20170066
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
AUGUST 9, 2017
STATE OF NORTH DAKOTA

Supreme Court Case No.: 20170066
Billings County District Court Case No.: 04-2013-CV-00015

IN DISTRICT COURT
COUNTY OF BILLINGS

STATE OF NORTH DAKOTA
SOUTHWEST JUDICIAL DIVISION

Continental Resources, Inc.,

Plaintiff/Appellee,

vs.

Counce Energy BC #1, LLC,

Defendant/Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES .... Page iii

STATEMENT OF THE ISSUES .... ¶1

Whether the District Court properly followed the Gas & Oil Act, which mandates that the question of whether well drilling costs are "reasonable actual" must be decided by the NDIC, in dismissing Counce Energy's reasonableness claim for failure to exhaust administrative remedies .... ¶1

Whether the District Court properly dismissed Counce Energy's belated reasonableness claim with prejudice where Counce Energy knowingly waived that claim by not commencing an NDIC action and instead litigated in court. .... ¶2

Whether the District Court properly dismissed Counce Energy's fraud claim, which was based on the exact same conduct that Counce Energy alleged constituted a breach of contract. .... ¶3

Whether the District Court properly rejected Counce Energy's unsupported contention that Continental failed to prove it incurred the drilling costs. .... ¶4

STATEMENT OF THE CASE .... ¶5

STATEMENT OF THE FACTS .... ¶11

ARGUMENT .... ¶15

I. THE DISTRICT COURT CORRECTLY RULED THAT COUNCE ENERGY FAILED TO EXHAUST ADMINISTRATIVE REMEDIES BECAUSE THE DETERMINATION OF WHETHER WELL DRILLING COSTS ARE "REASONABLE" MUST FIRST BE MADE BY THE NDIC .... ¶15

A. Standard of Review .... ¶15

B. The Legislature Gave The NDIC Broad Powers To Regulate Gas And Oil Production And Determine Whether Well Costs Are Reasonable. .... ¶16

C. Exhaustion Of Administrative Remedies Prohibits Parties From Asserting Claims In Court That Are Within The NDIC's Jurisdiction. .... ¶21

D. Counce Energy's Belated Challenge To The Reasonableness Of Drilling Costs Was Within The NDIC's Jurisdiction. .... ¶24

E. Continental's Lawsuit Is Not Subject To Exhaustion. .... ¶26

F. Counce Energy Was Not Relieved Of Its Obligation To Exhaust Administrative Remedies Merely Because This Is A Contract Action. ..¶28

II. THE DISTRICT COURT PROPERLY DISMISSED COUNCE ENERGY'S REASONABLENESS CLAIM WITH PREJUDICE. ....¶32

A. Standard Of Review ....¶32

B. Counce Energy Relinquished Its Right To Petition The NDIC. ....¶33

III. THE DISTRICT COURT PROPERLY APPLIED NORTH DAKOTA LAW IN DISMISSING COUNCE ENERGY'S FRAUD CLAIM. ....¶49

A. Standard of Review ....¶49

B. Counce Energy's Fraud Claim Arose From And Was Dependent Upon Counce Energy's Breach Of Contract Claim. ....¶50

C. The Authorities Counce Energy Cites Are Inapposite. ....¶56

IV. CONTINENTAL DID NOT FAIL TO PROVE IT INCURRED THE DRILLING COSTS. ....¶59

A. Standard of Review ....¶59

B. There Was Ample Evidence To Support The Jury's Conclusion. ....¶60

C. The District Court Did Not Abuse Its Broad Discretion In Permitting Continental To Recall Witness Kristy Brown. ....¶64

CERTIFICATE OF COMPLIANCE ....¶70

CERTIFICATE OF SERVICE ....¶72

TABLE OF AUTHORITIES

Cases **Paragraphs**

Amerada Hess Corp. v. Furlong Oil & Minerals Co.,
348 N.W.2d 913 (N.D. 1984) ....¶17, 19

Bernhardt v. Harrington,
2009 ND 189, 775 N.W.2d 682 ....¶ 35

Bjorgen v. Kinsey,
466 N.W.2d 553 (N.D. 1991) ....¶63

Brown v. State Bd. of Higher Ed.,
2006 ND 60, 711 N.W.2d 194 ....¶21, 22, 43

Bryant v. Dept. of Veterans Affairs,
No. 15-5691, 2016 WL 1717582 (D.N.J. Apr. 28, 2016)..¶45

City of Fargo v. Erickson,
1999 ND 145 ¶ 22, 598 N.W.2d 787 ....¶64

Continental Res., Inc. v. Farrar Oil Co.,
1997 ND 31, 559 N.W.2d 841 ....¶17

Dakota Grain Co., Inc. v. Ehrmantrout,
502 N.W.2d 234 (N.D. 1993) ....¶53

Disciplinary Board v. Stensland,
2011 ND 110 ¶¶ 17-19, 799 N.W.2d 341 ....¶68

Douglas v. Dist. of Columbia,
65 F. Supp. 3d 225, 226-229 (D.D.C. 2014)..¶45

Erickson v. Erickson,
2010 ND 86, 782 N.W.2d 346 ....¶56, 57, 58, 64

Frazier v. North Carolina Cent. Univ.,
779 S.E.2d 515 (N.C. Ct. App. 2015)..¶45

GEM Razorback, LLC. v. Zenergy, Inc.,
2017 ND 33, 890 N.W.2d 544 ....¶22, 24

German v. Pena,
88 F. Supp. 2d 222 (S.D.N.Y. 2000)..¶45

Hageness v. Davis,
2017 ND 132, 896 N.W.2d 251 ....¶49, 50

Harrup v. Carter,
No. 3:15CV697, 2017 WL 2625068 (E.D. Va. June 16, 2017) ....¶45

Hill v. Weber,
1999 ND 74, 592 N.W.2d 585 ....¶63

Johnson v. State,
2006 ND 122, 714 N.W.2d 832 ....¶36

Kost v. Kraft,
2014 ND 92, 845 N.W.2d 889 ....¶15

Kummer v. Continental Res., Inc.,
No. 4:13-CV-135 (D.N.D.) ....¶23

Kuntz v. Stelmachuk,
136 N.W.2d 810 (N.D. 1965) ....¶63

Liberty Bankers Life Ins. v. First Citizens Bank & Trust Co.,
No. 13CA1486, 2014 WL 5840149 (Colo. App. Nov. 6, 2014) ....¶45

Long v. Samson,
1997 ND 174, 568 N.W.2d 602 ....¶27

McKart v. United States,
395 U.S. 185, 193-194 (1969) ....¶ 23

Minto Grain, LLC v. Tibert,
2009 ND 213, 776 N.W.2d 549 ....¶59

Oden v. Chicago Bd. of Ed.,
No. 94-C-4936, 1995 WL 3988 (N.D. Ill. Jan. 5, 1995) ....¶45

Oklahoma Horsemen's Benevolent & Protective Ass'n v. Shotts,
38 P.3d 916 (Okla. Civ. App. 2001) ....¶45

Olander Contracting Co. v. Gail Wachter Inv.,
2002 ND 65, 643 N.W.2d 29 ....¶54

Ovieda v. Sodexo Operations, LLC,
No. CV-12-1750, 2013 WL 3887873 (C.D. Cal. July 3, 2013) ....¶47

Pearison v. Pinkertons, Inc.,
No. 1:02-CV-142, 2002 WL 32060142 ....¶45

MINNESOTA/2071450.0002/14944172.1

Pioneer Fuels, Inc. v. Montana-Dakota Util. Co.,
474 N.W.2d 706 (N.D. 1991) .... ¶51

Sanders v. Gravel Prods., Inc.,
2008 ND 161, 755 N.W.2d 826 .... ¶35

Savre v. Santoyo,
2015 ND 170, 865 N.W.2d 419 .... ¶35

Schuck v. Montefiore Pub. Sch. Dist. No. 1,
2001 ND 698, 626 N.W.2d 698 .... ¶21

Seifert v. Farmers Union Mut. Ins. Co.,
497 N.W.2d 694 (N.D. 1993) .... ¶52, 53

Shaver v. Davie Cnty. Pub. Sch.,
No. 1:07CV00176, 2008 WL 943035 (M.D.N.C. Apr. 7, 2008) .... ¶45

Soentgen v. Quain & Ramstad Clinic, P.C.,
467 N.W.2d 73 (N.D. 1991) .... ¶21, 43

Staples v. Reckamp,
No. 04-CV-2607-A, 2005 WL 3536281 (W.D. La. Dec. 22, 2005) .... ¶45

