IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

CORYELL ROOFING & CONSTRUCTION, INC.,

Plaintiff/Appellee,

vs.

BURGESS FARMS, LLC,

Defendant/Appellant.

Case No. 121,275

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE DON ANDREWS, TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

Aaron Stiles
Marty Estes
Chloe Tyler
DOWNTOWN LEGAL
Norman, Oklahoma — For Plaintiff/Appellee

Michael W. Brewer
HILTGEN & BREWER, P.C.
Oklahoma City, Oklahoma — For Defendant/Appellant

OPINION BY STACIE L. HIXON, JUDGE:

Burgess Farms, LLC (Defendant) appeals the trial court's April 21, 2023 journal entry of judgment entering the jury's award of $178,000.00 for breach of

contract in favor of Coryell Roofing and Construction, Inc. (Plaintiff). Defendant alleges the trial court erred by declining to grant it a directed verdict on Plaintiff's breach of contract action and by refusing to instruct the jury on a negligence theory of recovery of its counterclaim. Based on our review of the record and applicable law, we find the trial court properly declined to grant Defendant a directed verdict on Plaintiff's action but erred by failing to instruct the jury on Defendant's negligence theory of recovery. Accordingly, we reverse the journal entry and remand this case to the trial court for further proceedings.

BACKGROUND

Defendant is an entity managed by Jim Burgess and his wife. Defendant owns a real property in Edmond that houses multiple structures, including a residential home, a horse arena, a stud barn, a log barn, a guest house, and horse sheds. The roofs and roofing systems of several of the structures were damaged by a hail event and a lightning storm, resulting in Defendant filing a claim with its insurance company for which it received payment.

In December 2018, Defendant entered a contract with Plaintiff to make repairs to the structures, including roof replacements, for $604,074.00. Defendant paid Plaintiff approximately $352,500.00 for the work performed but refused to pay the balance owed.

Plaintiff filed suit in July 2020 for breach of contract and to foreclose its mechanic's lien filed on Defendant's property. Plaintiff acknowledged there was an issue with the gutters installed on the property and estimated it would cost $10,244.50 to make those repairs. Thus, Plaintiff sought damages in the amount of $253,420.00, representing the alleged amount still owed by Defendant minus the cost of the gutter repairs. Defendant disputed that Plaintiff was entitled to its requested relief and filed a counterclaim based on breach of contract and negligence theories of recovery. As part of both theories, Defendant alleged Plaintiff failed to fulfill the contract and failed to perform the work in accordance with industry standards, citing to multiple examples of work it alleged was deficient, primarily involving alleged roof leaks.

A jury trial was held on January 23-26, 2023. After the presentation of evidence, Defendant moved for a directed verdict on Plaintiff's breach of contract action, which the trial court denied. As for Defendant's counterclaim, the trial court decided, *sua sponte*, not to allow submission of its negligence theory of recovery to the jury over Defendant's objection. The jury rendered a verdict in Plaintiff's favor and fixed the damages at $178,000.00. The jury also rendered a verdict in favor of Plaintiff on Defendant's breach of contract theory of recovery. The trial court's journal entry of judgment was filed April 21, 2023.

Defendant appeals.

STANDARD OF REVIEW

Defendant alleges the trial court erred by declining to grant it a directed verdict on Plaintiff's breach of contract action. In ruling on a motion for directed verdict, a trial court must consider as true all evidence and all inferences reasonably drawn therefrom that are favorable to the party against whom the motion is made; any conflicting evidence favorable to the movant must be disregarded. *U.S. Bank National Assoc. v. Hill*, 2023 OK 86, ¶ 11, 540 P.3d 1. However, when the party opposing the motion for directed verdict has failed to demonstrate a *prima facie* case for recovery, then a motion for directed verdict should be granted. *Id.* A trial court's denial of a motion for directed verdict is reviewed *de novo*. *Id.*

The issue of whether the jury should have been instructed on Defendant's negligence theory of recovery on its counterclaim is a question of law, also reviewed *de novo*. *See Bays Expl., Inc. v. Jones*, 2007 OK CIV APP 111, ¶ 10, 172 P.3d 217. Under *de novo* review, we have plenary, independent, and non-deferential authority to determine whether the trial court erred in its legal rulings. *Brassfield v. State*, 2024 OK 9, ¶ 5, 544 P.3d 938.

