ORIGINAL (E-FILED)

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Richard A. Engwicht III, Plaintiff & Appellant,	)	Supreme Court No. 20040079
v.	)	Cass County Civil No. 09-02-C-00466
Alan J. Lako dba Lako Drilling, Defendant & Appellee.	)	

APPELLANT'S REPLY BRIEF

The Appellant Appeals from the
Judgment Dated January 14, 2004,
by the Honorable Cynthia A. Rothe-Seeger
District Court, Cass County
East Central Judicial District

APPELLANT'S ATTORNEY
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1. Summary of Argument

2. The Respondent's brief correctly states North Dakota law for finding the terms of an oral contract (see p. 7): Both parties must understand, and mutually consent to, the same terms. Cargill, Inc. v. Kavanaugh, 228 N.W.2d 133, 138 (N.D. 1975). Mutual consent means "agree[ing] upon the same thing in the same sense." N.D.C.C. §9-03-16. To determine the actual terms of an agreement, a court should look at the parties' conduct in relation to it as well as their discussions. N.D.C.C. §9-06-01.

3. The problem is that while Lako states these principles, it never applies them. In fact, its brief cites no specific evidence supporting the trial court's findings of fact as to the terms of this contract; it offers only a one-sentence synopses of Alan and Dale Lako's testimony to the effect that they *generally* charge for services regardless of result (at p. 8). Lako ignores the concept of mutuality, and essentially asks the Court to believe Richard Engwicht entered into the contract knowing that its terms were not intended to serve his goal of obtaining a new well. Likewise, Lako never mentions the parties' conduct in relation to the contract, such as the actions of its own agent, Dale Lako, which indicated that he did not understand the contract the way Lako wants this Court to understand it.

4. The findings of fact are clearly erroneous because, as Lako's argument implicitly acknowledges, the only evidence that supports them is some vague testimony given by Lako's witnesses on direct examination. On cross-examination, moreover, Dale Lako – who made the contract and performed all of the work – expressly stated a contrary understanding of the contract's terms (see Appellant's Brief, pp. 8-9); Lako has no

explanation for that testimony other than to label it "selective." Respondent's Brief, p. 8. Under North Dakota law, however, it is well established that a finding of fact is clearly erroneous when, "although there is some evidence to support it, on the *entire* evidence, a reviewing court is left with a definite and firm conviction that a mistake has been made." Kaler v. Kraemer, 1999 ND 237, ¶¶12-23, 603 N.W.2d 698. (emphasis added). In Kaler, the Court held the trial court's finding of fact was clearly erroneous because it was contrary to the testimony of the party whom the finding favored. Id. That common sense rationale applies equally in this case.

5. Lako understandably wants to confine this review of the findings of fact to direct testimony developed and elicited with the aid of its lawyers, since the district court's findings are unsupportable when the entire record is considered. North Dakota law rejects such a narrow perspective, however, and therefore the judgment must be reversed because the trial court's findings are clearly erroneous in light of *all* the evidence, i.e., the circumstances which demonstrate the parties' *mutual* intent in making the contract, their contemporaneous conduct in relation to it; and all of their testimony in court.

6. The District Court's Findings are Contrary to the Evidence as to the Parties' Mutual Purposes and Understandings at the Time the Contract Was Made

7. In requiring courts to look at *both* parties' circumstances, intent and understanding in determining the terms of an oral contract, the law recognizes the eminently practical nature of a commercial contract – that each party must believe the contract terms serves their particular objective before they will agree to them. Here, Richard Engwicht needed a well that would supply water for his cattle and himself, and must have believed that

hiring Lako Drilling served that purpose. Moreover, it is highly unlikely that Alan and Dale Lako were at all uncertain or confused as to Mr. Engwicht's goal in contracting with them. Lako must have believed it could meet the plaintiff's need for water, and make a profit by charging its standard drilling rates for that service.[1]

8. Section 9-03-16 thus reflects common sense and experience in recognizing that *both* parties' aims must be advanced in order to obtain *mutual* consent to contract terms, i.e., "agree upon the same thing in the same sense." Under Lako's theory, however, the plaintiff's side of the ledger is a blank slate. We must believe that he agreed to pay Lako $10-$20,000 but had no promise or expectation of getting anything in return: perhaps the defendant thinks he was so thrilled that Lako was willing to work for him that he didn't care if Lako gave him an actual well to use on his farm or a merely big mudhole in the middle of his yard in return.

