NO. 14-10-00604-CV

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT
AT HOUSTON, TEXAS

2001 Trinity Fund, LLC,

Appellant

v.

Carrizo Oil & Gas, Inc.,

Appellee

On Appeal from the 295th Judicial District Court in Harris County, Texas
Trial Court Cause No. 2008-05053

APPELLEE'S MOTION FOR RECONSIDERATION EN BANC

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Pursuant to TEX. R. APP. P. 49.7, Appellee, Carrizo Oil & Gas, Inc. (Carrizo), moves the full Court to reconsider this case en banc for the following reasons:

ISSUES PRESENTED FOR RECONSIDERATION

1. One or more issues determined by the Substitute Opinion of the Panel present such an extraordinary circumstance that determination of the issues by the Court en banc is necessary.

2. The Substitute Opinion of the Panel of the Court of Appeals is contrary to another opinion issued by this Court.

BACKGROUND

2011 Trinity Fund, L.L.C. (Trinity) is the Appellant. Carrizo is the Appellee. On October 16, 2012, the Panel of Justices Kem Thompson Frost, Martha Hill Jamison and Charles W. Seymore (the Panel) issued an original opinion.

On December 28, 2012, the Panel granted in part and denied in part a motion for rehearing filed by Carrizo. It withdrew the earlier opinion and issued the Substitute Opinion of the Panel.

Within fifteen (15) days of the denial in part of the motion for rehearing and of issuance of the Substitute Opinion of the Panel, Carrizo seeks reconsideration of the reversal of the jury verdict and trial court judgment awarding Carrizo substantial monetary awards against Trinity for breach of contract and,

alternatively, under quantum meruit and promissory estoppel. This Court has the authority to grant this motion and submit this case to the full Court sitting en banc. TEX. R. APP. P. 41.2 and 49.7.

ARGUMENT FOR RECONSIDERATION

I. The Panel Has Rewritten the Applicable "No-Evidence" Standard of Review and Applied a New Erroneous Standard to Deprive Carrizo of Vested Property Rights Without Due Process.

The Panel sustained "no-evidence" challenges to the jury's verdict and resulting judgment awarding Carrizo over $10,000,000 in breach of contract and alternative quantum meruit and promissory damages. The Panel held the trial evidence would not enable reasonable and fair-minded people to find that Carrizo could recover under these causes of action.

The Panel made a correct statement of the first component of the "no-evidence" standard of review, but, as the Supreme Court has admonished, the key issue is how the entire standard is applied. *City of Keller v. Wilson*, 168 S.W.3d 802, 827-828 (Tex. 2005). A sharp scrutiny of that application reveals that the Panel applied the standard in a manner which rewrote the standard and vested the Panel with unlimited latitude to substitute its judgment for the facts presented at trial, as well as the jury's verdict and the trial court's judgment. The Court should now act en banc because the Panel effectively applied a new standard of "no-evidence" review which, if not corrected, could jeopardize vested property rights

arising out of a jury verdict and corresponding judgment in a myriad of cases before this and other intermediate appellate courts.

Each no-evidence holding is initially perplexing because Justice Tracy Christopher, the trial court judge and now a member of this Court, had considered the exact same evidence and found that a reasonable person could so find. Justice Christopher denied Trinity's motion for summary judgment, motion for directed verdict and submitted a question on each cause of action to the jury which they found in favor of Carrizo. A dispute among judges over the legal sufficiency of the evidence does not per se mean that the evidence is legally sufficient, *Id.* 827. However, given the trial court's serious and repeated consideration of the sufficiency of the evidence, this Court should be reticent to find that consideration unreasonable as the Panel did.

A. A Concise Statement of the "No-Evidence" Standard of Review.

The application of the correct standard of review for "no-evidence" points of error jurisdictionally defines the basic power of this Court. It prudentially limits that power by preventing a Panel from substituting the Panel's judgment for the actual facts and the vested property rights arising out of a jury verdict and corresponding trial court judgment.