State ex rel. Anderson v. City of Madison,
444 S.W.2d 443 (Mo. 1969) .... ¶46

State v. Buchholz,
2004 ND 77, 678 N.W.2d 144 .... ¶66, 68

State v. Doll,
2012 ND 32, 812 N.W.2d 381 .... ¶66

State v. Hannah,
2016 ND 11, 873 N.W.2d 668 .... ¶62

State v. Hill,
1999 ND 26, 590 N.W.2d 187 .... ¶69

State v. Muhle,
2007 ND 132, 737 N.W.2d 647 .... ¶68

State v. Otto,
2013 ND 239, 840 N.W.2d 589 .... ¶38

State v. Skorick,
2002 ND 190, 653 N.W.2d 698 .... ¶69

State v. Wanner,
2010 ND 121, 784 N.W.2d 143 ....¶66

Stenehjem ex rel. State v. Nat'l Audubon Soc'y, Inc.,
2014 ND 71, 844 N.W.2d 892 ....¶36

Symington v. Mayo,
1999 ND 48, 590 N.W.2d 450 ....¶62

T.T., 2011 ND 111, 798 N.W.2d 678....................¶65, 66

Thomas v. Am. Home Assurance Co.,
403 S.W.3d 512 (Tex. App. 2013)....................¶45

Thompson v. Peterson,
546 N.W.2d 856, 861 (N.D. 1996) ....¶ 21

Tracy v. Cent. Cass Pub. Sch. Dist.,
1998 ND 12, 574 N.W.2d 781 ....¶21

Trottier v. Bird,
2001 ND 177, 635 N.W.2d 157 ....¶47

Von Ruden v. N.D. Workforce Safety & Ins. Fund,
2008 ND 166, 755 N.W.2d 885 ....¶35

Westberg v. FDIC,
926 F. Supp. 2d 61 (D.D.C. 2013)....................¶45

WFND, LLC v. Fargo Marc, LLC,
2007 ND 67, 730 N.W.2d 841 ....¶29

Wisdahl v. XTO Energy Inc.,
No. 4:13-CV-136, 2014 WL 10537960 (D.N.D. May 14, 2014) ....¶17, 23

Woodford v. Ngo,
548 U.S. 81 (2006)....................¶43

Zerr v. N.D. Workforce Safety & Ins.,
2017 ND 175, __ N.W.2d __ ....¶15, 32

Ziya v. Global Linguistic Solution,
No. 3:11-CV-1398, 2013 WL 4049514 (D. Or. Aug. 9, 2013) ....¶45

Statutes

N.D.C.C. Chapter 9-03 ....¶58

N.D.C.C. Chapter 38-08 ....¶5, 20

N.D.C.C. § 09-02-02....................¶58

N.D.C.C. § 09-03-03....................¶58

N.D.C.C. § 09-03-08....................¶56, 58

N.D.C.C. § 38-08-01....................¶17

N.D.C.C. § 38-08-08....................¶5, 20

N.D.C.C. § 38-08-08(1) ....¶17

N.D.C.C. § 38-08-08(2) ....¶19, 24, 26, 30, 39

N.D.C.C. § 38-08-10....................¶18, 20, 26, 39

N.D.C.C. § 38-08-11(4) ....¶ 7

N.D.C.C. § 38-08-12....................¶19

N.D.C.C. §§ 38-08-13....................¶19

N.D.C.C. § 38-08-14 ....¶19

Other Authorities

N.D.R. App. P. 32(a)(7)(A) ....¶70

N.D.R.Civ.P. Rule 50....................¶10, 59, 63

N.D.R.Ev. 615....................¶66, 68, 69

W. Page Keeton, et al, *Prosser & Keeton on the Law of Torts* § 92, at 656 (5th ed. 1984)....................¶52

STATEMENT OF THE ISSUES

[¶1] **Whether the District Court properly followed the Gas & Oil Act, which mandates that the question of whether well drilling costs are "reasonable actual" must be decided by the NDIC, in dismissing Counce Energy's reasonableness claim for failure to exhaust administrative remedies.**

[¶2] **Whether the District Court properly dismissed Counce Energy's belated reasonableness claim with prejudice where Counce Energy knowingly waived that claim by not commencing an NDIC action and instead litigated in court.**

[¶3] **Whether the District Court properly dismissed Counce Energy's fraud claim, which was based on the exact same conduct that Counce Energy alleged constituted a breach of contract.**

[¶4] **Whether the District Court properly rejected Counce Energy's unsupported contention that Continental failed to prove it incurred the drilling costs.**

STATEMENT OF THE CASE

[¶ 5] Counce Energy BC #1, LLC ("Counce Energy") appeals from a jury verdict in favor of Continental Resources, Inc. ("Continental"). The jury found Counce Energy breached the parties' contract by failing to pay its share of the expenses to drill the Burian 1-27H oil well in Billings County ("Burian Well" or "Well"). Continental is the operator of the Well; Counce Energy is a non-operating minority owner. The contract is imposed by law pursuant to a pooling order issued by the North Dakota Industrial Commission ("NDIC" or "Commission") under the Act for the Control of Gas and Oil Resources, N.D.C.C. Ch. 38-08 ("Gas & Oil Act" or "Act"). As provided by the pooling order, Continental incurred the costs to drill and complete the Well and sought reimbursement from non-operating owners according to their proportionate shares.

[¶ 6] Continental brought suit after Counce Energy stopped paying for its share of drilling expenses. Although it asserted in the lawsuit that the drilling costs were not "reasonable actual" (a term used in the Gas & Oil Act), Counce Energy did not

MINNESOTA/2071450.0002/14944172.1

commence an NDIC proceeding for a cost determination as required by law. The District Court thus ruled that Counce Energy failed to exhaust administrative remedies and could not assert its "reasonableness" claim for the first time in court. Contrary to Counce Energy's assertions (Appellant Br. ¶ 5), the District Court did not dismiss the reasonableness claim *sua sponte*. Continental pled failure to exhaust administrative remedies at the outset in its answer to Counce Energy's amended counterclaim. Docket #34. The District Court focused on the issue during a November 2015 pretrial conference. At the District Court's direction, the parties submitted briefs addressing exhaustion of administrative remedies and subject matter jurisdiction. After rendering an initial decision, the District Court directed the parties to file additional briefs and then issued a memorandum opinion on December 23, 2015, Docket #328. The District Court found it had jurisdiction over Continental's lawsuit because the suit is authorized by the Gas & Oil Act, but the court did not have jurisdiction over Counce Energy's reasonableness claim because that issue is within the purview of the NDIC. Counce Energy failed to exhaust administrative remedies by obtaining a cost determination from the Commission. Consequently, the District Court dismissed the reasonableness claim with prejudice. 1/13/16 Order, Docket #345.

[¶ 7] Counce Energy moved to "correct" this order, requesting dismissal without prejudice so it could commence an NDIC petition. Docket #349-350. This was Counce Energy's first and only attempt to go to the NDIC, and it came after years of litigation, two trial dates had passed, and the District Court had already dismissed the reasonableness claim for failure to exhaust administrative remedies. The District Court denied the motion on March 31, 2016. Docket #364, 367.

[¶ 8] In pretrial submissions, Counce Energy proposed offering evidence relating to its contention that the drilling costs were not reasonable. On Continental's motion *in limine*, the District Court held that Counce Energy could not offer evidence on reasonableness of the costs because it had not exhausted administrative remedies. Docket #389.

[¶ 9] Counce Energy asserted counterclaims for breach of contract, fraud, breach of fiduciary duty and abuse of process. On Continental's summary judgment motion, the District Court dismissed the fraud and fiduciary duty claims. Docket #205 & 225. The court permitted abuse of process to go to trial, but the jury ruled in Continental's favor. The only tort claim Counce Energy appeals is fraud based on the theory that Continental wrongfully sought to recover drilling expenses in excess of an estimate. The District Court dismissed this fraud claim because it was founded upon the same conduct Counce Energy alleged constituted breach of contract. Docket #205 ¶¶ 20-28.

[¶ 10] The trial was held in September 2016. On the last day, both parties made Rule 50 motions that the Court denied. In its motion, Counce Energy suggested, notwithstanding the undisputed fact that the Well was completed, that Continental may not have paid the costs. Trial Transcript ("Tr.") 511-512. Counce Energy made this suggestion despite evidence that Continental had been subsidizing Counce's share of the expenses (¶ 61 *infra*). Continental recalled witness Kristy Brown, who testified that Continental did incur all the costs. Tr. 528-529. Counce Energy claims Brown should not have been permitted to testify, but cannot show that her testimony was untruthful or influenced by any other witness. The jury returned a verdict for Continental on all issues and awarded Continental the entire amount it sought. Docket #402. The District Court entered judgment on the jury's verdict. Docket #477.