ANALYSIS

Defendant alleges the trial court erred by not granting its motion for directed verdict on Plaintiff's breach of contract action. To survive Defendant's motion, Plaintiff was required to make a *prima facie* case for breach of contract, which

requires: 1) formation of a contract; 2) breach of the contract; and 3) damages as a result of that breach. *Morgan v. State Farm Mut. Auto. Ins. Co.*, 2021 OK 27, ¶ 21, 488 P.3d 743. To recover for an alleged breach of contract, a plaintiff is also required to show full or substantial performance of its obligations under the contract. *Holden v. Dubois*, 1983 OK 45, ¶ 14, 665 P.2d 1175. Substantial performance occurs when a contractor has in good faith intended to perform its part of the contract "'and has done so in the sense that the building is substantially what is provided for, and there are no omissions or deviations from the general plan which cannot be remedied without difficulty."' *Collins v. Baldwin*, 1965 OK 55, ¶ 24, 405 P.2d 74 (quoting *Kizziar v. Dollar*, 268 F.2d 914, 916 (10th Cir. 1959). Substantial performance does not require "'literal compliance in all details[.]"' *Id. See also*, Oklahoma Uniform Jury Instruction No. 23.23.

In its brief in chief, Defendant's sole argument is that Plaintiff failed to make a *prima facie* showing that a breach occurred by failing to show it performed the contracted scope of work and failing to show it substantially performed the work pursuant to the contract.[1] Regarding the scope of the work, Plaintiff presented as an

[1] In its brief in chief, Defendant does not argue that Plaintiff failed to present evidence making a *prima facie* showing of the formation of a contract or damages as a result of the breach of contract. Defendant argues for the first time in its reply brief that Plaintiff failed to make a *prima facie* case of damages. Given new arguments may not be raised for the first time in a reply brief, we do not consider this argument. *See Cox Oklahoma Telecom, LLC v. State ex rel. Oklahoma Corp. Comm'n*, 2007 OK 55, ¶ 33, 164 P.3d 150. Regardless, Jeremiah Hey, Plaintiff's sales manager, testified regarding the amount of damages at trial.

exhibit a detailed estimate number 3520, which was incorporated into the contract and itemizes the exterior work to be performed under the contract. The estimate also states the interior scope of work was to be handled per the insurance adjustment. Additionally, Plaintiff presented testimony of Hey and Burgess, echoing that the scope of work under the contract included the items contained in estimate number 3520 and on the insurance supplement for the interior work.

Regarding the issue of the substantial performance, Hey's testimony indicated the contracted work was completed around July 2019. Hey further testified that after the work was complete, Burgess complained about a leak in the main residence, and water testing was performed. However, the water testing showed the roof was not leaking, but rather the siding was leaking, which Plaintiff was not hired to repair. While on the property for the testing, Burgess complained about additional issues, and a "punch list" was created, which Plaintiff memorialized in writing and sent to Burgess for approval. Hey testified that Burgess told him that he would pay Plaintiff after the items on the punch list were completed upon his inspection, and Plaintiff also presented an e-mail from Burgess approving of the punch list. Hey further testified that Plaintiff performed all the work on the punch list, and he met with Burgess to do a "walk through." Hey also testified that Burgess complained about other repairs that were outside of the scope of the contract, which Plaintiff made in attempt to satisfy Burgess and receive payment.

Plaintiff also presented engineer Martin Henry as an expert witness. Henry's testimony generally indicated that Burgess's complaints regarding additional repairs he alleged needed to be made were unfounded, either because there were no repairs needed in the first place or because the repairs were not within the scope of work Plaintiff was hired to perform. It is true that Plaintiff presented testimony and exhibits acknowledging a few minor repairs needed to be made that were in the scope of the contract for over $600,000.00 in repairs, including replacing one section of gutters at a cost of around $10,000.00 and installing a snow guard for around $2,200.00.[2] However, taking Plaintiff's evidence as true and making all inferences in its favor, we find the trial court did not err by finding the issue of Plaintiff's substantial performance of the contract should be submitted to the jury.

