Reverse and Render in Part; Affirm in part and Opinion Filed July 1, 2026

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-24-01447-CV

KINDER MORGAN TREATING LP, Appellant
V.
NORTH PARK ADVANTAGE WALDEN MRU, LLC, Appellee

On Appeal from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-20-04189

MEMORANDUM OPINION

Before Justices Miskel, Kennedy, and Lee
Opinion by Justice Kennedy

Kinder Morgan Treating L.P. ("KMT") appeals the trial court's judgment awarding North Park Advantage Walden MRU, LLC ("Advantage") $5,645,810 on its negligent misrepresentation claim. In four issues, KMT argues that (1) Advantage's negligent misrepresentation claim is barred as a matter of law by the economic loss rule, (2) the evidence is legally and factually insufficient to support the trial court's findings on essential elements of a negligent misrepresentation claim, (3) the damages awarded on Advantage's negligent misrepresentation claim were improper, unsupported and failed to account for Advantage's comparative fault, and (4) Advantage is not entitled to judgment on its breach of contract claim. We sustain KMT's first and fourth issues. We reverse the portion of the trial court's judgment against KMT and render judgment that Advantage take nothing against KMT. In all other respects, we affirm the trial court's judgment. Because all issues are settled in law, we issue this memorandum opinion. TEX. R. APP. P. 47.4.

BACKGROUND

I. 2017 Contract for the Construction and Operation of the North Park Gas Processing Plant

In June 2017, Copano Pipelines/Rocky Mountain, LLC ("Copano"), an affiliate of Kinder Morgan Mainstream, entered into a Gas Purchase/Processing Facilities Agreement (the "Copano-SandRidge Contract") with SandRidge Exploration and Production, LLC ("SandRidge"). Under that contract, Copano agreed to design, build, and operate the North Park Plant in Jackson County, Colorado, to process raw natural gas produced from oil wells SandRidge drilled and operated upstream from the plant. Without a gas processing plant, the natural gas would otherwise have to be flared or wasted. Processing the gas would yield two revenue sources: natural gas liquids ("NGLs") and condensate. Copano was given until November 5, 2018, to make the plant operational. If it failed to do so, SandRidge could terminate the contract.

With respect to the cost to construct the North Park Plant, SandRidge agreed to pay 50% of the construction cost, which was estimated to be $1,519,000.

However, SandRidge's share of the cost was capped at 120% of $1,519,000. Any cost overruns exceeding the cap were to be borne solely by Copano.

With respect to revenue sharing, the Copano–SandRidge Contract provided that Copano would receive 100% of the net revenues for NGLs derived from the first 600 MCF per day of monthly production, but net revenues associated with volumes above 600 MCF per day were to be shared on a "percent-of-proceeds" basis, with 80% allocated to SandRidge and 20% allocated to Copano. For plant condensate, all net revenues were to be shared on a percent-of-proceeds basis, with 80% allocated to SandRidge, and 20% allocated to Copano. In addition to the Copano–SandRidge Contract, Copano entered into an agreement with KMT (the "Copano Equipment Lease") for the lease of various equipment to be utilized in connection with the North Park Plant.

By May 2018, Copano received construction bids that were over $2 million higher than the projected construction cost. Thus, Copano would be responsible for 100% of the overruns exceeding the 120% cap. This turned Copano's economic projections upside down. Copano had two options, either re-negotiate with SandRidge or sell the project.

II. In May 2018, SandRidge Approached Advantage About Taking Over the Construction and Operation of the North Park Plant

Knowing Copano wanted out of the North Park Plant project, SandRidge approached Advantage Midstream LLC ("Advantage Midstream") to consider taking over the project on an expedited basis. Advantage Midstream was in the "gas-to-liquids" ("GTL") business, taking processed, pipeline-quality gas otherwise being flared and turning it into liquid fuels like diesel or gasoline. Advantage Midstream had already contracted with SandRidge to install one of its GTL units downstream from the North Park Plant. Advantage was formed as a wholly owned subsidiary of Advantage Midstream for the purpose of taking over the North Park Plant project.

When Advantage learned that Copano was potentially seeking to back away from the North Park Plant project, it decided to look at it because Advantage Midstream's GTL facility was dependent on the plant to process its raw gas through a mechanical refrigeration unit and produce, at the tailgate, pipeline-quality gas that could then be converted into liquid fuel. In order to take over the North Park Plant project, Advantage had to determine if the project was financially viable, receive approval from its investor Castlelake LP, and negotiate three contracts: an assignment of the Copano–SandRidge Contract, an amendment to the Copano–SandRidge Contract, and an equipment lease with KMT.

On May 17, 2018, Copano sent Advantage the first package of information concerning the North Park Plant including: (1) a computer simulation referred to as "Case 63," and (2) the Copano Equipment Lease, by which the mechanical refrigeration unit and other equipment were being supplied to the plant. Thereafter, Copano provided additional analysis of the Case 63 recoverable NGLs, showing a "GPM" or "gallons per thousands" of 5.2—which reflected the NGLs (not the condensate) likely to fall out of the gas stream. Copano did not include condensate in the economics for the Plant.

Advantage's Chief Commercial Officer, Charles Nelson, a chemical engineer, used the same data from Case 63 on NGLs to do his initial revenue projections, until he received the later "Case 65" and "Case 67" simulations at end of July 2018. He understood the Case 63 simulation did not include condensate. Nelson derided the Case 63 analysis, calling it a "joke" in an email he sent to Advantage's Chief Executor Officer, John Stephenson, and Chief Operating Officer, Kevin Beasley. In another email, Nelson told Stephenson and Beasley that, based on the same Case 63 analysis, this deal is "very underwater" and that "[w]e can't take this over in its current form unless I'm missing something." Nelson testified that the something he was missing was the condensate numbers.

The initial pro formas Nelson created in the May to July 2018 time frame projected Internal Rates of Return ("IRRs") from 17%, to 31%, to 34% for NGL revenues alone—with no condensate. Castlelake, which owned 97% of Advantage, had "veto" power over whether Advantage could make any particular investment, including in the North Park Plant. Obtaining Castlelake's approval required signoff by Castlelake's Internal Review Committee ("IRC"). On July 16, 2018, the IRC approved the investment based on a 28% rate of return for NGLs with no condensate.

