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STATE OF NORTH DAKOTA

No. 2016-0452

In the Supreme Court of the State of North Dakota

CONTINENTAL RESOURCES, INC.,

Plaintiff and Appellee,

v.

P&P INDUSTRIES, LLC I d/b/a UNITED OILFIELD SERVICES, P&P INDUSTRIES, LLC, and PAUPER INDUSTRIES, INC.,

Defendants and Appellants,

and

PARKA, INC.,

Defendant and Appellee.

Appeal from the Judgment on Jury Verdict Dated November 4, 2016 in the District Court, Northwest Judicial District, Williams County, Civil No. 53-2014-CV-00206.
The Honorable **Joshua B. Rustad**, Judge Presiding.

BRIEF OF DEFENDANTS AND APPELLANTS

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

[1] Whether Continental Resources, Inc. ("Continental"), was entitled to judgment against P&P Industries LLC 1 d/b/a United Oilfield Services ("United") and Pauper Industries, Inc. ("Pauper"), on the Jury's special verdict.

[2] Whether United and Pauper are entitled to judgment as a matter of law on Continental's claims.

[3] Whether, in the alternative, United and Pauper are entitled to a new trial on Continental's claims because of the Jury's inconsistent verdict; the denial to United of complete discovery; the introduction of improper evidence; the court's improper instructions to the Jury; and the lack of evidence to support a judgment for Continental.

[4] Whether United is entitled to judgment on its counterclaim for the value of the services United provided for which Continental never paid.

[5] Whether, in the alternative, United is entitled to a new trial on its claims because the district court improperly instructed the Jury on Continental's affirmative defenses, the evidence does not support the Jury's verdict on Continental's affirmative defenses, and because of other errors denying United a fair trial.

[6] Whether the district court erred by limiting lost profits damages to 30 days and precluding United from recovering the enterprise value of its company that was totally destroyed.

STATEMENT OF THE CASE

[7] Continental is an oil producer that has done significant business in the Bakken Field in North Dakota and Montana. (Appendix ("A._"),111, ¶ 3; A.121, ¶ 3).

United and Pauper provided water, water transportation and related services and materials at Continental's well sites. (A. 103, ¶ 11). Continental brought an action against United and Pauper on February 11, 2014, alleging improper billing, among other claims. (A.38). United filed a counterclaim against Continental alleging that Continental wrongfully withheld payment of over $4.5 million from United, failed to provide notice of termination required by the parties' Master Services Contract ("MSC"), and caused United's destruction, among other claims. (A.111). The district court resolved some claims on summary judgment. (A.193). The remaining claims were tried to a Jury between August 1 and August 12, 2016, resulting in a special verdict. (A.279). The district court entered and Order for Judgment on October 28, 2016 (A.269) and entered judgment in favor of Continental on November 4, 2016 (A.271), notice of which issued on November 7, 2016 (A.274). The district court denied United and Pauper's post-trial motion on October 28, 2016. (A.278). United and Pauper filed their timely notice of appeal on January 4, 2017. (A.374).

STATEMENT OF THE FACTS

Background

[8] Buck Herman formed Pauper in the 1990s with two trucks and a saltwater disposal facility. (Transcript ("Tr._") 1792). Pauper assisted Continental with its first frac in Montana a few years later. (Tr. 1794). Pauper's business steadily grew, and by 2012 its revenues from Continental alone were $25 million. (Tr. 457, 1793-94). United was created in December 2012 when it acquired Pauper and its related companies, and the assets of a separate company, Parka, Inc. ("Parka"), also a long time service provider for Continental, for a total price of over $56 million. (A.61, ¶¶ 4-6; A.70, ¶¶ 1-2;

Tr. 284). Parka was a defendant/counter-plaintiff in this case but it settled with Continental shortly before trial. (District Court Event Number ("Doc._") 1055).

[9] United's revenues from Continental in 2013 were about $53 million. (Tr. 289). In December 2013 and January 2014, United provided Continental with over $4.5 million of materials and services for which Continental never paid. (Tr. 709, 801). Instead, Continental announced on January 29, 2014, that "[b]ased on the results of our preliminary audit, field audits and other information, Continental Resources has determined effective Thursday, January 30, 2014 at 12 a.m. [Continental] will stop using all services provided by [United]," and Continental further announced that "[a]ll accounts have been put on hold." (A.312).

[10] Continental's actions caused United's primary lender, PNC bank, to declare United's account receivable from Continental to be ineligible to support United's borrowing. (Tr. 1496-97, 1510-11, 1517; Doc. 1129). After a period of forbearance and unsuccessful negotiation with Continental, PNC ultimately required United to sell all of its assets to satisfy its debt. (Tr. 1511, 1549-50, 1777; Doc. 1110). The proceeds of the liquidation were paid to PNC, United ceased doing business, and about 180 people lost their jobs. (Tr. 1697, 1777).

Continental's "audit"

[11] Continental announced in the fall of 2013 that it was going to embark upon an "audit" of United pursuant to the MSC. (A.48, ¶¶ 1, 6; Tr. 709-710). Continental's audit work continued through the spring of 2014. (Tr. 710). United provided extensive records to Continental, and Continental's auditors spent two weeks in

November 2013 and February 2014 at United's facilities in Lambert, Montana. (Tr. 711, 799).

[12] Continental's audit process began by reviewing the invoices and field tickets that United had provided to Continental in the ordinary course of business. (Tr. 713). Each time a United employee or subcontractor's employee performed a service, he or she would prepare a field ticket describing those services. (Tr. 2058-60). United personnel would review those tickets and then would submit those tickets for review and signature to Continental's representatives at the well site, called "company men." Once the tickets were signed by Continental's company men, they were returned to United's office where its billing specialist for Continental's work, Kandi Holland, would compile them and United would prepare an invoice describing the services, and the corresponding field tickets were attached. At Continental's instruction, United separated the invoices by frac and by the type of service provided. Holland would then bundle the invoices together pertaining to each frac, and would provide a "cost sheet" summarizing the costs for each frac. (*Id*.) (Examples of United's invoices include A.322 and Docs. 1217-1221-1228-1231, 1235-1237.) As reflected on the face of the invoices, or on separate documents from the digital "Spendworks" system utilized later in 2013 (Docs. 1225, 1243), Continental representatives signed off on the invoices to which the field tickets were attached at several levels of the company during the invoice review process, after which they were entered on Continental's accounts payable system as "due." (Tr. 1961-66; Doc. 1238). The amount Continental recognized on its own books as being "due" to United was $4,371,822.15. (A.307; Tr. 2080). The number that United carries on its books as being due from Continental is $4,582,704.42. (A.309; Tr.2080).

[13] The MSC did not specify the services or materials that United would be providing to Continental. (A.48; Tr. 718). Those terms were set by emails scheduling United for work and arrangements made in the field, and the costs for those services were reflected in price lists, emails and other documents, including the invoices. (Tr. 719-29, 1006, 1349, 1862, 1886-87, 2071). The auditors did not speak with the field personnel who set those terms, including Continental's Water Coordinator, Allen Hammeren, any frac superintendent, or any of Continental's company men. (Tr. 722,729, 1918).