STATEMENT OF THE FACTS

[¶ 11] Continental is the operator of the Burian Well and owns a 62.5% interest. Tr. 53. Counce Energy is a non-operating owner with a 12.5% interest. Tr. 179. The NDIC issued a pooling order covering the Well. Tr. 57. Continental sent Counce Energy an invitation to participate, which Counce Energy accepted. Tr. 54-55. Along with the invitation to participate, Continental sent a document titled Authority for Expenditure ("AFE") containing an estimate of anticipated drilling costs. Docket #405. Based upon the pooling order and accepted invitation to participate, Continental and Counce Energy became parties to a contract imposed by law under the Gas & Oil Act. Continental is entitled to recover Counce Energy's proportionate share of the drilling costs, plus a reasonable charge for supervision. NDIC Order, Docket #404. Once work began, Continental sent monthly billing packets including the invoice for drilling expenses and an expenditure detail. Tr. 179-180, 197.

[¶ 12] In June of 2012, Counce Energy stopped paying for drilling costs. Tr. 487-488. In September 2013, after Counce Energy's account had been in arrears for nearly a year and a half, Continental exercised its statutory right to place a lien on Counce Energy's interest and foreclose by bringing this suit. Docket #1.

[¶ 13] After the lawsuit had been pending for three months, Continental conducted a regular internal audit of the Burian Well. Tr. 100. That audit revealed a minor error concerning a handful of invoices incorrectly charged to Burian. *Id.* The magnitude of the error was extremely small; total drilling costs for Burian were over $10 million (Tr. 178-179), while the incorrect invoices totaled only about $200,000 or 2% (Tr. 104). Continental identified each incorrect invoice (Tr. 154-156) and gave Counce Energy the "JADE report," which is a searchable, sortable database reflecting every charge and

containing every invoice (Tr. 161-168). Continental immediately corrected the error and credited the Burian account. Tr. 100-104. Based on its 12.5% interest, the credit to Counce Energy was $23,573.23. Tr. 184. Although the credit was small compared to the total Counce Energy owed, Continental released its lien, paid all withheld revenue, and dropped the foreclosure claim. Tr. 250-254. Notably, Counce Energy earned a handsome profit from its contract with Continental; the revenue Continental paid vastly exceeds Counce Energy's share of the costs. Tr. 193.

[¶ 14] At trial, the District Court did not permit Counce Energy to argue the drilling costs were not "reasonable actual" under the Gas & Oil Act because Counce Energy knowingly failed to exhaust administrative remedies. Counce Energy tried to escape its payment obligation in other ways by manufacturing nonexistent irregularities regarding Continental's billing practices. Counce Energy argued: (1) Continental initially sent invoices to the wrong Counce entity (an issue corrected in the first few months and which caused no confusion, Tr. 451-460); (2) a $400,000 cost related to delayed well stimulation was improper (Richard Counce admitted he no longer disputes this charge, Tr. 469); and (3) a small number of invoices for other wells were improperly charged to Burian (each was credited after Continental's audit, Tr. 100-104). The jury rejected these arguments and awarded Continental the full amount of its claim based on the uncontroverted evidence. Although Counce Energy references these issues again in this appeal (Appellant Br. ¶ 14), it has not and cannot show the evidence was insufficient to support the jury's verdict.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT COUNCE ENERGY FAILED TO EXHAUST ADMINISTRATIVE REMEDIES BECAUSE THE DETERMINATION OF WHETHER WELL DRILLING COSTS ARE "REASONABLE" MUST FIRST BE MADE BY THE NDIC.

A. Standard of Review

[¶ 15] Counce Energy appeals the 12/23/15 memorandum and 1/13/16 order dismissing Counce Energy's reasonableness claim for failure to exhaust administrative remedies (Docket #s 328 & 345), as well as the 9/16/16 order on Continental's motion *in limine* (Docket #389). This Court reviews dismissal for lack of subject matter jurisdiction for failure to exhaust administrative remedies *de novo*. *Zerr v. N.D. Workforce Safety & Ins.*, 2017 ND 175 ¶ 10, __ N.W.2d __. Rulings on motions *in limine* are reviewed for abuse of discretion. *Kost v. Kraft*, 2014 ND 92 ¶ 9, 845 N.W.2d 889.

B. The Legislature Gave The NDIC Broad Powers To Regulate Gas And Oil Production And Determine Whether Well Costs Are Reasonable.

[¶ 16] Although it refers to the Gas & Oil Act throughout its brief, Counce Energy never quotes the text or discusses the cases interpreting the statute. That is because the statutory language and governing case law belie Counce Energy's argument that it could challenge the reasonableness of the drilling costs without first going to the NDIC.

[¶ 17] The purpose of the Gas & Oil Act is to:

> encourage, and to promote the development, production, and utilization of natural resources of oil and gas in the state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas be had and that the correlative rights of all owners be fully protected.

MINNESOTA/2071450.0002/14944172.1

N.D.C.C. § 38-08-01. To accomplish this purpose, the Gas & Oil Act "equipped the Industrial Commission with comprehensive powers to regulate oil and gas development." *Continental Res., Inc. v. Farrar Oil Co.*, 1997 ND 31 ¶ 12, 559 N.W.2d 841. The NDIC "has very broad, general jurisdiction and authority over all persons and property necessary to effectively enforce the Act." *Wisdahl v. XTO Energy Inc.*, No. 4:13-CV-136, 2014 WL 10537960, at *3 (D.N.D. May 14, 2014) (citing *Farrar Oil*, 559 N.W.2d at 845; *Amerada Hess Corp. v. Furlong Oil & Minerals Co.*, 348 N.W.2d 913, 916 (N.D. 1984)). The NDIC's powers include the authority to integrate fractional tracts by issuing pooling orders, as in this case. N.D.C.C. § 38-08-08(1).

[¶ 18] The Gas & Oil Act provides for payment of drilling costs, and states that if a party challenges the reasonableness of the costs, the NDIC is to decide that issue:

> Each such pooling order must make provision for the drilling and operation of a well on the spacing unit, ***and for the payment of the reasonable actual cost thereof by the owners of interests in the spacing unit***, plus a reasonable charge for supervision. ***In the event of any dispute as to such costs, the commission shall determine the proper costs.*** If one or more of the owners shall drill and operate, or pay the expenses of drilling and operating the well for the benefit of others, then, the owner or owners so drilling or operating shall, upon complying with the terms of section 38-08-10, have a lien on the share of production from the spacing unit accruing to the interest of each of the other owners for the payment of the owner's or owners' proportionate share of such expenses.

[¶ 19] N.D.C.C. § 38-08-08(2) (emphasis added). The Act sets forth procedures for resolution of matters within the NDIC's jurisdiction, such as disputes regarding the reasonableness of costs. N.D.C.C. § 38-08-11(4). A person adversely affected by an NDIC decision may seek reconsideration by the NDIC or appeal to the district court. N.D.C.C. §§ 38-08-13 (reconsideration); 38-08-14 (appeal). A party may further appeal to this Court. *Amerada Hess*, 348 N.W.2d at 916.

[¶ 20] The Gas & Oil Act also provides that a person owed a debt for drilling expenses may fix a lien on the owing party's interest and foreclose through the judicial process:

> A person to whom another is indebted for expenses incurred in drilling and operating a well on a drilling unit required to be formed as provided for in section 38-08-08, may, in order to secure payment of the amount due, fix a lien upon the interest of the debtor in the production from the drilling unit or the unit area, as the case may be, by filing for record, with the recorder of the county where the property involved, or any part thereof, is located, an affidavit setting forth the amount due and the interest of the debtor in such production. *** The lien may be foreclosed as provided for with respect to foreclosure of a lien on chattels.

N.D.C.C. § 38-08-10.

C. Exhaustion Of Administrative Remedies Prohibits Parties From Asserting Claims In Court That Are Within The NDIC's Jurisdiction.

