

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

CASE NO. 20170066

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|------------------------------|---|
| Continental Resources, Inc., |) |
| |) |
| Appellee, |) |
| |) |
| vs. |) |
| |) |
| Counce Energy BC #1, LLC, |) |
| |) |
| Appellant. |) |
| |) |
| |) |

APPELLANT’S BRIEF

APPEAL FROM THE ORDER ON PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT, DATED MARCH 10, 2015; ORDER DENYING DEFENDANT’S MOTION FOR LEAVE TO AMEND ANSWER AND COUNTERCLAIM TO ALLEGE EXEMPLARY DAMAGES, DATED MAY 5, 2015; ORDER, DATED JANUARY 13, 2016; ORDER, DATED MARCH 31, 2016; ORDER ON MOTION IN LIMINE, DATED SEPTEMBER 16, 2016; ORDER DENYING DEFENDANT’S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, DATED DECEMBER 22, 2016; AMENDED ORDER FOR JUDGMENT ON JURY VERDICT, DATED JANUARY 23, 2017; AND AMENDED JUDGMENT ON JURY VERDICT, DATED JANUARY 24, 2017, BY THE HONORABLE JUDGE DANN GREENWOOD, SOUTH WEST JUDICIAL DISTRICT COURT, BILLINGS COUNTY, NORTH DAKOTA, CASE NO. 04-2013-CV-00015

David J. Smith #06610
Tyler J. Malm #07575
Smith Porsborg Schweigert
Armstrong Moldenhauer & Smith
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630
Attorneys for Appellant Counce Energy BC #1, LLC

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STATEMENT OF THE ISSUES

- [¶1] I. Whether the district court erred in depriving Counce of its constitutional and statutory right to defend and assert compulsory counterclaims against Continental's claims while also relieving Continental of its burden of proving its breach of contract claim at trial.
- II. Whether the district court erred in denying Counce's motion for judgment as a matter of law in light of Continental's failure to establish the essential elements of its breach of contract claim.
- III. Whether the district court erred in granting Continental's motion for partial summary judgment dismissing Counce's fraud claims.
- IV. Whether the district court erred in denying Counce's motion to correct the January 13, 2016 Order dismissing Counce's contract defenses and counterclaims *with prejudice* for lack of subject-matter jurisdiction.

STATEMENT OF THE CASE

[¶2] This appeal arises from an action commenced by Continental Resources, Inc. ("Continental") against Counce Energy BC #1, LLC ("Counce") to recover expenses allegedly incurred in the drilling and operation of the Burian 1-27H well located in Billings County, North Dakota (also referred to as the "Subject Well"). As the operator, Continental is required to drill and operate the Subject Well in a manner so as to protect the correlative rights of all interested parties, incur the cost of such operations, and distribute the proceeds from the operation to the working interest owners (including Counce) in proportion to their respective interests in the well. In turn, the non-operating working interest owners are required to "reimburse" Continental for their respective share

of the “reasonable actual cost of drilling and operating the well, plus a reasonable charge for supervision.” As a defense and in support of its compulsory contract-based counterclaims, Counce asserted the amounts sought to be recovered by Continental exceeded the reasonable actual cost of drilling and operating the Subject Well. (App. 037-053; 098-120). However, due to the district court’s various rulings being challenged in this appeal, Counce was denied its right to defend against Continental’s claims, or otherwise present evidence in support of its counterclaims to the jury.

[¶3] Continental commenced litigation against Counce in September 2013 to foreclose upon an oil and gas production lien for the alleged non-payment of drilling and operating expenses for the Subject Well. (App. 001 at Docket # 1-3). As a defense and compulsory counterclaim to the validity of the lien claimed by Continental, Counce (among other claims) asserted the amounts sought to be recovered by Continental were not the reasonable actual cost of drilling and operating the Subject Well, plus a reasonable charge for supervision. (App. 037-053). In March 2014, Continental amended its complaint to withdraw its lien foreclosure claim and substitute causes of action sounding in contract. (App. 088-97). Counce again raised its defenses and compulsory counterclaims in response thereto. (App. 098-120).

[¶4] In November 2014, Continental moved for partial summary judgment in relation to Counce’s fraud, breach of fiduciary duty, and abuse of process counterclaims. (App. 004 at Docket # 88-99). Prior to a ruling on that motion, Counce submitted a motion in February 2015 requesting leave to allege exemplary damages against Continental. (App. 006 at Docket # 187-190). On March 10, 2015, the district court entered an order on Continental’s motion for partial summary judgment dismissing Counce’s fraud and

breach of fiduciary duty counterclaims. (App. 181). On May 6, 2015, the district court entered an order denying Counce's motion for leave to allege exemplary damages in connection with its remaining tort claim for abuse of process. (App. 192). Because Counce's fraud and breach of fiduciary duty claims had been dismissed on summary judgment, the district court did not address exemplary damages in relation to those claims. (App. 182-191).

[¶5] In anticipation of trial scheduled for November 17, 2015, a pretrial conference was held on November 9, 2015. (App. 009). On November 12, 2015, the district court scheduled a status conference to address an issue raised *sua sponte* concerning exhaustion of administrative remedies and the court's subject-matter jurisdiction. (App. 203 at ¶ 2). The Court permitted the parties to file briefs on the issue by November 14, 2015. (*Id.*) In light of the district court's preliminary conclusion that it lacked jurisdiction over the parties' respective claims, the Court entered an order continuing the trial and allowing thirty (30) days for the parties to submit additional briefing on the issue. (App. 203-209).

[¶6] After a second round of briefing, the district court issued a memorandum opinion on December 22, 2015 and entered an order on January 13, 2016 as follows: (1) finding subject matter jurisdiction over Continental's contract claims and that Continental was not required to exhaust administrative remedies before asserting those claims in court; (2) finding a lack of subject matter jurisdiction over Counce's contract defenses/counterclaims and dismissing said claims *with prejudice*; (3) precluding Counce from asserting or offering any evidence, either as a defense or in support of a counterclaim, that the expenses Continental incurred in drilling and operating the Subject Well were not reasonable actual expenses; (4) dismissing both parties' unjust enrichment

claims; and (5) rescheduling trial to commence on September 20, 2016. (App. 210-221). In response to an objection by Counce to Continental's proposed order, the district court also issued a clarification of its memorandum decision regarding subject matter jurisdiction on January 13, 2017. (App. 222-227).

[¶7] On January 18, 2016, Counce submitted a motion to correct the January 13, 2016 order on the grounds that Counce's contract defenses/counterclaims were improperly dismissed *with prejudice* after the district court concluded it did not have subject-matter jurisdiction to adjudicate those claims. (App. 010 at Docket # 348-352). Counce further requested to stay the district court proceedings pending a determination by the North Dakota Industrial Commission ("NDIC") of the reasonable actual costs of the Subject Well. (Id.) The district court issued a memorandum opinion on Counce's motion and entered an order denying said motion on March 31, 2016. (App. 228-239).