Defendant's reliance on *Cook v. Alexander*, 1965 OK 128, ¶ 17, 405 P.2d 990, is misguided. *Cook* did not involve the review of a denial of a motion for directed verdict. Rather, the case simply stands for the proposition that an appellate court will defer to the fact finder's ultimate determination of whether substantial performance occurred when there are conflicts in the evidence. For the above reasons, we find the trial court did not err by denying Defendant's motion for directed verdict and by submitting Plaintiff's breach of contract action to the jury.

---

[2] At one point, Burgess testified he had obtained an estimate from another company in the amount of $150,000.00 to make the repairs. We disregard this evidence when reviewing the denial of Defendant's motion for directed verdict.

Next, regarding Defendant's counterclaim, it alleges as it did at trial that the trial court should have instructed the jury on its negligence theory of recovery, in addition to instructing on the breach of contract theory. We agree.

Plaintiff argues the trial court properly declined to submit the negligence theory to the jury because Defendant did not present evidence establishing a *prima facie* case of negligence. Significantly, Plaintiff does not argue on appeal and did not argue to the trial court that, as a matter of law, the jury should not be instructed on both breach of contract and negligence theories, despite presenting a *prima facie* case of both theories, because they were based on the same facts and the same damages. The Dissent creates this argument for Plaintiff *sua sponte*.[3] The Supreme Court has previously cautioned appellate courts against searching for additional authorities to support unsupported arguments, much less crafting entire, unraised arguments for the parties. Indeed, this practice "violates a basic common-law tenet that judges must always cast themselves into the role of neutral and detached decisionmakers rather than turning themselves into combatants in a forensic battle." *Fent v. Contingency Rev. Bd.*, 2007 OK 27, ¶ 23, 163 P.3d 512.

In any event, it is possible Plaintiff did not raise this argument on appeal because it does not reflect the common practice in courts throughout this State in

[3] The trial court, likewise, did not cite the Dissent's argument as to why both theories should not be presented to the jury, instead citing general concerns about jury confusion.

trials involving construction contracts where the work has been completed but is allegedly faulty or deficient. More importantly, the argument the Dissent crafts for Plaintiff is contradicted by Oklahoma Supreme Court authority.

Specifically, in *Keel v. Titan Const. Corp.*, 1981 OK 148, 639 P.2d 1228, the plaintiffs entered a construction contract with a builder, which then hired an architect to draw the building plans. Plaintiffs filed suit against the architect, alleging the plans were defective. *Id.* at ¶ 2. The architect filed a motion to dismiss, arguing there was no privity of contract between it and the plaintiffs, and therefore, no cause of action could be brought against him. *Id.* at ¶ 7. The Court reversed the district court's dismissal, concluding that a party's liability for negligent breach of a contract with a third party is not necessarily dependent upon a pre-existing privity. *Id.* at ¶¶ 14-16. In reaching its decision, the Court explained that "[a]ccompanying every contract is a common-law duty to perform it with care, skill, reasonable experience and faithfulness the thing agreed to be done," adding, "a negligent failure to observe any of these conditions is a tort, as well as a breach of contract." *Id.* at ¶ 14. While *Keel* admittedly did not squarely address the facts of the present case where the parties were in privity of contract, the Court's analysis certainly indicates a party may pursue recovery under both breach of contract and torts theories when supported by the evidence.

The Court made this point even more clearly in *Finnell v. Jebco Seismic*, 2003 OK 35, 67 P.3d 339. In *Finnell*, the plaintiff contracted with the defendant to conduct a seismic survey on his land. *Id.* at ¶ 2. The contract provided the defendant would conduct the survey "in accordance with good standard practices and in a prudent and careful manner." *Id.* The plaintiff sued upon learning the survey had caused more damage to his land than was contemplated in the compensation provisions of the contract. *Id.* at ¶ 3. The defendant admitted liability, and the case went to trial on the issue of damages. *Id.* at ¶ 5.[4] After trial, the plaintiffs sought attorney fees under 12 O.S. § 940, which allows recovery of fees in an action to recover damages for the negligent or willful injury to property. *Id.* at ¶ 9. The defendant argued section 940 did not apply because the plaintiffs only sued for breach of contract. *Id.* at ¶ 10. The question was whether the plaintiffs had *also* pursued a negligence theory, entitling them to fees under section 940. *See id.* at ¶ 11. The Court affirmed the trial court's decision awarding fees under section 940, finding the plaintiffs had recovered under a negligence theory, thus entitling them to fees under section 940. *See id.* at ¶¶ 10-15.