9. The record contains no support for a finding Mr. Engwicht was that gullible. Yes, he initially hired Lako to test-drill for ground water, and agreed to pay for that service knowing there was little or no chance of finding any water.[2] The evidence shows that the understanding of the parties was very different as to the contract for the artesian well, however, and is completely inconsistent with the finding that plaintiff agreed to pay Lako

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[1] Thus, plaintiff conceded he was probably mistaken in thinking that Lako's quote of $12,000 for an artesian well was a firm price, rather than an estimate, as both the evidence and logic support the finding that the actual price would be based on Lako's standard rate of $1000 plus $10 per drilled foot. By the same token, however, Mr. Engwicht's objective in hiring a well driller would seem be the best indicator of what Lako agreed to do under the contract.

[2] It should be noted that although Lako's counterclaim included this test drilling, Dale Lako expressly testified that he waived those charges as part of the artesian well contract. See Appendix: Respondent's Brief, p. 8; Transcript, p. 112, lines 7-9.

over ten thousand dollars regardless of whether he got a well in return. For example, the parties both knew that the existing, 75-year-old artesian well had produced 6-7 gallons per minute before it had frozen over the previous winter. [Tr., p. 17, lines 2-8]. That fact undoubtedly served as one point of reference by which to judge performance of Lako's contractual obligation to "get [plaintiff] the best well available on the formation he has." (Testimony of Dale Lako, p. 114, lines 10-11). That obligation, in turn, provides context for this summation of the contract by Mr. Lako: "*If we were successful* . . . it would cost him $10.00 a foot . . . plus a thousand dollars for the surface [sic] casing. **That was our agreement.**" [Tr., p. 131, lines 11-16 (emphasis added)]. This testimony also tends to show that Mr. Engwicht was mistaken in treating Lako's quote of $12,000 as a firm price instead of an estimate (Tr., p. 88, lines 14-18), but not nearly so mistaken (or misleading) as Lako's argument that the price term of the contract – which depended on the actual depth of the new well – constituted the *entire* contract.

10. The Conduct of Defendant's Own Agent Contradicts the Trial Court's Findings

11. Dale Lako's conduct relating to the contract not only contradicts the trial court's findings, it shows that Lako's current interpretation of the contract is entirely a product of litigation. Lako claims the contract merely required it to drill a hole in the ground, push some pipe down the hole, then send a bill for its services and materials; Mr. Engwicht obviously hoped water would come out of the pipe, Lako says, but he knew the contract obligated to pay approximately $12,000 even if the well was useless. Dale Lako clearly did not believe that when he made and performed the contract in 1996, however: He "wasn't satisfied" with the flow of 2½ gallons per minute (Tr., p. 115, lines 1-3) – i.e., he

didn't think he had provided the "best well available on the formation" – and spent days trying to improve it. He ultimately tried to pull all 1,200 feet of well pipe out of the hole, but it broke some 300 feet below ground; he then tried to drill through the remaining pipe, got his drill bit stuck, had considerable difficulty in extracting it, and was forced to abandon the hole. Without asking for more money, he immediately began drilling a second hole. [Tr., p. 31, line 20, to p. 33, line 11; p. 93, line 8, to p. 94, line 19].

12. By that time it was clear he was losing money on the deal, however, and thus he essentially told plaintiff it wasn't worth trying to case the second well; he ensured that plaintiff wouldn't want him to finish the well by saying there was an (imaginary) vein of ground water only 140 feet down. The point is that Lako never asked for another penny from Mr. Engwicht until he sued for the down payment, indicating that the defendant came to its current "understanding" at about the same time it spoke to its attorneys.

