No.

IN THE

Supreme Court of the United States

DEXTER EDWARDS D/B/A EDWARDS LAND & CATTLE,
PETITIONER,

v.

GENEX COOPERATIVE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

Did the court of appeals violate *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and the pragmatic federalism it represents by refusing to apply established North Carolina contract law to determine the rights and liabilities of the parties under their oral agreement for respondent's delivery of liquid nitrogen to petitioner's elite cattle reproduction business?

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The unpublished *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit in *Dexter Edwards d/b/a Edwards Land & Cattle v. Genex Cooperative, Inc.*, C.A. Docket No.18-1183, decided and filed June 13, 2019, and reported at 2019 WL 2479720, affirming the entry of summary judgment against petitioners by the United States District Court for the Eastern District of North Carolina, Southern Division, is set forth in the Appendix hereto (App. 1-28).

The unpublished decision of the United States District Court for the Eastern District of North Carolina, Southern Division, in *Dexter Edwards d/b/a Edwards Land & Cattle v. Genex Cooperative, Inc.*, Dist. Court Docket No. 7:16-CV-53-BO, filed February 8, 2018, and reported at 2018 WL 793596 (D.N.C. 2018), granting summary judgment to respondent and denying petitioners' motion for judgment on the pleadings or, in the alternative, for summary judgment, is set forth in the Appendix hereto (App. 29-39).

The unpublished order of the United States Court of Appeals for the Fourth Circuit in *Dexter Edwards d/b/a Edwards Land & Cattle v. Genex Cooperative, Inc.*, C.A. Docket No.18-1183, decided and filed on July 10, 2019, denying petitioners' timely filed petition for rehearing, is set forth in the Appendix hereto (App. 40).

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit affirming the entry of summary judgment against petitioners by the United States District Court for the Eastern District of North Carolina, Southern Division, was entered on June 13, 2019; and its further order denying petitioners' timely filed petition for rehearing was filed and decided on July 10, 2019 (App. 1-28;40).

This petition for writ of certiorari is filed within ninety (90) days of July 10, 2019. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

N.C.G.S. §§ 25-2-106(1)& (3) (North Carolina Uniform Commercial Code):

> Definitions: "Contract"; "agreement"; "contract for sale"; "sale"; "present sale"; "layaway contract"; "conforming" to contract; "termination"; "cancellation."
>
> (1)In this article unless the context otherwise requires "contract" and "agreement" are limited

to those relating to the present or future sale of goods, including layaway contracts. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (G.S. 25-2-401). A "present sale" means a sale which is accomplished by the making of the contract. A "layaway contract" means any contract for the sale of goods in which the seller agrees with the purchaser, in consideration for the purchaser's payment of a deposit, down payment, or similar initial payment, to hold identified goods for future delivery upon the purchaser's payment of a specified additional amount, whether in installments or otherwise.

....

(3)"Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

....

STATEMENT

For more than fifteen years, petitioner Dexter Edwards d/b/a Edwards Land & Cattle ("petitioner" or "Edwards") has been engaged in the business of genetically reproducing elite cattle in North Carolina. Specializing in "pure-bred genetics," petitioner collects genetically "elite" semen and embryos, some of which are from deceased sires and dams, and stores them in

Liquid Nitrogen ("LN2") tanks, preserving them in sub-freezing temperatures for future matching and production of elite calves. The resulting elite cattle have won many awards which has increased their value and their sale to third parties. Petitioner owns the business while his son (Nicholas Edwards) manages the animals.

Petitioner owns seven such LN2 tanks or biostats for preserving elite semen and embryos and beginning around 1999, he purchased LN2 from respondent Genex Cooperative, Inc. ("respondent" or "Genex"). There was no written contract between the parties for Genex furnishing petitioner this LN2. Robert Martin, its Territory Sales Manager ("TSM"), simply delivered LN2 to petitioner's tanks on a regular basis with petitioner paying Genex for each delivery upon receiving Genex's invoice.