In reaching its decision, the Court explained that "Oklahoma law has long recognized that an action for breach of contract and an action in tort may arise from *the same set of facts*." *Id.* at ¶ 13 (emphasis added). The Court reiterated that "there

---

[4] Before trial, the plaintiff's wife was added as a plaintiff.

is inherent in every contract a common-law duty to perform its obligations with care, skill, reasonable experience and faithfulness." *Id.*[5] Moreover, a person injured by the substandard performance of a duty derived from a contractual relationship "may rely on a breach-of-contract or tort theory, *or both*" though only a single recovery may be achieved. *Id.* (emphasis added). The Court found that the contract contained an express undertaking to perform in a prudent and careful manner, and thus, the terms of the contract provided a basis for recovery for a breach of contract. *Id.* Additionally, the Court found the "contract provides the factual background for a claim *ex delicto*, the basis of which is defendants' tortious conduct in the performance of a duty derived from the contractual relationship." *Id.* Thus, the Court concluded the petition's allegations gave the defendant adequate notice of the "*dual nature*" of the plaintiffs' cause of action. *Id.*

In addition to examining the allegations in the petition, the Court also examined the jury instructions and found they did not support the argument that the

---

[5] The Dissent takes issue with the Court's repeated recognition of this duty in *Keel* and *Finnell*. It cites *Embry v. Innovative Aftermarket Sys. L.P.*, 2010 OK 82, 247 P.3d 1158 and *Wathor v. Mut. Assur. Adm'rs, Inc.*, 2004 OK 2, 87 P.3d 559, as purportedly stating "precisely the opposite." Notably, neither *Embry* nor *Wathor* overruled *Keel*, *Finnell*, or their progeny. The Supreme Court has also continued to rely on the *Keel* line of cases in post *Embry* and *Wathor* decisions. *See Gaasch v. St. Paul Fire & Marine Ins. Co.*, 2018 OK 12, ¶ 18, 412 P.3d 1151. Moreover, *Embry* and *Wathor* both deal with insurance contracts and the duty of good faith and fair dealing. The present case involves a different type of contract and a different duty. In the context of construction contracts, as in this case, the above precedent is clear that a duty arises to perform the contracted-for work in a non-negligent manner, and the breach of such duty gives rise to a cause of action for both negligence and breach of contract. *Embry* and *Wathor* simply do not apply.

case was tried only under a breach of contract theory. *Id.* at ¶ 14. The Court noted that while damages under either theory of recovery could be different, under the facts of the case before it, "[t]he *same quantum* of monetary recovery is plaintiffs' due whether their claim be deemed actionable in contract or in tort." *Id.* (emphasis added).

Thus, contrary to the Dissent's reading, *Finnell* contemplated that a plaintiff may pursue both breach of contract and negligence theories, even when based on the "same" facts and the "same" damages. Though the Dissent appears to acknowledge that both theories may be pled, it remains unconvinced, or unwilling to acknowledge, that both may submitted to the jury. On this point, however, the Court in *Finnell* provided this directive:

> The doctrine of mandatory election of remedies is now an anachronism. At the submission stage, *the court must charge the jury on all theories of recovery the evidence may support*. The court will craft the available relief which the facts justify.