[14] Continental's auditors focused on billings from February 2013 and identified several issues with respect to United's billings, which Continental called "exceptions." (Docs. 1139-148). The total of all the exceptions noted in the audit was $110,000. (Tr. 789). The outstanding invoices by December 18, 2013, were around $2 million (Tr. 785), and the auditors had not identified any discrepancies in those invoices. (Tr. 786).

[15] Continental continued to call on United to provide water hauling and other services while the audit was ongoing. While Continental had put a "hold" on payments to United during the audit process for a few days in December 2013, Continental released the "hold" within days, following a conference call between representatives of the two companies. (Tr. 787; Doc. 1083). Continental recognized internally its "business need for [United's] services in the immediate future," and that Continental did not want to "jeopardize [its] frac plan." (*Id*.)

[16] Continental's company men did not complain about the level of service United provided. (Tr. 905, 1426). Continental's company men and other representatives did not object, with one exception that was worked out, to United's costs,

which were disclosed for each frac shortly after completion. (Tr. 764-65, 1044, 1366-67, 1794, 1810, 2062-64). As late as January 24, 2014, Continental had put United on its frac schedule. (Tr. 788, 1369, 1909-11; Doc. 1215). On January 10, 2014, Continental awarded United a substantial, six month water hauling bid. (Tr. 1369-70; Doc. 1201).

[17] The auditors continued their work into late January 2014, including scheduling future meetings with United representatives. (Tr. 791-95; Docs. 1199, 1200, 1205). John Kelly did not suggest at that time that United had not been cooperating with the audit, nor did he express any urgency in receiving additional information. (Tr. 795). Kelly testified that that there was no event between December 18, 2013, and January 29, 2014, that had any significance to him. (Tr. 796). It appears that Continental's views changed based on the "field audit" performed by its recently hired employee, Peter Duprey.

The "field audit"

[18] Duprey replaced Hammeren as the Water Supervisor in January 2014, weeks prior to Continental's January 29th letter. (Tr. 389, 582). Witnesses testified that Duprey announced in the field that he was there to put United out of business. A United employee, Laura Kelly, described an encounter with Duprey on January 24, 2014, as a verbal attack, in which he yelled, got so close to her face that he spat on it, and accused her of lying. (Tr. 2143-45). She testified that Duprey announced that he was there "to let United go, that United "was going under," and that "he was there to take us down." (Tr. 2151-53). A third-party truck driver, Rod Henry, also testified that Duprey "threaten[ed] to shut down [United] completely," to "run 'em out of business." (Tr. 2320, 2324). Duprey's conduct apparently caused a driver for a third-party trucking company to

threaten Duprey over the radio. (Tr. 1099-1101, 1108-09, 2333). Duprey reported his version of the January 24 events up the chain, based on which a Continental Vice-President, Brad Aman, decided on January 27, 2014, that Continental would stop doing business with United. (Tr. 389).

[19] Herman phoned Continental's regional Completions Manager, Gene Dowhaniuk, to discuss Duprey. (Tr. 1806). Herman testified that he told Dowhaniuk that United had written statements from United employees and subcontractors complaining about Duprey's conduct in the field. (*Id*.) Herman asked Dowhaniuk "what Pete's malfunction was." (*Id*.) According to Herman, Dowhaniuk denied there was a problem with Duprey, and that instead there was a problem with United, particularly the fact that Eddie Mindt still worked for United, a reference to a conversation Herman and Dowhaniuk had weeks earlier in which Dowhaniuk expressed that he wanted Mindt off of Continental's locations. (Tr. 1014-15, 1805-06). That demand followed a conversation Dowhaniuk had with Mindt in which Mindt refused to allow other trucking companies to haul United's water. (Tr. 1014).

[20] Continental fired Duprey later in 2014. (Tr. 592). Continental later sued Duprey, serving him with process in North Dakota, but Continental did not call him as a witness at trial. (Tr. 653).

Discovery concerning Duprey and the fraud claims

[21] United served Continental with interrogatories addressing the allegations of purposeful overbilling, fraud, theft and kickbacks. (Doc.118, pp. 6-7, ¶¶ 18-23; Doc. 119, pp. 22-24, Nos. 15-20). Continental identified Duprey as its only employee who had knowledge of the serious misconduct Continental alleged in paragraphs 18

through 23 of its complaint. (*Id*.) Continental also identified two United employees, Laura Kelly and Katherine Everhart, but they both denied any knowledge of overbilling or improper conduct, and they both testified that their names should not have been included by Continental on those interrogatory answers. (Tr. 2159, 2165, 2225).

[22] Continental refused to provide documents relating to Duprey in discovery, so United filed a motion to compel in August 2015 to receive documents relating to Duprey's "hiring, termination, salary, and benefits, including his resume, and documents relating to his performance, discipline and the reasons for his termination." (Docs. 116-124). That motion was fully briefed and argued, but the district court did not rule on it until shortly before the trial started, denying it without explanation. (A.215-216).

[23] Continental then stated during *voir dire*, in opening statements, and during the direct examination of its general counsel, that Continental fired Duprey for sexual harassment. (Tr. 149-51, 295, 592). The district court commented that Continental violated its own motion *in limine*, and the court then required that Continental produce documents relating to Duprey. (Tr. 241, 254,259). Confronted with information United received for the first time during the trial relating to Duprey's employment, Continental's General Counsel, Eric Eisssenstat, denied that the information Duprey provided in January 2014 about United had anything to do with his firing (Tr. 592), but Eissenstat admitted that Continental took the position in connection with Duprey's unemployment compensation claim that Duprey had "brought forward complaints to the company that were unsubstantiated." (Tr. 649).

Discovery concerning alleged improper billing

[24] United served interrogatories to Continental asking it to identify what invoices and field tickets it contended were improper, as alleged in Paragraph 16 of Continental's Complaint, and to explain why. (Doc. 86, Ex. 1, p. 5). Continental refused to provide complete answers to these interrogatories. (Doc. 86, Ex. 2, pp. 10-22). In response to United's interrogatory asking Continental to identify the damages it sought and how they were calculated, Continental objected to that question as premature, and stated that it would disclose that information through its experts. (*Id*., p. 29).

[25] United move to compel. (Doc. 86). In the alternative, United asked that Continental be barred at trial from putting on evidence it didn't fully disclose. (*Id*.) The motion was fully briefed in July 2015 and argued on November 2, 2015, but the district court did not rule on that motion, either, until shortly before the trial started, again denying it entirely without explanation. (A.215-216).

[26] Continental ultimately disclosed two experts: a forensic accountant (Michael Zeeb) and a statistician (Jimmy Jackson). (A.356-373). Zeeb described himself as a "Certified Fraud Examiner" who was hired to "quantify the inaccurate charges" that Continental alleged United, Pauper and Parka issued to Continental. (A.357). Jackson does "mathematical modeling." (A.365). Using the information that Zeeb provided, Jackson utilized "monetary unit sampling" to determine his "best estimate of overbilling" by United of $976,963.46. (A.372).