While Copano and Advantage were negotiating the Assignment of the Copano–SandRidge Contract (the "Copano–Advantage Assignment"), by which

Advantage would take over the completion and operation of the North Park Plant, Advantage was represented by counsel. One thing that concerned CCO Nelson was the "as is, where is" language in the proposed assignment,[1] which Nelson understood meant that Copano was not making any warranties.

In an email to Beasley on July 16, 2018, Nelson quoted the as is, where is language in full and noted:

> Our entire economics depend on the asset functioning as advertised and also having the recoveries we were given as part of this or in some other agreement that we may have. Can we confirm that the Kinder Morgan Treating lease can cover any issues? I think we need to eliminate any "AS IS" language and also have them re-run the recovery simulations and mention that in the agreement. For instance, if all the sudden we

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[1] More particularly, the as is, where is provision stated:

> EXCEPT AS EXPRESSLY SET FORTH HEREIN, ASSIGNOR IS TRANSFERRING THE PROPERTY AND THE CONTRACTS AND PERMITS SET FORTH ON EXHIBIT A "AS IS, WHERE IS AND WITH ALL FAULTS" AS OF THE CLOSING AND ASSIGNOR MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND OR NATURE, EXPRESS OR IMPLIED, AT LAW, BY STATUTE OR IN EQUITY, WITH RESPECT TO THE PROPERTY, AND IN PARTICULAR, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, THERE ARE NO COLLATERAL AGREEMENTS, CONDITIONS, REPRESENTATIONS OR WARRANTIES MADE BY ASSIGNOR, EXPRESS OR IMPLIED, ARISING AT LAW, BY STATUTE OR IN EQUITY OR OTHERWISE WITH RESPECT TO: (A) THE SIZE, STATE, INTEGRITY, FITNESS, USEFULNESS, SUITABILITY, USE (PAST, PRESENT OR FUTURE), PURPOSE, SERVICEABILITY OR MERCHANTABILITY OF THE BUSINESS OR ANY OF THE PROPERTY, (B) COMPLIANCE WITH ANY APPLICABLE LAWS, ENVIRONMENTAL LAW, AND GOVERNMENTAL REGULATIONS, VALIDITY OR STATUS OF ANY CLAIMS OR POTENTIAL CLAIMS IN CONNECTION WITH ANY OF THE PROPERTY, (C) THE STATE OF REPAIR OF ANY OF THE PROPERTY, INCLUDING LATENT OR PATENT DEFECTS, AND (D) THE VALUE OF THE PROPERTY. **WITHOUT LIMITING THE GENERALITY OF THE IMMEDIATELY PRECEDING SENTENCE, EXCEPT AS EXPRESSLY SET FORTH HEREIN, ASSIGNOR HEREBY DISCLAIMS AND NEGATES ANY REPRESENTATION OR WARRANTY, EXPRESS, OR IMPLIED, AT COMMON LAW, BY STATUTE OR OTHERWISE, RELATING TO THE CONDITION OF THE PROPERTY (INCLUDING ANY IMPLIED OR EXPRESS WARRANY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR OF CONFORMITY TO MODELS OR SAMPLE AS OF MATERIALS).**

> are only recovering 4.6 GPM rather than the modeled 5.2 GPM that really throws everything off.

In response, Beasley told Nelson, that "[y]es, KM [Copano] is selling us this equipment as is where is and the only warranties we get are from the original vendor," and that "[t]he process number will come from KMT and they have not sent that contract to us yet." When Advantage emailed its revisions to the Copano–Advantage Assignment later that same day, it made only one minor revision to the as is, where is language.[2]

The next day, Nelson noted in an email to Beasley, Stephenson, and others at Advantage, that, in the Equipment Lease between KMT and Copano, there was no protection for projected performance of the plant or any reference to a simulation "or expected recovery rates for various NGL components."

III. Request for Additional Simulations and Project Information

On July 25, 2018, before it entered into the agreements to take over the completion and operation of the North Park Plant project, Advantage sent VP of Engineering, Lucas Marr, to Colorado Springs to get a grasp of the full scope of the North Park Project. Marr met with engineer Jake Latham at Kinder Morgan Midstream's office. They reviewed files and drawings and the status of the project. Latham testified that his marching orders were "we're an open book" and to get

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[2] That revision was the insertion of "AND THE CONTRACTS AND PERMITS SET FORTH ON EXHIBIT A" after EXCEPT AS EXPRESSLY SET FORTH HEREIN, ASSIGNOR IS TRANSFERRING THE PROPERTY.

Advantage "what they want." There was a "good back and forth" with Marr asking a lot of questions relating to the design of the plant. At the end of the meeting, Latham told Marr that they would get him anything he needed and that Copano would transfer all of the data they reviewed to Advantage—which they subsequently did by thumb drive.

On July 25, 2018, Copano sent Nelson a final clean version of the Copano-Advantage Assignment with Nelson's changes accepted and the new price Advantage would pay Copano—$1,010,464.55. The "as is, where is" language remained unchanged. At that time, Advantage was still waiting for a first draft of the KMT equipment lease. Nelson indicated that the KMT equipment lease was "becoming the critical path item." Nelson also stated, "A few things we are going to need to see in that lease is something that ties the system to the provided and simulated GPM of the recovery of the NGL."

The same day, Jack Mechem, a KMT employee, emailed Nelson, Beasley, and Stephenson the draft KMT Equipment Lease. Mechem explained:

> The document shows redlines against the original Copano [lease] agreement that you had in the dataroom. I took the liberty of accepting the changes for dates, company names, price (the original was $33k).

By this time, KMT had approved offering Advantage the same reduced lease fee of $17,500 per month (a 50% discount) that KMT was charging its affiliate Copano in the Copano Equipment Lease.

