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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
and 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.

REPLY BRIEF OF DEFENDANTS AND APPELLANTS

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I. The Special Verdict was Irreconcilable

[1] While this Court endeavors to reconcile special verdicts whenever possible, the verdict must be "logical and probable." *Moszer v. Witt*, 2001 ND 30, ¶11, 622 N.W.2d 223, 228. The Jury's finding, in one breath, that United and Pauper did not breach their contractual obligations, defined as "presenting inaccurate or false charges" (A.297), while in the next breath finding that their "conduct" was "accompanied by" fraud and deceit, defined as "including a variety of false statements on billing documents" (A.287), is "clearly inconsistent and perverse." *Id.* ¶ 15.

[2] Continental claims (¶40) that "the conduct for breach of contract and fraud/deceit is not necessarily the same." The conduct was defined to be the same: false billing. Nor was there any dispute whether inaccurate or false charges would have been a breach of contract had that occurred. (¶¶ 41-44). Continental contends (¶46) that the many conjunctions in the instruction directed the jury to find in Defendants' favor. If the Jury had determined that United or Pauper submitted inaccurate or false charges, it would have found for Continental; there would be no need to go beyond the "and/or." Continental argues (¶¶47-48) that the Jury may have found in favor of only one of the Defendants and thought that required a finding for both. Continental ignores the fact that the Jury made separate findings as to each Defendant.

II. Continental Didn't Prove Fraud

[3] Continental's assertion (¶32) that United "engaged in a massive fraudulent and deceitful billing scheme" is empty rhetoric. The majority of Zeeb's "billing issues" came from field tickets indicating that drivers worked more than 11 hours. Zeeb focused on DOT rules limiting driver time to 11 hours, but he conceded that those rules only restrict

driving, not working. (Tr.1227-31). Continental says (¶ 64) this error "was accounted for in [Zeeb's] analysis," but doesn't explain how. Zeeb also described water consultants and frac heaters as "drivers" and erroneously limited them to 14 hours. (Tr.1239-47). Instead of fixing his error, Zeeb cooked up a "sensitivity analysis" in an effort to sweep his mistake under the rug. His flawed work, upon which Jackson relied, cannot support a judgment on a fraud claim.

[4] Continental's experts determined their $976,000 "best estimate of overbilling" as to United. (A. 356-373). That's less than a quarter of what Continental's own accounting records reflect it owes to United. (A.306-07). The Jury assessed no damages as to Pauper. Continental was not injured, even if it had shown any improper billing.

[5] The propane claim was baseless. The invoices stated how much United was charging for propane. (SuppA137). Continental says (¶71) that "the parties' agreement was United would charge its 'market cost' for propane." United's price sheets stated that United would charge for propane "at market price" not "market cost." (SuppA133). Continental says (¶72) that "United's invoices purported to state its propane cost." They don't. (SuppA137).

[6] The "log book variance" testimony also was baseless. John Kelly knows nothing about driving a truck or working in an oilfield and he didn't bother to talk to anyone who does. Continental presented no evidence that log books must match field tickets. Buck Herman and Eddie Mindt explained that the drivers identified in Kelly's spreadsheet billed on a service basis, not on an hourly basis. (Tr. 1380-82, 1808). Continental ignores this fact. (¶¶ 75-76).

[7] Continental now for the first time argues (¶78) that the lien claim was really a fraud claim. Continental's Amended Complaint includes the lien claim only in its breach of contract count. (A.136-38).

[8] Continental now for the first time claims it was defrauded in December 2013 into paying a portion of the tab it had wrung up. Continental owed United more than $5.5 million in mid-December. (Supp.A.49). Further, the invoices that supported the $2.5 million in payments Continental says it made in December are among the invoices its experts reviewed in determining their "best estimate of overbilling" of $976,000, which the Jury apparently rejected.

III. United and Pauper are Entitled to a New Trial[1]

[9] The district court denied Defendants' motion to compel Continental to identify what it would claim and then allowed Continental to make claims it never disclosed. (A.216). The district court initially recognized that it would be improper to allow Kelly's testimony, but then permitted the testimony anyway. (A.248-59). Continental says (¶82) that United and Pauper don't "argue that they were unaware of the substance of Continental's claims nor identify any specific prejudice about the substance of Continental's claims." Continental ignores United's and Pauper's arguments. (Appellants' Brief, ¶¶ 24-25, 28-30, 54, 57). Continental stated that it would present its damage claims through its experts (Docs. 87-95,103). Continental never disclosed that John Kelly would testify about fraud claims based on propane charges or a comparison of

[1] The boilerplate language in the two paragraph order denying the post-trial motion that the court "was fully advised on this matter" is not a substitute for a memorandum stating the reasons for the court's decision as required by N.D.R.Civ.P. 59(f). (A.278). Continental cites *Industrial Fiberglass v. Jandt*, 361 N.W.2d 595, 600 (N.D. 1985), but there this Court was able to determine the bases for the trial court's rulings from its findings following a bench trial.

driver logs to field tickets. Continental says (¶¶ 25, 89) that "[t]he information underlying Mr. Kelly's testimony was disclosed prior to trial." That "information" is raw United accounting and other records relating to propane and a spreadsheet that Kelly apparently prepared during the audit process, buried among hundreds of thousands of pages of documents produced in discovery.

