

No. 2016-0452

**IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA**

CONTINENTAL RESOURCES, INC.,

Plaintiff/Appellee

v.

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

Defendants/Appellants

and

PARKA, INC.,

Defendant

**Appeal from District Court's Judgment on Jury Verdict Dated
November 4, 2016**

Civil No. 53-2014-CV-00206

**County of Williams, Northwest Judicial District
The Honorable Joshua B. Rustad, Judge Presiding**

PLAINTIFF AND APPELLEE'S PETITION FOR REHEARING

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STATEMENT OF ISSUES ON REHEARING

[¶1] The Opinion and Judgment incorrectly reverses and remands the fraud and deceit findings in favor of Continental by overlooking or misapprehending the Court’s holdings: (1) the jury’s answers regarding breach of contract and fraud *are reconcilable*, and (2) the record contains clear and convincing evidence of fraud outside the contract.

[¶2] The Opinion and Judgment incorrectly reverses and remands the verdict and judgment denying liability on United’s breach of contract counterclaim by overlooking and failing to address and give effect to the jury’s answers to three distinct affirmative defenses.

[¶3] The Court’s Judgment should acknowledge portions of the proceedings below are expressly affirmed by the Court, and all causes of action not challenged by United on appeal are also affirmed.

STATEMENT OF CASE

[¶4] The procedural history is stated in the Court’s Opinion in *Continental Resources, Inc. v. P&P Industries, LLC I d/b/a/ United Oilfield Services, et al.*, 2018 ND 11, -- N.W.2d -- (“Opinion”). A Petition for Rehearing “must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition.” N.D.R.App.P. 40(a)(2). Appellee/Petitioner

Continental Resources, Inc. (“Continental”) submits the Court overlooked or misapprehended the law and facts in three ways.

[¶5] First, the Opinion and Judgment reversing the fraud/deceit verdict and judgment overlooks or misapprehends the Court’s holdings: (1) the jury’s answers regarding breach of contract and fraud *are reconcilable*, and (2) the record contains clear and convincing evidence of fraud outside the contract.

[¶6] Second, the Opinion and Judgment overlooks and fails to address and give effect to the jury’s findings in favor of Continental on three distinct affirmative defenses to United’s breach of contract counterclaim: (1) fraud or deceit, (2) equitable estoppel, and (3) failure to perform conditions precedent.

[¶7] Third, the Court’s characterization of its decision in the Opinion and Judgment as “REVERSED and REMANDED” overlooks (1) the Court’s affirmance of portions of the proceedings below, and (2) that the jury verdict and judgment should be affirmed as to all causes of action not challenged by United on appeal.

STATEMENT OF FACTS

[¶8] The facts are stated in the Opinion.

LAW AND ARGUMENT

I. The Court’s Holdings Show Continental’s Fraud/Deceit Verdict and Judgment Should Be Affirmed.

[¶9] As correctly noted in the Opinion, United and Pauper argued Continental’s fraud/deceit verdict and judgment should be reversed because the jury’s answers to those questions could not be reconciled with the jury’s answers on Continental’s breach of contract claims. [Opinion ¶¶ 14, 20; *see* Brief of Defendants and Appellants (“Appellants’ Br.”) ¶ 35].

[¶10] The Opinion correctly rejects United/Pauper’s argument. “The findings on Continental’s breach of contract and fraud claims *can be reconciled*.” [Opinion ¶ 23 (emphasis added)]. The Court correctly holds, “[t]he jury could have found the billing practices were not a breach of contract but did constitute fraud,” and “[t]he jury could have determined there was clear and convincing evidence the December 2013 conduct constituted fraud but was not breach of contract.” [Opinion ¶¶ 21, 22].

[¶11] The jury awarded Continental \$2.415 million for fraud/deceit, which is within the evidence of Continental’s December 2013 fraud damages alone, and certainly within the remainder of Continental’s fraud damages evidence totaling approximately \$9.5 million. [See Brief of Plaintiff and Appellee (“Appellee Br.”) ¶ 78; Tr.379:13-381:10; 498:14-500:7; 501:1-205:4; 783:23-784:6; 784:24-785:19; SuppA047-50]. *See City of*

Grand Forks v. Hendon/DDRC/BP, LLC, 2006 ND 116, ¶ 8, 715 N.W.2d 145.