Later on July 25, 2018, Nelson sent Mechem an updated gas analysis, showing a breakdown of the gas composition from twelve SandRidge wells that Advantage had received from SandRidge on June 12, 2018, and asked KMT to run a new simulation based on the updated gas analysis. Mechem forwarded the updated SandRidge gas analysis to Tim Shackelford, a KMT petroleum engineer who was responsible for, and had vast experience in, running simulations of recoveries for KMT equipment. Mechem told Shackelford that Advantage wanted "an updated process simulation so that they [could] confirm their economics and proceed with the purchase sale agreement."

Shackelford used a program called ProMax to run simulations. Shackelford input the relevant assumptions, including: (a) the equipment to be used (*e.g.*, the MRU, stabilizer, dehydrator, and heat exchanger), (b) the configuration of the equipment; (c) the pressures and temperatures throughout the process; and (d) gas composition data. When entering gas composition data, Shackelford had to designate whether it was in "mole percent" (percentage of the number of molecules of a component divided by the total number of gas molecules) or "weight percent" (percentage of the total mass). The software runs the simulation based on those input assumptions.

With respect to the updated SandRidge gas composition data, Shackelford did not see the notice in the upper left-hand corner of the spreadsheet stating: "*All percentages are in wt%*". Even though the notice was not hidden, Shackelford testified that in his experience gas composition is "always in mole percent," that he does not know why the SandRidge gas data was in "weight percent," which was not the "standard" measure used for such data.

Shackelford further testified that when he had seen gas composition data in "weight percent," that would normally be indicated immediately above the column containing the data—not in a note in the corner. As a result of Shackelford's failure to see the "weight percent" notation, he mistakenly entered the gas composition data as "mole percent" instead of "weight percent"—a mistake, he conceded, that was the "most egregious error" in his career. Because the assumptions that Shackelford input into the ProMax model were incorrect as it pertained to gas composition, the three simulations he ran based on the updated SandRidge gas analysis—Case 65, and subsequently, Case 67-II, and Case 67-Rev.3—were incorrect insofar as they projected the recoveries of NGLs and condensate volumes at the North Park Plant. All three overstated the projected recoveries.

On July 26, 2018, Mechem forwarded the Case 65 simulation to Nelson. At that time, he did not know about Shackelford's input error. Case 65 reflected condensate sales of 5,434 gallons per day, and NGLs of 10,606 gallons per day. After receiving the Case 65 simulation, Nelson asked KMT to run another simulation (a) changing the gas outlet pressure and (b) doing max ethane rejection. On July 27, 2018, after further review of Case 65 simulation, Nelson emailed Mechem stating, "We are seeing some pretty strong deviation from the original NGL composition" as reflected in the Case 63 simulation, and asking, "How can we reconcile all these variances?" At trial, Nelson testified that "when you see large deviations . . . it does raise red flags." Mechem responded to Nelson's email stating that (1) they should wait to get the new model from Shackelford, (2) KMT had run "about 60 cases for this project and there are several knobs that can be turned that affect the net result," and (3) it would probably be best to have a call once the new model is done and talk through the process and answer his questions. Nelson indicated they could talk through what is causing the large variance when they receive the new simulation. At trial, Nelson testified he was absolutely still concerned about the variances.

On July 30, 2018, Mechem emailed Nelson the Case 67-II simulation, which showed condensate sales of 5,625 gallons per day, and NGLs of 11,242 gallons per day. Thereafter, Nelson asked KMT to run another simulation that optimized for more NGL recoveries and a higher-quality condensate. On July 31, 2018, KMT emailed Nelson the Case 67-Rev3 simulation, which showed condensate sales of 4,150 gallons per day and NGLs of 16,758 gallons per day.

IV. Advantage Hires a Process Engineer

Advantage did not have in house engineers with expertise in gas processing; thus, on July 31, 2018, Advantage's COO Beasley forwarded the Case 67-II simulation to Coby Crawford of Crosstrails Engineering, along with the updated SandRidge gas analysis. Advantage hired Crawford to check KMT's numbers. Crawford is a chemical and gas process engineer who had 24 years of experience at the time Advantage hired him, including running simulations. When Crawford input the updated SandRidge gas analysis, he made the same mistake Shackelford made, he entered the data as "mole percent" rather than as "weight percent." Crawford confirmed that it was very unusual to receive gas information in weight percent, and that it was not clear to him at the time that the data was in weight percent.

Crawford sent his simulation to Advantage on July 31, 2018 and reported, "It IS NOT a perfect match, but I can't match theirs perfectly without more information. . . I match their Condensate stream pretty closely. CONCLUSION: THEIR ANALYSIS CAN GENERALLY BE ASSUMED TO BE ACCURATE – BUT I'D DISCOUNT THE NGL A LITTLE BIT AND ASSUME MAYBE 2,000 GALLONS LESS PER DAY ON THAT RECOVERY FOR CONSERVATISM'S SAKE." Beasley then forwarded Crawford's email to Nelson and Stephenson noting, "Feedback from my KM checker? KM numbers look reasonable to him."

V. New Pro Formas

In a July 30, 2018 pro forma based on Case 67-II simulations, Nelson calculated an IRR of 476 percent. The next pro forma created by Nelson showed an IRR of 559%. When Advantage forwarded these pro formas to Castlelake, which had approved investment in the North Park Plant at 28% IRR, Castlelake asked its accountant to review them. On August 1, 2018, the Castlelake accountant projected an IRR of 116.5%. At trial, one of KMT's chemical engineers testified that he had not heard of a gas plant having triple digit rates of return. Commenting on the projected 116.5% IRR, Nelson said "This is an insane return for a gas processing deal." The projected 116.5% was the "green light" to move forward with the project.

VI. The Agreements

After receiving Castlelake's computed 116.5% IRR, Nelson emailed Mechem a redlined version of the Equipment Lease with Advantage's proposed changes, explaining if "these work for you let's put them on [the] signing block." Among Advantage's proposed changes was the addition of the following:

> As set forth on Exhibit "C" is the expected output of the Equipment based on the assumptions set forth thereon.