[¶8] On September 9, 2016, Continental submitted a motion in limine based on the jurisdictional rulings of the court. (App. 011 at Docket # 380-387). The district court entered an order on September 16, 2016, precluding Counce from challenging or offering any evidence of whether the costs charged by Continental in the drilling of the Subject Well were reasonable actual expenses or that they were not exclusively for the Subject Well (either as a defense to Continental's claims or in support of Counce's counterclaims), and precluding Counce from offering any evidence regarding whether the allocation of expenses incurred by Continental in the drilling of the Subject Well (and other wells) was correct. (App. 240-250). As a result of the district court's pre-trial rulings, Counce was effectively stripped of its ability to defend against Continental's claims or prosecute substantive counterclaims, and was forced into a trial with its hands

metaphorically tied behind its back. This negatively impacted Counce's ability to show both its damages and the ulterior motives of Continental regarding Counce's abuse of process counterclaim.

[¶9] A jury trial in this case was held on September 20-22, 2016, at the Billings County Courthouse, before the Honorable Judge Dann Greenwood. (App. 011); (9/20/16 Tra. P. 1-177); (9/21/16 Tra. P. 178-414); (9/22/16 Tra. P. 416-578). After the parties had rested their respective cases, competing motions for judgment as a matter of law were heard and subsequently denied by the court. (9/22/16 Tra. P. 505-517). In support of its motion, Counce argued Continental had failed to satisfy its burden of proof in relation to its breach of contract claim and that Continental presented no evidence of actual payment of the amounts for which it sought reimbursement from Counce. (Id. at P. 510-516). Over the objection of Counce to the presentation of additional evidence, the court permitted Continental to re-call a "rebuttal" witness (although merely to elicit testimony as to the subject-matter of Counce's motion for judgment as a matter of law and not as a rebuttal to Counce's only trial witness). (Id. at P. 518-522, 525-531). After closing arguments and deliberation, the jury found against Counce on its abuse of process claim and for Continental on its breach of contract claim returning a verdict in the amount of \$153,333.50. (App. 011 at Docket # 402).

[¶10] An order for judgment and judgment on the jury verdict were entered on October 11, 2016. (App. 275-278). However, because certain costs and disbursements were improperly taxed in the judgment, including Continental's attorney travel/meal expenses and miscellaneous expenses, Counce submitted an objection to Continental's claimed costs and disbursements. (App. 013 at Docket # 480-481). On October 26, 2016, Counce

also submitted a renewed motion for judgment as a matter of law which was denied by the district court on December 22, 2016. (App. 284-294). On January 13, 2017, the district court sustained Counce's objections to Continental's claimed costs and disbursements and entered an amended order and amended judgment on the jury verdict on January 24, 2017. (App. 295-305). Counce submitted its notice of appeal in this matter on February 20, 2017. (App. 306-307).

STATEMENT OF THE FACTS

[¶11] Continental is the operator of the drilling spacing unit comprised of Sections 27 and 34 in Township 141N, Range 99W located in Billings County, North Dakota, wherein the Subject Well is located. (9/20/16 Tra. P. 50-51). Continental is also the owner of a 62% working interest in the Subject Well. (Id. at P. 53). Counce is the owner of a 12.5% working interest in the Subject Well. (Id.)

[¶12] It is undisputed a contract exists between Continental and Counce as imposed by NDIC Pooling Order 18497 issued pursuant to N.D.C.C. Chapter 38-08 and N.D.A.C. Article 43-02. (App. 011 at Docket # 404). The contract between the parties is not a typical arms-length negotiated agreement, but was prescribed by the statutory and regulatory scheme setting forth the duties and benefits of the operator and the non-operating working interest owners. (Id.) The operator is required to invite the non-operating working interest owners to participate in the drilling of a well which must be accepted or rejected upon terms prescribed by the applicable statutes and regulations. (Id.)

[¶13] By letter dated November 1, 2011, Continental invited Counce to participate as a 12.5% working interest owner in the Subject Well. (App. 004 at Docket # 103). The

letter included an attached Authority for Expenditure (AFE) and the statement: “As set forth in the enclosed AFE for the “Burian 1-27H”, the estimated total costs for this operation are \$8,329,000.” (Id.) That AFE included a contingency line item of \$334,000 leaving a hard cost AFE of \$7,995,000. (Id.) The letter also enclosed an invoice billing Counce \$1,041,125 for its share of the total, including the contingency line item of \$334,000. (Id.) That invoice demanded payment in full within fifteen (15) days of receipt and such prepayment is not required by North Dakota law. (Id.); (9/20/16 Tra. P. 71-75).

[¶14] As of May 2012, Counce had, in good faith, paid all of the billing statements it had received, totaling \$1,159,963. (9/21/16 Tra. P. 326-327). This amount was \$118,838 or 11.4% over the total AFE. (App. 004 at Docket # 103). Counce paid all of those invoices despite Continental’s numerous and prolonged errors in billing, crediting the wrong entity, and accounting discrepancies. (Id. at Docket # 101). Continental continued to bill for additional capital expenses which Counce declined to pay without substantiation for the overages. (Id.) The additional capital expenses Continental charged to the well totaled approximately \$1,224,000. (Id.) Counce’s share of that amount was \$153,000 which is what Continental sued to recover in this litigation. (App. 88-97). Continental never substantiated any of those excess charges despite repeated requests from Counce. (App. 004 at Docket # 101). Continental asserted, in an email, that there was one unforeseen event which was an aborted first frack attempt resulting in \$400,000 of additional charges, but never provided any additional substantiation for that amount. (Id.)

[¶15] As a result of the district court’s pre-trial rulings discussed above, Counce was prevented from defending against Continental’s breach of contract claim at trial. (App. 210-250). Additionally, the court’s limine ruling (interpreted as preventing Counce from discussing any AFE amounts) eviscerated Counce’s presentation of its abuse of process claim both as to damages and Continental’s ulterior purpose. (App. 240-250); (9/20/16 Tra. P. 69-71).

LAW AND ARGUMENT

I. THE DISTRICT COURT’S JURISDICTIONAL RULINGS DEPRIVED COUNCE OF ITS RIGHT TO DEFEND AGAINST AND ASSERT COMPULSORY COUNTERCLAIMS AGAINST CONTINENTAL’S CLAIMS WHILE ALSO RELIEVING CONTINENTAL OF ITS BURDEN OF PROVING ITS BREACH OF CONTRACT CLAIM AT TRIAL.

A. Standard of Review

[¶16] Counce appeals the district court’s *Order*, dated January 13, 2016, finding a lack of subject-matter jurisdiction to adjudicate Counce’s defenses and compulsory counterclaims, and precluding Counce from asserting or offering evidence that expenses incurred by Continental were not “reasonable actual” costs of drilling and operating the Burian 1-27H well, “plus a reasonable charge for supervision.” (App. 220-221). Counce also appeals the district court’s *Order on Motion in Limine*, dated September 16, 2016, based on the district court’s jurisdictional ruling precluding Counce from offering any evidence of whether the expenses incurred by Continental in the drilling of the Subject Well were “reasonable actual expenses” (either as a defense to Continental’s claims or in support of Counce’s counterclaims), and precluding Counce from offering any evidence regarding whether the allocation of expenses incurred by Continental in the drilling of the Subject Well (and other wells) was correct. (App. 240-250).

