

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

WFND, LLC,)
)
)
 Plaintiff/Appellant,)
 and Cross-Appellee,)
)
 vs.)
)
 Fargo Marc, LLC,)
)
)
 Defendant/Appellee,)
 and Cross-Appellant.)
)

Supreme Court No. 20060125

Appeal from the Judgment, Dated April 18, 2006, Civil No. 09-04-C-03626
Cass County District Court, East Central Judicial District
The Honorable Douglas R. Herman

REPLY BRIEF OF APPELLANT AND CROSS-APPELLEE

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I. THE DECEIT OF GARY PACHUCKI

“Fargo Marc’s representatives should have known as of the date of closing, that the Old Navy rent had been reduced by \$1.00 per sq. ft. beginning on July 1, 2002.” Finding No. 63, App. P. 506.

“The Court concludes and finds, however, that Fargo Marc committed the tort of deceit, as promulgated at N.D.C.C. §9-10-02.” Finding No. 70, App. P. 508.

The court found that Fargo Marc was deceitful (App. P. 508) and guilty of “fundamental forgetfulness” (Tr. P. 1250).

II. THE CAUSE OF ACTION

Fargo Marc is frustrated that it could not fool WFND into inappropriately and unnecessarily mixing theories of breach of contract and tort, making the case more complicated than necessary, to allow Fargo Marc to “game” the confusion, and bring comparative fault into the picture.

WFND presented the case on breach of contract only. There was no stipulation or motion to dismiss the other causes of action. The court indicated that it would let the case proceed on all theories.

The court misinterpreted and misconstrued the purchase agreement, finding that it was not breached, but finding instead that there was deceit giving it unlimited power to reach whatever result it thought was “fair” by comparing fault.

The express terms of the purchase agreement were breached. Everything about the purchase agreement, and all of the documents it required, was aimed at one thing, the accurate disclosure of the rent the Westgate Commons tenants were actually obligated to pay. It was not good enough to fail to disclose rent reductions that, as the court found,

Mr. Pachucki had to know about because Mr. Pachucki “was himself the one who negotiated this even as late as the closing” referring to the certified rent roll. Tr. P. 1250.

In the certified rent roll, Mr. Pachucki certified that the rent roll was “to the best of my knowledge, true and correct as of the date hereof.” App. P. 215.

Fargo Marc argues that there was no specific representation that the rent roll was the amount of rent the tenants were actually legally obligated to pay.

We identified many examples of a specific breach of a specific term before.

A substantial or material breach of contract is one which touches the fundamental purpose of the contract and defeats the object of the parties entering into the contract. *Independence v. Lead Mines Company v. Hecla Mining Company*, 37 P.3d 409, 415 (Idaho 2006).

WFND’s fundamental purpose in purchasing Westgate Commons was to obtain a bond-type investment and the object of the purchase agreement was to make 100% certain that WFND knew the income the purchase would generate, meaning total, complete and accurate disclosure of all rent tenants were contractually obligated to pay.

This court has recognized a duty of parties to deal in good faith, at least where insurance contracts are concerned.

The implied covenant of good faith and fair dealing is engrafted upon every contract. 5 Williston, Contracts § 670 (3rd Ed. 1969).

Under Minnesota law, every contract includes an implied covenant of good faith and fair dealing requiring that one party not “unjustifiably hinder” the other party’s performance of the contract. *In re Hennepin County 1986 Recycling Bond Litigation*, 540 N.W.2d 494, 502 (M.N. 1995).

Every clause, sentence, or provision should be given effect consistent with the main purpose of the contract. Vanderhoof v. New Marian Homes Corp., 117 N.W.2d 851 (N.D. 1987). The intention of the parties to a contract must be gathered from the entire instrument,^o not from isolated clauses, and every clause, sentence, and provision should be given effect consistent with the main purpose of the contract. National Bank v. International Harvester Co., 421 N.W.2d 799 (N.D. 1988).

Contracts can be breached by a breach of an expressed term, but also by an implied term. In Mace v. Cole, 198 N.W.2d 816, 818 (N.D. 1924) the court held that a contract includes not only what parties say, but also what is necessarily to be implied from what they say. What is implied in an express contract is as much a part of it as what is expressed. Id.; Bishop on Contracts (2d Ed.) §241, 13 C.J. 271.

Fargo Marc's Brief smacks of blaming the victim. It is as if a shopkeeper mistakenly turns his back leaving the till open, and the thief grabbing the money successfully argues that it was not his fault, because the shopkeeper was the one who turned his back and left the till open. He might also argue that the cash register manufacturer was at fault too because the bell on the cash drawer was no longer working.