Nelson proposed attaching Case 67-II and Case 67-Rev.3 simulations as Exhibit C. KMT did not agree to Nelson's proposed changes and instead proposed the following:

> Set forth on Exhibit "C" are sample simulation summaries which depict the capability of the Equipment based on the assumptions set for the thereon; provided, however, Lessor makes no representation or warranty that Lessee's operation of the Equipment will produce the results set forth on Exhibit C.

Section V. of the Equipment Lease the parties signed contained KMT's proposed language and not Advantage's. Section V. is titled "USE, OPERATION, AND CONDITION." The full provision is as follows:

> Lessee will use the Equipment in a safe and careful manner for the Equipment's intended use and will comply with all laws, ordinances, insurance policies and regulations which apply to the use and operation of the Equipment. Lessee will pay all operating costs for the Equipment including, but not limited to, electricity, operating labor, repair materials and labor, maintenance materials and labor, methanol, and supplies. Lessee will pay all costs, claims, damages, fees and charges

> arising out of its possession, use or maintenance of the Equipment. Lessee, at its expense, will keep the Equipment in a condition of good repair and operate and maintain the Equipment in a competent and prudent manner, including daily inspections. Lessor will not be liable for any loss of Gas, liquids, minerals, or production that may result from Lessee's operation of the Equipment. Set forth on Exhibit "C" are sample simulation summaries which depict the capability of the Equipment based on the assumptions set for the thereon; provided, however, Lessor makes no representation or warranty that Lessee's operation of the Equipment will produce the results set forth on Exhibit C.

On August 3, 2018, prior to signing the Equipment Lease, Advantage and Copano signed the Assignment, Bill of Sale and Conveyance ("Assignment") whereby Advantage purchased Copano's interest in certain equipment procured for the plant and assumed Copano's rights and duties under the Copano-SandRidge Contract. The purchase price was $1,010,464.55. In addition, along with SandRidge, Advantage signed an amendment to the Copano–SandRidge Contract, which increased the percentage of net revenues Advantage would receive from sales of condensate.

The Assignment contained the following provision:

> EXCEPT AS EXPRESSLY SET FORTH HEREIN, ASSIGNOR IS TRANSFERRING THE PROPERTY AND THE CONTRACTS AND PERMITS SET FORTH ON EXHIBIT A **"AS IS, WHERE IS AND WITH ALL FAULTS"** AS OF THE CLOSING AND ASSIGNOR MAKES NO REPRESENTATIONS OR WARRANTIES OF ANY KIND OR NATURE, EXPRESS OR IMPLIED, AT LAW, BY STATUTE OR IN EQUITY, WITH RESPECT TO THE PROPERTY, AND IN PARTICULAR, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, THERE ARE NO COLLATERAL AGREEMENTS, CONDITIONS, REPRESENTATIONS OR WARRANTIES MADE BY ASSIGNOR,

> EXPRESS OR IMPLIED, ARISING AT LAW, BY STATUTE OR IN EQUITY OR OTHERWISE WITH RESPECT TO: (A) THE SIZE, STATE, INTEGRITY, FITNESS, USEFULNESS, SUITABILITY, USE (PAST, PRESENT OR FUTURE), PURPOSE, SERVICEABILITY OR MERCHANTABILI1Y OF THE BUSINESS OR ANY OF THE PROPERTY, (B) COMPLIANCE WITH ANY APPLICABLE LAWS, ENVIRONMENTAL LAW, AND GOVERNMENTAL REGULATIONS, VALIDITY OR STATUS OF ANY CLAIMS OR POTENTIAL CLAIMS IN CONNECTION WITH ANY OF THE PROPERTY, (C) THE STATE OF REPAIR OF ANY OF THE PROPERTY, INCLUDING LATENT OR PATENT DEFECTS, AND (D) THE VALUE OF THE PROPERTY. **WITHOUT L1MITING THE GENERALITY OF THE IMMEDIATELY PRECEDING SENTENCE, EXCEPT AS EXPRESSLY SET FORTH HEREIN, ASSIGNOR HEREBY DISCLAIMS AND NEGATES ANY REPRESENTATION OR WARRANTY, EXPRESS, OR IMPLIED, AT COMMON LAW, BY STATUTE OR OTHERWISE, RELATING TO THE CONDITION OF THE PROPERTY (INCLUDING *ANY* IMPLIED OR EXPRESS WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR OF CONFORMITY TO MODELS OR SAMPLES OF MATERIALS).**

Advantage and KMT signed the Equipment Lease on August 21, 2018, and August 30, 2018, respectively. The Equipment Lease warranted only:

> . . . that the Equipment will perform in accordance with industry standards under normal use and services for a period of sixty (60) days after the Shipping Date. Lessor’s obligation under this warranty is limited to repairing or furnishing without charge, a similar part to replace any part which within sixty (60) days after delivery is proven to have been defective. In the event the Equipment includes equipment and/or parts manufactured by a third patty from which Lessor obtained a warranty when it acquired the equipment and/or parts that is greater in scope and/or length of time than the warranty provided by Lessor above, Lessor will, to the extent assignable, assign the warranty to Lessee, without recourse, such assignment to be effective at the time the equipment is delivered.

> THE WARRANTY DESCRIBED IN THIS PARAGRAPH IS EXCLUSIVE AND IS IN LIEU OF ANY OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. THE REMEDIES OF LESSEE ARE LIMITED TO REPAIR OR REPLACEMENT OF THE DEFECTIVE PART AS PROVIDED IN THIS ARTICLE XIII.

The Equipment Lease also contained a limitation of liability provision, providing:

> LESSOR WILL NOT BE LIABLE TO LESSEE FOR LOSS OF PROFITS, SPECIAL, INDIRECT, INCIDENTAL, OR CONSEQUENTIAL DAMAGES ARISING OUT OF A BREACH OF THIS AGREEMENT OR OBLIGATION UNDER THIS AGREEMENT OR OUT OF WARRANTY, CONTRACT TORT OR OTHERWISE.