On August 23, 2004, however, Genex wanted a so-called Liquid Nitrogen Service Agreement for each of the seven tanks; and on that date, Martin signed these Service Agreements on behalf of Genex. Petitioner never saw, read, discussed or signed any of these Service Agreements. Instead, his son Nicholas Edwards signed the Agreements but he did so incompletely, signing only the "Embryo Storage Policy" clause which is just one part of the Agreement, leaving blank the signature space for signifying his assent to the entire Agreement. This "Embryo Storage Policy" clause contains a provision that "Genex will not accept responsibility or liability for embryos or any other frozen biologic products stored in customer's tank(s) that are filled with LN2 by its employees."

Significantly, the other part of the Service Agreements *left unsigned* by Nicholas Edwards provided that the Customer, i.e., petitioner, "accepts full and sole responsibility to...monitor LN2 level[s] routinely ....;" requires both parties to give the other 60 days notice before terminating; and immunizes Genex from any liability for damages "arising out of the use or application of these goods and services" as well as any liability for special, incidental, indirect, punitive or consequential damages.

In October of 2012, Genex's new TSM, Corey Peters, began servicing petitioner's LN2 tanks and did so on a regular basis, approximately every three months. Petitioner was not required to be present during these deliveries and Peters did not notify petitioner that he would be making these deliveries. Petitioner would contact Peters if the LN2 levels were getting low or if he needed supplies; otherwise, Peters simply showed up every three months or 12 weeks to fill the tanks. Petitioner could check the tanks by picking them up as their weight would indicate the level of liquid nitrogen; when empty they would weigh about 30 pounds and when full about 80 pounds. When they felt light, he could check the LN2 level with a black measuring dipstick. If the level was less than six centimeters, he would request delivery from Peters but he did so only once in all the sixteen years Genex made deliveries.

There was *no* written policy or procedure contained in the 2004 Service Agreements which defined petitioner's duty to monitor "routinely" the levels of LN2 in the tanks. But in 2013, nine years after these Service Agreements were purportedly signed,

Peters without notice to petitioner, unilaterally modified these Service Agreements by placing a *disclaimer sticker* on petitioner's tanks which now provided: "Disclaimer: Owner/user is responsible for monitoring nitrogen level, making sure [liquid nitrogen] unit is filled regularly...." Petitioner never read this disclaimer on the sticker; and Nicholas Edwards never read or understood the sticker disclaimer since he is dyslexic.

The LN2 tanks were located in a visible place in the small office in a show barn next to Nicholas Edwards' house. They were kept on rubber mats and if the tanks failed due to a loss of vacuum, sweat or condensation would be visible on the mat to indicate the evaporation of LN2. But there was never an issue with the tanks, they were always in good working order and consistently maintained their LN2 levels. Both petitioner and Nicholas were frequently in this area to monitor the tanks, especially during breeding season (November-June), sometimes daily. As petitioner later testified, he and Nicholas always took care of the tanks both in the breeding season and out of the breeding season. However, during the summer and outside of the breeding season, neither one of them was there as much.

Through the years, there was never a problem with Genex not filling the tanks. Whe Peters started filling the tanks for Genex in 2012, he would arrive, fill the tanks and hang a tag on one tank once filled. Petitioner never had a reason to check this tag because the tanks were always filled and since prior to 2012, or for over 13 years prior thereto, there never was a tag placed on the tanks. At the end of his day, after filling

petitioner's tanks, Peters would input this service information into his hand-held device which would cause his computer to forward this information to Genex's headquarters which would then invoice petitioner. According to Genex, "the service date and billing date should match unless there is error by the TSM entering the sale."