[27] Since that figure is less than a quarter of what Continental's own accounting records reflected that United was due on unpaid invoices, and since, United argued, Continental was unable to show any injury sufficient to support any of its claims,

United moved for summary judgment on Continental's claims against United. (Doc. 563). The district court denied that motion, determining that "the over-billing alleged by Continental is a factual determination and constitutes damages regardless of whether United can prove Continental owes more to United for services rendered than United owes to Continental for over-billing." (A.194).

Continental was permitted to present undisclosed claims at trial

[28] Continental's counsel did not describe in his opening statement the damage claims Continental would make during trial; he stated only that they were "substantial." (Tr. 287). Before Continental called Zeeb and Jackson, it called John Kelly. His direct examination was devoted mostly to describing the work done in the audit. (Tr. 450-527). Continental's counsel then asked Kelly to describe documents relating to United's charges for propane. (A.237-241). Continental's counsel then asked Kelly to describe his "conclusions," and Kelly proceeded to describe a formula he prepared using what he determined to be United's profit margin on propane, and then said, "so the amount overbilled to Continental is likely around $1.5 million." (A.242). United's counsel asked to be heard outside the presence of the jury and asked that the propane testimony be stricken since Continental had never disclosed that it would make such a claim at trial. (A.243-249). The district court initially determined that Kelly would not be permitted to discuss damage numbers (A.248-250), then overruled that ruling (A.251), then stated that Kelly would not be permitted to testify as to amounts (A.257), but ultimately overruled the objections and permitted the testimony. (A. 258-259).

[29] John Kelly then was permitted, over objection that Continental had not previously disclosed it as a damage claim and that the testimony lacked foundation, to

describe a spreadsheet comparing field tickets to log books and concluded that "[o]ur variance on the field ticket compared to DOT log indicated a 16 percent variance… So we had about $29,000 worth of items, and extrapolated, that was about $4.5 million worth of variance." (A.262-269, 349-355).

[30] Continental also was permitted to introduce evidence of a claim concerning "liens" that Continental did not disclose in discovery. (Tr. 627). Continental did not include that claim in its initial Complaint. (A.38). Rather, it was included in Continental's First Amended Complaint (A.130) that it was granted leave to file immediately before trial. (A.221, 223). United asked the court to sever that claim from the trial since there had been no discovery on the claim, and the court denied that request. (A.219-220).

Jury instructions

[31] The district court conducted conferences relating to jury instructions both before and during the trial. (Tr. (July 28, 2016), 25-80; Tr. 62-81, 2415-2527, 2540-87). United and Pauper objected to the instructions as a whole, and to the special verdict form. (Tr. 2508). With respect to Continental's fraud and deceit claims, United advised the court repeatedly that nowhere in the instructions was the Jury instructed that Continental bore the burden of establishing each element of its fraud claim by clear and convincing evidence. (Tr. 2508-20, 2546, 2565). United also objected to instructing the jury on Continental's affirmative claims while at the same time instructing the jury on Continental's claim to a set-off, alerting the court to the confusion that would cause. (Tr. (July 28, 2016), 58-60; Tr. 2455-58, 2472). As to United's claims against Continental, United objected to instructing the jury on Continental's defenses of prior material breach

(Tr. (July 28, 2016), 53-54; Tr. 70, 2454); condition precedent (Tr. (July 28, 2016), 55; Tr. 2460); fraud and deceit (Tr. 2422-26, 2461); and equitable estoppel. (Tr. (July 28, 2016), 57; Tr. 2470-72, 2488-90).

The Jury's verdict

[32] The Jury found (A.279-282) that United and Pauper did not breach their contract obligations (Nos. 1 and 7), but that Continental did (No. 13). It found that the "conduct" of United and Pauper was "fraudulent or accompanied by fraud" (Nos. 4 and 10) and was "deceitful or accompanied by deceit" (Nos. 5 and 11). The Jury entered the number $2,415,000 on the line asking it to assess damages against United (No. 6), but as to Pauper entered the number 0 on the line asking it to assess damages (No. 12). As to United's counterclaim, the Jury found that Continental breached its contract obligations, but that Continental was "excused from performing" by United's prior material breach, failure to perform a condition precedent, fraud or deceit, and equitable estoppel (No. 14). Because of the answers to No. 14, the Jury was not called upon to determine whether Continental's breach of contract was intentional, malicious, or willful and wanton (No. 15), nor was it called upon to assess United's damages (No. 16). The Jury found in favor of Continental on United's separate promissory estoppel claim. (No. 17). The Jury entered the number 0 on the verdict form asking it whether to assess punitive damages.

ARGUMENT

[33] United and Pauper are entitled to judgment as a matter of law in their favor and against Continental on all of Continental's claims, or in the alternative to a new trial on those claims. United also is entitled to judgment as a matter of law for the value of the materials and services it provided to Continental for which Continental never paid,

or to a new trial on that claim, and to a trial to recover the lost enterprise value of its company.

I. It Was Improper to Enter Judgment on the Special Verdict in Favor of Continental on Its Claims Against United and Pauper

[34] The Jury answered "No" to questions 1 and 7 of the Special Verdict Form, asking whether United or Pauper "breached its Master Services Contract obligations to Continental." (A.279-280). The district court described the alleged breach of contract as follows: "presenting inaccurate or false charges to Continental and/or by billing for services in violation of the parties' contract and allowing liens to be filed on wells operated by Continental." (A.297). Since the formation of the contract was not in dispute, the Jury necessarily determined that Continental did not prove by the greater weight of the evidence that United or Pauper presented inaccurate or false charges, billed for services in violation of the parties' contract, or allowed liens to be filed, any of which caused any damage to Continental. The very same "conduct" that the Jury determined United did not engage in, when determining that United did not breach the contract, formed the basis for Continental's fraud and deceit claims. (A.287-288). Since the Jury determined that Continental did not prove that United engaged in any of the conduct Continental claimed United engaged in, the district court erred by entering judgment in favor of Continental and against United on Continental's fraud and deceit claims.