Id. at ¶ 12 (emphasis added). The Dissent ignores this plain language.[6] We, however, take the Supreme Court at its word and find that the jury should have been instructed on Defendant's negligence theory (in addition to the breach of contract

[6] The Dissent's position begs the question of how a theory could be pled but not pursued at trial without some pre-submission election of remedies in contradiction of *Finnell*. Moreover, the fact that the Oklahoma Uniform Jury Instructions do not squarely address the situation in this case does not mean the law need not be followed.

theory) if it presented a *prima facie* case of negligence under a directed verdict standard.[7]

To establish a *prima facie* case of negligence on its counterclaim, Defendant was required to prove: (1) a duty owed by Plaintiff to protect Defendant from injury; (2) a failure to perform that duty; and (3) injuries to Defendant that are proximately caused by Plaintiff's failure to exercise the duty of care. *Bird v. Pruett's Food*, 2023 OK 92, ¶ 7, 536 P.3d 578. As for the existence of a duty, as noted above, there is a common-law duty accompanying every contract to perform the work to be done pursuant to the contract with care, skill, reasonable experience, and faithfulness. *Keel*, 1981 OK 148, ¶ 14.

It was undisputed at trial that Plaintiff and Defendant entered a contract for Plaintiff to properly perform certain repairs to the roofs and roofing systems of multiple structures on Defendant's property. Moreover, viewing all the evidence Defendant presented at trial as true, and all inferences reasonably drawn therefrom in its favor, Defendant presented evidence establishing that Plaintiff breached this duty by deficiently making some of the contracted repairs that damaged the property

---

[7] Our division has previously reached a similar conclusion. *See Abercrombie & Fitch Stores Inc. v. Penn Square Mall Ltd. P'ship*, 2018 OK CIV APP 56, ¶ 9, 425 P.3d 757 (finding the trial court did not err in providing the jury with a negligence instruction when a breach of contract instruction had also been submitted based on the same facts).

and/or that would cost additional amounts to repair.[8] Thus, we find the jury should have been instructed on a negligence theory of recovery.

Plaintiff argues our finding that the jury should have been instructed on negligence does not require reversal because any error is harmless. Plaintiff's point is well-taken. It is difficult to see given the facts of this case how the jury could have found Plaintiff liable on Defendant's counterclaim under a negligence theory when the jury found Plaintiff not liable for breach of contract. Regardless, the Supreme Court has held that where jury instructions "fail to present the theory of a party on which the case was tried and on which evidence was introduced, which theory goes to the right to recover, such failure constitutes fundamental and prejudicial error." *Bradley Chevrolet, Inc. v. Goodson*, 1969 OK 25, ¶ 8, 450 P.2d 500. *See also LPCX Corp. v. Faulkner*, 1991 OK 46, ¶ 20, 818 P.2d 431 (same); *Smicklas v. Spitz*, 1992 OK 145, ¶ 11, 846 P.2d 362 ("It is the trial court's duty to instruct on the fundamental issues of a case. Failure to do so is grounds for a new trial."). Plaintiff fails to recognize the above authority, and our research reveals

---

[8] Plaintiff argues Defendant failed to make a *prima facie* case of negligence because it did not present expert testimony on the duty of care and Plaintiff's alleged breach thereof. We reject this argument. Defendant's primary complaints were Plaintiff's alleged failure to complete all the contracted repairs and failure to properly install the roofs and make other repairs, as evidenced by leaks that occurred after installation and other issues about which Burgess testified. Expert testimony was unnecessary to establish that a breach of a duty occurred under such circumstances. *See Johnson v. Hillcrest Health Ctr., Inc.*, 2003 OK 16, ¶ 13, 70 P.3d 811 (explaining expert testimony is unnecessary to establish breach of duty of care when "the common knowledge of lay persons would enable a jury to conclude the applicable standard of care and whether its breach caused the injury.").

these cases remain good law.[9] Accordingly, we are duty bound to follow these directives of the Supreme Court.

CONCLUSION

We therefore reverse the trial court's April 21, 2023 journal entry and remand this matter to the trial court for further proceedings consistent with this Opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HUBER, P.J., concurs, and BLACKWELL, J., concurs in part and dissents in part.