The Supreme Court has established the components of the "no-evidence" standard of review:

> Whether a court begins by reviewing all the evidence or disregarding part in a legal-sufficiency review, there can be no disagreement about where that review should end. If the evidence at trial would enable reasonable and fair-minded people to differ in their conclusions, then jurors must be allowed to do so. A reviewing court cannot substitute its judgment for that of the trier-of-fact, so long as the evidence falls within the zone of reasonable disagreement.
>
> Similarly, there is no disagreement about how a reviewing court should view evidence in the process of that review. Whether a reviewing court starts with all or only part of the record, the court must consider evidence in the light most favorable *to the verdict*, and indulge every reasonable inference that would support it. But if the evidence allows of only one inference, neither jurors nor the reviewing court may disregard it.
>
> …
>
> This is not to say judges and lawyers will always agree whether evidence is legally sufficient. … [R]easonable people may disagree about what reasonable jurors could or must believe. But once those boundaries are settled, *any* standard of review must coincide with those boundaries – affirming jury verdicts based on evidence within them and reversing jury verdicts based on evidence that is not. Any standard that does otherwise is improperly applied.

Id. at 822-823 [emphasis added]. The form of the questions answered by the jury and comprising the verdict is a critical boundary. *Id.* That boundary does not allow a reviewing court to review the evidence in a vacuum, to de-couple the evidence from the form of the jury questions, and then to review the evidence in terms of issues not included in the jury questions.

B. The Panel Eliminated the Critical Boundary.

The Panel chose to delete the boundary imposed by the form of the jury questions and substitute its judgment for the jury's verdict.

1. The Breach of Contract Claim:

As the freedom to contract includes the freedom to delete a term (i.e. a termination term) and to change a term (i.e. a rig-compensation term), Carrizo argued, and the jury was asked in Question No. 1 to find, that Trinity agreed to continue with the Barnett Shale Participation Agreement (Participation Agreement) by deleting a termination provision and adding a new compensation term for non-use of Trinity's drilling rig. *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 228 (Tex. 1986). Whether the Participation Agreement was modified depended upon the intentions of Carrizo and Trinity and was a question of fact. *Id.* That being said, the Panel, under the applicable standard of review, had to determine whether a jury could resolve this fact question by finding that there was "a meeting of the minds" only on the one deleted term and on the one changed term based upon the evidence detailed by Carrizo in its briefing (which if believed by the jury would support the verdict and judgment for Carrizo). *Id.*

The Panel did not follow the form of Question No. 1 actually given to the jury. Instead, it wrongly uses the shorthand phrase of the "Alleged Agreement" and focused its review on whether the parties had entered into an entirely new

agreement. The Panel should have only considered whether the evidence was legally sufficient to delete the termination term and add a new rig-compensation term. Trinity did not object to the form of Question No. 1 submitted to the jury. Trinity did not ask that Question No. 1 inquire whether Carrizo and Trinity entered into some new Alleged Agreement.

The Panel suggests that the remainder of the Participation Agreement was not in effect. The Panel, especially the concurrence of Justice Jamison, focuses on whether there was agreement on a payment term. There was no issue to decide whether the remainder of the Participation Agreement or the payment term was in effect. Trinity did not ask that this issue be submitted to the jury. Yet, the Panel fixated on this non-existent issue, which lay outside the boundary created by the form of the jury questions.

When Trinity agreed to continue the Participation Agreement by deleting the termination term and substituting a new compensation term, Trinity was again faced with the payment terms it had agreed to in the first place. *Id*. The Panel surmises that Trinity would not enter into such a deal, but it is irrelevant if the result is a good or bad deal for Trinity because Trinity had the freedom to contract as it did.

The Panel does not address the actual payment terms contained in the Participation Agreement. The Participation Agreement contains provisions for the

payment of past, current and future charges. (e.g. PEX 6 JOA at pp. 10, 21 and 32 and COPAS at p. 1). It further provides a range of remedies when, as in this case, Trinity did not make its prior due payments. *Id.*

The Panel does not address that the absence of a "time for payment" legally does not prevent contract formation. In the absence of an express "time for payment," a contract is still formed, but with an implied reasonable time for payment. *NHA, Inc. v. Jones*, 500 S.W.2d 940, 945 (Tex. Civ. App. – Fort Worth 1973, writ ref'd. n.r.e.) "What is implied in a contract is as much one of its terms as though expressly set forth therein." *Id.*