[10] Continental argues (¶ 26) that United didn't timely object to the propane testimony. Kelly's testimony that "the amount overbilled to Continental is likely around $1.5 million" came without warning. (A. 241-42). United objected and moved to strike the testimony within moments. (A.243-59). N.D.R.Ev.103(a)(1)(A) requires either a timely objection or a motion to strike. Continental cites *May v. Sprynczynatyk*, 2005 ND 76, ¶ 25, 695 N.W.2d 196, but there May's counsel did not raise an objection until after the parties had rested. *Id.* ¶23.

[11] Continental argues (¶ 83) that "United was allowed to create a completely new damage model during the first week of trial." In fact, United was forced to develop a damage model to address the district court's erroneous ruling on summary judgment, issued two weeks before trial, limiting United's recovery to the "net profits it could have earned during the thirty –day notice period…" (A.203). That doesn't justify Continental's violation of discovery rules and its own motion *in limine* by presenting claims it purposely concealed from United until day three of the trial, for no good reason other than it wanted to ambush United and Pauper.

[12] Continental claims (¶84) that United and Pauper were required to seek a continuance. They were not. They were entitled to a fair trial, on the date that had been set by the court, restricted to the information that had properly been disclosed during

discovery. In *Reimche v. Reimche*, 1997 ND 138, ¶8, 566 N.W.2d 790, 793, this Court determined that Mrs. Reimche was made aware of the custody claim well before trial. In *Hamre v.Senger*, 79 N.W.2d 41, 46 (N.D. 1956), plaintiff claimed surprise by the testimony of a third party witness, but there is no indication that Defendant violated discovery rules and an order *in limine* (A.207), and misrepresented what he would claim at trial as Continental did here.

[13] Continental's lien claim did not become part of the case until days before the trial started. (A.217). The parties did no discovery on the claim, and Continental never disclosed what it would claim or who would testify about it.

[14] Tim Partin didn't provide "reputation" testimony pursuant to N.D.R.Ev. 608. Nor did Continental provide any foundation for any such testimony. Offering Renee Clinton's testimony only in rebuttal was not excused by "surprise." (¶96-98). The agreement relating to water consultants was described in detail in multiple sources during discovery. (Doc.834). United was not able to call Clinton in rebuttal because Continental didn't disclose that it would call her as a witness until the night before the day on which the evidence closed. Continental did that to sandbag United and to preset it as the last evidence presented at trial for theatrical effect.

[15] Jury instructions must "correctly and adequately inform the jury on essential issues in the case." *Rittenour v. Gibson*, 2003 ND 14, ¶ 23, 656 N.W.2d 691, 698. The district court never instructed the Jury on the elements of fraud or deceit, or on Continental's burden to prove each of those elements. Continental tendered a breach of contract instruction stating the elements of that claim and its burden to prove those elements. (A.297). Continental tendered no such instruction for its fraud and deceit

claims. Instructions defining those terms according to statute were not a substitute for an instructions requiring proof on all elements of the fraud and deceit claims. *Northstar Founders, LLC v. Hayden Capital USA, LLC*, 2014 ND 200, ¶ 27, 855 N.W.2d 614, 626 (reciting the elements); *Bourke v. Western Business Products, Inc.*, 2005 Ok. Civ. App. 48, ¶ 33, 120 P.3d 876, 886-87 ("Fraud is never presumed and each of the elements must be proved by clear and convincing evidence."). The elements are not found in other instructions, even if that were a proper substitute. While reliance is discussed in the "Fraud and Deceit" instruction, that instruction was limited to the affirmative defense. (A. 303). While the clear and convincing burden of proof is mentioned on the verdict form, nowhere was the Jury instructed that it was required to find each element by clear and convincing evidence.

[16] Continental received a judgment for $2.415 million, and avoided paying the over $4.3 million it recognized on its own books as being due. The facts and the law don't support that result. At the very least, United and Pauper are entitled to a new trial on Continental's claims.

IV. United is Entitled to Judgment on its Counterclaim, or to a New Trial

[17] Continental cites *Monarch Photo, Inc. v. Qualex, Inc.*, 935 F.Supp. 1028, 1033 (D. N.D. 1996), on "prior material breach," but there the court determined that "Monarch materially breached the Ancillary Agreement…[b]y refusing to perform certain types of work without a price increase." United provided Continental with $4.5 million of services and materials. (Tr.709, 801). Continental showed no breach supporting it receiving that work for free.

[18] The Jury in one breath determined that United did not commit breach of contract (Question 1), but in the next breath determined that it did (Question 14). United raised that patent inconsistency in the Jury's verdict in its post-trial motion. (Doc.1266, ¶10).

[19] Continental continues to rely solely on *Kruger v. Soreide*, 246 N.W.2d 764, 769 (N.D. 1976), but there this Court determined that a condition precedent "may be a prerequisite to the existence of a contract." *Id.* at 769. That's not an issue in this case.

[20] With respect to the "fraud and deceit" and "equitable estoppel" affirmative defenses, Continental could not have been deceived in connection with invoices it never paid. There is no explanation for how Continental was permitted to avoid paying any of the outstanding invoices, other than that United was improperly required to forfeit payment for the services and materials it indisputably provided to Continental.

V. The District Court Improperly Limited United's Damages

[21] Continental doesn't address the distinction United identified in *Osborn v. Commanche Cattle Indust., Inc.*, 545 P.2d 827, 831 (Okla. App. 1975). United doesn't simply claim that it lost business from Continental as a result of Continental's failure to give proper notice. Continental's theft of $4.5 million in materials and services, coupled with its false accusations of corruption and kickbacks, put United out of business, as Continental announced was its intention. The law permits United to recover for all of the injury proximately caused by Continental's breaches, which here is the enterprise value of United that was entirely lost.

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