[¶17] The facts regarding this issue are not disputed by the parties as the jurisdictional and limine rulings are based upon the district court's interpretation of N.D.C.C. Chapter 38-08. (App. 210-219, 222-227). It is well settled under North Dakota law that challenges to a district court's subject matter jurisdiction are reviewed de novo when the jurisdictional facts are not in dispute. Schirado v. Foote, 2010 ND 136, ¶ 7, 785 N.W.2d 235. Similarly, a court's interpretation of a statute is a question of law which this Court reviews de novo. Olson v. Job Serv. N. Dakota, 2013 ND 24, ¶ 3, 827 N.W.2d 36.

B. In response to Continental's decision to pursue its contract claims in district court, Counce was required to raise its defenses and compulsory counterclaims to which the district court's subject-matter jurisdiction attached.

[¶18] "Subject-matter jurisdiction is the court's power to hear and determine the general subject involved in the action." Trottier v. Bird, 2001 ND 177, ¶ 6, 635 N.W.2d 157. "Subject-matter jurisdiction is derived from the constitution and the laws, and cannot be conferred by agreement, consent or waiver." Id. "For subject-matter jurisdiction to attach, 'the particular issue to be determined must be properly brought before the court in the particular proceeding.'" Id. (quoting Reliable, Inc. v. Stutsman County Comm'n, 409 N.W.2d 632, 634 (N.D. 1987)). "The constitutional grant of original jurisdiction to the district court creates a court of general jurisdiction with the power to determine all controversies which can possibly be made the subject matter of a civil action." Citibank (S. Dakota), N.A. v. Peterson, 2011 ND 86, ¶ 13, 797 N.W.2d 312.

[¶19] Continental commenced an action against Counce in September 2013 to foreclose upon an oil and gas production lien for alleged non-payment of drilling and operating costs for the Burian 1-27H well. (App. 001 at Docket # 1-3). Continental chose the forum as the plaintiff bringing its claims in district court. Accordingly, as required by

N.D.R.Civ.P. 12(b) and N.D.R.Civ.P. 13(a), Counce was compelled to assert every defense to Continental's claims, together with all compulsory counterclaims arising out of the transaction or occurrence that was the subject matter of Continental's claims. *See* N.D.R.Civ.P. 12(b) ("Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required."); *See also* N.D.R.Civ.P. 13(a) (A pleading must state as a counterclaim any claim that – at the time of its service – the pleader has against any opposing party, if the claim...arises out of the transaction or occurrence that is the subject matter of the opposing party's claim).

[¶20] As a defense and compulsory counterclaim to the validity of the lien claimed by Continental, Counce (among other claims) asserted the amounts sought to be recovered by Continental's lien foreclosure were not the "reasonable actual" cost of drilling and operating the Burian 1-27H well, as required to be pled in its responsive pleading under Rules 12(b) and 13(a). (App. 037-053). In March 2014, Continental amended its complaint to withdraw its lien foreclosure claim and substitute causes of action based in contract. (App. 88-97). In doing so, Continental re-affirmed its choice of forum and Counce was again compelled to assert its defenses and compulsory counterclaims. (App. 098-120).

[¶21] It is undisputed a contract exists between Continental and Counce as imposed by NDIC Pooling Order 18497 issued pursuant to N.D.C.C. Chapter 38-08 and N.D.A.C. Article 43-02. (App. 011 at Docket # 404). For its breach of contract claim, Continental specifically alleged that "Continental and Counce entered into a valid and binding contract under which Continental agreed to charge Counce, and Counce agreed to pay, its share of reasonable actual costs of drilling and operating the Burian 1-27H well, plus a

reasonable charge for supervision.” (App. 090 at ¶ 11). There can be no question that Continental’s breach of contract claim relates to the reasonable actual costs of drilling and operating the Subject Well as Continental sought to recover expenses it claimed were due and owing under its contract with Counce. (App. 88-97).

[¶22] “A breach of contract is the nonperformance of a contractual duty when it is due.” Barrett v. Gilbertson, 2013 ND 35, ¶ 7, 827 N.W.2d 831. Counce’s contractual duty was to “reimburse” Continental for its proportionate share of the reasonable actual costs of drilling and operating the Burian 1-27H well, plus a reasonable cost for supervision.” (App. 011 at Docket # 404) (“The working interest owners shall reimburse the operator for their proportionate share of the reasonable actual cost of drilling and operating said well, plus a reasonable charge for supervision.”). Accordingly, in order for Continental to establish a breach of contract, it was required to prove what the reasonable actual costs of drilling and operating the Burian 1-27H well actually were; that all of said costs were actually paid by Continental; and that Counce failed to reimburse Continental for its proportionate share of said costs. This is the fundamental flaw of the district court’s jurisdictional ruling as the respective claims of both parties in this case equally concern the “reasonable actual” costs of drilling and operating the Subject Well and Continental’s contract claims should therefore not have been tried to the exclusion of Counce’s contract defenses and compulsory counterclaims on the same issue.

[¶23] The district court’s January 13, 2016 *Order*, finding subject-matter jurisdiction over Continental’s contract claims to the exclusion of Counce’s contract defenses and compulsory counterclaims, deprived Counce of its right to defend against Continental’s claims under Rule 12(b), and the requirement that Counce raise its compulsory

counterclaims arising from the subject-matter of Continental's claims under Rule 13(a). This was a deprivation of Counce's right to equal protection of the law under the Fourteenth Amendment of the United States Constitution.

[¶24] Nor should N.D.C.C. Chapter 38-08 be interpreted as depriving the district court of its original jurisdiction to adjudicate defenses and compulsory counterclaims required to be raised in response to an operator's "private right of action" under N.D.C.C. Chapter 38-08. The district court issued a Memorandum Opinion on December 22, 2015, concerning its subject-matter jurisdiction over the parties' respective claims finding a "private right of action" on behalf of operators to commence litigation to collect payment from other owners for their proportionate share of expenses. (App. 210-219). Such an interpretation, however, goes beyond the specific remedy provided by N.D.C.C. Chapter 38-08 in permitting a lien and foreclosure remedy to operators. *See* N.D.C.C. § 38-08-08(2); N.D.C.C. § 38-08-10. Based on the plain language of N.D.C.C. Chapter 38-08, the only possible "private right of action" is for operators to enforce a lien via the foreclosure process described. *Id.*

[¶25] The district court's overly expansive interpretation of an operator's private right of action under N.D.C.C. Chapter 38-08 was contrary to the preliminary finding it made in its November 14, 2015 order explaining that because Continental was fully aware of Counce's challenge to the claimed well costs as not reasonable and/or actual before commencing action in district court, N.D.C.C. § 38-08-08(2) should not be interpreted to preclude Counce from defending against an operator's pursuit of a lien under N.D.C.C. Chapter 38-08. (App. 205-207). Specifically, the district court stated as follows:

The Court refuses to believe that the Legislature intended or anticipated by allowing for pursuit of a lien that the

owner, with full knowledge that the costs for which it was seeking the lien were disputed as not reasonable and/or actual, could not only seek that lien but preclude the responsible party from defending against the same by asserting that such costs were not reasonable or actual.