BLACKWELL, J., concurring in part and dissenting in part:

I agree with the Court's resolution of the defendant's claim of error related to the denial of its motion for a directed verdict. For the following two reasons, however, I respectfully dissent from the Court's reversing and remanding for new trial due to the trial court's failure to give the requested negligence instructions. First, I do not agree with the majority that Oklahoma law requires a judge to submit separate tort and contract instructions to a jury when the allegations of harm involve the same acts and cause the exact same harm. Second, even if this is required, I would hold that the failure to instruct in this case was harmless because the jury's

[9] The Dissent also cites no authority to support its position that any error in failing to instruct the jury on negligence was harmless.

rejection of the contract theory would have necessarily rejected a tort theory offered under the same facts.[1]

I.

This case involves a simple breach of contract and the harm that allegedly flowed therefrom. The view that this breach may be presented to a jury as *two* claims—for both breach of contract and negligence—arises from a fundamental misinterpretation of the original cases involving similar, but never identical, questions.

The root of the rule under which the majority reverses is stated in *Keel v. Titan Const. Corp.*, 1981 OK 148, 639 P.2d 1228. *Keel* is a well-known case examining a motion to dismiss. The *Keel* plaintiffs attempted to sue both their builder and the architect the builder hired to draw up plans for a dwelling, with an auxiliary solar heat system, on the plaintiffs land. *Id.* ¶ 2. Among other allegations, the Keels alleged the architect's design was defective. The motion to dismiss was based on a lack of contract between the architect and the Keels. Examining the motion to dismiss, the Court noted that a duty exists in every contract to perform it skillfully,

[1] Because I would affirm on the two propositions of error the majority reviews, I would also address defendant's third proposition of error, related the allegedly improper comments made by the plaintiff's counsel during closing argument.

carefully, diligently, and in a workmanlike manner. *Id.* ¶ 8.[2] The Court noted, however, that although the Keels maintained that their petition stated a cause of action in their favor as third-party beneficiaries of the contract between the builder and the architect, "[t]his portion of the petition does not plead an action for breach of contract, and therefore the question of whether there is or there is required to be privity between the Keels and [the architect] is not here involved." *Id.* ¶ 11. It was in the absence of a pled contract claim that *Keel* noted that "[a]ccompanying every contract is a common-law duty to perform with care, skill, reasonable experience and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of contract." *Id.* ¶ 14. Hence, the court found that the Keel's petition pled a colorable claim of negligence against the architect and could not be dismissed for failure to state a claim. *Id.* ¶ 15.

The key holding of *Keel* is not that a negligent failure to perform a contract may constitute a tort as well as a breach of contract.[3] It is that the statutory duty

---

[2] *Keel* cites 15 O.S. § 171, which states that "[s]tipulations which are necessary to make a contract reasonable or conformable to usage, are implied in respect to matters concerning which the contract manifests no contrary intention" as the source of a statutory duty. *Keel* at n.11.

[3] Indeed, the Supreme Court has on many occasions stated precisely the opposite. *See, e.g., Embry v. Innovative Aftermarket Sys. L.P.*, 2010 OK 82, ¶ 14, 247 P.3d 1158, 1161 ("There is simply no general duty to use reasonable care in the performance of a contract."); *Wathor v. Mut. Assur. Adm'rs, Inc.*, 2004 OK 2, ¶ 5, 87 P.3d 559, 561 ("In ordinary commercial contracts, a breach of that duty merely results in damages for breach of contract, not independent tort liability."). One federal district court has succinctly summed up the Oklahoma law in this arena as follows:

under a contract to perform skillfully, carefully, diligently, and in a workmanlike manner is the *same duty* as the common law duty to perform with care, skill and reasonable experience. Hence, a petition may be interpreted as stating a tort or contact claim based on a breach of the same duty. Although the language of *Keel* taken out of the context appears to assist the appellant here, upon further inspection I do not find the case instructive for the reasons stated.

