

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.

PETITION FOR REHEARING OF DEFENDANTS AND APPELLANTS

PETER KING, ID # P01405
(pking@kingjoneslaw.com)
WILLIAM H. JONES, ID # P01406
(wjones@kingjoneslaw.com)
CANEL, KING & JONES
Three First National Plaza
70 West Madison Street, Suite 3970
Chicago, Illinois 60602
Telephone: (312) 372-4142
Facsimile: (312) 372-6737

Lance D. Schreiner (ND ID # 03618)
(lschreiner@zkslaw.com)
ZUGER KIRMIS & SMITH
316 North Fifth Street
P. O. Box 1695
Bismarck, North Dakota 58502-1695
Telephone: 701-223-2711
Facsimile: (701) 223-9619

*Attorneys for Defendants and Appellants,
P&P Industries LLC I, d/b/a United Oilfield
Services and Pauper Industries, Inc.*

TABLE OF CONTENTS

TABLE OF AUTHORITIESiii

Paragraph Nos:

I. United’s Tortious Breach of Contract Claim2-3
II. The Jury Instructions and the “Law of the Case” Doctrine4-6
III. This Court Should Reconsider Its Ruling Limiting United’s Damages 7

TABLE OF AUTHORITIES

Cases:	Paragraph Nos:
<i>Dobbler v. Malloy</i> , 214 N.W.2d 510, 513-14 (ND 1973).....	5
<i>Florafax International, Inc. v. GTE Market Resources, Inc.</i> , 933 P.2d 282, 288 (Okla. 1997).....	7
<i>Jim’s Hot Shot Serv., Inc. v. Cont’l W. Ins. Co.</i> , 353 N.W.2d 279, 285-86 (N.D. 1984)...	7
<i>Martinson v. Martinson</i> , 2011 ND 156, ¶ 12.....	1
<i>Tom Beuchler Const. v. City of Williston</i> , 413 N.W.2d 336, 338-39 (ND 1987).....	3,4
<i>State v. Burckhard</i> , 1999 ND 65, ¶ 7).....	4
<i>State v. Torrez</i> , 2013-NMSC-034, ¶ 34, 305 P.2d 944, 953.....	5
Rules:	
North Dakota Rule of Appellate Procedure 40.....	1

[1] Petitioners/Appellants, P&P Industries LLC I, d/b/a United Oilfield Services (“United”), and Pauper Industries, Inc. (“Pauper”), respectfully petition this Court for rehearing pursuant to N.D.R.App. Rule 40 to address two issues that Petitioners believe are likely to arise on remand. See, e.g., *Martinson v. Martinson*, 2011 ND 156, ¶ 12 (Court noted that “[w]e feel compelled to define the proper scope of the remand and clarify issues which may arise.”). United also asks this Court to reconsider its ruling limiting United’s recoverable damages.

I. United’s Tortious Breach of Contract Claim

[2] After determining that the special verdict was inconsistent, requiring a new trial, this Court stated that “a new trial is required on Continental’s breach of contract, fraud, and deceit claims against United and Pauper and United’s breach of contract claim against Continental.” (2018 ND 11, ¶ 28). This Court did not specifically mention in that list United’s tortious breach of contract claim. Petitioners respectfully request that this Court expressly confirm that United may also pursue its tortious breach of contract claim on remand.

[3] The District Court determined that Oklahoma law supports that claim and instructed the jury on it. (A. 205; A. 289; A.296). Continental did not cross-appeal from those rulings. Nor did Continental ask this Court to affirm the judgment on the tortious breach of contract claim on any alternative grounds. The law of the case doctrine and waiver principles bar Continental from even contesting that United’s tortious breach of claim be submitted to the jury at the new trial. *Tom Beuchler Const. v. City of Williston*, 413 N.W.2d 336, 338-39 (ND 1987). Petitioners respectfully request this Court to confirm that the retrial will include United’s tortious breach of contract claim.

II. The Jury Instructions and the “Law of the Case” Doctrine

[4] This Court stated that “[t]he jury instructions, therefore, are the law of the case.” 2018 ND 11, ¶ 16. Petitioners are concerned that on remand the District Court will construe this statement as a requirement that it use the same verdict form and the same instructions on retrial. This Court has described the law of the case doctrine as “the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal question thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain the same.” *Id.* at 339, quoting Black’s Law Dictionary (1979). This Court has cautioned that the mandate rule, a corollary to the law of the case doctrine, requires that the trial court “follow pronouncements of an appellate court on legal issues in subsequent proceedings of the case to carry the appellate court’s mandate into effect according to its terms.” *State v. Burckhard*, 1999 ND 65, ¶ 7 (internal quotations, brackets, and citations omitted). Petitioners ask that this Court either advise the District Court that the law of the case doctrine does not preclude the District Court from revising the jury instructions on remand, or reconsider making that statement and determine the propriety of the instructions given at the first trial.

[5] Petitioners were not able to locate a case from this Court discussing the effect of the law of the case doctrine as it relates to jury instructions on retrial. Other courts have determined that the law of the case doctrine does not prevent the trial court from modifying jury instructions on remand. *State v. Torrez*, 2013-NMSC-034, ¶ 34, 305 P.2d 944, 953 (“during a retrial of a case from remand on appeal, a judge is not required to give the same instructions that were given during the first trial.”). This Court has indicated that on remand the trial court is free, for example, to permit amendments to pleadings. *Dobbler v. Malloy*, 214 N.W.2d 510, 513-14

(ND 1973). Justice Jensen’s Special Concurrence suggests that the District Court review and revise the jury instructions. 2018 ND 11, ¶ 59. Petitioners respectfully submit that the parties and the District Court can do better job on remand drafting instructions and a verdict form on the remaining claims than they did at the first trial, and Petitioners ask this Court to clarify that the parties and the court are not restricted by the law of the case doctrine or the mandate rule from making such an effort.