(App. 207).

[¶26] In interpreting the language of N.D.C.C. Chapter 38-08, statutes are to be construed in a practical manner with a presumption the legislature did not intend an absurd or ludicrous result. *See State v. Brossart*, 2015 ND 1, ¶ 23, 858 N.W.2d 275. However, the district court's interpretation of N.D.C.C. § 38-08-08(2) and N.D.C.C. § 38-08-10 as depriving the district court of its jurisdiction to adjudicate defenses and compulsory counterclaims in response to an operator's "private right of action" results in an absurdity. Under the district court's construction, an operator would never have an enforceable lien remedy without first proceeding before the NDIC because an essential element of a lien foreclosure action requires proving the alleged lien amount is actually due and owing. *See e.g.* 51 Am. Jur. 2d Liens § 13 ("As a lien is a right to encumber property until a debt is paid, it presupposes the existence of a debt" and "[i]f there is no debt in the first instance, there is no need for a lien, so a lien cannot legally exist or attach.").

[¶27] As provided by N.D.C.C. Chapter 38-08, the proper lien amount in this case is the "reasonable actual" costs of drilling and operating the well together with "a reasonable cost for supervision." *See* N.D.C.C. § 38-08-08(2). If the district court were unable to determine such costs, no lien could ever be foreclosed upon by an operator without a prior cost determination by the NDIC. Certainly, the lien foreclosure remedy provided by the Legislature under N.D.C.C. Chapter 38-08 was intended to be effective without

prior mandatory NDIC proceedings. In this regard, both N.D.C.C. §§ 38-08-08(2) and 38-08-10 can be given full effect if construed together as recognizing the concurrent jurisdiction of the NDIC.

[¶28] Accordingly, while N.D.C.C. Chapter 38-08 authorizes the NDIC to make cost determinations in the cases before it, such jurisdiction is not exclusive where an operator elects to proceed in district court and N.D.C.C. Chapter 38-08 should not be interpreted as depriving the district court of its original jurisdiction to adjudicate defenses and compulsory counterclaims required to be raised in response to an operator's "private right of action" under N.D.C.C. Chapter 38-08.

[¶29] Lastly, upon raising its contract defenses and compulsory counterclaims in response to Continental's commencement of proceedings in district court, Counce was deprived of its right to a trial by jury as demanded. The North Dakota Rules of Civil Procedure provides that "[t]he right of trial by jury as declared by the Constitution of the United States or by the Constitution of the State of North Dakota – or as provided by a statute of the United States or of the State of North Dakota –is preserved to the parties inviolate." N.D.R.Civ.P. 38(a).

[¶30] In this case, Counce specifically demanded a jury trial as provided by Rule 38 in its original *Answer and Counterclaim* and again in its *Answer and Counterclaim to Amended Complaint*. (App. 002 at Docket # 7, 25). As discussed above, Counce was required to and properly raised its defenses and compulsory counterclaims to which the district court's subject-matter jurisdiction attached, and Counce was further entitled to a jury trial on its claims as demanded.

C. The district court's limine ruling erroneously and unfairly restricted Counce's ability to defend against Continental's contract claim and from pursuing its abuse of process counterclaim.

[¶31] As a result of the district court's order on Continental's motion in limine, dated September 16, 2016, Counce was precluded from presenting all of its responses to Continental's billings which mentioned the AFE amounts for various cost codes and the fact that billings for almost every cost code far exceeded what Continental had presented as its best estimate of the costs when it presented the invitation to participate. (App. 240-250). With almost each such response Counce requested substantiation of the excess. (App. 004 at Docket # 101). While the AFE amounts might not have been a hard *contractual* amount, they were certainly admissible as Continental's *best estimate of what was reasonable* as of two weeks before drilling began and it was error to refuse to admit them. See Gadeco v. Industrial Commission, 2013 ND 72, ¶ 5, 830 N.W.2d 535 (“Requiring the invitation to participate *to include an itemization of the estimated costs of drilling and completion will allow working interest owners to calculate their financial responsibility necessary to participate in the well.*”) (Emphasis added).

[¶32] “An AFE is an estimate of expected costs to drill and complete the well, but it is common place to have some costs overestimated or underestimated, due to various conditions encountered during the location preparation, drilling, and completion of the well.” Gadeco, 2013 ND 72, ¶ 5, 830 N.W.2d 535. This Court indicated in reference to a prior appeal of the Gadeco case that “[t]he argument that immaterial or insubstantial changes do not necessitate a new amended invitation to participate is compatible with the administrative requirements for the ‘estimated’ costs and the ‘approximate’ spud date under N.D. Admin. Code § 43-02-03-16.3(1)(a)(2) and (3).” Id. at ¶ 4 (citing Gadeco v.

Industrial Commission, 2012 ND 33, ¶ 20, 812 N.W.2d 405). In this case, however, the excess charges by Continental to Counce were not “immaterial” or “insubstantial” as many of the amounts charged appeared to be double (and some nearly triple) the AFE amount. (App. 004 at Docket # 116). The alleged overall costs far exceeded the AFE for hard costs of \$7,995,000 and a line item of \$334,000 for contingencies for a total of \$8,329,000, which was a part of the agreement between Continental and Counce. (App. 004 at Docket # 101, ¶ 13, 22-23). Counce’s 12.5% share of that total amount should have been \$1,041,125.

[¶33] In June 2012, Counce (frustrated after months of trying to get explanations for the excessive charges without success) refused to pay further capital costs until a satisfactory explanation was received. (App. 004 at Docket # 101, ¶ 18). At this point, Counce had already paid \$1,159,963 towards the capitalized drilling and completion cost of the well. (Id.) That amount is Counce’s 12.5% share of total billed well costs of \$9,279,704. The \$9,279,704 represents \$7,995,000 of the AFE hard costs plus the \$334,000 of AFE contingencies plus the \$400,000 cost of the unforeseen aborted frack attempt plus \$550,704 of additional costs charged but never substantiated by Continental. Accordingly, Counce’s counterclaim sought a refund of all payments it made in excess of the reasonable actual costs. (App. 115-116 at ¶ 101-102, 106). The district court’s failure to admit evidence of the AFE amount and excess amounts paid by Counce without any substantiation (justifying Counce’s refusal to pay further capital costs without substantiation) made Counce appear to be a deadbeat instead of a conscientious and good faith working interest owner.

[¶34] Also as a result of the district court’s limine ruling, Counce was further precluded from discussing the *Gas Purchase, Gathering, Treating and Processing Agreement* between Bear Paw Energy, LLC and Continental (proposed at trial as Exhibit CK) which was the basis of the invoice entered into evidence as Exhibit DK. (9/22/16 Tra. P. 446-448); (App. 013 at Docket # 470). Based on the foregoing, the district court’s limine ruling erroneously restricted Counce’s ability to defend against Continental’s contract claim and from pursuing its abuse of process counterclaim.

D. Continental was improperly relieved of its burden of proving the essential elements of its breach of contract claim at trial.

