

20100064

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Irish Oil and Gas, Inc.)
)
 Appellant,)
)
 vs.)
)
 Gerald C. Riemer, Doris E. Riemer,)
 Lillie J. Riemer, and Joanne Johnson,)
)
 Appellees.)

Supreme Court Case No. 20100064

District Court Case No. 13-09-C-11

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAY 24 2010

STATE OF NORTH DAKOTA

REPLY BRIEF OF APPELLANT IRISH OIL AND GAS, INC.

APPEAL FROM THE DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT
DUNN COUNTY, NORTH DAKOTA
THE HONORABLE ZANE ANDERSON

PEARCE & DURICK
PATRICK W. DURICK, ND #03141
ZACHARY E. PELHAM, ND #05904
314 East Thayer Avenue
P.O. Box 400
Bismarck, ND 58502-0400
(701) 223-2890

Attorneys for Irish Oil and Gas, Inc.

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Law and Argument	1
I. The District Court Should Have Granted Irish’s Motion to Amend Its Complaint.....	1
II. The Lease is Still Valid Because Consideration Exists	2
Conclusion	3

TABLE OF AUTHORITIES

	Page
<u>Cases</u>	
<i>State Bank of Kenmare v. Lindberg</i> 471 N.W.2d 470 (N.D. 1992)	1
<i>First National Bank of Belfield v. Burich</i> 367 N.W.2d 148 (N.D. 1985)	2, 3

LAW AND ARGUMENT

I. The District Court Should Have Granted Irish's Motion to Amend its Complaint.

¶1 Gerald Riemer and Doris Riemer claim in their brief that the tort of deceit does not apply here because Irish and Gerald Riemer and Doris Riemer entered into a contract. But Irish's proposed amended complaint does not seek damages under the terms of the contract. Rather, Irish is seeking damages related to extra-contractual statements made by Gerald Riemer that Irish relied on to its detriment.

¶2 The Court has previously addressed this issue and determined the tort of deceit can proceed out of a contract under certain circumstances. *State Bank of Kenmare v. Lindberg*, 471 N.W.2d 470, 474 (N.D. 1991). In *State Bank of Kenmare*, the Lindbergs' deceit counterclaim against the bank arose out of "damages for injuries allegedly caused by extra-contractual statements made by the lender, which induced the Lindbergs to alter their position to their detriment." *Id.* The Lindbergs alleged that the bank made a promise without intending performance. *Id.* The Lindbergs alleged oral representations were made by the bank to adjust the terms of an existing loan. But when the adjustments were not made, this was alleged to be deceit. *Id.*

¶3 Irish sought to amend its complaint to assert a deceit claim against Gerald Riemer. The district court, without analysis, denied Irish's motion. Sufficient evidence was presented by Irish to permit its deceit claim to proceed. Irish submitted an affidavit of Irish's Tim Furlong. (App. 38-39). Mr. Furlong spoke with Mr. Riemer and will testify that Mr. Riemer agreed to extend the deadline for payment on the bonus consideration. (App. 39, 49-52). These statements were extra-contractual in nature and

were relied on to the detriment of Irish. Mr. Riemer had no intention of honoring this promise, he misled Irish, and misrepresented himself. While Mr. Riemer disputes Mr. Furlong's account, the material dispute is factual. The Court should reverse the district court's denial of Irish's motion to amend to assert a deceit claim against Gerald Riemer.

II. The Lease is Valid Because Consideration did not Totally Fail.

¶4 The failure of the "bonus consideration" did not cause a total failure of consideration. The consideration that continued to exist in the oil and gas lease did not make it "meaningless." *First National Bank of Belfield v. Burich*, 367 N.W.2d 148, 153 (N.D. 1985). For to describe the oil and gas lease as "meaningless," after the failure of the "bonus consideration," would be to unreasonably assert that the promise to develop, pay royalties, and the ten dollars paid meant nothing in terms of consideration. The object of the oil and gas lease was not "bonus consideration." Rather, it was the promise to develop and pay royalties. The remedy for failure of partial consideration is damages, not rescission of the contract. The district court erred when it determined a total failure of consideration occurred.