[35] N.D.R.Civ.P 49(c) states that when answers on a verdict "are inconsistent with each other… judgment must not be entered; instead… a new trial must be ordered." While courts should reconcile special verdict forms to the extent possible, the "answers must represent a logical and probable decision on the relevant issues submitted." *Moszer v. Witt*, 2001 ND 30, ¶11, 622 N.W.2d 223, 228; *Barta v. Hinds*,

1998 ND 104, ¶12, 578 N.W.2d 553, 557 (improper to speculate in construing a special verdict). To determine whether answers to questions on a special verdict form can be reconciled, courts "look first to how the relevant issues were submitted to the jury." *Grenz v. Kelsch*, 436 N.W.2d 552, 554 (N.D. 1989). Here, the Jury determined that Continental did not prove by the greater weight of the evidence that United committed breach of contract by presenting inaccurate or false charges. That cannot be reconciled with a determination that Continental did prove by clear and convincing evidence that the very same alleged conduct amounted to fraud or deceit, even if, as discussed below, the Court had properly instructed the Jury on the elements of those claims and Continental's burden of proof. This Court reviews the question of whether an inconsistent verdict requires a new trial under an abuse of discretion standard. *Moszer*, at ¶ 10. A court abuses its discretion "if it acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of a rational mental process leading to a reasoned determination, or it misinterprets or misapplies the law." *Johnson v. Buskohl Constr. Inc.*, 2015 ND 268, ¶ 12, 871 N.W.2d 459, 463. The district court here abused its discretion by entering judgment for Continental on the Jury's verdict when the answers the Jury provided were patently inconsistent.

II. United and Pauper Are Entitled to Judgment as a Matter of Law Under N.D.R.Civ.P 50 on Continental's Fraud and Deceit Claims

[36] The Jury did not in fact determine Continental's fraud and deceit claims, and there was not sufficient evidence to support such a verdict had it been asked to. The district court erred by denying United and Pauper's Rule 50(a) motion for judgment as a matter of law at the close of evidence, instead effectively granting

judgment as a matter of law for Continental (Tr. 2529-30), and by denying United and Pauper's post-trial motion seeking judgment under Rule 50(b). (Doc. 1266; A.278).

[37] The standard for deciding a motion under Rule 50 is whether "the evidence favoring the verdict is so insufficient, reasonable minds could reach only one conclusion as to the verdict." *Minto Grain, LLC, v. Tibert*, 2009 N.D. 213, ¶ 7, 776 N.W.2d 549, 553. This Court applies that standard as a matter of law. *Amyotte v. Rolette County Housing Auth.*, 2003 N.D. 48, ¶ 9, 658 N.W.2d 324, 329-30.

[38] The Jury did not in fact render a verdict that United or Pauper committed the torts of fraud or deceit; they weren't instructed on all of the elements of those claims nor were they asked to determine whether all of the elements were proven by clear and convincing evidence. Those elements include intent, reliance and damages. *Bourke v. Western Business Products, Inc.*, 2005 OK CIV APP 48, ¶29,120 P.3d 876, 886.[1] Instead, the district court permitted the Jury to assess damages if it found simply that United's "conduct" was "accompanied by" fraud or deceit. The Jury's finding that United's and Pauper's "conduct" was "accompanied by" fraud and deceit does not support a judgment for Continental. Indeed, the Jury entered "0" on line 12 of the special verdict form as to damages caused by Pauper, expressly finding that one of the elements of a fraud or deceit claim did not exist. By entering judgment for Continental when the Jury found against it on its breach of contract claim, and when the the Jury had not been instructed on all of the elements of fraud or deceit, the district court essentially granted

[1] United submits that Oklahoma law should apply to all the claims because they arise out of the MSC specifying that Oklahoma law applies. See *Masters Group Int'l, Inc. v. Comerica Bank*, 352 P.3d 1101, 1115-1116 (Mont. 2015). But the elements are not materially different under North Dakota law. *Northstar Founders, LLC v. Hayden Capital USA, LLC*, 2014 ND 200, ¶ 27, 855 N.W.2d 614, 626 (elements of fraud include reasonable reliance and actual damages caused by the misrepresentation).

judgment as a matter of law in favor of Continental; it did not enter judgment on a verdict on Continental's fraud and deceit claims since there was no verdict finding that Continental proved all the elements of those claims.

[39] Even if the Jury, properly instructed on all elements, had actually rendered a verdict on Continental's fraud or deceit claims, however, there was not sufficient evidence to support such a verdict. Continental presented no evidence to support the scurrilous charges it made in its Complaint against United, including purposeful overbilling, paying kickbacks and engaging in corruption. (A.42, ¶¶ 19-23). Continental finally admitted at trial that it had no evidence of kickbacks and it presented no evidence to support the other charges. (Tr. 298, 664). Continental identified three witnesses to support those charges, two of whom, Laura Kelly and Katherine Everhardt (Tr. 2159, 2165, 2225), flatly refuted them, and the third (Duprey) Continental chose not to call at trial, having fired him, sued him and, it was discovered during trial, accused of having made unsubstantiated claims. (Tr. 649).

[40] With respect to its allegations of overbilling, Continental announced in discovery that it rested its proof of its allegations on its experts, who turned out to be Zeeb and Jackson. Zeeb testified, over objection that his opinions were not properly disclosed and lacked foundation, that United intentionally and fraudulently overbilled Continental. (Tr. 1193, 1210-13). Zeeb had no basis on which to opine as to United's motives. His opinions were based solely on his reading of Continental's complaint and his review of the invoices, and his report disclosed only "billing issues," not fraud. (A.361; Tr. 1213-1223).

[41] Jackson offered his "best estimate of overbilling" by United of $976,963.46. (A.372). Jackson admitted that his numbers were based entirely on Zeeb's numbers (Lines 2-6 of Table 2 of his report (A.361; Tr. 1235)), and Zeeb admitted on cross examination that his methodology and his numbers were wrong. (Tr. 1241-48). The overwhelming majority of his "billing issues," which came solely from his review of invoices, were based on his assumption that any field ticket reflecting time worked of more than 11 hours by a truck driver was a "billing issue." (A.361,Table 2, Line 4(c)). Zeeb conceded that there was nothing improper about a truck driver working and billing more than 11 hours in a day. (Tr. 1227-31). Zeeb stated that he assumed the drivers were driving for more than 11 hours, which he assumed was improper, unless the ticket on its face reflected that the driver was doing something other than driving, but there was no basis for either assumption. Zeeb conceded that he had never seen a written policy that required United to explain on every driver's ticket what the driver was doing during all the hours that were being billed. (Tr. 1231). Continental's company men regularly signed driver's tickets reflecting more than 11 hours without more detailed explanation, Continental regularly paid invoices to which those tickets were attached, and Continental never indicated that there was a requirement for more detail about what a driver may have been doing during that time. (Tr. 726, 952, 2065).

[42] Neither Zeeb nor any other witness at trial showed that the time that drivers billed was not actually worked. And John Kelly conceded that, even if the hours of a driver exceeded DOT regulations, Continental was still obligated to pay for the work so long as it was performed. (Tr. 767).

[43] Similarly, Zeeb conceded that his category of "drivers" who billed more than 14 hours ($24,449 – A.361, Table 2, Line 4(b)) improperly included as "drivers" water consultants and frac heaters, who did not drive and who were not restricted to any hour limit, either by DOT rules or by Continental. (Tr. 1239-1247). Zeeb made no effort to fix that error even though he knew it existed prior to authoring his report. (Tr. 1243). In a feeble effort to overcome the obvious mistake, Zeeb performed a "sensitivity analysis" in which he analyzed a different set of data and determined that this alternative analysis would more than offset the error in including water consultants and frac heaters in his initial determination of overbilling. (Tr. 1241-45).