Consistent with this billing protocol, sometime in early September of 2015, Genex sent petitioner an invoice dated August 31, 2015, billing him for a delivery of LN2 to his tanks on that same day, August 31, 2015. On September 14, 2015, petitioner paid Genex pursuant to this invoice. On September 17, 2015, Genex then sent petitioner a letter immediately terminating its service of delivering LN2 to petitioner even though its 2004 Service Agreements require a 60-day written notice of termination by either party, an apparent violation of these purported Agreements which Genex later characterized as "an inadvertent error" on its part. This notice informed petitioner that Genex's "liquid nitrogen service will be discontinued upon receipt of this letter" and, in addition, it told petitioner that it had filled petitioner's tanks *on August 31, 2015*, in order to allow him "time to find a new provider." Petitioner received this letter on September 23, 2015.

In fact, however, and unbeknownst to petitioner, *Genex had not filled petitioner's tanks on August 31, 2015*. Instead, even though it had already billed petitioner (and had been paid by him)for a delivery of LN2 on August 31, 2015, Genex last filled petitioner's tanks *on July 13, 2015*. Because Genex's last delivery of LN2 took place on July 13, 2015, petitioner's tanks would have become empty by the first week in October

of 2015. Yet petitioner relied on Genex's representations both in its cancellation letter and its invoice he paid that it had filled the tanks on August 31, 2015, a reliance which led him to believe that he would have three months from August 31, 2015, or at least to late November of 2015, to have a new provider fill his tanks.

This reasonable reliance by petitioner proved disastrous for the genetically elite semen and embryos stored in those tanks. On October 12, 2015, while performing an early flush, Nicholas Edwards discovered that four of its seven tanks were empty of LN2 while the other three were virtually empty. Nicholas immediately attempted to contact Peters, leaving messages on his phone which went unanswered. Genex also failed to acknowledge or respond to petitioner's letter of October 14, 2015. Petitioner then contacted another LN2 supplier which filled petitioner's tanks. Despite this re-fill, Genex's negligent failure to honor its agreed-upon duty to deliver LN2 to petitioner's tanks caused petitioner to lose the stored genetically elite semen and embryos from prize "sires" and "dams" in four of his seven tanks, an irreparable loss since some of these sires and dams are now deceased.

On March 24, 2016, petitioner and Nicholas Edwards brought this civil action against Genex for breach of contract in the federal district court for the Eastern District of North Carolina, Southern Division. Positing jurisdiction on 28 U.S.C. § 1332, on account of diversity of citizenship, petitioner alleged the material facts recited above and claimed that Genex breached its agreement with petitioner when it "failed to deliver the

liquid nitrogen on or about August 31, 2015, and as a result of [its] failure to timely deliver the nitrogen [four] tanks became completely empty while others were virtually empty resulting in the elite semen and embryos being destroyed or contaminated and thus useless."

In December of 2016, petitioner sought to amend his complaint to include a claim against Genex for committing an unfair and deceptive trade practice under North Carolina law (N.C. Gen. Stat. § 75.1) and to remove Nicholas Edwards as a plaintiff (App. 9-10;30). The district judge on April 13, 2017, denied his motion to add a UDTP claim under State law but granted the motion to remove Nicholas as a party plaintiff (App. 10;30). After some discovery, petitioner again moved to amend his complaint to allege a UDTP claim citing the aggravating circumstances of Genex's breach of contract but it was again denied (App. 10-12;30).

On September 8, 2017, Genex moved for summary judgment contending that petitioner could adduce no evidence to show that its admitted mistake in failing to fill petitioner's tanks on August 31, 2015, and then billing him for such a delivery----a delivery it *never made* and on which petitioner relied causing his LN2 tanks to become empty or virtually empty by October 12, 2015----amounted to a breach of any agreement it had with petitioner or that any such breach proximately caused him injury (App. 12;29). Incident to its motion, Genex submitted four Service Agreements, *only one* of which applied to the four tanks for which petitioner was making a claim in this suit.