[¶ 21] This Court has "consistently required the exhaustion of remedies before the appropriate administrative agency as a prerequisite to making a claim in court." *Brown v. State Bd. of Higher Ed.*, 2006 ND 60 ¶ 98, 711 N.W.2d 194 (citing *Thompson v. Peterson*, 546 N.W.2d 856, 861 (N.D. 1996). Failure to exhaust administrative remedies deprives the court of jurisdiction. *Schuck v. Montefiore Pub. Sch. Dist. No. 1*, 2001 ND 698 ¶ 10, 626 N.W.2d 698; *Tracy v. Cent. Cass Pub. Sch. Dist.*, 1998 ND 12 ¶ 15, 574 N.W.2d 781. The purpose of the exhaustion requirement is to effectuate separation of powers. *Brown*, 2006 ND 60 ¶ 11 (citing *Tracy*, 1998 ND 12 ¶ 14). Requiring exhaustion accords "recognition to the 'expertise' of the [agency's] quasi-judicial tribunal, permitting it to adjudicate the merits of the plaintiff's claim in the first instance." *Soentgen v. Quain & Ramstad Clinic, P.C.*, 467 N.W.2d 73, 82 (N.D. 1991) (quotation omitted). The exhaustion requirement also promotes judicial efficiency. *Brown*, 2006 ND 60 ¶ 16. Administrative proceedings allow for the discovery of "relevant evidence, sharpen the issues, retain the possibility of avoiding judicial proceedings, provide a

record which a court may ultimately review if the issue is still not fully resolved upon exhaustion of the administrative remedies, and provide the opportunity to eliminate or mitigate damages early in the dispute." *Id.*

[¶ 22] This Court recently affirmed dismissal of a lawsuit where the claimant failed to exhaust administrative remedies through the NDIC as required by the Gas & Oil Act. *GEM Razorback, LLC. v. Zenergy, Inc.*, 2017 ND 33, 890 N.W.2d 544. Plaintiff, a non-participating owner of a gas and oil well, sued to force a well operator to divulge records. The Gas & Oil Act gives the NDIC authority to order production of well records—the very relief plaintiff sought. *Id.* ¶ 13 (citing § 38-08-12). Dismissal was warranted because plaintiff did not exhaust administrative remedies through the NDIC before asserting that claim in court. *Id.* ¶¶ 7-14.

[¶ 23] The federal court similarly recognized that claims under the Gas & Oil Act must first be brought to the NDIC. Judge Hovland addressed this issue in suits against well operators alleging improper flaring of gas wells. *Wisdahl*, 2014 WL 10537960, at *1. The court noted that the NDIC "has authority to enforce flaring regulations," including determination of whether the operator flared in violation of the Act. *Id.* In other words, North Dakota law prescribed an administrative remedy for plaintiffs' claims. *Id.* *5. Exhaustion mandates that "[a]s long as administrative procedures are prescribed they must be followed before a party seeks judicial relief." *Id.* *9 (citing *McKart v. United States*, 395 U.S. 185, 193-194 (1969). Plaintiffs failed to exhaust administrative remedies because they had not first petitioned the NDIC to redress the allegedly improper flaring, and thus could not assert that claim in court. *Id.* *11. *See also Kummer v. Continental Res., Inc.*, No. 4:13-CV-135 (D.N.D.). Appellee Appx. 1-27.

D. Counce Energy's Belated Challenge To The Reasonableness Of Drilling Costs Was Within The NDIC's Jurisdiction.

[¶ 24] The Gas & Oil Act states that, in the event of a dispute, the NDIC must decide whether well drilling costs are "reasonable actual":

> Each such pooling order must make provision for the drilling and operation of a well on the spacing unit, and for the payment of the reasonable actual cost thereof by the owners of interests in the spacing unit, plus a reasonable charge for supervision**.** ***In the event of any dispute as to such costs, the commission shall determine the proper costs.***

N.D.C.C. § 38-08-08(2) (emphasis added). Use of the term "shall" leaves no doubt the NDIC has original jurisdiction over disputes regarding "reasonableness" of costs. As in *GEM Razorback* and the flaring cases, the Gas & Oil Act gives the NDIC authority to provide the relief Counce Energy seeks here: a determination of whether the drilling costs are reasonable.

[¶ 25] Counce Energy never filed any petition with the NDIC. It had ample opportunity, yet chose not to do so. Counce Energy did this knowingly; it threatened to commence an NDIC action in multiple letters before Continental filed suit (*see infra* ¶ 37). Because Counce Energy intentionally declined to exhaust administrative remedies, the District Court correctly ruled it could not decide Counce Energy's reasonableness claim.

E. Continental's Lawsuit Is Not Subject To Exhaustion.

[¶ 26] Counce Energy argues it is unfair—even a violation of due process rights—for the exhaustion requirement to apply to Counce Energy's reasonableness claim but not to Continental's lawsuit to collect the costs. Appellant Br. ¶ 23. The District Court correctly rejected this argument because the Gas & Oil Act authorizes a well operator to sue to collect unpaid drilling costs, with no requirement that the operator first go to the NDIC. N.D.C.C. §§ 38-08-08(2), 38-08-10. The Act also provides that if a party wishes

to challenge whether costs are "reasonable," the mechanism for doing so is to file an NDIC petition. N.D.C.C. § 38-08-08(2). Thus, the statute itself imposes an exhaustion requirement on a party challenging the reasonableness of drilling costs, but imposes no such requirement on an operator suing to collect unpaid costs.

[¶ 27] If an operator files suit and the defendant wishes to challenge reasonableness, the defendant can commence an NDIC proceeding at the outset of the lawsuit. The case can then be stayed pending the NDIC's determination. Hence, there is fairness for both parties. A non-operator cannot, however, do what Counce Energy tried here: knowingly decline to file an NDIC proceeding at the outset, litigate in court for several years, and then attempt to invoke the NDIC process after losing several key pretrial rulings and when the case is trial ready (§ II *infra*). Not allowing Counce Energy to employ this tactic was neither unfair nor a deprivation of due process. *Long v. Samson*, 1997 ND 174 ¶ 14, 568 N.W.2d 602 (no due process violation because inability to assert claim in court resulted from claimant's own failure to exhaust administrative remedies).

F. Counce Energy Was Not Relieved Of Its Obligation To Exhaust Administrative Remedies Merely Because This Is A Contract Action.

[¶ 28] Counce Energy argues it could challenge the reasonableness of the costs without going to the NDIC because this is a contract case and reasonableness was a contract defense. Appellant Br. ¶ 22. That is pure sophistry. Regardless of the fact that this case concerned Counce Energy's breach of its contractual obligation, Counce Energy sought to challenge whether the costs were "reasonable actual" within the meaning of the Gas & Oil Act. That question must be brought before the NDIC before it can be litigated in court. The label of the cause of action does not alter that reality.

1. "Reasonableness" Is Not An Element Of A Contract Claim.

[¶ 29] There is no support for Counce Energy's claim that proving "reasonableness" element of Continental's cause of action. "The elements of a prima facie case for breach of contract are: (1) the existence of a contract; (2) breach of the contract; and (3) damages." *WFND, LLC v. Fargo Marc, LLC*, 2007 ND 67 ¶ 13, 730 N.W.2d 841. No legal authority indicates that "reasonableness" is an additional element.

[¶ 30] "Reasonableness" was an issue in this case only because Counce Energy claimed the costs were not "reasonable actual" under § 38-08-08(2). Counce Energy selectively references the "reasonably actual" language from this section (Appellant Br. ¶¶ 2, 3, 16, 20-22, 25, 27, 33, 36-41, 43, 46-47, 55, 61) but neglects to mention the next sentence: "In the event of any dispute as to such costs, the commission shall determine the proper costs." This provision puts the onus of going to the NDIC upon the party challenging whether the costs are "reasonable actual." Nothing in the Act suggests the well operator has the burden of proving reasonableness when it brings suit under the statute.

2. The Contract Is Imposed By Law And Inextricably-Intertwined With The Statute.

[¶ 31] Counce Energy acknowledges this lawsuit was not a garden-variety contract action over a privately-negotiated agreement. The contract in this case was imposed by law and the terms set forth in the NDIC pooling order. Appellant Br. ¶¶ 12, 21, 36 (acknowledging contract imposed by law). Counce Energy's claim is not that the drilling costs were not "reasonable actual" under a private contract, but rather that the costs were not "reasonable actual" under the Gas & Oil Act. The statute unequivocally says, in the event of a dispute, that the question of whether costs are "reasonable actual" must be decided by the NDIC, with appeal to the courts only after the NDIC renders a decision.

II. THE DISTRICT COURT PROPERLY DISMISSED COUNCE ENERGY'S REASONABLENESS CLAIM WITH PREJUDICE.

A. Standard Of Review

[¶ 32] Counce Energy appeals the 1/13/16 order dismissing the reasonableness claims with prejudice (Docket #345), and the March 2016 memorandum and order affirming that decision (Docket #s 364 & 367). These rulings relate to the finding on exhaustion of administrative remedies, which is reviewed *de novo*. *Zerr*, 2017 ND 175 ¶ 10.

B. Counce Energy Relinquished Its Right To Petition The NDIC.

[¶ 33] The District Court correctly rejected Counce Energy's claim that it was entitled to halt this lawsuit to pursue a belated NDIC petition it could have filed years before. Counce Energy makes this absurd suggestion under the guise of its assertion that it was improper for the District Court to dismiss its reasonableness claim with prejudice. Appellant Br. ¶¶ 61-67. This argument does not withstand even modest scrutiny.

