully, this Court will not display the same naivete.

Respectfully submitted this 24th day of July, 2012.

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CERTIFICATE OF SERVICE

I, Stephen D. Little certify that on the 24th day of July, 2012, a true and correct copy of the Appellant's Brief with an attached Certificate of Service were mailed to the following:

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