[44] The 14 hour limit that Zeeb applied in his analysis itself was a fiction. Zeeb learned about a "14 hour rule" from Continental's lawyer. (Tr. 1225). No such rule exists in writing. Witnesses provided different accounts of what it meant and when it came into existence. (Tr. 43-31, 434, 966). Continental's former Frac Superintendent, Chris Danielson, provided the following description of the policy at his October 2015 deposition: "the rule really came into place, I would say, about a year ago, and that's when they started really enforcing it…Before then, and the guys even asked during meetings, it was use your best judgment. If someone's getting really tired, then shut 'em down." (Tr. 1902-03). Many field tickets themselves show on their face that workers worked more than 14 hours, which the Continental company men gladly signed, and supervisors gladly approved. (Doc. 1234; Tr. 996, 1471, 1445, 2033). Continental knew perfectly well that vac truck operators at well sites were working consecutive 24 hour shifts manning their trucks in case there was a spill. (Tr. 909,1345-47, 1882-87, 1895-96, 1905-07, 2038-39, 2277).

[45] United's representatives testified that they understood the 14 hour rule to limit the amount of hours on each ticket, not to limit the hours its employees or subcontractors could work. (Tr. 869, 1359-60, 1976, 1982-83, 1988). While Herman and Holland agreed that splitting the hours worked on separate tickets was done "to work around the Continental policy," they and others testified that United was directed to do that by Continental representatives. (Tr. 869, 1359-60, 1836-46, 1982-85, 2117-19).

[46] Continental spent considerable time at trial discussing instances in which water consultants billed multiple fracs for the same hours when they were furnishing water to different well sites at the same time, which Continental described as double billing, but there was substantial evidence that Continental expressly agreed to that billing method. (Tr. 757-758,834, 864, 1143-1147, 1171-1175, 1361; Docs. 1217, 1218, 1220, 1221). The Jury apparently rejected that claim (see the discussion below). Further, Zeeb/Jackson made no effort to quantify how much of the more than $55 million in billings by United would include water consultants billing the same time to multiple fracs. That number would necessarily be only a small fraction of the total "estimate of overbilling" of United, $976,963.46.

[47] Even if the Jury had accepted the Zeeb/Jackson $976,963.46 "best estimate of overbilling," Continental's fraud and deceit claims still fail because Continental was not injured. Continental conceded that United provided services to Continental in December 2013 and January 2014 for which Continental never paid. (Tr. 709, 801). Continental's own accounting records reflect that it owes United $4,371,822.15 for those services. (A.307; Tr. 2080). Even crediting the Zeeb/Jackson testimony entirely, that United overbilled Continental $976,963.46, Continental has been

holding over $3.5 million of United's money since January 2014. Had Continental actually introduced evidence of overbilling, that at best would have provided an offset against what it indisputably owes to United.

[48] When it became clear to Continental that its own experts were wrong, and their numbers amounted to less than a quarter of what Continental's own accounting records show that it owes United even if they were right, Continental decided to make additional damages claims at trial without ever disclosing that it planned to do so. Continental kept its intent secret, even through opening statements, springing its new claims during its examination of John Kelly on day three of the trial.

[49] Continental had John Kelly describe his "conclusion" about United's charges for propane, stating that "the amount overbilled to Continental is likely around $1.5 million." (A.242). Continental failed to prove that it was defrauded into paying for propane, even if it was proper to allow Continental to introduce it for the first time on day three of the trial without ever disclosing that it planned to do so. The claim, as described by John Kelly, was based on the fact that United's price sheet disclosed that it would bill propane at "market." (A.316). To support its theory that United charged more than "market," Continental used United's internal documents showing what United's costs were for propane. Cost is cost; market is market. Continental put on no evidence of what the market price for propane was in North Dakota or Montana at any given time, and thus it failed utterly to prove that United charged above market prices. In addition, the price United charged for propane was reflected, clear as day, on the face of each invoice in which United charged for propane. (A.322). Continental expressly approved each invoice at multiple levels. Continental cannot claim to have been ignorant of the market price of

propane, and its payment of the invoices shows that United charged a fair price, which was under the market price for propane in North Dakota or Montana. (A. 320-322).

[50] The log book extrapolation, in which John Kelly determined that there was "about $4.5 million worth of variance" (A.261-263), also was baseless and did not show either fraud or deceit. Continental was careful to not let its statistician Jackson review that work because it knew Jackson would have had the same reaction to that extrapolation that he had to another extrapolation the Continental audit team performed, that "there was no statistical basis to accept that [extrapolation] as being valid." (Tr. 1282, 1294). John Kelly's exercise in comparing the hours on field tickets to driver's log books does not show fraud. Continental did not introduce any witness who was competent to say that a field ticket from a driver that does not match the hours in his or her log book is fraudulent; that was simply a baseless assumption Kelly drew. As described by Herman and Mindt, much of the work of the drivers who were identified on the spreadsheets was billed on a service basis, not on an hourly basis, such as hot oil trucks and winch trucks. (Tr. 1380-1382, 1808). One would not expect log books and field tickets to match in those instances. The John Kelly spreadsheet was meaningless and provided no evidence to support a fraud claim.

[51] It is apparent that the Jury rejected both the Zeeb/Jackson $976,000 number, and the John Kelly log book extrapolation number, $4.5 million. The conclusion that the Jury rejected the Zeeb/Jackson analysis is apparent from the fact that the Jury awarded damages against United but not Pauper despite the fact that Zeeb/Jackson calculated an "estimate of overbilling" as to both companies using the same methodology. Further, the number the Jury entered in response to Question 6,

$2,415,000, appears to be composed of the propane charge, $1.5 million (A.242), and the lien claim, $915,000 (Tr. 627-28). The propane claim cannot support a fraud verdict, as discussed above. The lien claim was not a fraud claim at all.

[52] The lien claim was a breach of contract claim, and the Jury determined that United did not breach any contract. The only evidence Continental put on during trial to support it was the testimony of Eissenstat, who testified that he was not directly involved in the lien issues, but that he was informed that there were $915,000 in liens, of which about $215,000 had been paid. (Tr. 627). Continental did not introduce one document to support any of that testimony, none of which Eissenstat had any direct knowledge of. Of the $700,000 in alleged outstanding liens, there is no evidence that Continental will ever pay anything on those claims. Continental offered no evidence showing where the wells were located, what work the lien claimants performed, when they performed it, or how that work relates to United. As to the liens Continental allegedly satisfied, which United knows of, the evidence was unrebutted through the testimony of Holland that Continental did not pay United for the work those subcontractors performed. (Tr. 2076-2079). United did not "allow liens to be placed on Continental's wells," as Continental claimed. To the extent any liens were placed on Continental's wells by United subcontractors, that was caused by Continental's failure to pay United.