[6] This Court predicated its statement that the jury instructions are the law of the case on the statement that “United and Pauper proposed using a general verdict form, but there are no specific objections to the final verdict form or to the breach of contract instructions in the record, and any issues related to these instructions were not raised on appeal.” *Id.* The verdict form was the product of the pre-trial rulings and the rulings during the jury instruction conferences based on the competing instructions and verdict forms the parties submitted and based on the evidence that had been received. (Tr. (July 28, 2016), 24-80; Tr. 62-81; Tr. 2415-2527; Tr. 2537-2586). Petitioners submit that they did object to the verdict form on several grounds, including that the instructions as a whole, including the verdict form, failed to instruct jury that it was required to find that Continental proved all the elements of its fraud claim; the instructions, including the verdict form, improperly included Continental’s claims both as affirmative claims and as a set-off (Tr. (July 28, 2016), 58-60; Tr. 2455-58, 2472)); and the instructions on Continental’s affirmative defenses, including the verdict form, improperly included prior material breach (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). United and Pauper raised these errors in their Brief in this Court. (¶¶ 31, 38, 60-61, 65-69). If the law of the case doctrine does not prevent the District Court from

revising the jury instructions and the verdict form on remand, this Court need not further address Petitioners' objections to the jury instructions and verdict form at the first trial. But if instead this Court meant, by its statement that the jury instructions and verdict form are the law of the case, that the District Court is bound to use the same instructions and verdict form at the retrial, Petitioners respectfully request that this Court reconsider that statement, fully examine the instructions given and the objections posed, and determine whether the same jury instructions and verdict form should be given at the retrial.

III. This Court Should Reconsider Its Ruling Limiting United's Damages

[7] Oklahoma law permits a victim of a breach of contract to recover damages sufficient to put it in the position it would have occupied had the contract been fully performed, including lost profits a company would have earned but for the breach. *Florofax International, Inc. v. GTE Market Resources, Inc.*, 933 P.2d 282, 288 (Okla. 1997); see also *Jim's Hot Shot Serv., Inc. v. Cont'l W. Ins. Co.*, 353 N.W.2d 279, 285-86 (N.D. 1984). This Court distinguished *Florofax* by stating that "United is not claiming it is entitled to damages for lost profits from a third-party contract that was cancelled because Continental breached its contract with United." 2018 ND 11, ¶ 38. United does claim the loss of business from third parties. United presented evidence that Continental wrongfully refused to pay over \$4.5 million of United's invoices, kicked United off of every well site overnight, announced that it intended to put United out of business, and filed a lawsuit falsely accusing United of corruption and paying kickbacks. United claims that those breaches put United out of business, completely, and thus did prevent United from doing business with third parties. This Court stated that "United was not assured performance or profits from the contract beyond the 30-day notice requirement." *Id.* United agrees with that statement. United does not dispute that Continental was free to terminate its

relationship with United on 30 days notice. But United is not claiming profits from future business it lost with Continental. United is claiming the lost profits it would have made with other companies had Continental not put United out of business through its breaches of contract and tortious conduct. That inability to continue as an on-going concern is what forms United's enterprise value claim. The 30 day notice provision is just that: a requirement that Continental provide 30 days notice before terminating its relationship with United. It is not a liquidated damages provision and it does not purport to limit the damages United may recover for Continental's breaches of contract.

For these reasons, United and Pauper respectfully request that this Court grant rehearing, modify its Opinion as set forth herein, and grant any other relief the Court deems just.

By: /s/Peter M. King
CANEL, KING & JONES
70 West Madison Street, Suite 3970
Chicago, Illinois 60602
Telephone: 312-372-4142
Fax: 312-372-6737
Peter M. King, ID # P01405
pking@kingjoneslaw.com
William H. Jones , ID # P01406
wjones@kingjoneslaw.com

~and~

Lance D. Schreiner, ND ID # 03618
ZUGER KIRMIS & SMITH
316 North Fifth Street
P. O. Box 1695
Bismarck, North Dakota 58502-1695
Telephone: 701-223-2711
Fax: (701) 223-9619
lschreiner@zkslaw.com

**ATTORNEYS FOR PETITIONERS/ DEFENDANTS/
COUNTER-PLAINTIFF/APPELLANTS
P&P INDUSTRIES LLC I d/b/a UNITED OILFIELD SERVICES,
AND PAUPER INDUSTRIES, INC.**

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2018, I electronically filed the PETITION FOR REHEARING OF DEFENDANTS AND APPELLANTS with the Clerk of the North Dakota Supreme Court, together with this Certificate of Service, and served both documents on the following via email:

Lawrence Bender
Fredrikson & Byron, P.A.
LBender@fredlaw.com

Danielle Krause
Fredrikson & Byron, P.A.
dKrause@fredlaw.com

Andrew D. Sims
Harris, Finley & Bogle, P.C.
asims@hfblaw.com

Russell R. Barton
Harris, Finley & Bogle, P.C.
rbarton@hfblaw.com

Paul T. Elkins
Harris, Finley & Bogle, P.C.
pelkins@hfblaw.com

Lance D. Schreiner
Zuger Kirmis & Smith
lschreiner@zkslaw.com

Charles K. Maier
Gary, Plant, Mooty, Mooty & Bennett, P.A.
charles.maier@gpmlaw.com

/s/William H. Jones
William H. Jones