> The circumstances under which Oklahoma law permits contracting parties to sue each other in tort are not perfectly defined. The Oklahoma Supreme Court has stated that tort liability requires "violation of a duty imposed by law independent of contract." *Lewis v. Farmers Ins. Co.*, 681 P.2d 67, 69 (Okla. 1983). That court also stated that every contract embodies a "common law duty to perform [the thing to be done] with care, skill, reasonable expediency, and faithfulness," and breach of such duty "will give rise to an action ex delicto as well as an action ex contractu." *Id.* at 69.
>
> Looking to the substance of their rulings, Oklahoma courts have permitted tort claims by and against contracting parties in two scenarios: (1) where the defendant engaged in tortious conduct amounting to breach of an extra-contractual duty—*i.e.*, a duty "imposed by law, by reason of the [parties'] relationship"; and (2) where, in the course of performing under a contract, the defendant committed an "independent" wrong, typically characterized by behavior that is "willful, designed, intentional, or malicious." Outside these scenarios—that is, without breach of an independent duty or the commission of an "independent" tort—a contractual violation, even if intentionally undertaken, will not support a claim for tort liability. See *Hall Jones*, 459 P.2d at 861 ("Conduct that is merely a breach of contract is, of course, not a tort."); *Pack*, 97 P.2d at 770 ("There is a broad distinction between causes of action arising ex contractu and ex delicto, and a mere matter of contract cannot be converted into a tort.").

Miller v. EOG Res., Inc., CIV-19-1033-G, 2020 WL 592339, at *2 (W.D. Okla. Feb. 6, 2020) (footnotes omitted). I find this recitation persuasive and I would apply it here to affirm the judgment entered on the jury's verdict.

The next case that is frequently cited in favor of the appellant's claim is *Howell v. James*, 1991 OK 47, ¶ 11, 818 P.2d 444, 447. It states:

> A litigant may plead inconsistent defenses and rely on these defenses throughout the trial. While inconsistent judgments or double recovery may not be permissible, the party is not prevented from fully litigating the inconsistent theories or defenses at trial.

Id. ¶ 11. *Howell's* reference to "fully litigating inconsistent theories" is often cited as authority that the same failure to perform under a contract may be presented to a jury as a both a negligence claim and a breach of contract claim.

Howell examines the pleading code at 12 O.S. 2008(E)(2) which states that "[a] party may set forth, and at trial rely on, two or more statements of a claim or defense alternately or hypothetically." Interpreting this statute, *Howell* held that a party could try both his claim seeking reformation of the contract, or rescission thereof, and his defenses of breach of contract and failure of consideration, even though these were inconsistent. *Howell*, 1991 OK 47, ¶ 14. The key holding in *Howell* is that, despite the fact that the contract could not both fail for lack of consideration and also be reformed, the pleading code allowed inconsistent pleading. There is nothing inconsistent in the claims in the current case, however. Both claims seek the same damages for the same harm.

The fact that *Howell* does not approve of presenting an otherwise identical claim to a jury for identical harm on both tort and contract theories is also clear from its accompanying statement that *inconsistent judgments and double recovery are*

impermissible. Presenting two separate theories to a jury involving the same acts and damages invites double recovery, as it would be impossible to tell from a general verdict if the jury found damages and awarded them twice, once in contract and once in tort. It also invites inconsistent verdicts finding that the same acts breached a tort duty to perform with "care, skill, reasonable experience and faithfulness" but not a contract duty to perform "skillfully, carefully, diligently, and in a workmanlike manner." Complex findings by a jury would appear mandatory to avoid double recovery and inconsistent verdicts in such cases, but I find no provision in the uniform jury instructions addressing when the same acts and the same resulting damages are presented to a jury as two separate claims, and no evident request for such instructions in the current case.[4]

Another case often cited, and relied on by the majority here, is *Finnell v. Seismic*, 2003 OK 35, 67 P.3d 339. *Finnell* is a fee case that addresses, post-verdict, whether the case involved a negligent injury to property that would support a fee award under 12 O.S. § 940, even though the "petition's allegations pressed only a demand for breach of contract." *Id.* ¶ 10. Hence, *Fennell* examined whether the pleadings were sufficient to put the defendants on notice that they were defending a

[4] Indeed, based on the verdict forms the defendant offered, it would be impossible to tell whether damages for the same injuries were awarded. *See* R. 438, *Defendant's Proposed Jury Instructions*, pgs. 27, 29 (offering separate verdict forms for the defendant's negligence and breach of contract claims, with no instruction as to how to detect overlapping damages).