III. THE STATEWIDE IMPORTANCE OF THIS APPEAL IS THE MISAPPLICATION OF THE COMPARATIVE FAULT STATUTES TO A BREACH OF CONTRACT CASE

If comparative fault is applied to breach of contract cases, then centuries of contract law will be changed. We will have comparative proximate cause and comparative foreseeability. If the comparative fault statutes apply to breach of contract cases, we can expect punitive damages claims as well.

Nothing in the legislative history suggests that the comparative fault statutes were meant to do anything other than to curb personal injury, negligence and product liability litigation, as part of “tort reform” legislation sweeping the country at the time.

Here is one example of the flavor of the legislative history.

According to Representative Douglas Payne, the bill’s co-sponsor, House Bill 1571 was introduced as “an attempt to bring all the tort concerns into one package.” As such, those discussing its merits referred to the bill as “tort reform.” Advocates of the legislation emphasized that it was needed to protect against excessive jury awards in tort actions. Those advocating the legislation asserted that it would protect North Dakota businesses from rising insurance premiums resulting from the cost of defending tort actions, thereby bolstering the state’s economy.

Source: 1987 House Standing Committee Minutes: House Committee on Judiciary, Bill No. HB 1571.

California courts have ruled more decisively. See *Kransco v. American Empire Surplus Lines Ins. Co.*, 97 Cal.Rptr.2d 151, 161 (Cal. 2000) (finding that contractual beaches are generally excluded from comparative fault allocations); *Goldx Fin. Servs. v. Bank of American*, Unpub. Lexis 2749 (Cal. App. 2001) (reasoning that comparative fault does not apply to contract causes of action).

“The concept [of comparative fault] has no place in the context of ordinary business transactions. *Carroll v. Gava*, 159 Cal.Rptr. 778, 781 (Cal. 1979). The modern law of misrepresentation evolved from the action on the case of deceit in business transactions. *Id.* Business ethics justify reliance upon the accuracy of information imparted in buying and selling, and the risk of falsity is on the one who makes a

representation. *Id.* This straightforward approach provides an essential predictability to parties in the multitude of everyday changes; application of comparative fault principles, designed to mitigate the often catastrophic consequences of personal injury, would only create unnecessary confusion and complexity in such transactions.” *Id.*

“The application of §877.6(c) to contract actions is correct only if an action for breach of contract is properly characterized as being a claim based on “comparative fault.” I am unaware of any support for that characterization. We recently reiterated the principle that “The distinction between tort and contract is well grounded in common law, and divergent objectives underlie the remedies in the two areas.” *Foley v. Interactive Data Corp.* 254 Cal.Rptr. 211, 227, (Cal. 1988). Indeed, the distinction is hornbook law. Actions based on tort have long been referred to as being “ex delicto,” meaning in modern phraseology that they are based on *fault*. (See Black’s Law Dict. (5th ed. 1979) p. 509, col. 1.) Actions for breach of contract have been denominated as being “ex contractu” – from or out of a contract – to distinguish them from actions based on fault, i.e., tort actions. (See Black’s Law Dict., *supra*, p. 508, col. 1; see also *Foley v. Interactive Data Corp.*, *supra*, 254 Cal.Rptr. at 232).

No reported case in North Dakota applies comparative fault to a breach of contract case.

One recent case involved a conversion claim, *Case Credit Corp v. Oppegard's Inc.*, 2005 ND 141, 701 N.W.2d 891 related to the sale of a tractor from a farmer to a dealer. The dealer/defendant had knowledge of the lien owed to Case/plaintiff, yet it paid the farmer the entire sale amount. The Court correctly applied comparative fault as no

contract existed between plaintiff and defendant and the relief plead was for the tort of conversion.

Dakota Grain Co. v. Ehrmantrout, 502 N.W.2d 234 (N.D. 1993) involves a commercial setting, and the trial court did apply comparative fault, under a breach of warranty claim. The Code section used to apply comparative fault was a former Code section addressing pure comparative fault that applied to product liability actions, repealed in 1993. Ehrmantrout represents the only commercial case in North Dakota case law that applied the comparative fault statute, but to a breach of warranty claim, not a breach of contract claim.

If we must have a comparative fault analysis, then the maxim of N.D.C.C. §31-11-05(8) applies. It states:

A person cannot take advantage of that person's own wrong.

Fargo Marc, already found to be 70% at fault, attempts to benefit from its own fault.

The interpretation of contract is a question of law and the construction of a written contract to determine its legal effect is a question of law. Here the trial court, by finding that the purchase agreement was not breached has misinterpreted the purchase agreement and misconstrued its legal effect.

No matter what standard of review applies, a court must get the law right. Findings of fact are clearly erroneous if they are induced by an erroneous view of the law and a court abuses its discretion if it misinterprets or misapplies the law. The interpretation of a statute is fully reviewable on appeal.