VII. Discovery of Input Error

After completing construction of the North Park Plant in early 2019, Advantage began processing SandRidge's natural gas. The actual NGLs and condensate recoveries were nowhere near those projected in the Cases 65, 67-II, and 67-Rev3 simulations. So, Advantage obtained a new gas composition analysis, which provided the data in mole percent, weight percent, and volume percent. Advantage sent the new gas composition analysis to Crosstrails for consultation and to KMT to run additional simulations.

On January 21, 2019, Crawford discovered and notified Advantage that he and KMT had made a mistake in entering the updated SandRidge gas analysis in mole percent and not weight percent. While Advantage continued working on the North Park Plant project, none of its efforts to make the project profitable succeeded. Advantage first notified KMT of the mistakes in the Cases 65, 67-II, and 67-Rev3 simulations in October 2019, shortly before sending KMT a demand letter.

VIII. The Lawsuit

Advantage sued KMT for fraud, negligent misrepresentation, and breach of contract. Advantage also sued Copano for fraud and negligent misrepresentation. All of Advantage's claims were based upon the sample simulation summaries KMT provided to Advantage.[3] Advantage's claims against Copano were tried to a jury

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[3] For both its breach of contract and negligent misrepresentation claims, Advantage incorporated and re-alleged the preceding paragraphs of the petition. The factual portion of the petition goes into great detail

and its claims against KMT were tried to the court, pursuant to the Equipment Lease's waiver of right to trial by jury provision. The jury found against Advantage on its claims against Copano. With respect to Advantage's claims against KMT, the trial court found KMT did not commit fraud but was liable to Advantage for negligent misrepresentations and breach of contract. Advantage elected to recover on its negligent misrepresentation claim. On January 2, 2025, the trial court rendered

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regarding the case simulations and the fact that KMT input composition information about SandRidge's natural gas into KMT's model in mole percent rather than in weight percent.

In its negligent misrepresentation claim, Advantage alleged:

> Kinder Morgan and Copano made representations to Advantage in the course of Kinder Morgan's and Copano's businesses or in transaction in which Kinder Morgan and Copano had an interest.
>
> Kinder Morgan and Copano supplied false information for the guidance of Advantage. Their pre-contractual misrepresentations breached the legal duty not to fraudulently procure a contract, which is separate and independent from the duties established by the Assignment itself.
>
> Kinder Morgan and Copano did not exercise reasonable care or competence in obtaining or communicating the information. Advantage justifiably relied on the information provided by Kinder Morgan and Copano.
>
> Kinder Morgan's and Copano's negligent misrepresentations proximately caused Advantage injury.

In its breach of contract claim against KMT, Advantage alleged, *in the alternative to its negligent misrepresentation and fraud claims*:

> Kinder Morgan materially breached the Equipment Agreement by providing sample simulation summaries to Advantage, including Case 65 and Case 67, that were not based on the gas analysis Advantage provided to Kinder Morgan from SandRidge and did not "depict the capability of the Equipment based on the assumptions set forth" on Cases 65 and 67, as provided under section V of the Equipment Agreement.

In its prayer for relief, with respect to damages Advantage sought:

> Actual damages, including general and special from Kinder Morgan and Copano in an amount proven at trial, or , in the alternative, recission of the Assignment and Equipment Agreement, and such further damages or expenses necessary to restore Advantage to its original position before entering into those contracts, including, but not limited to, the security deposit and monthly lease fees Advantage paid to Kinder Morgan and the cash Advantage paid to Copano.
>
> Exemplary damages from Kinder Morgan and Copano in an amount proven at trial.

judgment that Advantage recover nothing from Copano, that Advantage recover the sum of $5,654,810 from KMT as actual damages,[4] plus pre and post judgment interest and costs, and that KMT recover nothing from Advantage.

KMT requested Findings of Fact and Conclusions of Law. The trial court entered findings of fact and conclusions of law, including, but not limited to the following:

- Advantage has proven its claim for negligent misrepresentation against KMT.

- Advantage actually and justifiably relied on the information KMT provided when entering into the Equipment Lease Agreement . . , the Assignment, Bill of Sale and Conveyance . . and the Amendment No. 1 to the Gas Purchase/Processing and Facilities Agreement.

- KMT had a legal duty to use reasonable care when supplying information to Advantage for the purpose of guiding Advantage's decision on whether to enter into the Equipment Agreement, Assignment, and Amendment No. 1. Because KMT breached an independent, pre-contractual legal duty to Advantage and Advantage incurred an independent injury, the economic loss rule does not bar Advantage's claims against KMT.

- Neither Crawford nor his company . . . shared an agency relationship with Advantage. The evidence in the trial record does not prove that Advantage had any right of control over Mr. Crawford or his company . . . Any acts, omissions, or negligence that Crawford or Crosstrails Engineering committed cannot be imputed to Advantage.

- Section XV of the Equipment Lease–entitled "Limitation of Liability"–does not bar Advantage's claims. . . The Court rules that Section XV is ambiguous. KMT authored the Equipment Agreement. This Court construes Section XV against KMT and gives effect to Advantage's interpretation and concludes

[4] More particularly, the award of $5,654,810 is comprised of (1) the $1,010,465 Advantage paid Copano for the Copano-Advantage Assignment, (2) the $3,275,085 Advantage expended to complete the North Park Plant, and (3) $1,369,260 in alleged losses that Advantage sustained while operating the North Park Plant from January to August of 2019.

that Section XV does not limit the available damages for Advantage's negligent misrepresentation claim.

- Advantage incurred actual damages in the sum of $5,654,810.00 in reliance on the negligent misrepresentations of KMT.

- The evidence establishes that KMT breached the Equipment Agreement.

- The evidence establishes that Cases 67-II and 67-Rev3 were the "sample simulation summaries" included in Exhibit C.

- KMT breached the Equipment Agreement because Cases 67-II and 67-Rev3 provided false information that did not depict the capability of the Equipment, as defined in the Equipment Agreement.

- Section V of the Equipment Agreement further provides that KMT "makes no representation or warranty that [Advantage's] operation of the Equipment will produce the results set forth on Exhibit C." This provision does not bar Advantage's breach of contract claim or negligent misrepresentation claim.