[¶35] As a result of the district court’s interpretation of the January 13, 2016 *Order*, Continental was inexplicably relieved of its burden of proving the essential elements of its breach of contract claim at trial. As indicated above, “[a] breach of contract is the nonperformance of a contractual duty when it is due.” Barrett, 2013 ND 35, ¶ 7, 827 N.W.2d 831. In order to establish a breach of contract, the party asserting the breach must prove: (1) the existence of a contract; (2) a breach of the contract; and (3) damages which flow from the breach. Id. (citing WFND, LLC v. Fargo Marc, LLC, 2007 ND 67, ¶ 13, 730 N.W.2d 841).

[¶36] As to the contract between the parties, Continental (as the operator of the well) is obligated to drill and operate the Burian 1-27H well, incur the cost of that operation, and distribute the proceeds of the well with the non-operating working interest owners according to their proportional interests. (App. 011 at Docket # 404). In turn, Counce’s obligation under the contract is to “reimburse Continental for its proportionate share of the reasonable actual cost of drilling, completing, and operating said well, plus a reasonable charge for supervision.” (Id.) As discussed above, the contract between

Continental and Counce is imposed by law pursuant to the requirements of N.D.C.C. Chapter 38-08, N.D.A.C. Article 43-02, and NDIC Pooling Order 18497. (App. 011 at Docket # 404). It is undisputed that Counce is not a party to a separate joint operating agreement with Continental. (9/22/16 Tra. P. 463-464).

[¶37] Accordingly, in order to establish a breach of contract, Continental was required to prove Counce failed to perform its contractual duty of reimbursing Continental for its 12.5% share of the *reasonable actual* costs of drilling and operating the Burian 1-27H well plus a *reasonable* charge for supervision. This necessarily requires establishing what the reasonable actual costs of drilling and operating the Burian 1-27H well actually are, that Continental had paid them, and that Counce failed to reimburse Continental for its proportionate share of that amount. These were essential elements of Continental's breach of contract claim upon which Continental bore the burden of proof at trial. Without proving what the reasonable actual cost of drilling and operating the Burian 1-27H well actually were, Continental cannot show that Counce failed to perform a contractual duty.

[¶38] Although the district court's jurisdictional ruling prevented Counce from challenging whether Continental's claimed expenditures were "reasonable actual," nothing relieves Continental of its burden of proving the necessary elements of its breach of contract claim. At trial, Continental failed to produce any witness with personal knowledge that each of the costs asserted by Continental was for work/services actually performed in the drilling, completing, and operating of the Burian 1-27H well, or that they were a reasonable actual charge to the Burian 1-27H well.

[¶39] Throughout this entire dispute, and even prior to the commencement of formal proceedings, Continental has taken the approach of shifting its burden onto Counce to disprove Continental's billings. The district court effectively permitted this strategy to continue through trial as a result of its jurisdictional rulings. (App. 210-250). As the plaintiff, Continental bore the burden of establishing each and every element of its contract claim; there is no shifting of that burden to Counce to disprove those elements. However, because Continental did not establish what the reasonable actual cost of drilling and operating the Burian 1-27H well actually were, it failed as a matter of law to establish a breach of contract by Counce or the amount of its claimed damages.

[¶40] Furthermore, Continental presented no evidence at trial sufficient to show actual payment of the amounts for which it sought reimbursement from Counce. As indicated above, under the contract Counce is obligated only to *reimburse* Continental for its proportionate share of the cost of drilling and operating the Burian 1-27H well, plus a reasonable charge for supervision, and is not obligated to pay any amount if Continental has failed to prove actual payment by Continental. (App. 011 at Docket # 404).

[¶41] In sum, the district court's jurisdictional ruling improperly relieved Continental of proving the essential elements of its breach of contract claim at trial: (1) the reasonable actual costs of drilling and operating the Burian 1-27H well, together with the reasonable costs of supervision; (2) that all of said costs were actually paid by Continental; and (3) that Counce failed to reimburse Continental for its proportionate share of said costs.

II. CONTINENTAL FAILED TO PRESENT A LEGALLY SUFFICIENT EVIDENTIARY BASIS FOR THE JURY TO FIND FOR CONTINENTAL ON ITS BREACH OF CONTRACT CLAIM AND THE DISTRICT COURT ERRED IN DENYING COUNCE'S MOTION FOR JUDGMENT AS A MATTER OF LAW.

A. Standard of Review.

[¶42] Counce appeals the district court's *Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law*, dated December 22, 2016, denying its renewed Rule 50 motion for judgment as a matter of law. (App. 294). A trial court's decision on a motion for judgment as a matter of law is fully reviewable on appeal. Amyotte ex rel. Amyotte v. Rolette Cty. Hous. Auth., 2003 ND 48, ¶ 15, 658 N.W.2d 324.

B. In order to prevail on its breach of contract claim, Continental was required to establish the reasonable actual costs of drilling and operating the Burian 1-27H well, together with the reasonable costs of supervision; that all of said costs were actually paid by Continental; and that Counce failed to reimburse Continental for its proportionate share of said costs.

[¶43] On October 26, 2016, Counce submitted its renewed motion for judgment as a matter of law under Rule 50. (App. 013 at Docket # 482-484). Rule 50(b) of the North Dakota Rules of Civil Procedure specifically allows for the renewal of a motion for judgment as a matter of law following trial. *See* N.D.R.Civ.P. 50(b) (discussing renewal of a motion for judgment as a matter of law after trial). In denying Counce's renewed motion for judgment as a matter of law, the district court erred by failing to require Continental to prove its claimed expenditures were reasonable actual costs of drilling and operating the Burian 1-27H well, and that those costs had actually been paid by Continental. Both of these are essential elements of Continental's breach of contract claim which were never addressed at trial.

[¶44] The applicable legal standard governing motions for judgment as a matter of law is set forth by Rule 50(a) which provides that “[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: (A) resolve the issue against the party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.” N.D.R.Civ.P. 50(a)(1). In order to survive a Rule 50 motion, “[t]he evidence must be sufficient with regard to each essential element of the claim.” Perry v. Reinke, 1997 ND 213, ¶ 13, 570 N.W.2d 224. “A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury...and must specify the judgment sought and the law and facts that entitle the moving party to the judgment.” N.D.R.Civ.P. 50(a)(2).

[¶45] As discussed above, Continental failed to present sufficient evidence at trial to establish each essential element of its breach of contract claim. “A breach of contract is the nonperformance of a contractual duty when it is due.” Barrett, 2013 ND 35, ¶ 7, 827 N.W.2d 831. In order to establish a breach of contract, the party asserting the breach must prove: (1) the existence of a contract; (2) a breach of the contract; and (3) damages which flow from the breach. Id. In order for Continental to have survived Counce’s Rule 50 motion, “[t]he evidence must be sufficient with regard to each essential element” of its breach of contract claim. Perry, 1997 ND 213, ¶ 13, 570 N.W.2d 224.