The Panel, therefore, could not ignore that the question of whether Trinity agreed to continue with the Participation Agreement was a fact question properly submitted to the jury, a question which the jury answered favorably to Carrizo. Under the standard of review, *City of Keller*, 168 S.W.3d at 822, 827, the Panel had to find that the jury could find as it did find. Under the facts considered in favor of the jury's findings, *Id.*, the jury could find (among other facts) that:

1) Trinity never denied that it was continuing with the Participation Agreement (which it easily could have done so with a single email);

2) Trinity lined up its investors (which it would not have done if the Participation Agreement was truly terminated);

3) Trinity engaged in an email exchange with Carrizo (which it would not have done if the Participation Agreement was truly terminated); and

4) Trinity confirmed the new compensation formulation "would work" (which is an affirmative reply).

(4 RR 148-154, 158-159, 163-164, 6 RR 191, 203-210, 8 RR 139-143, 155-156).

Whether the Panel would have reached a different result is irrelevant. In discounting the jury's finding and considering non-existent issues which exist outside the boundaries of the standard of review, the Court has improperly interposed itself as the trier-of-fact. *Id.*

2. The Alternative Quantum Meruit and Promissory Estoppel Claims

The Panel made the same conceptual errors when reviewing the award and judgment under the alternative quantum meruit and promissory estoppel claims. As a result, the Panel reviewed the evidence based upon how the Panel wanted Question Nos. 4-7 to read rather than how they actually read. *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000).

Carrizo asked the jury and the jury found that Trinity was liable to Carrizo under quantum meruit and promissory estoppel relating to drilling performed under the Barnet Shale Drilling Program (Drilling Program). The Drilling Program was separate and apart from the Participation Agreement, which based upon the Panel's earlier erroneous ruling, had terminated. The Drilling Program pre-dated and post-dated the Participation Agreement and had its own existence. Consequently,

Question Nos. 4-7 did not reference the Participation Agreement and referenced only the Drilling Program.

Guided by the jurisdictional boundary of the form of Question Nos. 4-7, the Panel had to consider the facts and circumstances of the Drilling Program which were sufficient to support the jury's findings (PEX 20, 55 and 64, 4 RR 77-80, 148-154, 159-165, 6 RR 203-206, 209-210, 8 RR 113, 118-120, 128-129, 139-143, 144-145, 155-156, 158-159). The Panel failed to review these facts.

a. There is evidence to satisfy all elements of the quantum meruit claim

The Panel held that the quantum meruit claim fails because Carrizo did not drill the wells jointly *for* Carrizo and Trinity and because Trinity could not earn an interest under the previously held terminated and unenforceable Participation Agreement. That was an inapposite conclusion.

It should be undisputed that the wells were jointly drilled because:

1) Trinity chose which wells Carrizo would drill;

2) Trinity had access to Carrizo's proprietary seismic data to choose the wells to drill only because Trinity and its investors would participate in the Drilling Program;

3) Carrizo would not have drilled the chosen wells except for the participation of Trinity and its investors;

4) Carrizo did not seek other investors to drill the wells because Trinity and its investors were in the Drilling Program; and

5) Trinity refers to all wells in the Drilling Program as joint wells.

Id. Even if these facts are disputed, a jury could find that these facts support a finding that the wells were drilled not just for Carrizo, but also *for* Trinity.

The Court further erred in finding that Trinity could have no joint interest in the wells. Trinity had a joint interest in the Drilling Program wells. First, Trinity and its investors were "participants," which is a term of art in the oil and gas industry that refers to a "… domestic agreement whereby certain parties agree to participate, usually by the contribution of capital, in an exploration and/or development project." Patrick H. Martin and Bruce N. Kramer, WILLIAMS & MEYERS OIL & GAS LAW MANUAL OF TERMS at p. 742 (LexisNexis Matthew Bender 2010). Trinity made express and implied promises to contribute capital for the Drilling Program. *MGA Ins. Co. v. Charles R. Chestnutt, P.C.*, 358 S.W.3d 808, 813 (Tex. App. – Dallas 2012, no pet.); *Schwartzott v. Maravilla Owners Ass'n, Inc.*, ___ S.W.3d __, 2012 WL 27670 *3 (Tex. App. – Houston [14th Dist.] 2012, pet. denied). Second, Trinity signed a letter agreement and exchanged emails with Carrizo concerning the Drilling Program as detailed on page 9. Carrizo never denied that it would assign certain interests to Trinity if Trinity and its investors paid what was owed to earn the interest. *Id.* Trinity earned equitable rights under the signed letter agreement and emails which would have matured into equitable title, had Trinity and its investors paid. *Neeley v. Intercity Mgmt. Corp*., 623 S.W.2d 942 (Tex. App. – Houston [1st Dist.] 1981, no writ).