- Advantage incurred damages of $126,052.50 as a result of KMT's breach of the Equipment Agreement. However, because Advantage has elected to recover only the damages awarded for its negligent misrepresentation claim, the Court does not award Advantage these damages for breach of the Equipment Agreement.

DISCUSSION

I. Standard of Review

In an appeal from a bench trial, we review a trial court's findings of fact under the same sufficiency of the evidence standards used with respect to jury findings. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996) (per curiam). Where, as here, our record contains a reporter's record of the trial proceedings, findings of fact are not conclusive if the contrary is established as a matter of law or there is no evidence to support the findings. *Brockie v. Webb*, 244 S.W.3d 905, 908 (Tex. App.—Dallas

2008, pet. denied). We review the trial court's conclusions of law de novo. *Fulgham v. Fischer*, 349 S.W.3d 153, 157 (Tex. App.—Dallas 2011, no pet.). We are not bound by the trial court's erroneous conclusions of law. *See Bantuelle v. Williams*, 667 S.W.2d 810, 818 (Tex. App.—Dallas 1983, writ ref'd n.r.e.) (per curiam).

II. Advantage's Negligent Misrepresentation Claim

In its first issue, KMT challenges the trial court's finding the economic loss rules does not bar Advantage's negligent misrepresentation claim.

In actions for unintentional torts, the common law has long restricted recovery of purely economic damages unaccompanied by injury to the plaintiff or his property—a doctrine referred to as the economic loss rule. *LAN/STV v. Martin K. Eby Const. Co., Inc.*, 435 S.W.3d 234, 235 (Tex. 2014). Whether the economic loss rule bars a tort claim presents a question of law. *See House of Reaford Farms, Inc. v. SOMMA Food Grp., LLC*, No. 05-22-01231-CV, 2024 WL 396609, at *2 (Tex. App.—Dallas Feb. 2, 2024, pet. denied) (mem. op.) (citing *Eagle Oil & Gas Co. v. Shale Expl., LLC*, 549 S.W.3d 256, 268 (Tex. App.—Houston [1st Dist.] 2018, pet. dism'd)).

The Texas Supreme Court has noted that whether and how to apply the economic loss rule to negligent misrepresentation claims does not lend itself to easy answers or broad pronouncements. *LAN/STV*, 435 S.W.3d at 245. Rather, the application of the rule depends on an analysis of its rationales in a particular situation. *Id.* at 245–46. The rule has two primary rationales: (1) because purely economic harm is not self-limiting like physical injury is, allowing its recovery in tort could lead to indeterminate and disproportionate liability that discourages economic activity; and (2) the risks of economic losses are well suited to allocation by contract, where parties familiar with their own economic needs may protect themselves through insurance or indemnity agreements and price their transactions accordingly. *House of Raeford*, 2024 WL 396609, at *3. The first rationale is commonly referred to as the indeterminate and disproportionate liability rationale and the second the deference to contract rationale. *LAN/STV*, 435 S.W.3d at 240–41.

Here, we discuss the second rationale as it is dispositive of KMT's first issue. With respect to the second rationale, the economic loss rule has been applied to prevent a plaintiff from asserting tort claims against a defendant for disappointed economic expectations arising from a contractual relationship, or in a setting in which a contractual allocation of risks reasonably should be expected or encouraged. *See, e.g.*, *id.* at 241 (applying the economic loss rule to bar a negligent misrepresentation claim by a general contractor against an architect in connection with errors in the architect's plans that resulted in increased costs of performing contractor's construction contract and specification);[5] *Jim Walter Homes, Inc. v.*

[5] In holding as a matter of law Eby's negligent misrepresentation claim against LAN/STV was barred by the economic loss rule, the Texas Supreme Court noted:

> In actions for unintentional torts, the common law has long restricted recovery of purely economic damages unaccompanied by injury to the plaintiff or his property—a doctrine

Reed, 711 S.W.2d 617, 618 (Tex. 1986) ("The Reeds' injury was that the house they were promised and paid for was not the house they received. This can only be characterized as a breach of contract."); *see also Equistar Chems., L.P. v. Dresser-Rand Co.*, 240 S.W.3d 864, 867 (Tex. 2007) ("The rule is based on the proposition that commercial parties may negotiate for whatever warranty or liability limits they choose, and adjust their price accordingly."); *Chapman Custom Homes, Inc. v. Dallas Plumbing Co.*, 445 S.W.3d 716, 718 (Tex. 2014) ("The economic loss rule generally precludes recovery in tort for economic losses resulting from a party's failure to perform under a contract when the harm consists only of the economic loss of a contractual expectancy.").

Risks of economic loss tend to be especially well suited to allocation by contract. First, economic injuries caused by negligence often result from a decision by the victim to rely on a defendant's words or acts when entering some sort of transaction. *LAN/STV*, 435 S.W.3d at 240. A potential plaintiff making such a decision has a full chance to consider how to manage the risks involved, whether by

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> we have referred to as the economic loss rule. The rule serves to provide a more definite limitation on liability than foreseeability can and reflects a preference for allocating some economic risks by contract rather than by law. But the rule is not generally applicable in every situation; it allows recovery of economic damages in tort, or not, according to its underlying principles. The issue in this case is whether the rule permits a general contractor to recover the increased costs of performing its construction contract with the owner in a tort action against the project architect for negligent misrepresentations—errors—in the plans and specifications. We conclude that the economic loss rule does not allow recovery and accordingly reverse the judgment of the court of appeals and render judgment for the architect.