[¶46] In order for Continental to establish a breach of contract by Counce, it was required to prove Counce failed to perform its contractual duty of *reimbursing* Continental for its share of the *reasonable actual* costs of drilling and operating the

Burian 1-27H well plus a reasonable charge for supervision. This was an essential element of Continental's breach of contract claim upon which Continental bore the burden of proof at trial. Accordingly, without proving what the reasonable actual cost of drilling and operating the Burian 1-27H well actually were, Continental cannot show that Counce failed to perform a contractual duty. Again, although the district court's jurisdictional rulings prevented Counce from challenging whether Continental's claimed expenditures were "reasonable actual," nothing in the Court's rulings relieved Continental of its burden of proving the necessary elements of its breach of contract claim. Continental failed to present a legally sufficient evidentiary basis for the jury to find for Continental on its breach of contract claim and the district court erred in denying Counce's motion for judgment as a matter of law.

[¶47] Nor did Continental present evidence at trial sufficient to show actual payment of the amounts for which it sought reimbursement from Counce. Under its contract with Continental, Counce is obligated only to *reimburse* Continental for its proportionate share of the cost of drilling and operating the Burian 1-27H well, plus a reasonable charge for supervision, and is not obligated to pay any amount if there is no evidence of actual payment by Continental. (App. 011 at Docket # 404). In this regard, another essential element of Continental's breach of contract claim was to prove it had actually paid the amounts for which it sought reimbursement from Counce.

[¶48] Despite the district court's finding that "payment is not a prerequisite for the right of reimbursement," it went on to conclude that the evidence presented by Continental at trial was "sufficient to create an issue of fact about whether Continental actually paid the costs for which it seeks reimbursement and that such evidence is sufficient to support the

verdict in that respect.” (App. 287-288). The district court did not identify the evidence upon which it relied beyond stating that this was the Court’s conclusion after viewing the evidence in the light most favorable to Continental, and accepting the truth of the evidence presented by Continental and the truth of all reasonable inferences from that evidence which support the verdict “regardless of whether or not [the Court] considers the rebuttal testimony of Continental’s witness, Kristy Brown.” (Id.) At trial, however, Continental failed to produce a witness with personal knowledge that each of the charges had, in fact, been paid by Continental. Although Kristy Brown was permitted to testify as to her belief that some of the invoices had been paid, it was clear on cross-examination she had no personal knowledge of any actual payments made by Continental and there was no documentation evidencing payment of any of the invoices billed to the Subject Well. (9/22/16 Tra. P. 528-531).

[¶49] Even Ms. Brown’s testimony is subject to additional scrutiny as her testimony on this issue was solicited only after the close of evidence with both parties having rested their cases and expressing to the district court there was no rebuttal. (9/22/16 Tra. P. 504-531). Furthermore, Ms. Brown’s testimony was given after having been present in the courtroom throughout the duration of oral argument on the parties’ competing motions for judgment as a matter of law (despite having been previously excluded under N.D.R.Ev. 615 and discharged as a witness). (Id.) There is no North Dakota law or procedural rule which allows a party to re-open testimony following a Rule 50 motion made after the close of evidence. Although labeled by Continental and the district court as a “rebuttal” witness, Ms. Brown was not called as a rebuttal to the testimony of Counce’s only witness, Richard Counce, who did not testify about Continental’s

nonpayment of invoices. (Id.) Rather, the only purpose of Ms. Brown's testimony was as a direct response to Counce's motion for judgment as a matter of law and argument that Continental had failed to prove it had actually paid the amounts for which it sought reimbursement from Counce. (Id.)

[¶50] Despite Ms. Brown being permitted to testify, as indicated above, it was clear she had no personal knowledge of actual payment made by Continental, and there was no documentation or other witness presented at trial capable of proving actual payment by Continental of any of the invoices for which it sought reimbursement from Counce. (9/22/16 Tra. P. 528-531). In sum, Continental failed to present evidence at trial sufficient to establish each essential element of its breach of contract claim and the district court erred in denying Counce's motion for judgment as a matter of law.

III. THE DISTRICT COURT ERRED IN GRANTING CONTINENTAL'S MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSING COUNCE'S FRAUD CLAIMS.

A. Standard of Review.

[¶51] Counce appeals the district court's *Order on Plaintiff's Motion for Partial Summary Judgment*, dated March 10, 2015, dismissing its fraud claims against Continental. (App. 181). Whether the district court properly granted summary judgment is a question of law which this Court reviews de novo on the entire record. Krenz v. XTO Energy, Inc., 2017 ND 19, ¶ 17, 890 N.W.2d 222.

B. Counce's fraud claims exist independently of its breach of contract claim, and genuine questions of material fact exist precluding summary judgment as to whether Continental's conduct in this case constitutes fraud.

[¶52] Pursuant to its *Memorandum Opinion* on Continental's motion for partial summary judgment, dated February 24, 2015, the district court concluded Continental

was entitled to summary judgment on Counce's fraud claim regarding Continental's misrepresentations/omissions about the propriety of expenses attributed to the Burian 1-27H well. (App. 166-168). In granting summary judgment on this claim, the district court concluded that Counce's tort-based fraud claim was dependent upon its breach of contract claim "in the sense that the contract determines whether Continental is or is not entitled to what Counce alleges that Continental fraudulently sought payment from Counce." (Id.)

[¶53] As a general rule, in order for a party to bring tort and contract claims as part of the same action, the tortious conduct must exist independently of a breach of contract. *See Seifert v. Farmers Union Mut. Ins. Co.*, 497 N.W.2d 694, 696 (N.D. 1993). Although a tort is not committed merely by breaching a contract, *a tort may occur at the same time and in connection with a breach of contract, or may arise out of the same transaction.* Doe v. Southwest Grain, 309 F.Supp.2d 1119, 1122 (D.N.D. 2004) (Emphasis added). As discussed by this Court in the Seifert case, tort obligations are imposed apart from and independent of promises made and therefore apart from any manifested intention of parties to a contract or other bargaining transaction. Seifert, 497 N.W.2d at 696 (citing W. Page Keeton et al., *Prosser and Keeton on The Law of Torts* § 92, at 656 (5th ed. 1984)).

[¶54] It is also important to clarify that under North Dakota law, fraud is a contract-based tort for which the existence of an underlying contract is an essential element of the claim. *See* N.D.C.C. § 09-03-08; Erickson v. Erickson, 2010 ND 86, 782 N.W.2d 346. Fraud confronts situations where one party intentionally misrepresents or conceals facts *from another contracting party.* Erickson, 2010 ND 86, ¶ 8, 782 N.W.2d 346. Actual

fraud under North Dakota law consists of any of the following acts *committed by a party to a contract*, or with the party's connivance, with intent to deceive *another party thereto or to induce the other party to enter into the contract*: (1) The suggestion as a fact of that which is not true by one who does not believe it to be true; (2) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true though that person believes it to be true; (3) The suppression of that which is true by one having knowledge or belief of the fact; or (5) Any other act fitted to deceive. N.D.C.C. § 09-03-08. Because intent to defraud is ordinarily not susceptible of direct proof, fraud may be inferred from the circumstances. American Bank Center v. Wiest, 2010 ND 251, ¶ 12, 793 N.W.2d 172. "Actual fraud is always a question of fact." N.D.C.C. § 09-03-10.