1. The Reasonableness Claim Is Barred By Waiver And Laches.

[¶ 34] North Dakota law obligates parties to assert claims in a timely manner and avoid unreasonable delays that result in prejudice. The law does not permit parties to sit on their rights and refuse to assert known claims, particularly where other parties incur substantial expense. Counce Energy did not ask the District Court to stay the case so it could pursue an NDIC proceeding until 2016. At that point, the case had been pending for years and the case was trial ready; indeed, two trial dates had passed. Counce Energy had the opportunity to file an NDIC petition at the outset. It was well aware of that right, as evidenced by its repeated threats to go to the NDIC (*infra* ¶ 37). Counce Energy chose to forego that right and instead proceed in court. By litigating for years, Counce Energy waived its right to petition the NDIC to its reasonableness claim. Moreover, because of

Counce Energy's long delay, its claim was barred by laches. The District Court properly forbade Counce Energy from inflicting considerable prejudice upon Continental by knowingly sitting on its rights and failing to bring a timely NDIC claim.

[¶ 35] "Waiver is a voluntary and intentional relinquishment or abandonment of a known advantage, benefit, claim, privilege, or right." *Savre v. Santoyo*, 2015 ND 170 ¶ 20, 865 N.W.2d 419 (quotation omitted). Waiver "may be inferred from a party's acts and conduct." *Von Ruden v. N.D. Workforce Safety & Ins. Fund*, 2008 ND 166 ¶ 14, 755 N.W.2d 885. "When a right is waived, the 'right is gone forever and cannot be recalled.'" *Bernhardt v. Harrington*, 2009 ND 189 ¶ 13, 775 N.W.2d 682 (quoting *Meyer v. Nat'l Fire Ins. Co.*, 269 N.W. 845, 852 (N.D. 1936)). "Although the existence or absence of waiver is generally a question of fact … the issue becomes a question of law if reasonable persons could draw only one conclusion from the circumstances." *Sanders v. Gravel Prods., Inc.*, 2008 ND 161 ¶ 10, 755 N.W.2d 826 (citations omitted).

[¶ 36] "Laches is a delay or lapse of time in commencing an action that works a disadvantage or prejudice to the adverse party because of a change in conditions during the delay." *Stenehjem ex rel. State v. Nat'l Audubon Soc'y, Inc.*, 2014 ND 71 ¶ 12, 844 N.W.2d 892. "Laches prevents a litigant from raising issues the litigant unreasonably delayed claiming through failure to exercise due diligence." *Johnson v. State*, 2006 ND 122 ¶ 14, 714 N.W.2d 832. Put simply, laches "require[s] a litigant to raise issues in a proper, timely fashion." *Id.* Laches bars a stale claim even if the applicable law does not impose a specific deadline. *See id.* ¶ 10 (laches barred claim even though governing statute did not contain filing deadline or time restriction).

MINNESOTA/2071450.0002/14944172.1

[¶ 37] Counce Energy was well aware of its right to petition the NDIC, as evidence by a series of letters it sent to Continental. As early as October 2012, a year before commencement of this suit and nearly four years before requesting a stay, Counce Energy referenced the NDIC process:

> If Continental Resources believes that the current billings for capital expenditures for the [Burian Well] reflect the reasonable and necessary actual costs please let us know so that we can arrange an appearance before the North Dakota Industrial Commission for resolution as provided by the Pooling Order for this spacing unit.

Docket #357. A month later, Counce Energy proposed an NDIC proceeding, noting disputes over "reasonableness" must be brought before the NDIC:

> In the event that Continental Resources cannot adequately provide explanation for the overages on this project, we propose taking this dispute to the North Dakota Industrial Commission for resolution ***as provided by North Dakota statutes***.

Docket #358 (emphasis added). In December 2012, Counce Energy again threatened to file an NDIC petition, demonstrating not only an awareness of its rights but also its knowledge that it must so ***before*** going to court:

> We deserve to have our correspondence timely answered and, if it is not done so soon [sic], we will have no alternative but to present the dispute to the N.D. Industrial Commission and, if necessary, ***subsequent*** litigation in the civil courts for resolution.

Docket #359 (emphasis added). In April 2013, Counce Energy again said it was planning to bring its claim before the NDIC:

> We have disputed the validity of the billing shown as past due, and for current capital expenditures and have not received a satisfactory response from your company to our series of letters beginning with our June letter to Claude Seaman regarding this and we will withhold payment for those amounts until we have a satisfactory resolution of this issue either with him or with the North Dakota Industrial Commission.

Docket #360. These letters—all sent before Continental sued—make it crystal clear Counce Energy (1) was aware of its right to petition the NDIC to dispute the costs, and (2) knew an NDIC petition was a prerequisite to going to court.

[¶ 38] When Continental commenced this action, Counce Energy could have petitioned the NDIC at that time. Despite its obvious awareness of that right, Counce Energy elected not to file an NDIC action and instead proceeded in court. This was a voluntary relinquishment of a known right, and hence a textbook example of waiver. Moreover, after years of intense and expensive litigation, laches prohibited Counce Energy from changing its mind going to the NDIC with the case trial ready and after two trial dates had passed. The prejudice to Continental was obvious; it spent three years prosecuting this lawsuit. Continental should not have been made to forfeit its time and substantial costs, especially since Counce Energy had no valid excuse for failing to file an NDIC petition at the proper time.[1]

2. Permitting Counce Energy To Invoke NDIC Procedures Years After Choosing To Litigate Would Vitiate Continental's Statutory Cause Of Action.

[¶ 39] The Gas & Oil Act authorizes operators to sue where, as here, a non-operator refuses to pay its share of well costs. N.D.C.C. §§ 38-08-08(2) & 38-08-10. Continental exercised that right by filing this lawsuit. When sued, a non-operator may invoke its own statutory right to petition the NDIC. The time to do so is at the outset of the case, not after three years of costly litigation.

[1] Continental argued waiver and laches in opposing Counce Energy's motion to correct the 1/13/16 order, Docket #355. Although the District Court did not specifically reference those doctrines, this Court can affirm the ruling for any basis supported by the record. *State v. Otto*, 2013 ND 239 ¶ 7, 840 N.W.2d 589.

[¶ 40] An operator's right to file suit would be dismantled if non-operators are allowed to sandbag and petition the NDIC after several years, thereby derailing the lawsuit as trial approaches. Permitting a non-operator to employ such tactics would nullify the operator's statutory rights. A non-operator could litigate as long as it pleases, and then at some arbitrary point have the lawsuit abruptly stopped by filing an NDIC petition. This would be manifestly unjust. Armed with the right to halt an operator's suit at its own whim, a non-operator would undoubtedly make strategic and/or tactical decisions about the precise moment doing so would afford it with an optimal advantage. Clever non-operators could tie up an operator's suit in court for years, forcing the operator to expend legal fees and costs, only to jettison that lawsuit on the eve of trial or after receiving unfavorable rulings from the court.

[¶ 41] This case presented exactly that scenario. Counce Energy litigated this case for years. After a series of key losses on summary judgment, requests for additional discovery and sanctions, and a frivolous motion to add a claim for exemplary damages, Counce Energy decided it no longer wished to be in court. Counce Energy thus tried to hit the reset button and start the case anew in a different venue, and thereby delay enforcement of Continental's right to repayment of Counce Energy's share of the drilling costs. To countenance this conduct would pervert the NDIC process and all but eliminate an operator's statutory right to go to court. That is surely not what the Legislature intended when it enacted the Gas & Oil Act.

3. Allowing Invocation Of Administrative Procedures After Years Of Litigation Would Thwart The Exhaustion Requirement.

[¶ 42] The fundamental tenant of exhaustion of administrative remedies is to require parties to utilize available administrative processes ***before*** going to court. Counce

Energy sought to reverse this process—litigate in court for several years, and then proceed on the administrative claim ***after*** the lawsuit was nearly concluded. Counce Energy's request to proceed in this bizarre fashion was utterly without precedent, and if allowed would have abrogated the exhaustion doctrine's *raison d'être*.