LAN/STV, 435 S.W.3d at 235–36 (footnotes omitted).

inspecting the item or investment, obtaining insurance against the risk of disappointment, or making a contract that assigns the risk of loss to someone else. *Id.* at 240–41. Second, money is a complete remedy for an economic injury. *Id.* at 241. Insurance benefits, indemnification by agreement, or other replacements of money payments are just as good as the money lost in a transaction that turns out badly. *Id.* This fungibility makes those other ways of managing risk—insurance, indemnity, and the like—more attractive than they might be to a party facing a prospect of personal injury. *Id.*

Those same points often will make it hard for a court to know what allocation of responsibility for economic loss would best serve the interests of the parties to a risky situation. *Id.* A contract that settles responsibility for such a risk will therefore be preferable in most cases to a judicial assignment of liability after harm is done. *Id.* The contract will better reflect the preferences of the parties and help prevent the need for speculation and litigation later. *Id.* Contracts also are governed by a body of commercial law that has been developed to address economic loss and thus will often be better suited for that task than the law of torts. *Id.* As a result, courts generally do not recognize tort liability for economic losses caused by the breach of a contract between the parties and often restrict the role of tort law in other circumstances in which protection by contract is available. *Id.* The Texas Supreme Court has noted, "the *Restatement* concludes, while there is 'no general duty to avoid the unintentional infliction of economic loss', the duty may exist when the rationales

. . . for limiting recovery are 'weak or absent'." *Id.* The Texas Supreme Court further noted that the *Restatement* now concludes generally that "there is no liability in tort for economic loss caused by negligence in the performance or negotiation of a contract between the parties." *Id.* at 243.

Concerning the rationale of deference to contract, the Texas Supreme Court explained that the economic loss rule bars recovery in tort when the parties used, *or could have used*, contracts to clarify the duties and liabilities of each participant in a commercial enterprise:

> Though there remains the possibility that a contractor may not do so, we think the availability of contractual remedies must preclude tort recovery in the situation generally because, as stated above, "clarity allows parties to do business on a surer footing". "Where contracts might readily have been used to allocate the risk of a loss," the *Restatement* observes, "a duty to avoid the loss is unlikely to be recognized in tort—not because the economic loss rule applies, but simply because courts prefer, in general, that economic losses be allocated by contract where feasible." We see no reason not to apply the economic loss rule to achieve this end.

Wal-Mart Stores, Inc. v. Xerox State & Local Sols., Inc., No. 05-18-01421-CV, 2024 WL 5087116, at *9 (Tex. App.—Dallas Dec. 12, 2024, no pet.) (mem. op.) (citing *LAN/STV*, 435 S.W.3d at 248 (footnotes omitted) (quoting Restatement (Third) § 6 cmt. b, § 3 cmt. f.). Accordingly, where a contract might readily have been used to allocate the risk of loss, a duty to avoid the loss is unlikely to be recognized in tort and the economic loss rule should apply. *LAN/STV*, 435 S.W.3d at 248; *Wal-Mart*, 2024 WL 5087116, at *15.

Moreover, and while Texas courts have not formally adopted the Restatement Third of Torts: Liability for Economic Harm as binding authority, the Texas Supreme Court has cited it extensively as persuasive authority, particularly to articulate the rationales underlying the economic loss rule, the risk of indeterminate and disproportionate liability from recognizing open-ended tort duties in commercial settings, and deference to contract, reflecting the principle that parties negotiating a deal have a full chance to consider how to manage the risks involved. *See LAN/STV*, 435 S.W.3d at 240–41. With respect to contract negotiations specifically, the Restatement Third "does not recognize liability for negligent misrepresentations made in the course of negotiating or performing a contract between the parties." RESTATEMENT (THIRD) OF TORTS § 5; *see also LAN/STV*, 435 S.W.3d at 243.

The subject of the case before us is the construction and operation of a processing plant and the lease of equipment in connection therewith, which is governed by three agreements—the Copano–Advantage Assignment, the Amendment, and the Equipment Lease. Advantage sought to allocate to KMT the risk of actual versus expected recoveries of NGLs and condensate by requesting that KMT in essence warrant the Cases 67-II and 67-Rev3 simulations in the Equipment Lease. But KMT rejected Advantage's proposed language, and Advantage chose to proceed with the North Park Plant project with the parties agreeing to the following:

> Set forth on Exhibit "C" are sample simulation summaries which depict the capability of the Equipment based on the assumptions set forth thereon; provided, however, Lessor makes no representation or

> warranty that Lessee's operation of the Equipment will produce the results set forth on Exhibit "C."

In addition, in the Copano-Advantage Assignment, Advantage agreed to the "as is, where is" provision despite concern about same. The "as is, where is" provision in the Copano-Advantage Assignment, and the Equipment Lease's: "Use, Operation, and Condition" provision disclaiming representation and warranty in connection with the results of the sample simulation summaries; and the limited warranty and "Limitation of Liability" provisions allocated risks concerning the construction and operation of the North Park Plant and the operation of the leased equipment. Permitting Advantage to sue KMT for economic loss could disrupt the allocation of risk the parties negotiated and agreed upon. *See Trebuchet Siege Corp. v. Pavecon Com. Concrete, Ltd.*, No. 05-12-00945-CV, 2014 WL 4071804, at *7 (Tex. App.—Dallas Aug. 19, 2014, no pet.) (mem op.) ("Application of the economic loss rule is particularly appropriate here, where permitting Trebuchet to sue Pavecon for economic loss would disrupt the risk allocations that Trebuchet worked out in its contract with DFM, and that DFM, in turn, worked out in its contract with Pavecon."); *Hou-Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 107 (Tex. App.—Houston [14th Dist.] 2000, no pet.) ("Permitting Hou-Tex to sue Landmark for economic losses would disrupt the risk allocations that Hou–Tex worked out in its contract with Saguaro and the risk allocations in Landmark's beta agreement or licensee agreement with SeisVision's licensees.").

Moreover, with respect to Advantage's contention and the trial court's finding KMT breached an independent, pre-contractual legal duty to Advantage and incurred an independent injury, we note that the factual basis of Advantage's claims against KMT for breach of contract and negligent misrepresentation are the same and involve the Cases 67-II and 67-Rev3 simulations and a misrepresentation concerning the potential recoveries of NGLs and condensate.[6] It is readily apparent that Advantage sought to recover in tort what was expressly excluded by the limitation of liability provision in the Equipment Lease for breach of contract claims.[7]

In addition, a negligent misrepresentation claim arising from the negotiation process faces the economic loss rule and will fail unless the plaintiff can establish an injury independent of the contractual expectancy. *See D.S.A., Inc. v. Hillsboro Indep. Sch. Dist.*, 973 S.W.2d 662, 664 (Tex. 1998); *see also Signature Ind. Servs., LLC v. Int'l Paper Co.*, 638 S.W.3d 179, 186 (Tex. 2022) ("Damage for breach of contract may include both direct and consequential damages."). American law traditionally recognizes three types of recovery to compensate for a breach of contract: expectancy, reliance, and restitution damages. *Atrium Med. Ctr., LP v.*

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[6] In its findings of fact and conclusions of law, the trial court stated, "Advantage's breach of contract claim is that Cases 67-11 and 67-Rev3 were misleading and false; did not depict the capability of the Equipment; and were not based on the gas composition data Advantage provided KMT."