III. United and Pauper are Entitled to a New Trial on Continental's Claims if This Court Does Not Enter Judgment in Their Favor

[53] There were several errors that, individually and cumulatively, require a new trial in the event the Court does not enter judgment in favor of United and Pauper. See N.D.R.Civ.P. 59(b)(1) ("irregularity in the proceedings of the court, jury, or adverse

party, or any court order or abuse of discretion that prevented a party from having a fair trial"); (6) (insufficient evidence to justify the verdict or other decision, or that the verdict is against the law"); (7) (errors in law occurring at trial). While the district court has broad discretion in determining whether to grant a new trial, "it must exercise its discretion in a manner that best comports with substantial justice."). *Flynn v. Hurley Enterprises, Inc.*, 2015 ND 58, ¶5, 860 N.W.2d 450, 452. This Court applies an abuse of discretion standard. *Johnson*, at ¶ 12. The district court denied United and Pauper's post-trial motion (Docs. 1266-1275) in a two paragraph order. (A.278). N.D.R.Civ.P. 59(f) requires a written memorandum explaining the grounds upon which a motion for a new trial is denied. That error alone requires reversal. *Grisvold v. Windbreak, Inc.*, 2007 ND 54, ¶¶ 16-18, 730 N.W.2d 597, 603-04.

A. United and Pauper were denied complete discovery

[54] The district erred by denying United and Pauper's motion to compel seeking to ascertain what Continental claimed and the bases for those claim, or in the alternative to bar Continental from introducing evidence that it did not fully disclose in discovery. (Docs 85-96). The district court did not rule on that motion for over a year, denying it without explanation less than two weeks before the trial started. (A.215-216). See *Federal Land Bank of Saint Paul v. Halverson*, 392 N.W.2d 77, 82 (N.D. 1986) ("When a trial court enters an order on any matter before it, responsible exercise of judicial power suggests a need for explanation of the court's reasons."); *Black Stone Minerals Co. v. Brokaw*, 2017 ND 110, ¶¶ 19-20, 893 N.W.2d 498, 505-06. United was entitled to full and complete answers to its interrogatories or to an order barring Continental from introducing evidence it failed to identify. N.D.R.Civ.P. 26(b)(1)

(discovery is permitted of "any nonprivileged matter that is relevant to any party's claim or defense…"); see also *Black Hills Molding, Inc. v. Brandom Holdings, LLC*, 295 F.R.D. 403, 413 (D.S.D. 2013) (an interrogatory that asks another party "to indicate what it contends, to state all the facts on which it bases its contentions, [and] to state all the evidence on which it bases its contentions," is proper). United also was entitled to a complete response to its interrogatory asking Continental to state what damages it would claim at trial and how it calculated them. Continental stated that its claims would be presented through its experts, and expert disclosures came in December 2015, with the Zeeb/Jackson estimate of overbilling. But the court then allowed Continental to present three new damage claims that were not disclosed in discovery as claims Continental would be presenting at trial or as opinions its experts would be offering, in violation of the Order *in limine* that Continental itself requested. (A.208, 211 (No. 8)). This created a trial by ambush. Discovery rules require complete disclosure of what a party will claim as damages at trial. Continental did not properly disclose these claims. Continental's failure to answer this and other discovery requires a new trial. *In the Interest of G.L.D.*, 2014 ND 194, ¶¶ 8-16, 855 N.W.2d 99, 103-04 (error in denying complete discovery was an abuse of discretion).

[55] United also filed a motion to compel in 2015 to receive documents relating to Duprey, who played a critical role in Continental's decision to kick United off of every well site overnight and to not pay more than $4.5 million it owes United. (Docs. 117-124). The Court did not rule on that motion, either, until a week before trial, denying it without explanation. (A.215-216). Continental told the jury that Continental fired Duprey for sexual harassment, when in fact the reasons were far more complex and

included the fact that Duprey made claims against vendors that Continental determined to be "unsubstantiated." (Tr. 149-51, 295, 592). While the Court required Continental to provide some of the information during trial, that was too little, too late. United is entitled to a new trial based on the fact that it was not provided full and complete information regarding Duprey.

B. The district court should have severed the lien claim

[56] As described above, the Court allowed Continental to amend its Complaint to include the lien claim less than two weeks before the trial started. (A.217) and then refused to sever it. (A.219). Permitting Continental to proceed on that claim without permitting United to obtain any discovery on it violated fundamental fairness and requires a new trial in the event this Court does not enter judgment for United on that claim as a matter of law. N.D.R.Civ.P. 59(b)(1).

C. The district court improperly admitted evidence at trial

[57] Continental was permitted to have John Kelly offer an opinion that Continental was overbilled for propane "by around $1.5 million" (A.242), and that there was "about $4.5 million worth of variance" between what some drivers entered on their field tickets and what they entered on their log books. (A.260-263). Continental was permitted to have Eissenstat testify as to the amount of liens that "have been filed on Continental's wells as a result of United's failure to pay its subcontractors." (Tr. 627). Continental did not disclose that it would present any of those claims at trial, and thus allowing that evidence violated N.D.R.Civ.P 26, the district court's Order *in limine* (A.208, No. 8), and fundamental fairness. In addition, there was no foundation for that testimony. John Kelly knows nothing about the market price of propane in North Dakota

or Montana, and knows nothing about how drivers' field tickets and log books should properly be prepared. Eissenstat had no personal involvement in any lien claims and offered no testimony concerning who made lien claims, when, on what wells, for what service, by whom, and what may have been paid.

[58] United objected during trial to allowing Zeeb to offer his opinions for two reasons. First, those opinions were not properly disclosed. He was allowed to present opinions of "overbilling" as a "fraud examiner" when his report simply identified "billing issues" by inserting numbers onto a spreadsheet. (A. 361). *Perius v. Nodak Mutual Ins. Co.*, 2012 ND 54, ¶ 9, 813 N.W.2d 580, 583 ("Parties must fully, completely, and fairly disclose the subject matter on which their expert witnesses will testify at trial and the substance of their expert witnesses' testimony."). Second, as described above, Zeeb admitted that the numbers in his tables were wrong and were based on flawed premises. Zeeb's opinions lacked foundation and should not have been admitted. *Stein v. Ohlhauser*, 211 N.W.2d 737, 742-43 (N.D. 1973).

[59] Continental was permitted to call two witnesses (through video) in its rebuttal case that it should not have been permitted to call. It played a portion of Tim Partin's testimony in which he ranted about Richard Manning allegedly lying to him about an issue that has nothing to do with this case. (Tr. 2350). The testimony was not rebuttal, it was not relevant to any issue in the case, and it was unfairly prejudicial. N.D.R.Evid. 401, 403; *Hamilton v. Oppen*, 2002 ND 185, ¶23, 653 N.W.2d 678, 685. The court also permitted Continental to play a portion of Renee Clinton's deposition in which she stated, without foundation, that billing the same time for multiple fracs would be unethical. (Tr. 2341). Clinton was not identified as a witness that Continental intended

to call at trial, nor did Continental designate her testimony according to the parties' agreements on when designations would be exchanged. (Docs. 1271-1273). Instead, Continental was permitted to present that testimony as the last evidence presented in the case without disclosing until the evening before that it would do so, and when the testimony was not rebuttal. As the court was advised, Clinton was not available to testify for personal health reasons, and Continental's actions deprived United the opportunity to secure additional testimony by deposition. Again, Continental got away with trial by ambush. *Flynn*, at ¶16 (errors in admitting evidence that affect substantial rights require a new trial).