¶5 This Court addressed total and partial failure of consideration in *Burich*. At least one of the appellees argues the factual scenario applies here. But *Burich* is distinguishable from this case in one key aspect: the failure of consideration in *Burich* caused the contract to become "meaningless," whereas the oil and gas lease here continued to be meaningful even with the failure of the "bonus consideration."

¶6 In *Burich*, The First National Bank of Belfield brought an action to recover \$2,000 loaned to Burich to remodel a house. *Id.* at 151. The bank promised to obtain title to the house; it was this promise that induced Burich to borrow the money. *Id.*

The bank argued that at most a partial failure of consideration occurred because the consideration of \$2,000 existed independently of the promise to obtain title. *Id.* at 153-54. The case was tried and the district court found as a matter of law that “the considerations for which [Burich] executed the \$2,000 note failed entirely inasmuch as the Bank failed to timely secure the title to the real property in [Burich].” *Id.* at 151. This Court noted that the district court’s conclusion was actually one of fact, but such a factual finding was perfectly acceptable when the district judge sat as the factfinder. *Id.* at 152 n.2. The *Burich* Court affirmed and stated: “the Bank’s promise to obtain the title was the object and essence of the contract and consequently the Bank’s failure to secure the title constituted a total failure of consideration.” *Id.* The Court further stated “[t]he \$2,000 loan was meaningless to Burich unless he received title to the home.” *Id.* at 154.

¶7 The district court in this case applied the wrong standard in its finding that total failure of consideration occurred. Reasoning minds beg to differ that only one conclusion from the factual evidence presented could be reached. Sufficient competent and admissible factual evidence was presented by Irish to show that, at most, a partial failure of consideration occurred. It is not the province of the district court to answer a factual question that is, under the law, left for the factfinder. The object of the oil and gas lease agreement between Irish and Appellees was the promise of Irish to develop land for the production of oil and gas.

CONCLUSION

¶8 For all the reasons set forth above, as well as Irish’s previous arguments, this Court should reverse the district court’s decision to grant the Appellees’ motions for

summary judgment, reverse the district court's decision to deny Irish's motion to amend, and remand the matter for further consideration by the district court.

Dated this 24th day of May, 2010.

PEARCE & DURICK



PATRICK W. DURICK, ND #03141

ZACHARY E. PELHAM, ND #05904

314 East Thayer Avenue

P. O. Box 400

Bismarck, ND 58502-0400

(701) 223-2890

Attorneys for Irish Oil and Gas, Inc.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Irish Oil and Gas, Inc.)	
)	
Plaintiff-Appellant,)	Supreme Court Case No. 20100064
)	
vs.)	District Court Case No. 13-09-C-11
)	
Gerald C. Riemer, Doris E. Riemer,)	
Lillie J. Riemer, and Joanne Johnson,)	
)	
Defendants-Appellees.)	

AFFIDAVIT OF MAILING

STATE OF NORTH DAKOTA)
) ss.
 COUNTY OF BURLEIGH)

Cari Timmons, being first duly sworn, deposes and says that on the 24th day of May, 2010, she mailed copies of the foregoing Reply Brief of Appellant Irish Oil and Gas, Inc., by placing true and correct copies thereof in an envelope, addressed to each of the following:

Mary Nordsven
Attorney at Law
P.O. Box 570
Dickinson, ND 58602

Dann Greenwood
Attorney at Law
P.O. Box 1157
Dickinson, ND 58602

Jason Henderson
Attorney at Law
P.O. Box 1097
Dickinson, ND 58602

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Cari Timmons
Cari Timmons

Subscribed and sworn to before me this 24 day of May, 2010.

Annette Kirschenheiter
Notary Public