fee-bearing negligence claim. The Court, after examining the history and requirements of notice pleading in Oklahoma, found that the "petition's allegations give adequate notice of the dual nature of plaintiffs' claim." *Id.* ¶ 13 (emphasis removed). It was in this context that *Finnell* recited the familiar statements that "Oklahoma law has long recognized that an action for breach of contract and an action in tort may arise from the same set of facts" and that "[t]his is so because there is inherent in every contract a common-law duty to perform its obligations with care, skill, reasonable experience and faithfulness." *Id.* *Finnell* then returned to a historical line of cases examining whether the gravamen of the case lay in tort or contract.[5] *Finnell* does not stand for the proposition that the same acts, resulting in the same damages, must be submitted to a jury under both a contract and tort theory just because both theories were pled.[6]

All later cases, including, *Estate of Gaasch v. St. Paul Fire & Marine Ins. Co.*, 2018 OK 12, 412 P.3d 1151, cite back to these roots. In my view, none of them

---

[5] "The court has held that where a contract is the mere inducement creating the state of things that furnishes the occasion for a tort, the tort, not the contract, is the basis of the action." *Finnell*, ¶ 13 (citing *Morriss v. Barton,* 1947 OK 260, ¶ 41, 190 P.2d 451, 457; *Independent Torpedo Co. v. Carder*, 1933 OK 477, 25 P.2d 62, 64; *Jackson v. Central Torpedo Co.*, 1926 OK 434, ¶ 8, 246 P. 426, 428 ("If the transaction complained of had its origin in a contract which placed the parties in such a relation that, in attempting to perform the promised service, the tort was committed, then the breach of the contract is not the gravamen of the suit. The contract in such case is mere inducement, creating the state of things which furnishes the occasion of the tort, and in all such cases the remedy is an action on the case.")).

[6] *Finnell* also notes that "even if the evidence supports both, the claimant can achieve but a single recovery," that the defendants admitted liability for the damage to plaintiffs' property prior to trial, and the damages issue alone was tried. *Id.* ¶ 14.

require the submission of the same acts, resulting in the same damages, to a jury as two independent theories of recovery.[7]

II.

Further, even if the trial court erred in refraining to give the defendant's requested negligence instruction, and if appropriate instructions could be fashioned to prevent double recovery and inconsistent verdicts, I would find any error here was harmless. *Keel* is clear that the statutory duty under a contract to perform skillfully, carefully, diligently, and in a workmanlike manner is the same as the common law duty to perform with care, skill, and reasonable experience. The jury was instructed that the defendant claimed a breach of this contractual duty, including a specific instruction that, "[b]y agreeing to perform work in a contract, a person promises to use reasonable skill, care, and diligence and that the work will be done in a workmanlike manner and be reasonably fit for its intended use." *See* R. 469, *Jury Instructions*, pg. 15 (Instruciton No. 14) (taken verbatim from OUJI 23.15a). The jury found no liability.

---

[7] This is not to say that a breach of contract claim and tort claim for breach of common law contract duties can never coexist before a jury. Where the alleged tortious behavior varies significantly from the required behavior under the contract, or where remedies that are not available in contract are available in tort, such claims may both go to a jury with appropriate instructions. *See Abercrombie & Fitch Stores, Inc. v. Penn Square Mall Ltd. P'ship*, 2018 OK CIV APP 56, ¶ 12, 425 P.3d 757, 763 (where contract contains a provision prohibiting consequential damages, but allows negligence suits, consequential damages caused by "breach of a contractual duty to maintain the mall's plumbing lines in good order, condition, and repair" could constitute a contract and a negligence claim).

Had the requested negligence instructions also been given, I see no basis under which a jury could find that the contractor *had not* failed to perform the work with skill, care and diligence for the contract claim, but *had* failed to perform the same work with care, skill, and reasonable experience for the negligence claim. Indeed, as the negligence claim requires an extra element compared to the contract claim—foreseeability of harm—a verdict against the contract claim operates as a verdict against a negligence claim based on the same behavior. To hold otherwise would sanction the inconsistent verdicts prohibited by *Keel* and *Finnell*. Hence, I would hold that, even if it was error to refuse the requested negligence instructions, the jury's verdict against the contract claim renders any error harmless.

August 27, 2024