D. The district court's errors in instructing the jury require a new trial

[60] There were several errors in instructing the Jury on Continental's claims. *Flynn,* at ¶25 (errors in instructing the jury that affect substantial rights require a new trial). As set forth above, the Jury was instructed as to the definition of the terms "fraud" and "deceit" (A.294-295), but the Jury was not instructed on all the elements of those torts. The Jury was instructed on both "fraud" and "deceit" even though under North Dakota law, which the district court applied, fraud would have been the only proper instruction based on the existence of a contract. *Dewey v. Lutz*, 462 N.W.2d 435, 439 (N.D. 1990). In addition, Oklahoma law, not North Dakota law, applies here, so it was improper in the first instance to instruct the Jury under North Dakota law.

[61] The Jury was instructed on both fraud and deceit as to both Continental's affirmative claim and Continental's affirmative defense. Instructing the Jury on both hopelessly confused it and yielded an absurd result. The proper procedure, even assuming any evidence supported a fraud claim, would have been to fully instruct

the Jury on Continental's fraud claim under Oklahoma law, stating all of the elements Continental was required to prove by clear and convincing evidence, and, had Continental sustained that burden, offsetting that amount against the outstanding amount Continental owes to United, $4,676,455.00. The Zeeb/Jackson $976,963.46 "estimate of overbilling" included both invoices Continental had paid and invoices it never paid, although they did not quantify which was which. Continental maintained an account payable on its own books of over $4.3 million based on the unpaid invoices and the materials and services that United unquestionably provided, which are described in those invoices. (A. 307). Assuming that the number the Jury wrote in response to Question 6 came from a finding based on competent evidence that United fraudulently and deceitfully billed Continental in the amount of $2,415,000 (a groundless assumption as demonstrated above), Continental was not entitled to both a judgment in that amount and to avoid paying the invoices it recorded in its own books as being due. Improperly instructing the Jury and entering judgment on the verdict as the district court did operated as a forfeiture of the undisputed amount of the invoices representing services and materials United provided and from which Continental profited, which the law abhors. *Keller v. Bolding*, 2004 ND 80, ¶18, 678 N.W.2d 578, 584; *State ex rel. Harris v. 2011 Honda*, 2015 OK 11, ¶7, 345 P.3d 389, 391.

E. The evidence was insufficient to support the verdict

[62] As set forth in Section II, the evidence was insufficient to support a judgment for Continental on any of its claims. United is entitled to a new trial on those claims, even if the Court does not enter judgment in favor of United and Pauper on those claims. N.D.R.Civ.P. 59(b)(6).

IV. United is Entitled to Judgment as a Matter of Law, or in the Alternative to a New Trial, on its Counterclaim for the Value of the Materials and Services It Provided to Continental

[63] The Jury determined that Continental breached the MSC and that United did not. (A.279, 281). But the district court allowed Continental to receive the materials and services described in the unpaid invoices for free because of the Jury's answers to four questions the court submitted based on Continental's affirmative defenses. They were not proper affirmative defenses and there was no evidence to support them. *In re Estate of Dion*, 2001 ND 53, ¶ 31, 623 N.W.2d 720, 728 ("a court need not instruct the jury on a theory when there is no evidence to support it.").

[64] The unpaid invoices were presented at trial in eight binders, summarized in a spreadsheet. (A.308; Tr. 2079-2080). The invoices reflect 21,000 hours of labor, hauling 408,000 barrels of fresh water and 422,000 barrels of production water, and 140,000 gallons of propane, that Continental received but never paid for. (Tr. 2080). Continental did not put on any evidence that there was any defect in the materials or services United provided to which those invoices refer.

[65] The district court should not have instructed the Jury on Continental's affirmative defenses. Because pleading standards liberally allow a party to plead any claim or defense (N.D.R.Civ.P. 8, 10), this Court "expect[s] to find an understanding of the theory upon which" a claim is made in a jury trial "from the special verdict and the instructions." *Hagert v. Hatton Commodities, Inc.*, 350 N.W.2d 591, 594 (N.D. 1984). No such understanding can be gleaned from the instructions and special verdict, and the

result here in nonsensical. The MSC required Continental to pay for the services and materials United provided. Permitting Continental to be "excused" from paying for those services and materials based on undefined conduct and abstract legal doctrines having no relationship to the services and materials United provided simply makes no sense and created the forfeiture that the law abhors. *Keller*, at ¶18.

[66] The Jury should not have been instructed on "prior material breach." The court instructed the Jury that "a party that commits a first breach of the parties' contract… excuses the latter's duty to give the agreed exchange under the contract." (A. 290, 301). None of the cases Continental cited in support of the "prior material breach" instruction actually discussed the propriety of instructing a jury on such a defense. (Doc. 1038, p. 61). Further, Continental presented no evidence that United committed any breach of any obligation in connection with the materials and services United provided in December 2013 and January 2014.

[67] So too, the Jury should not have been instructed on "condition precedent," and no evidence supports that defense. (A.302). Continental cited *Dollar Rent a Car Systems, Inc. v. P.R.P Enterprises, Inc.*, 2006 WL 1266515 (N.D. Okla. May 8, 2006), which says nothing about "condition precedent," and *Kruger v. Soreide*, 246 N.W.2d 764, 769 (N.D. 1976), in which this Court held that "North Dakota law recognizes that a condition precedent may be a prerequisite to the existence of a contract." There is no issue in this case whether the parties had a contract.

[68] As noted above, there was no competent evidence to support instructing the Jury on "fraud or deceit," either as to Continental's affirmative claim or as to its affirmative defense. (A.303). The court instructed the Jury that Continental was

excused from performing if United made a statement or an act that was intended to deceive on which Continental relied. The undisputed facts do not support such a defense. Even if there was some fraud or deceit within the unpaid invoices, Continental did not rely on those invoices; Continental did not pay them.

[69] So too, a false statement and reliance are elements of an equitable estoppel defense. (A.305). With respect to United's claim to be paid for the materials and services it unquestionably provided, Continental presented no evidence that United said or did anything that would support an equitable estoppel defense. Nor can Continental claim to have relied to its detriment on statements in invoices that it never paid.

[70] Since the Jury determined that Continental breached the MSC, and since there was no evidence to support any affirmative defense, United is entitled to judgment as a matter of law in its favor on its breach of contract claim in the amount of $4,676,455.00. (A.308-311; Tr. 2079-2083). This Court makes that determination as a matter of law. *Amyotte*, at ¶ 9.