[¶55] Here, although Counce's fraud claim arose out of the subject matter as its contractual relationship with Continental, the tortious conduct complained of by Counce exists separate from the claimed breach of contract by Continental. Counce's breach of contract counterclaim precluded by the district court was based upon Continental's failure to perform a contractual duty (i.e. drilling and operating the well and billing Counce for its proportionate share of only the "reasonable actual" cost of doing so). (App. 115-116). On the other hand, Counce's fraud claim was based upon Continental's repeated misrepresentations/omissions which Counce claims were intended to deceive it regarding the propriety of expenses Continental attributed to the Burian 1-27H well. (App. 117); (App. 004 at Docket # 101-169). As indicated above, Counce's fraud claim necessarily requires the existence of an underlying contract between the parties; however, the tortious conduct arising from Continental's intentional misrepresentation/concealment

of facts from Counce regarding its unlawful shifting of its expenses from other Continental wells to the Burian 1-27H well exists separately, and in addition to, its breach of contract claim.

[¶56] In viewing the evidence in a light most favorable to Counce, Continental's representations/omissions as to certain expenses attributed to the Burian 1-27H well raise numerous questions of material fact which precludes summary judgment on Counce's fraud claim. In response to Continental's motion for partial summary judgment, Counce identified the following as raising material questions of fact as to Continental's fraud: (1) Continental's inclusion of drill pipe charges from other wells; (2) Continental's hauling of drill cuttings from several other wells and depositing said cuttings into the Burian 1-27H cuttings pit, thereby necessitating the construction of a second cuttings pit and associated charges that Continental fraudulently attributed to the Subject Well; (3) Continental's charging the Subject Well for solar panel assemblies which Continental retained for use in its own facilities; (4) Continental's charging the Subject Well for the entire cost (\$281,082) of constructing a gas gathering line which was for the benefit of Continental, then billing Counce for use of that gas gathering line; (5) Continental's misrepresentations regarding the installation of a pump; and (6) Continental's billing the Subject Well numerous other charges for materials and services supplied to other Continental wells. (App. 004 at Docket # 101-169). The district court's summary judgment order and evidentiary rulings precluded Counce's presentation at trial of items two through six identified above.

[¶57] Continental intentionally and fraudulently represented these charges to be those of the Subject Well. By shifting the charges to the Subject Well, where Continental had

only a 62% working interest, Continental would be responsible for only 62% of such costs. As the result of Continental's fraud, Counce and the other minority working interest owners would each be burdened with their proportionate share of the other 38% of those charges. (App. 004 at Docket # 101-169). The affidavit of Richard Counce in response to Continental's motion for partial summary judgment in its entirety, but particularly paragraphs 23 through 52 and the exhibits referred to therein, are more than sufficient to establish the existence of material facts which preclude summary judgment against Counce's fraud claim. (App. 004 at Docket # 101-169). The inquiries referenced therein were to high officers of Continental and the false responses were made by Continental's Senior V.P., General Counsel, and Secretary, Eric Eissenstat. For the foregoing reasons, genuine issues of material fact exist as to whether Continental's conduct in this matter constitutes fraud thereby precluding summary judgment.

[¶58] Construing North Dakota law as the district court has in this matter would further be against public policy as encouraging fraud. An operator such as Continental could fraudulently misrepresent that work and/or materials for certain wells were for other wells with impunity. If that fraud remained undiscovered by the other working-interest owners, the operator stands to gain at their expense. If discovered, however, there is no penalty to the operator; it simply gets paid what it would have been entitled to without the fraudulent conduct. A contracting party should never be encouraged by the law to commit fraud.

[¶59] In connection with Counce's fraud claim, there is sufficient evidence to support a finding by a jury of oppression, fraud, and/or actual malice by Continental and Counce should have been allowed to seek exemplary damages in connection with that claim. On

May 5, 2015, the district court issued a memorandum opinion denying Counce's motion to seek exemplary damages in connection with its abuse of process claim. (App. 182-192). However, in relation to Counce's fraud claim, there is sufficient evidence to support a finding by the trier of fact that a preponderance of the evidence establishes oppressive, fraudulent, and/or malicious conduct by Continental. As explained above, Counce's fraud claim is based upon Continental's repeated misrepresentations and concealment of facts regarding Continental's shifting of expenses to the Burian 1-27H well and the propriety of expenses attributed to the Burian 1-27H well. Certainly, a jury could find that Continental's conduct towards Counce in this regard was oppressive, fraudulent, and/or malicious as those terms are defined by North Dakota law and Counce should be allowed to seek exemplary damages in connection with its fraud claim on remand.

IV. THE DISTRICT COURT ERRED IN DENYING COUNCE'S MOTION TO CORRECT THE JANUARY 13, 2016 ORDER DISMISSING COUNCE'S CONTRACT DEFENSES AND COUNTERCLAIMS WITH PREJUDICE FOR LACK OF SUBJECT-MATTER JURISDICTION.

A. Standard of Review.

[¶60] Counce appeals the district court's *Order*, dated March 31, 2016, denying its Rule 60 motion to correct the January 13, 2016 *Order* dismissing Counce's contract counterclaims and defenses *with prejudice* for lack of subject-matter jurisdiction. (App. 239). A district court's decision on a Rule 60 motion for relief from a judgment or order is reviewed by this Court under an abuse of discretion standard. See Erickson v. Olsen, 2016 ND 33, ¶ 11, 875 N.W.2d 535; see also Holkesvig v. VandeWalle, 2016 ND 107, ¶ 17, 879 N.W.2d 728. "A district court abuses its discretion if it acts in an arbitrary, unconscionable, or unreasonable manner, if its decision is not the product of a rational

mental process leading to a reasonable determination, or if it misinterprets or misapplies the law.” Holkesvig, 2016 ND 107, ¶ 17, 879 N.W.2d 728. The district court’s dismissal of Counce’s contract defenses and counterclaims for lack of subject matter jurisdiction *with prejudice* is a misapplication of law, and therefore constitutes an abuse of discretion.

B. Rule 12(h)(3) requires dismissal without prejudice for lack of subject matter jurisdiction where it is found *at any time* that subject-matter jurisdiction is lacking.

[¶61] It stands to reason that if a court lacks jurisdiction, it lacks the ability to decide any matter before it *on its merits* and therefore cannot enter any order dismissing it *with prejudice*. The most a court can do in such a situation is dismiss under N.D.R.Civ.P. 12 for lack of subject-matter jurisdiction. However, pursuant to its January 13, 2016 Order, the district court dismissed Counce’s contract defenses and counterclaims with prejudice for lack of subject matter jurisdiction. (App. 220 at ¶ 2) (“The Court does not have subject matter jurisdiction over Defendant’s counterclaims pursuant to which Defendant challenges Plaintiff’s damages or seeks to recover as Defendant’s own damages what Defendant alleges are either not reasonable or actual expenses incurred in the drilling or operation of the subject well, and therefore those claims are dismissed with prejudice.”).

[¶62] On January 28, 2016, Counce submitted a Rule 60 motion to correct the January 13, 2016 Order to properly dismiss Counce’s contract defenses and counterclaims for lack of subject matter jurisdiction under Rule 12. (App. 010 at Docket # 348-350). In denying Counce’s Rule 60 motion to correct the January 13, 2016 Order, the district court abused its discretion by dismissing Counce’s contract defenses and counterclaims *with prejudice* after finding it did not have subject-matter jurisdiction over those claims.