[¶12] The Opinion and Judgment reversing the fraud/deceit verdict and trial court judgment overlooks or misapprehends the Court's express holdings of no irreconcilable conflict and sufficient clear and convincing evidence of fraud. Continental respectfully requests the Court reconsider its Opinion and Judgment in light of these specific holdings and affirm the fraud/deceit verdict and trial court judgment in favor of Continental.

II. The Court's Opinion Overlooks Three Independent Affirmative Defenses to United's Breach of Contract Counterclaim.

[¶13] The Court acknowledges the jury found Continental was excused from United's breach of contract counterclaim based on affirmative answers to four affirmative defenses: (1) prior material breach, (2) fraud or deceit, (3) equitable estoppel, and (4) failure to perform conditions precedent. [Opinion ¶ 7]. But, in reversing the trial court's judgment in which United took nothing on its breach of contract counterclaim, the Court addresses only the jury's answer to the affirmative defense of prior material breach. [Opinion ¶¶ 13, 19, 23-26].

[¶14] The Opinion overlooks and fails to address the jury's answers to the other affirmative defenses, each of which independently excuses United's breach of contract counterclaim. [SuppA248]. Because the jury's

findings on these distinct affirmative defenses support the judgment that United take nothing on its counterclaim, any conflict in the jury's answer to the material breach affirmative defense does not require reversal. *See Benedict v. St. Luke's Hosps.*, 365 N.W.2d 499, 504-05 (N.D. 1985) (error in failing to give instruction was not reversible where other findings negated Hospital's liability); *Koppinger v. Cullen-Schlitz & Assoc.*, 513 F.2d 901, 906-07 & 907 n.5 (8th Cir. 1975) (jury's findings on *res ipsa loquitur* and specific acts of negligence are inconsistent but not reversible because *res ipsa* finding becomes "mere surplusage").

[¶15] Thus, because the jury's answers to these separate affirmative defenses bar United's recovery on its counterclaim, the jury's answer to the material breach affirmative defense should not "affect[] the outcome of a proceeding" and should not require reversal. *Howes v. Kelly Servs., Inc.*, 2002 ND 208, ¶¶ 5-6, 654 N.W.2d 422; *Gowin v. Transgrud*, 1997 ND 226, ¶ 21, 571 N.W.2d 824 ("The result would be the same if the alleged error had not occurred."); N.D.R.Civ.P. 61.

i. Fraud or Deceit

[¶16] The jury instructions and verdict form regarding the affirmative defense of fraud or deceit are law of the case. [Opinion ¶ 16 ("*Duma v. Keena*, 2004 ND 104, ¶ 7, 680 N.W.2d 627 (stating party did not raise any

issues about jury instructions on appeal and the unopposed instructions became the law of the case)”; “[T]here are no specific objections to the final verdict form . . .”).

[¶17] The Court correctly states that United and Pauper argue there was no evidence to support the jury’s affirmative defense finding of fraud or deceit in favor of Continental. [Opinion ¶ 8; *see* Appellants’ Br. ¶ 68].

[¶18] The Opinion rejects United’s argument because there is sufficient clear and convincing evidence of fraud/deceit. [Opinion ¶¶ 21-23]. The jury’s answer to the fraud or deceit affirmative defense is entirely consistent with its findings on Continental’s fraud/deceit claims. Continental requests the jury’s distinct affirmative defense finding of fraud or deceit be considered and given effect to excuse Continental from United’s breach of contract counterclaim.

ii. Equitable Estoppel

[¶19] The trial court properly instructed the jury on equitable estoppel and United did not challenge the instruction or verdict form on appeal. [SuppA233; *see* Appellants’ Br. ¶ 69 (only arguing there was no evidence of equitable estoppel)]. Thus, as instructed, the defense of equitable estoppel is law of the case. [*See* Opinion ¶ 16].

[¶20] Equitable estoppel is based on false representations or conduct on which a party relies to its detriment. [SuppA233,248]. The Court acknowledges there is sufficient evidence of false representations to Continental. [Opinion ¶¶ 21-23]. And, Continental paid approximately \$9.5 million to United based on its false and fraudulent representations and conduct. [See Appellee Br. ¶ 78].