13. The Findings are Clearly Erroneous Because They are Contradicted by Testimony of Lako's Own Witnesses

14. Finally, the trial court's findings and Lako's arguments are in direct opposition to its own evidence. First, there is Dale Lako's testimony that he understood the contract quite differently than was stated in the findings of fact. [See Appellant's Brief, pp. 8-9]. Lako does not even try to reconcile that testimony with its argument, presumably in hopes the Court will ignore it, too. Second, Lako claims the "factual contention" that Dale Lako made the decision to pull the casing out of the first artesian well and thus was responsible for its destruction, "is not supported by the record." [Respondent's Brief, at p. 9]. His

testimony on page 136 of the transcript seems to offer at least some support for plaintiff's contention, however:

"Q: Did [Mr. Engwicht] indicate to you [that he had] any expertise in . . . well drilling?

A: No.

Q: So when that first artesian well didn't work who was making the decision on what to do next?

A: I was.

Q: So you're the one that decided to pull the casing?

A: Yes."

15. A third contradiction of the findings by Mr. Lako's testimony shows the logical absurdity to which Lako must resort in trying to make the facts fit its argument, rather than the other way around. Dale Lako testified that if Lako had fully installed the second artesian well, it would *not* have been entitled to any payment for its time and materials in drilling the first one. [Tr., p. 130, line 16, to p. 131, line 1]. Lako nonetheless maintains the trial court was not clearly erroneous in finding the contract entitled Lako to payment for both of the wells; if that were in fact true, it means the contract required Mr. Engwicht to pay Lako more (indeed, twice as much) for two useless wells than he would have owed for one working well! More likely, the finding of fact is completely off-base.

16. In short, the entire record – the undisputed circumstances surrounding the contract's making; the contemporaneous conduct and in-court testimony of defendant's own agent – considered in light of logic and common sense, demonstrates that the district

court's findings as to the contract terms are clearly erroneous and the judgment must be reversed. Further, the record shows that plaintiff paid the $6,000 to Lako as a down payment on a completed artesian well, and that there was a total failure of consideration on Lako's part since plaintiff got nothing in return. First Nat'l Bank of Belfield v. Burich, 367 N.W.2d 148, 153 (N.D. 1985). Therefore, plaintiff is entitled to judgment in that amount, plus interest, or in the alternative to a new trial on that issue.

CONCLUSION

17. For the foregoing reasons, plaintiff and appellant Richard Engwicht respectfully requests that the judgment in this action be reversed and an order be issued directing the trial court to enter a judgment awarding damages to plaintiff in the amount of $6,000, plus interest thereon, and for its costs in the District Court. Appellant further requests that he be awarded costs as the prevailing party on this appeal.

RESPECTFULLY SUBMITTED this 6th day of October, 2004.

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AFFIDAVIT OF SERVICE BY E-MAIL

STATE OF NORTH DAKOTA)
) :ss
COUNTY OF STUTSMAN)

Jay A. Schmitz, being first duly sworn on oath, does depose and say:

That he is a citizen of the United States, of legal age, and not a party to the above entitled action.

That on the 6th day of October, 2004, the affiant caused the Appellant's Reply Brief in the matter of Richard A. Engwicht III v. Alan J. Lako dba Lako Drilling to be filed electronically with the Clerk of the North Dakota Supreme Court by attaching the computer file containing said Brief to an e-mail transmission sent to the following address:

supclerkofcourt@ndcourts.com

That the Appellant's Reply Brief was served electronically on counsel for the appellee herein by attaching the computer file containing said Brief to an e-mail transmission sent to the following address listed in the 2004 Lawyers/Judges Directory published by the State Board of Law Examiners:

cbender@vogellaw.com

That to the best of the affiant's knowledge, information and belief, such addresses as given above were the actual e-mail addresses of the parties intended to be served.

Signed: **Jay A. Schmitz**

SUBSCRIBED and SWORN to before me this 6th day of October, 2004.

Signed: **Julie A. Swangler**
NOTARY PUBLIC
Stutsman County, North Dakota
My Commission Expires: 3-15-05