[¶ 43] The exhaustion requirement has two core functions: (1) "accord recognition to the expertise of the [administrative] organization's quasi-judicial tribunal, permitting it to adjudicate the merits of the plaintiff's claim in the first instance," and (2) "promote judicial efficiency by unearthing the relevant evidence and by providing a record which the court may review." *Brown*, 2006 ND 60 ¶ 10 (quoting *Soentgen*, 467 N.W.2d at 82). North Dakota law is in accord with the universally-recognized view of the importance of the exhaustion doctrine and the critical purposes it serves. As the United States Supreme Court explained:

> Exhaustion of administrative remedies serves two main purposes. First, exhaustion protects administrative agency authority. Exhaustion gives an agency an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court, and it discourages disregard of [the agency's] procedures. Second, exhaustion promotes efficiency. Claims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court. In some cases, claims are settled at the administrative level, and in others, the proceedings before the agency convince the losing party not to pursue the matter in federal court. And even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration.

Woodford v. Ngo, 548 U.S. 81, 89 (2006) (brackets in original).

[¶ 44] Implicit in these purposes is a requirement to exhaust administrative remedies before going to court. The exhaustion requirement would be meaningless if a party can go to court first, litigate for years, and then use the administrative remedy as a means to

escape or stall the judicial process if it does not go favorably. Tellingly, Counce Energy has not cited any authority allowing parties to proceed in reverse order.

4. A Dismissal For Lack Of Subject Matter Jurisdiction Can Be With Prejudice.

[¶ 45] Counce Energy argues that dismissal for lack of subject matter jurisdiction for failure to exhaust administrative remedies must always be without prejudice. Appellant Br. ¶¶ 61-67. That is not the law. Courts across the country routinely dismiss claims ***with prejudice*** based upon lack of subject matter jurisdiction where (as here) a party failed to exhaust administrative remedies. *See, e.g.*, *Harrup v. Carter*, No. 3:15CV697, 2017 WL 2625068, at *6-8 (E.D. Va. June 16, 2017); *Bryant v. Dept. of Veterans Affairs*, No. 15-5691, 2016 WL 1717582, at *2 (D.N.J. Apr. 28, 2016); *Frazier v. North Carolina Cent. Univ.*, 779 S.E.2d 515, 518-526 (N.C. Ct. App. 2015); *Liberty Bankers Life Ins. v. First Citizens Bank & Trust Co.*, No. 13CA1486, 2014 WL 5840149, at *2-5 (Colo. App. Nov. 6, 2014); *Douglas v. Dist. of Columbia*, 65 F. Supp. 3d 225, 226-229 (D.D.C. 2014); *Ziya v. Global Linguistic Solution*, No. 3:11-CV-1398, 2013 WL 4049514, at *3 (D. Or. Aug. 9, 2013); *Thomas v. Am. Home Assurance Co.*, 403 S.W.3d 512, 514 (Tex. App. 2013); *Westberg v. FDIC*, 926 F. Supp. 2d 61, 66 (D.D.C. 2013); *Shaver v. Davie Cnty. Pub. Sch.*, No. 1:07CV00176, 2008 WL 943035, at *2 (M.D.N.C. Apr. 7, 2008); *Staples v. Reckamp*, No. 04-CV-2607-A, 2005 WL 3536281, at *2 (W.D. La. Dec. 22, 2005); *Pearison v. Pinkertons, Inc.*, No. 1:02-CV-142, 2002 WL 32060142, at *1, 4-5) (E.D. Tenn. Sept. 16, 2002); *Oklahoma Horsemen's Benevolent & Protective Ass'n v. Shotts*, 38 P.3d 916, 918-919 (Okla. Civ. App. 2001); *German v. Pena*, 88 F. Supp. 2d 222, 223 (S.D.N.Y. 2000); *Oden v. Chicago Bd. of Ed.*, No. 94-C-4936, 1995 WL 3988, at *1 (N.D. Ill. Jan. 5, 1995).

[¶ 46] A particularly instructive case is *State ex rel. Anderson v. City of Madison*, 444 S.W.2d 443 (Mo. 1969). Missouri sued the city of Madison, IL, which is across the river from St. Louis, alleging that bridge tolls charged by the city were too high. The Missouri Supreme Court affirmed for lack of subject matter jurisdiction due to failure to exhaust administrative remedies. Like the Gas & Oil Act in this case, federal statutes vested the Department of the Army with authority to determine the "reasonableness" of interstate bridge tolls; Missouri had not gone to the agency for a "reasonableness" determination, and therefore could not assert that claim in court. *Id.* 444-445. Notably, the dismissal was with prejudice.

[¶ 47] *Trottier v. Bird*, 2001 ND 177, 635 N.W.2d 157, upon which Counce Energy relies (Appellant Br. ¶¶ 64-65), does not compel a different result. As the District Court recognized, *Trottier* does not concern lack of subject matter jurisdiction for failure to exhaust administrative remedies. Moreover, that case did not involve a party that knowingly declined to exhaust administrative remedies, litigated in court for several years, and then sought to stay the case when it was trial ready. Un-exhausted claims must be dismissed with prejudice where, as here, the claimant litigated in court before going to the administrative agency. Dismissal without prejudice would enable invocation of agency procedures after being in court and thereby "defeat[] the very purpose of the exhaustion requirement." *Ovieda v. Sodexo Operations, LLC*, No. CV-12-1750, 2013 WL 3887873, at *5 (C.D. Cal. July 3, 2013).

[¶ 48] This is not a case in which the District Court could not have exercised jurisdiction under any circumstances. The District Court would have had jurisdiction and could have considered the reasonableness claim had Counce Energy simply invoked the NDIC

procedure at the proper time and appealed the NDIC's ruling to the judiciary as set forth in the Gas & Oil Act. The dismissal with prejudice resulted from Counce Energy's actions—its decision not to exhaust administrative remedies with the NDIC at the proper time. Dismissal with prejudice was necessary because Counce Energy voluntarily waived its claim by choosing to proceed in court and litigate for years until the case was trial ready. Permitting Counce Energy to revive that claim under these circumstances would have undermined both the Gas & Oil Act and the exhaustion doctrine.

III. THE DISTRICT COURT PROPERLY APPLIED NORTH DAKOTA LAW IN DISMISSING COUNCE ENERGY'S FRAUD CLAIM.

A. Standard of Review

[¶ 49] Counce Energy appeals the District Court's summary judgment memorandum and order dismissing its fraud claim (Docket #205 & 225). The summary judgment appellate standard is "well established":

> On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

Hageness v. Davis, 2017 ND 132 ¶ 18, 896 N.W.2d 251 (quotation omitted).

B. Counce Energy's Fraud Claim Arose From And Was Dependent Upon Counce Energy's Breach Of Contract Claim.

[¶ 50] The District Court correctly dismissed the fraud claim because it was dependent upon Counce Energy's breach of contract claim. The District Court noted the factual allegations underlying the breach of contract and fraud claims were virtually identical. Docket #205 ¶¶ 21-23. The District Court also discussed controlling precedent that mere breach of contract does not give rise to tort liability. *Id.* ¶¶ 25. Under any standard of review, the District Court did not err in applying North Dakota law to dismiss a fraud

claim that was nothing more than a contract claim in disguise. Counce Energy asserted that Continental breached the contract because the costs it sought exceeded the AFE estimate. This very same conduct—seeking expenses in excess of the AFE—was the basis for the fraud claim. In case after case, this Court has rejected the argument that the same conduct can constitute both breach of contract and a tort.

[¶ 51] In *Pioneer Fuels, Inc. v. Montana-Dakota Util. Co.*, 474 N.W.2d 706 (N.D. 1991), plaintiff alleged that defendant not only breached the contract, but also committed a tort because defendant "had no intention" of complying with its contractual promises. *Id.* 708. This Court affirmed dismissal of the tort claim, holding:

> Tortious conduct must exist independently of the breach of contract and there must be proof of actual damages resulting from the independent tort. The independent tort must be separate and distinct from the breach of contract. While the intentional tort may occur at the same time and in connection with the breach, or may arise out of the same transaction, it is not committed merely by breaching the contract, even if such act is intentional. If it appears that the tort claim is only an alternative theory and a court could not properly enter judgment for compensatory judgment on both the contract and tort theories without granting double recovery, punitive damages should not be awarded.

Id. 710 (quoting 22 Am. Jur. 2d *Damages* § 752).

[¶ 52] In *Seifert v. Farmers Union Mut. Ins. Co.*, 497 N.W.2d 694 (N.D. 1993), a farmer sued his insurance company after a windstorm damaged irrigation equipment. After accepting a settlement on the policy, plaintiff brought a tort action on a negligence theory. *Id.* 696. This Court affirmed dismissal of the negligence claim, focusing on the distinction between contract and tort:

> Tort obligations are in general obligations that are imposed by law on policy considerations to avoid some kind of loss to others. They are obligations imposed apart from and independent of promises made and therefore apart from any manifested intention of parties to a contract or other bargaining transaction. Therefore, the alleged obligation to do or not to do something that was breached could not have existed but for a

> manifested intent, then contract law should be the *only* theory upon which liability would be imposed.