[¶21] It would be inequitable to allow United to maintain its breach of contract counterclaim in light of the jury's distinct affirmative defense finding of equitable estoppel in favor of Continental, the substantial evidence supporting that finding, and the harm suffered by Continental as a result of United's wrongful conduct. [Opinion ¶¶ 21-23; Appellee Br. ¶ 78; *see, e.g.*, Tr.789;821:24-822:22]. Continental requests the jury's affirmative defense finding of equitable estoppel be considered and given effect to excuse Continental from United's breach of contract counterclaim.

iii. Failure to Perform Conditions Precedent

[¶22] United's argument regarding Continental's affirmative defense of failure to perform conditions precedent is that the jury should not have been instructed on conditions precedent because "there is no issue in this case whether parties had a contract," and no evidence supports the defense. [Appellants' Br. ¶ 67]. As with the fraud/deceit and equitable estoppel

affirmative defenses, United's failure to challenge on appeal the instructions and verdict form regarding failure to perform conditions precedent makes this affirmative defense law of the case. [Opinion ¶ 16]. United's argument also overlooks that Oklahoma law, not North Dakota law, governs the contract. The Oklahoma Supreme Court holds:

A condition precedent of a contract is one which calls for the performance of some act or the happening of some event *after the contract is entered into* and upon the performance or happening of which its obligations are made to depend.

Rollins v. Rayhill, 191 P.2d 934, 937 (Okla. 1948).

[¶23] Thus, United's argument that the affirmative defense of failure to perform conditions precedent applies only to contract formation fails. Here, the contract was conditioned on Continental's satisfaction. [SuppA038 ("Contractor will perform . . . to the full and complete satisfaction of Continental. It is specifically understood that all service and work shall be performed *subject to* all the *terms and conditions of this Contract*) (emphasis added)]. The jury had ample evidence to find United failed to perform conditions precedent. [Tr.635:18-527:6;1210:16-23;2105:10-2110:1].

[¶24] Continental respectfully requests the jury's affirmative defense finding of failure to perform conditions precedent be considered and given effect to excuse Continental from United's breach of contract counterclaim.

III. At a Minimum, the Court’s Opinion and Judgment Should Be Clarified to Expressly Affirm Portions of the Proceedings Below.

[¶25] The Court expressly affirms the trial court’s summary judgment limiting United’s damages. [Opinion ¶¶ 29-39]. Continental requests the Opinion and Judgment clarify the Court’s affirmance of part of the proceedings below.

[¶26] The Opinion limits the reversal of the trial court judgment disposing of United’s claims to reversal of “United’s breach of contract claim against Continental.” [Opinion ¶ 28]. This is consistent with the fact that United did not challenge the disposition of any other cause of action on appeal. Matters not challenged on appeal from the trial court’s judgment are waived. *Darby v. Swenson, Inc.*, 2009 ND 103, ¶ 23, 767 N.W.2d 147.

[¶27] For example, the jury answered “No” to United’s promissory estoppel claim [SuppA249,no.17], and United did not challenge on appeal that finding or the trial court’s final judgment denying recovery to United on that claim. The Opinion also recognizes the trial court granted Continental’s summary judgment motion on United’s breach of fiduciary duty and constructive fraud counterclaims [Opinion ¶ 6], and United did not appeal those rulings. United also did not appeal from the disposition of its tortious breach of contract claim.

[¶28] At a minimum, and assuming Issues Nos. I and II are not granted, Continental requests clarification that the judgment is affirmed in part, and reversed in part, and that United's sole remaining claim on remand is breach of contract.

PRAYER

[¶29] Continental requests this Petition for Rehearing be granted. Because of the Court's specific holdings of no irreconcilable conflict between the breach of contract questions and fraud/deceit questions, and clear and convincing evidence of fraud, Continental requests the Court affirm the fraud/deceit verdict and judgment in favor of Continental. Continental also requests the Court consider and affirm the trial court's final judgment disposing of United's breach of contract counterclaim based on one or more of Continental's distinct affirmative defenses not addressed in the Opinion. At a minimum, Continental requests the Court's Opinion and Judgment be clarified to reflect the affirmance of portions of the proceedings below, and to expressly affirm the trial court's disposition of all causes of action not challenged by United on appeal.

DATED this 5th day of February, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2018, I electronically filed with the Clerk of the North Dakota Supreme Court the foregoing Petition for Rehearing, and served the Petition on the following via email:

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