[¶63] Rule 60 permits a court to make corrections and grant relief from orders and judgments. *See* N.D.R.Civ.P. 60 (Relief from a Judgment or Order). Rule 60(a) provides that “[t]he court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record.” N.D.R.Civ.P. 60(a). Additionally, Rule 60(b) provides that on motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for a number of reasons including: (1) mistake, inadvertence, surprise, or excusable neglect; (2) the order or judgment is void; (3) applying the order or judgment prospectively is no longer equitable; or (4) any other reason that justifies relief. *See* N.D.R.Civ.P. 60(b).

[¶64] “As a prerequisite to issuing a valid order or judgment, a court must have both subject matter and personal jurisdiction.” Trottier v. Bird, 2001 ND 177, ¶ 5, 635 N.W.2d 157 (citing Albrecht v. Metro Area Ambulance, 1998 ND 132, ¶ 10, 580 N.W.2d 583). “The question of whether a court has subject matter jurisdiction can be raised *at any time* in the proceeding.” Id. (citing N.D.R.Civ.P. 12(h)(3)) (Emphasis added). Additionally, “[i]ssues involving subject matter jurisdiction cannot be waived and can be raised *sua sponte at any time.*” Id. (citing Earnest v. Garcia, 1999 ND 196, ¶ 7, 601 N.W.2d 260) (Emphasis added).

Subject-matter jurisdiction is the court’s power to hear and determine the general subject involved in the action.... Subject-matter jurisdiction is derived from the constitution and the laws, and cannot be conferred by agreement, consent or waiver. For subject-matter jurisdiction to attach, the particular issue to be determined must be properly brought before the court in the particular proceeding. If subject matter jurisdiction is lacking, North Dakota Rule of Civil Procedure 12(h)(3) compels the dismissal of the action: Whenever it appears by suggestion of the parties or

otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Id. (internal citations omitted).

[¶65] In Trottier, this Court determined the trial court’s decision to dismiss a claim with prejudice for lack of subject matter jurisdiction was a misapplication of law and therefore an abuse of discretion. Id. at ¶ 8. Instead of dismissing the cause of action for lack of subject matter jurisdiction under Rule 12, the trial court in Trottier entered summary judgment improperly dismissing the action with prejudice. Id. Accordingly, this Court reversed and remanded with direction for the district court to dismiss the case for lack of subject matter jurisdiction. Id. at ¶ 9.

[¶66] As indicated above, the proper method of dismissing a claim for lack of subject matter jurisdiction is under Rule 12 which provides that “[i]f the court determines *at any time* that it lacks subject-matter jurisdiction, the court must dismiss the action.” N.D.R.Civ.P. 12(h)(3) (Emphasis added). “The North Dakota Rules of Civil Procedure are clear that a dismissal for lack of subject matter jurisdiction under Rule 12(h)(3) is not an adjudication on the merits of the cause of action, but only a determination of a court’s jurisdiction to hear and decide the dispute.” Trottier, 2001 ND 177, Footnote 1, 635 N.W.2d 157 (citing N.D.R.Civ.P. 41(b)). “The effect of dismissing a case with prejudice is to bar any future claim, as that action amounts to a final disposition of the controversy.” Id. at ¶ 8 (internal citations omitted). However, “[w]ithout subject matter jurisdiction, a court, whether trial or appellate, is powerless to act.” Id. (citing Bryan v. Miller, 16 N.W.2d 275, 284 (N.D. 1944)). “Any action beyond dismissing the claim for want of subject matter jurisdiction is a misapplication of the North Dakota Rules of Civil Procedure.” Id.

[¶67] Here, Counce’s contract defenses and counterclaims (as identified by the Court’s January 13, 2016 Order) should not have been dismissed with prejudice, but for lack of subject matter jurisdiction under Rule 12. The district court’s *Memorandum Opinion* on this issue places significance on the timing of its ruling. (App. 230 at ¶ 5) (“To be clear, had the issue of failure to exhaust administrative remedies been presented at the outset of this litigation, and had the Court then entered the order now under challenge, this Court understands that it would have been compelled to correct the order to dismiss without prejudice....”). However, the plain language of Rule 12(h)(3) requires dismissal for lack of subject-matter jurisdiction “*at any time*” once it is determined the court lacks subject-matter jurisdiction. *See* N.D.R.Civ.P. 12(h)(3) (“[i]f the court determines *at any time* that it lacks subject-matter jurisdiction, the court must dismiss the action.”). Simply put, because this Court found it did not have subject matter jurisdiction over Counce’s contract defenses and counterclaims, it lacked power to dismiss those claims for anything more than lack of subject matter jurisdiction under Rule 12. Accordingly, sufficient grounds existed under Rule 60 for this Court to amend its January 13, 2016 *Order* as requested by Counce, and the district court’s dismissal of Counce’s contract defenses and counterclaims *with prejudice* for lack of subject matter jurisdiction is an abuse of discretion and constitutes reversible error.

CONCLUSION

[¶68] For the foregoing reasons, Counce respectfully requests this Court for the following relief:

(1) Reverse the *Order*, dated January 13, 2016, *Order on Motion in Limine*, dated September 16, 2016, *Amended Order for Judgment on Jury Verdict*, dated January 23,

2017, *Amended Judgment on Jury Verdict*, dated January 24, 2017, both as to the verdict on Continental's breach of contract claim and Counce's abuse of process claim, and enter an order providing that the district court has subject-matter jurisdiction to adjudicate Counce's contract defenses and counterclaims and that Counce may introduce evidence, including but not limited to, the AFE amounts as some evidence of reasonable actual costs and its numerous futile requests for substantiation of excess charges in response to Continental's billings;

(2) Reverse the *Order on Plaintiff's Motion for Partial Summary Judgment*, dated March 10, 2015, and enter an order providing that material questions of fact exist precluding summary judgment as to Counce's fraud claim and permitting Counce to complete discovery in relation to said claim on remand;

(3) Reverse the *Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law*, dated December 22, 2016, and enter an order providing that Counce is entitled to judgment as a matter of law in relation to Continental's breach of contract claim;

(4) Reverse the *Order*, dated March 31, 2016, and enter an order providing the district court abused its discretion upon dismissing Counce's contract defenses and counterclaims with prejudice for lack of subject-matter jurisdiction.

Dated: July 10, 2017.

SMITH PORSBORG SCHWEIGERT
ARMSTRONG MOLDENHAUER & SMITH

By: /s/ David J. Smith
David J. Smith #06610
Tyler J. Malm #07575
Attorneys for Counce Energy BC #1, LLC

CERTIFICATE OF SERVICE

[¶69] I hereby certify that a true and correct copy of the forgoing brief was electronically filed with the Clerk of the North Dakota Supreme Court on the 10th day of July, 2017, and emailed to the following: **Donald T. Campbell** (donald.campbell@stinson.com) and **Robin W. Forward** (rob.forward@stinson.com).

By: /s/ David J. Smith
David J. Smith