Id. (quoting Prosser & Keeton on the Law of Torts § 92, at 656 (5th ed. 1984) (italics in original). The Court explained that contrary ruling "would open the door to a tort remedy for every contract breach." *Id.* 697.

[¶ 53] In *Dakota Grain Co., Inc. v. Ehrmantrout*, 502 N.W.2d 234 (N.D. 1993), a grain elevator purchased wheat from defendant. Although the agreement called for spring wheat, defendant delivered winter wheat. *Id.* 236. The grain elevator sued on both warranty and tort theories. *Id.* Affirming dismissal of the tort claim, this Court commented that "[t]he parties made this case much more complex and confusing than was necessary by trying the case on mixed principles of tort and contract law," and "[t]he parties unnecessarily complicated this case by using negligence terminology to describe [defendant's] breach of his express warranty[.]" *Id.* The Court reiterated that "mere breach of contract does not, by itself, furnish a basis for liability in tort for negligence" and "[c]onduct that constitutes a breach of contract does not subject the actor to an action in tort for negligence, unless the conduct also constitutes a breach of an independent duty that did not arise from the contract." *Id.* 236-237. The tort claim failed because plaintiff "has not alleged that [defendant] breached any duty, apart from the obligation to deliver spring wheat under a contract, upon which to predicate liability in tort for negligence." *Id.* 237.

[¶ 54] In *Olander Contracting Co. v. Gail Wachter Inv.*, 2002 ND 65, 643 N.W.2d 29, the Court affirmed the *sua sponte* dismissal of a tort claim intertwined with an alleged breach of contract. The parties entered into a construction contract. Plaintiff sued for the cost of extra work it claimed it was required to perform. 2002 ND 65 ¶ 3. A defendant

filed a counterclaim for negligence, which the district court dismissed because the claim sounded in contract rather than tort. *Id.* ¶¶ 23, 25. This Court affirmed because defendant could not show "breach of an independent noncontractual duty … that did not arise from its contract." *Id.* ¶ 26.

[¶ 55] The District Court painstakingly followed this authority in dismissing a fraud based on the same conduct constituting the breach of contract claim. Despite its protestations to the contrary, Counce Energy did not allege any "independent" tort. Its contract and fraud claims were based on identical facts: the costs Continental sought were in excess of the AFE estimate. The supposed support for this claim—a self-serving affidavit from Richard Counce (Appellant Br. ¶ 57)—was simply a rehash of the arguments that particular costs were not authorized under the contract. Even accepting Counce Energy's false premise that Continental had a duty had to refrain from seeking costs above the AFE amount, such duty would arise solely from the parties' contract and could not support any independent fraud claim.

C. The Authorities Counce Energy Cites Are Inapposite.

[¶ 56] Counce Energy does not discuss—much less distinguish—the controlling authorities. The cases on which Counce Energy relies are cited out of context and provide no support for its position. Counce Energy cites *Erickson v. Erickson*, 2010 ND 86, 782 N.W.2d 346, and N.D.C.C. § 09-03-08 for the propositions that "fraud is a contract-based tort for which the existence of an underlying contract is an essential element of the claim" and "[f]raud confronts situations where one party intentionally misrepresents or conceals facts *from another contracting party*." Appellant Br. ¶ 54. This is a wholesale misrepresentation of the case and the statute, which concern ***fraudulent inducement*** as a ***defense*** to enforcement of a contract.

[¶ 57] In *Erickson*, plaintiffs sued to rescind a contract claiming they were constructively defrauded into making the agreement. 2010 ND 86 ¶ 5. This Court affirmed dismissal because plaintiffs had no evidence their counterparty used misrepresentations to induce entry into the contract. *Id.* ¶ 9. *Erickson* had nothing to do with a fraud claim asserted together with a breach of contract claim based upon the same allegations and theories.

[¶ 58] *Erickson* cited N.D.C.C. § 09-03-08 in the context of distinguishing constructive fraud from actual fraud as defenses to a contract. 2010 ND 86 ¶ 9. This statute falls within Chapter 9-03 of the Century Code, which concerns the mutual consent requirement. Not surprisingly, the Century Code provides that if consent is procured by fraud, there is no agreement. N.D.C.C. § 09-02-02 & 09-03-03. Section 09-03-08 defines "actual fraud" with respect to contractual consent. This statute concerns fraudulent inducement as a contract defense; it has absolutely nothing to do with the principle that a tort claim must be independent of a contract claim.

IV. CONTINENTAL DID NOT FAIL TO PROVE IT INCURRED THE DRILLING COSTS.

A. Standard of Review

[¶ 59] Counce Energy appeals the denial of its Rule 50 motion (Docket #515 & 518). This Court reviews Rule 50 decisions under the same standard applied by district courts:

> In reviewing a district court ruling on a motion for judgment as a matter of law, we examine the sufficiency of the evidence by viewing the evidence supporting the jury verdict as the truth. This Court then applies the standard for a Rule 50 judgment as a matter of law, which is whether the evidence favoring the verdict is so insufficient, reasonable minds could reach only one conclusion as to the verdict.

Minto Grain, LLC v. Tibert, 2009 ND 213 ¶ 7, 776 N.W.2d 549 (quotation omitted).

B. There Was Ample Evidence To Support The Jury's Conclusion.

[¶ 60] Counce Energy's argument regarding actual payment of the drilling costs is perhaps its most preposterous. Despite the undisputed fact this $10 million dollar well was completed—and is operating and generating revenue today—Counce Energy attempted to suggest (for the first time at the conclusion of trial) that Continental may have somehow accomplished this feat without paying the contractors. Appellant Br. ¶¶ 40-41, 47-50. This frivolous assertion flies in the face of the evidence and defies any notion of common sense.

[¶ 61] Counce Energy is incorrect that Continental failed to prove it actually incurred the drilling costs. The very exhibits Counce Energy offered demonstrated that Continental was seeking ***reimbursement*** of the drilling costs and "would no longer continue to subsidize" Counce Energy. 5/3/13 Letter from Continental to Counce Energy, Docket #451. The meaning of "subsidize" indicates that Continental had incurred the costs, and was looking to Counce Energy to fulfill its contractual obligation to reimburse Continental for its proportionate share. Even without considering Kristy Brown's definitive testimony that Continental did actually incur the costs (discussed below), there was evidence to support the jury's verdict.

[¶ 62] On the other side of the ledger, Counce Energy could not muster a single piece of evidence suggesting Continental did not incur the drilling costs. Nearly three years before trial, Continental gave Counce Energy the JADE report identifying each individual cost and a copy of the underlying invoice. Using the JADE report, Counce Energy could search, sort, and review every charge and invoice for drilling costs. Tr. 168. As the JADE report shows, drilling the Burian Well involved dozens of contractors and more than $10,000,000 in drilling costs. Tr. 178-179. Yet Counce Energy was unable to locate

a solitary contractor or vendor who made any claim they were not paid. Counce Energy also could not identify a solitary lawsuit or lien by any party claiming that Continental did not pay their bill. That absence of even one contractor claiming non-payment is powerful evidence that Continental paid the invoices, even without Brown's testimony and the JADE report. The verdict is thus supported by logical inferences jurors are permitted to draw. It strains credulity to suggest this well could have been completed had Continental not paid those contractors. Using reason and common sense, the jury could and did conclude that Continental paid the drilling costs. *Symington v. Mayo*, 1999 ND 48 ¶ 12, 590 N.W.2d 450 ("Juries are allowed to draw reasonable conclusions by applying common sense."); *see also State v. Hannah*, 2016 ND 11 ¶ 9, 873 N.W.2d 668 ("We have long recognized juries may draw rational inferences based upon common knowledge in reaching a verdict, and that is not only permissible but also desirable.") That is the only reasonable conclusion to be drawn from the undisputed facts.

[¶ 63] Although couched in terms of appealing the ruling on its Rule 50 motion, Counce Energy is actually making a backdoor challenge to the sufficiency of the evidence. Counce Energy cannot come close to carrying the high burden of showing the evidence was insufficient to support the jury's verdict. As this Court explained:

> Our review of questions of fact tried to a jury is limited to determining if there is substantial evidence to support the verdict. We view the evidence in the light most favorable to the verdict and it is only when reasonable people "can reach but one conclusion upon review of the issues that the evidence becomes a question of law for the court." Thus, unless the verdict is so flagrantly against the weight of the evidence that it appears the jury was actuated by bias or prejudice, the verdict will not be set aside.