A jury could and did find that Carrizo drilled the wells under the Drilling Program jointly for Carrizo and Trinity, that Trinity knew that Carrizo expected to be paid Trinity's share of the reasonable value of the costs (and would not have drilled the wells otherwise), and that Trinity failed to pay. *Vortt Exploration Co., Inc. v. Chevron, U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990). There is evidence to satisfy all the elements of a quantum meruit claim. The Court must affirm the quantum meruit award.

b. The promissory estoppel claim is supported by specific and concrete promises.

The Court made similar errors regarding the promissory estoppel claim. The Court erroneously found the promises relied upon by Carrizo to support its promissory estoppel recovery are "too vague and indefinite." In so doing, finding, the Court focused solely on the content of two individual emails rather than the totality of the evidence the Court was supposed to review under the standard of review.

The Panel's isolated focus failed to take into account the unbroken line of agreements and emails, detailed on page 9. These emails include and culminate in the two isolated emails and puts them in their proper context. Had the Court not become so narrowed in its focus, it would have found, as the jury found, a specific and concrete promise to participate, which Carrizo relied upon to its detriment (which caused Carrizo not to secure alternative investors) and which caused the

damages suffered by Carrizo. *Id.* The Court must affirm the award under the claim for promissory estoppel.

II. The Concurring Opinion of Justice Seymore Manifestly Rewrites the Uniform Electronic Transactions Act.

The Uniform Electronic Transactions Act (UETA)[1] has been construed by only a few appellate courts,[2] but not the Supreme Court or this Court prior to the concurring opinion of Justice Seymore. Whether this concurring opinion has precedential value or not, it may be cited in other cases (much like non-published cases are cited in other cases even though they have no precedential value). TEX. R. APP. P. 47. The concurring opinion reflects this Court's first opinion on the UETA and this Court should reconsider it because it manifestly rewrites the UETA.

Carrizo argued, and the jury found in the answer to Question No. 1, that Carrizo and Trinity agreed to conduct business by electronic means. Under the correct "no-evidence" standard of review, as stated above, the jury could have made this finding based upon such facts: Trinity included its email address for required notice in key agreements, (PEX 1, 3, 4, 6, 20, 56) Trinity sent key letters or documents by email, and Trinity and Carrizo exchanged over 20 emails conducting business relating to the Drilling Program. Among the emails were

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[1] TEX. BUS. AND REM. CODE §§ 43.001, *et seq.*

[2] *Litton Loan Serving, LP v. Manning*, 366 S.W.3d 837 (Tex. App. – Dallas 2012, pet. denied); *Harding, Co. v. Sendero Res., Inc.*, 365 S.W.3d 732 (Tex. App. – Texarkana 2012, pet. denied); *Maddox v. Vantage Energy, LLC*, 361 S.W.3d 752 (Tex. App. – Fort Worth 2012, pet. denied); *Cunningham v. Zurich American Ins. Co.*, 352 S.W.3d 519 (Tex. App. – Fort Worth 2012, pet. denied).

emails relating to the agreement to continue the Participation Agreement (e.g. PEX 20-49).

Justice Seymore concedes that "… [w]hether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct." He further admits that an electronic record, like an email, cannot be denied legal effect solely because of its electronic form and must be treated with the same legal dignity as a letter or a fax.