[71] In the alternative, this Court should order a retrial on United's claims. As described in Section I, *supra*, the Jury's inconsistent verdict requires a new trial. N.D.R.Civ.P.49(c). In addition to the inconsistencies described above, the Jury determined that United did not breach its contractual obligations (A.279, No. 1), but then determined that United committed a "prior material breach," and failed to comply with a condition precedent. (A.281, No. 14). Further, in determining that United did not breach any contractual obligations, the Jury necessarily determined that United did not present inaccurate or false charges, but then the Jury determined that Continental was excused from performing because of United's alleged fraud, deceit and estoppel, defenses that

were based on the same alleged false charges that the Jury found did not exist. These inconsistencies are irreconcilable.

[72] Further, the errors described above in failing to compel Continental to respond to discovery, in improperly receiving evidence, in incorrectly instructing the jury, and the absence of evidence to support the affirmative defenses, requires a new trial on United's claims. The district court abused its discretion in denying United's request for a new trial, *Flynn*, at ¶5, and its failure to provide any reasons for its ruling itself requires reversal. *Grisvold*, ¶¶ 16-18.

V. The District Court Improperly Limited United's Damages

[73] United's company was completely destroyed as a result of Continental' s refusal to pay over $4.5 million for the services and materials United provided, in addition to Continental's failure to give 30 days notice of termination as required by the MSC. When Continental announced that it would not pay any of United's invoices, was kicking United off of every well site overnight, and filed a lawsuit accusing United of corruption and paying kickbacks, it set off a foreseeable chain of events with United's primary lender in which the lender declared all of Continental's receivables ineligible to support United's borrowing and, when Continental would not reason, required United to liquidate all of its assets, putting it out of business completely.

[74] Both Oklahoma and North Dakota law recognize that a victim of a breach of contract is entitled to recover damages sufficient to put them in the position they would have occupied had the contract been fully performed, including lost profits a company would have earned but for the breach. *Florafax International, Inc. v. GTE Market Resources, Inc.*, 933 P.2d 282, 288 (Okla. 1997)*; Firestone Tire & Rubber*

Co. v. Sheets, 62 P.2d 91, 93 (Okla. 1936); *Jim's Hot Shot Serv., Inc. v. Cont'l W. Ins. Co.*, 353 N.W.2d 279, 285-86 (N.D. 1984) (plaintiff permitted to recover the difference in fair market value immediately before the conduct that caused the damage and the fair market value that remained when the business stopped). Courts throughout the country permit a company destroyed by a breach of contract to recover its enterprise value caused by a breach of contract. *C&H Power Line Constr. Co. v. Enterprise Products Operating, LLC*, 2016 OK 102,¶ 7, 386 P.3d 1027, 1030 (applying Texas law); *Protectors Ins. Serv., Inc. v. U.S. Fid. & Guar. Co.*, 132 F.3d 612, 617 (10th Cir. 1998); *Indu Craft, Inc. v. Bank of Baroda*, 47 F.3d 490, 496 (2d Cir. 1995).

[75] The district court barred United on summary judgment from recovering the value of its destroyed business (A.201-203), relying on *Osborn v. Commanche Cattle Industries Inc.,* 545 P.2d 827 (Okla. Civ. App. 1975). The district court concluded that "United's damages, if proven, are limited to net profits United could have earned during the 30-day notice period…" (A.203, ¶ 39). The district court erred, which this Court reviews *de novo*. *Green v. Mid Dakota Clinic*, 2004 ND 12, ¶ 5, 673 N.W.2d 257, 260. The MSC required Continental to provide 30 days notice before terminating it, which Continental breached. But United's injuries are not limited to Continental's breach of the notice provision. Continental refused to pay for over $4.5 million of materials and services that United provided. That breach of its contract obligations, which also amounted to a tort, proximately caused United's complete destruction. United didn't just lose 30 days of business from Continental; United lost all of its business from every customer forever. While Continental was free to enter into an orderly separation from United and to use other contractors, it was not entitled

to steal United's materials and services and to commit what amounted to corporate murder. The *Florafax* court recognized this distinction by noting that *"*the rule of *Osborn* that a non-breaching party may not receive more in damages than he might or could have gained from full performance is inapplicable" because Florofax could have earned profits beyond those it would have earned during the 60 day notice period. 933 P.2d at 282. United is entitled to a trial at which it may recover for all the injuries proximately caused by Continental's breaches of contract and tortious misconduct.

CONCLUSION

[76] For all these reasons, United and Pauper respectfully request this Court to reverse the district court and to enter judgment in favor of United and Pauper and against Continental on all of Continental's claims; in the alternative to order a new trial on Continental's claims against United and Pauper; to enter judgment in favor of United and against Continental on United's counterclaim in the amount of $4,676,455.00 and to order a trial to determine whether Continental's breach of contract caused the destruction of United and if so to determine the enterprise value of United, and to determine whether Continental's breach of contract was tortious and justifies an award of punitive damages; in the alternative to order a new trial on all of United's claims against Continental; to vacate the judgments entered against United and Pauper, including the awards of costs; to award costs in favor of both United and Pauper; and to award any additional relief the Court deems just.

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No. 2016-0452

In the Supreme Court of the State of North Dakota

CONTINENTAL RESOURCES, INC.,

Plaintiff and Appellee,

v.

P&P INDUSTRIES, LLC I d/b/a UNITED OILFIELD SERVICES and PAUPER INDUSTRIES, INC.,

Defendants and Appellants.

Appeal from the District Court, Northwest Judicial District, Williams County,
Civil No. 53-2014-CV-00206.
The Honorable **Joshua B. Rustad**, Judge Presiding.

AFFIDAVIT OF SERVICE

I hereby certify that on June 1, 2017, the Brief of Defendants and Appellants along with the Separate Appendix was submitted via email to the Clerk of the Court for the North Dakota Supreme Court. I also certify that on June 1, 2017, all parties in the case will be served copies of the Brief and Appendix via the email addresses indicated below.

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No. 2016-0452

In the Supreme Court of the State of North Dakota

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Defendants and Appellants,

and

PARKA, INC.,

Defendant and Appellee.

Appeal from the Judgment on Jury Verdict Dated November 4, 2016 in the District Court, Northwest Judicial District, Williams County, Civil No. 53-2014-CV-00206.
The Honorable **Joshua B. Rustad**, Judge Presiding.

AFFIDAVIT OF SERVICE

I hereby certify that on June 9, 2017, the Brief of Defendants and Appellants along with the Separate Appendix was submitted via email to the Clerk of the Court for the North Dakota Supreme Court with the following corrections made: Caption was changed to the official caption, the date of the order being appealed was added, Michael Crane's name was removed from the cover; the table of contents was changed to reflect paragraph numbers, and the attorneys representing Parka, Inc., were added to the affidavit of service. I also certify that on June 9, 2017, all parties in the case will be served copies of the Brief and Appendix via the email addresses indicated below:

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