Bjorgen v. Kinsey, 466 N.W.2d 553, 558 (N.D. 1991) (citations omitted). There is no basis to cast aside the verdict here, particularly in light of the long-standing principle that an appellate court must view the evidence in the light most favorable to the party who

MINNESOTA/2071450.0002/14944172.1

prevailed at trial. *Kuntz v. Stelmachuk*, 136 N.W.2d 810, 815 (N.D. 1965). The District Court recognized there was sufficient evidence for the jury to determine Continental incurred and paid the drilling costs. Trial courts, like juries, are permitted to use common sense when evaluating evidence. *Hill v. Weber*, 1999 ND 74 ¶ 12, 592 N.W.2d 585.

C. The District Court Did Not Abuse Its Broad Discretion In Permitting Continental To Recall Witness Kristy Brown.

[¶ 64] Even if there had been some doubt as to whether Continental paid the drilling costs, it was erased by the testimony of Kristy Brown. Brown testified unequivocally that Continental did, in fact, pay the invoices. Tr. 528-529. That testimony was more than sufficient to support the jury's verdict. Unable to offer any rebuttal, Counce Energy asks this Court to disregard Brown's testimony. This request is based on the erroneous contention that Judge Greenwood abused his discretion by allowing Continental to recall Brown because she supposedly lacked personal knowledge and because she had been sequestered. Appellant Br. ¶ 49. These assertions have neither factual nor legal support.[2]

[¶ 65] Counce Energy first argues the District Court should not have permitted Brown to testify because there was some question regarding personal knowledge. Appellant Br. ¶¶ 48, 50. This suggestion is unsupported by the record. "This Court will not reverse a trial court's admission of witness testimony unless the trial court abused its discretion. *In re T.T.*, 2011 ND 111 ¶ 8, 798 N.W.2d 678. "An abuse of discretion occurs when a trial courts acts arbitrarily, unconscionably, or unreasonably, or when a decision is not based on a rational mental process. *Id.* (quotation omitted). Judge Greenwood certainly did not abuse his discretion in allowing the jury to hear Brown's testimony. Brown never denied

[2] Counce Energy also suggests it was improper to allow Brown's testimony because it was not true "rebuttal." Appellant Br. ¶ 49. The District Court pointed out that Counce Energy waived this argument by failing to object at trial. Docket #515 ¶¶ 18-19 (citing *City of Fargo v. Erickson*, 1999 ND 145 ¶ 22, 598 N.W.2d 787).

having knowledge regarding Continental's payment of the bills for the Burian Well (as Counce Energy falsely suggests), and there was amble evidence demonstrating that Brown is very knowledgeable on this topic. Brown is Continental's joint interest billing manager who had been with the company for eight years. Tr. 158. She gave detailed testimony regarding her work on the costs and invoices for drilling the Burian Well; that included her responsibility for the JADE report, which is the Continental record of all those costs and invoices. *Id.* 158-179. Despite this undisputed evidence regarding Brown's knowledge of the costs for this well, Counce Energy argued to the jury that Brown's testimony was not credible (Tr. 555). Not surprisingly, the jury rejected that argument. It is frivolous to suggest that the District Court acted in an "arbitrary, unreasonable or unconscionable manner" in admitting Brown's testimony.

[¶ 66] Counce Energy's assertion that the District Court abused its discretion under Rule of Evidence 615 fares no better. Appellant Br. ¶ 49. Rule 615 provides that "[a]t a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony, or the court may do so on its own." "Sequestration of witnesses serves two related policies: (1) to prevent witnesses from tailoring testimony in light of the testimony of other witnesses, and (2) to permit discovery of false testimony and other credibility problems." *State v. Doll*, 2012 ND 32 ¶ 19, 812 N.W.2d 381 (quoting *State v. Buchholz*, 2004 ND 77 ¶ 24, 678 N.W.2d 144). "Sequestration prevents witnesses from tailoring their testimony and allows a court to detect inconsistencies between different witnesses' testimony." *In re T.T.*, 2011 ND 111 ¶ 9. In simple terms, "[t]he purpose of sequestration is to prevent one witness's testimony from influencing another." *State v. Wanner*, 2010 ND 121 ¶ 13, 784 N.W.2d 143.

[¶ 67] Counce Energy does not even attempt to argue Brown tailored her testimony to conform to anything she from any other witness. Instead, Counce Energy speculates Brown may have been influenced by being in the courtroom when Counce Energy moved for judgment as a matter of law. Appellant Br. ¶ 49. Nothing in the record supports this rank conjecture, and Counce Energy cannot point to any evidence suggesting Brown's testimony was anything other than truthful.

[¶ 68] Counce Energy also cannot cite a single case in which Rule 615 was applied to prohibit testimony merely because the witness was present during argument on a motion. North Dakota courts have refused to apply Rule 615 in several analogous situations where the witness was supposedly influenced by something other than in-court testimony. In *In re TT*, this Court rejected the claim that Rule 615 barred witnesses from testifying because they talked to each other in the hallway, and the only asserted prejudice was that the witnesses may be "able to anticipate [the] attorney's questions." 2011 ND 111 ¶ 10. In *In re Stensland*, the Court held Rule 615 did not preclude witnesses from testifying where the attorney allegedly gave them a "refresher course" during a break. 2011 ND 110 ¶¶ 17-19, 799 N.W.2d 341. In *Buchholz*, the Court adopted a narrow interpretation of Rule 615, holding it did not apply to out-of-court communications between the attorney and two witnesses who had previously been questioned together. 2004 ND 77 ¶¶ 24-25. These decisions make clear that the focus of Rule 615 is preventing witnesses from hearing in-court testimony of other witnesses. There is no basis to depart from precedent and dramatically expand the scope of the rule by applying it where the witness was not influenced by any other testimony. That is particularly true given that Counce Energy had the opportunity to cross examine Brown. *State v. Muhle*, 2007 ND 132 ¶ 37,

737 N.W.2d 647 (no showing of prejudice to support Rule 615 violation where counsel could cross examine and alert jury to credibility questions).

[¶ 69] Even if there had been a violation of a sequestration order (which there was not), it was within Judge Greenwood's discretion to permit Brown to testify. The law with respect to allowing sequestered witnesses to testify is clear:

> It is within the trial court's discretion to permit a witness to testify even though the witness has heard prior testimony in spite of a sequestration order, and the court's decision will not be overturned unless the court has abused its discretion. *** We agree with the majority of courts which have applied [Rule 615] to rebuttal witnesses, giving the trial courts discretion whether to allow testimony by a rebuttal witness who has heard evidence in violation of a sequestration order.

State v. Hill, 1999 ND 26 ¶¶ 5-6, 590 N.W.2d 187. The trial court abuses its discretion in permitting a sequestered witness to testify only if the "the objecting party clearly shows, by offer of proof or other appropriate means, a witness's testimony would be influenced by prior testimony the witness heard in violation of a sequestration order[.]" *Id.* ¶ 14. Counce Energy cannot demonstrate Brown's testimony that Continental paid the drilling costs was based upon anything other than her familiarity with the JADE report, which she personally prepared, and her experience in the Continental accounting department. Absent such a showing, there is no basis for Counce Energy's claim that the District Court abused its discretion in permitting Brown's testimony. *State v. Skorick*, 2002 ND 190 ¶ 9, 653 N.W.2d 698 (rejecting abuse of discretion claim because "[t]here is no showing that the rebuttal witness' testimony was either tailored to a prior witness or made less candid by his having heard prior testimony.")

CONCLUSION

For the foregoing reasons, Continental respectfully requests the District Court's rulings and the jury's verdict be affirmed in their entirety.

Dated: August 9, 2017

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CERTIFICATE OF COMPLIANCE

[¶ 70] The undersigned certifies pursuant to N.D.R. App. P. 32(a)(7)(A) and the Court's July 28, 2017 order that the text of Continental Resources Inc.'s Appellee's Brief (excluding the table of contents and table of authorities) contains 9,905 words.

[¶ 71] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 word processing software in Times New Roman 12 point font.

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[¶ 72] I hereby certify that on August 9, 2017, a true and correct copy of Appellee Continental Resources Inc.'s Brief was served via electronic mail on:

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Supreme Court Case No.: 20170066
Billings County District Court Case No.: 04-2013-CV-00015

IN DISTRICT COURT
COUNTY OF BILLINGS

STATE OF NORTH DAKOTA
SOUTHWEST JUDICIAL DIVISION

Continental Resources, Inc.,

Plaintiff/Appellee,

vs.

Counce Energy BC #1, LLC,

Defendant/Appellant.

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[¶1] I hereby certify that on August 14, 2017, a true and correct copy of the corrected Appellee's Brief and corrected Appellee's Appendix were served via electronic mail on:

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