When this concession and admission are added to the longstanding Texas law that parties may form a written agreement or may agree to modify a written agreement by an exchange of letters, faxes or documents, then Carrizo and Trinity could agree to conduct business electronically based upon facts such as the facts in this case. When, as in this case, there is a dispute as to whether Carrizo and Trinity agreed to conduct business electronically, there is a resulting fact question which the jury could resolve and did resolve in Carrizo's favor. *Id.*

Justice Seymore did not follow this law. Instead, he asserted that Trinity could not have agreed to conduct business electronically because there was a written Participation Agreement which required amendments in writing, the parties entered into email negotiations, the parties exchanged written drafts, and *the parties never agreed "… that they would be contractually bound by the verbiage in electronic communications."*

Justice Seymore does not explain, and cannot explain:

- how the existence of the Participation Agreement precludes a modification by an exchange of emails when that same agreement could be modified by an exchange of letters or faxes;

- how a tangible email is not a writing when: (a) it is defined as a "record" UETA § 43.002 (7), (b) it is sufficient to satisfy the writing requirement of the Statute of Frauds (as even noted by Justice Seymore) UETA § 43.008, and (c) there is no dispute that Trinity signed the emails;

- the fact the parties exchanged written drafts is no more than one factor for the jury to consider; and

- why did the parties have to agree in writing to be bound electronically when there is no requirement for such an agreement in the UETA.

Contrary to the text of the UETA, Justice Seymore treats an email as a second-class legal citizen to letters, invoices, faxes and other documents, denies an email its legal status as a writing, and requires parties to state expressly that they are bound by emails when there is no similar requirement for other documents and there is no such requirement in the UETA.

Justice Seymore rewrote the terms of the UETA. He also leaves us with a fundamental question. He noted that his holding:

> … is confined to the facts of this case. There may be other fact patterns in which a jury issue arises regarding the intent of the parties to be bound by emails, without specific language reflecting mutual asset to be bound.

If the facts in this case do not meet that fact-pattern to create a jury question, will there ever be such a set of facts?

III. The Opinion of the Panel of the Court of Appeals is contrary to another opinion issued by this Court.

The Panel glosses over the question that a modification of the Participation Agreement is a question of fact, especially when Carrizo and Trinity disputed whether such a modification occurred. *Preston Farm & Ranch Supply, Inc. v. Bio-Zyme Enterprises*, 625 S.W.2d 295-298 (Tex. 1981). The attempt by the Panel to distinguish *Preston* underpins the Panel's effort to rewrite the "no-evidence" standard of review and conflicts with *Preston* and with another opinion from this Court.

The Panel wholly distinguishes *Preston* because it allegedly only "… involved an implied-in-fact contract under section 2.204 of the Uniform Commercial Code (UCC) case …." The Panel then limited the holding on *Preston* to UCC §§ 1.303 and 2.204.

This Court has previously disagreed with the Panel's limiting construction of *Preston*. For example, in *AKIB*, this Court recognized the concept of an implied contract by conduct is not limited to a UCC case. *AKIB Constr., Inc. v. Neff Rental, Inc.*, No. 14-07-00063-CV, 2008 WL 878935 * 4 (Tex. App. – Houston [14th Dist.] 2008, no pet.).

There is no basis for the Panel to disregard the concept of an implied contract, which may occur under the UCC and which may occur separate from the UCC based upon tenured case-law. *Preston*, 625 S.W.2d at 298. By ignoring *Preston*, the Court abandoned a century of law that holds the question of whether a modification of a contract occurred is a question of fact. *Keesey v. Old*, 82 Tex. 22, 17 S.W. 928, 929-930 (1891); *Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co., Inc.*, 480 S.W.2d 607, 609-610 (Tex. 1972).

PRAYER

Carrizo requests that the Court grant an en banc consideration, that the Court affirm the jury verdict and judgment of the trial court, and/or grant such other relief which Carrizo is entitled to under the facts and the law.

Respectfully Submitted,

ZUKOWSKI, BRESENHAN, SINEX & PETRY, L.L.P.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Appellee's Motion for Reconsideration En Banc was computer generated and the word count as shown of the computer program is 4481 words or less than the 4,500 word limit under TEX. R. APP. P. 9.4(i)(2)(D).

/s/ John M. Zukowski

CERTIFICATE OF SERVICE

I certify that Appellee's Motion for Reconsideration En Banc was served on January 11, 2013 as follows:

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