IV. THE APPROPRIATE CAPITALIZATION RATE

Gary Pachucki gave no expert testimony. The only expert testimony offered on the appropriate capitalization rate for the Old Navy rent reduction came from the preeminent James Kirby. He testified that an 8% capitalization rate would be appropriate in the case of Old Navy, given the credit worthiness of Old Navy.

The 9.08% capitalization rate picked by the court was simply a derived capitalization rate based on the Westgate Commons purchase price and the represented net monthly rent used by the parties to calculate a reduction in the purchase price for unspecified future tenants paying rent less than \$14.00 per sq. ft.

There is no connection between the derived capitalization rate to be applied to unspecified future tenants and damages for the loss of income from an “in-place” national anchor or co-anchor tenant such as Old Navy.

There was no range in the evidence on this point. It was a clearly erroneous to pick an unrelated derived capitalization applied to other specific events.

V. THE COURT DID NOT ERR IN ITS TAXATION OF COSTS

Fargo Marc argues that the court erred by awarding WFND costs as the court also found that both parties were prevailing parties. Fargo Marc cites *Bitler's Tower Service, Inc., v. Guderian*, 466 N.W.2d 141, 146 (N.D. 1991). In *Guderian*, the contractor, BTS, brought an action against the sole shareholder of Guderian to recover the unpaid balance and cost of extra hardware and freight for constructing a radio tower. The owner filed a counterclaim for breach of contract. The trial court entered judgment in favor of the owner, and the Supreme Court upheld the trial court's decision. BTS argued that the trial court erred in awarding costs to Guderian because neither party was the prevailing party

under N.D.C.C. §28-26-06. The statute requires the clerk to tax as part of the judgment the necessary disbursements of the prevailing party. The court held that when each party has prevailed on certain issues, however, there is no prevailing party against whom the clerk can tax disbursements. *Id.*, citing *Liebelt v. Saby*, 279 N.W.2d 881 (N.D. 1979); *Moen v. Norwest Bank*, 647 F. Supp. 1333 (D. N.D. 1986). The court found that the trial court properly set off the amount which Guderian was obligated to pay BTS had the contract been completed, from the amount BTS owed Guderian for cost of completion damages. Guderian's obligation to BTS, had BTS completed performance, was not an issue in the case, and therefore BTS did not prevail on that issue and could not be deemed a prevailing party. Therefore the trial court did not err in awarding costs and disbursements to Guderian. In *Libelt*, the court found that because both parties prevailed on certain respective issues in the District Court, there was no single prevailing party against whom the clerk could tax disbursements under §28-26-06. The court does note that in addition, N.D.C.C. §28-26-10 provides for the awarding of costs for or against either party, and that the awarding of costs under that statute is discretionary. The court found that the court did not err in refusing to tax disbursements in favor of Saby pursuant to §28-26-06 and that the court did not abuse its discretion in refusing to award costs pursuant to §28-26-10. *Libelt* at 888. In *Moen*, because Moen and Norwest each prevailed on certain issues, the court found that there was no single prevailing party against whom the clerk could tax disbursements. *Moen* at 1344. The court notes in the next sentence that §28-26-10 provides for the discretionary awarding of costs for or against either party, and accordingly each party would bear their own costs.

N.D.C.C. §28-26-10, which calls for costs in the discretion of the court, states:

In actions other than those specified in §§28-26-07 (Recovery of Real Property or Personal Property), §28-26-08 (Not Applicable), and §28-26-09 (Not Applicable), costs may be allowed for or against either party in the discretion of the court. In all actions, when there are several defendants not united in interest in making separate defenses by separate answers and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor.

Judge Herman awarded costs for WFND under §28-26-10 within the discretion of the court. Any failure to note specifically §28-26-10 was harmless error.

VI. MENARDS SALE

The court misconstrued and misinterpreted ¶19.15 of the purchase agreement (App. P. 194) by disconnecting the last sentence of the paragraph. That sentence states “any consideration payable by Menards for such conveyance shall be shared equally between Buyer and Seller.” This begs the question “what conveyance?” The answer is the conveyance described in the rest of ¶19.15 which specifically refers to a conveyance of a storm water detention pond with prior written approval, and only if the conveyance occurred before closing.

Fargo Marc cites no evidence in the record to any consideration for any oral agreement allowing a sale after the closing.

Dated this 29th day of November 2006.



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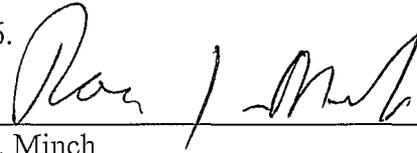
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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellant in the above matter, and as the author of the above reply brief, hereby certifies, in compliance with Rule 32(a)(7) of the North Dakota Rules of Appellant Procedure, that the above reply brief was prepared with proportional typeface and the total number of words in the above reply brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 2,471.

Dated this 29th day of November 2006.



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