[7] Advantage claims the "Limitation of Liability" provision does not include tort claims, KMT contends that it does. Because we conclude Advantage's negligent misrepresentation claim is barred by the economic loss rule, we need not determine whether the Equipment Lease's "Limitation of Liability" provision extends to tort claims.

Houston Red C LLC, 595 S.W.3d 188, 193 (Tex. 2020). Thus, merely because a plaintiff suing for negligence or negligent misrepresentation opts to sue for reliance damages does not mean that such damages are not, in essence, "contract" damages or that those damages constitute an independent injury. *See Sealy Emerg. Room, L.L.C. v. Free Standing Emerg. Room Mgrs. of Am., L.L.C.*, No. 01-21-00008-CV, 2024 WL 3973428, at *11 (Tex. App.—Houston [1st Dist.] Aug. 29, 2024, no pet.) (rejecting argument the economic loss rule did not bar plaintiffs' negligence claim seeking reliance rather than expectancy damages because reliance damages are a measure of contract damages.").

Under the circumstances presented in this case, we conclude that the economic loss rule bars Advantage's negligent misrepresentation claim. *See Wal-Mart*, 2024 WL 5087116, at *11 (it is inappropriate for courts to disrupt the agreement among the parties and it is inappropriate for courts to provide common law protection for a party when the parties' agreement governing the project failed to do so). Accordingly, we conclude the trial court erred in finding "the economic loss rule does not bar Advantage's [negligent misrepresentation] claims against KMT." We sustain KMT's first issue.

III. Breach of Contract Claim

In its fourth issue, KMT challenges the trial court's findings it breached Section V of the Equipment Lease and that Advantage incurred out-of-pocket damages of $126,052.50 as a result of such breach. KMT asserts no evidence supports these findings.

When an appellant challenges the legal sufficiency of an adverse finding on which he did not have the burden of proof at trial, he must demonstrate there is no evidence to support the adverse finding. *Wyde v. Francesconi*, 566 S.W.3d 890, 894 (Tex. App.—Dallas 2018, no pet.). When reviewing the record, we determine whether any evidence supports the challenged finding. *Id.* If more than a scintilla of evidence supports the finding, the legal sufficiency challenge fails. *Id.*

A breach of contract claim requires proof of each of the following elements: the existence of a valid contract; performance or tendered performance by the plaintiff; breach of the contract by the defendant; and damages sustained by the plaintiff as a result of the defendant's breach. *LendingHome Funding Corp. v. Tuesday Real Estate, LLC*, 05-20-00071-CV, 2021 WL 6124319, at *11 (Tex. App.—Dallas Dec. 28, 2021, no pet.) (mem. op.).

With respect to the breach element of Advantage's breach of contract claim, the trial court found KMT breached the Equipment Agreement because Cases 67-11 and 67-Rev3 provided false information that did not depict the capability of the Equipment, as defined in the Equipment Agreement. The provision upon which the trial court found a breach of contract is contained in Section V of the Equipment Lease, titled "USE, OPERATION, AND CONDITION." That provision provided, in relevant part:

Set forth on Exhibit "C" are sample simulation summaries which depict

> the capability of the Equipment *based on the assumptions set forth thereon*; provided, however, Lessor makes no representation or warranty that Lessee's operation of the Equipment will produce the results set forth on Exhibit C.[8]

(emphasis added). The trial court's finding of breach does not recognize that the reference to the case simulations contains the qualifying phrase "based on the assumptions set forth thereon." One of those assumptions was that the mole percent of the gas components was as indicated. While that assumption was incorrect, it does not negate the fact that it was the assumption used. Thus, the basis for the trial court's finding of breach in the first instance is unsupportable. Moreover, the trial court's finding the disclaimer of any representation or warranty that the results set forth in Exhibit C would be produced by Advantage's operation of the Equipment does not bar Advantage's breach of contract or negligent misrepresentation claims, based on Stevenson's testimony he understood the disclaimer only applied to shortfalls in Advantage's operation of the equipment, is contrary to the provision itself. The disclaimer is an additional bar to Advantage's breach of contract claim. *See ADT Sec. Servs., Inc. v. Van Peterson Fine Jewelers*, 390 S.W.3d 603, 607–08 (Tex. App.—Dallas 2012, no pet.) (claims for negligence, gross negligence, breach of contract, and negligent misrepresentation barred by disclaimer in parties' contract). We sustain KMT's fourth issue because no evidence supports the trial court's finding concerning the breach element of Advantage's breach of contract

[8] Exhibit C contained the Case 67-II and Case 67-Rev3 simulation summaries.

claim.

Given our disposition of KMT's first and fourth issues, we need not address its second and third issues challenging the trial court's findings on essential elements of a negligent misrepresentation claim and the damages to be awarded on Advantage's negligent misrepresentation claim. *See* TEX. R. APP. P. 47.1. In addition, we need not address the portion of KMT's fourth issue challenging the trial court's finding Advantage incurred out-of-pocket damages in the amount of $126,052.50 in connection with Advantage's breach of contract claim. *See id.*

CONCLUSION

We reverse the portion of the trial court's January 2, 2025 final judgment awarding Advantage the sum of $5,654,810 as actual damages, $2,171,524.50 as prejudgment interest, post-judgment interest, and court costs against KMT and render judgment that Advantage take nothing on its claims against KMT. In all other respects, we affirm the trial court's judgment.

/Nancy Kennedy/
NANCY KENNEDY
JUSTICE