Petitioner opposed the motion, moving for judgment on the pleadings or, in the alternative, for summary judgment on the issue of Genex's liability (App. 13-14;29). He argued that his complaint and Genex's answer admitted that their course of conduct establish that there was an oral agreement between them for the timely delivery of LN2 crucial to his elite cattle reproduction business; that Genex last delivered LN2 to petitioner on July 13, 2015, *not* on August 31, 2015, as it erroneously told him it had done; that it breached their oral agreement by failing to make this delivery on August 31, 2015, billing him for this delivery when no delivery was in fact made; and that this breach of their oral agreement caused him to lose his genetically elite cattle semen and embryos (App. 13-14).

Petitioner further argued that the one written Service Agreement submitted by Genex which applied to this proceeding (the other three Service Agreements submitted by Genex pertained to tanks for which petitioner was making no claim) did not reflect their actual agreement because Nicholas Edwards lacked the authority to bind petitioner; because Nicholas' signature signified his assent only to the "Embryo Storage Policy" part of the Agreement, *not* the entire Agreement itself since the signature space for this purpose was left blank; because the entire Agreement, including the "Embryo Storage Policy" clause, is ambiguous; and because the limitation of damages provision contained in the "Embryo Storage Policy" clause is unconscionable (App. 14).

On February 8, 2018, the district court, Boyle, J., issued a ruling granting Genex's motion for summary

judgment and denying petitioner's motion for judgment on the pleadings or, in the alternative, for summary judgment (App. 29-39). As for petitioner's motion, the district judge rejected his argument that the Service Agreements, even if applicable to all or just one of the tanks, were invalid as to him because it was not signed by him, was signed incompletely by Nicholas Edwards, and was ambiguous as well as unconscionable (App. 35-37). As he ruled, Nicholas had apparent authority to sign the Agreements; his signature under only the "Embryo Storage Policy" part of the Agreement was somehow but inexplicably sufficient to bind petitioner to the provisions of the *entire* Agreement; and the "Embryo Storage Policy" of the Agreement was neither ambiguous nor unconscionable (*Id.*).

In addition, even if there was an oral agreement between the parties which supplanted the written Service Agreements, it was found that petitioner "failed to plead or establish the terms of that verbal contract" (App. 37). This was so even though the district judge found earlier in his opinion that Genex had admitted in its answer to petitioner's amended complaint that the parties operated pursuant to "a contract"whereby petitioner purchased LN2 from Genex, Genex regularly filled the tanks and petitioner then paid Genex's invoices for same (App. 32-33). Finally, the motion judge ruled that if there was a verbal agreement between the parties, petitioner proffered "no allegation or evidence that this contract was for a definite term, and thus the oral contract would have been terminable at will by either party" (App. 37). As he concluded, petitioner's "loss occurred after the termination of the contract on September 17,

2015, and thus his claim for breach [of this verbal agreement] would fail" (*Id.*).

As for Genex's motion for summary judgment, Judge Boyle ruled that it was undisputed that Genex last filled petitioner's tanks on July 13, 2015; that it gave petitioner proper notice it was cancelling the contract even though that notice listed the incorrect date for the most recent date of service; that the tag Peters placed on the tank after servicing the tanks reflected a service date of July 13, 2015; and that petitioner had a duty under the written contract to monitor the LN2 levels in the tanks (App. 38). Accordingly, that the LN2 levels "became too low or ran out prior to [petitioners'] inspection is not evidence of [Genex's] breach" under the written Service Agreements (*Id.*). Finally, he ruled that Genex should not be estopped by its misstatement of the last service date from arguing that petitioner's failure to monitor its tanks constituted a beach of the Service Agreements (App. 38-39). Petitioner having failed to create a triable fact question whether Genex breached the Service Agreements, summary judgment entered for Genex (App. 39-40).

Petitioner appealed the denial of his motions to amend and for judgment on the pleadings or, in the alternative, for summary judgment. On June 13, 2019, the court of appeals unanimously affirmed the district court's rulings in a unpublished *per curiam* decision (App. 1-28). The Panel ruled that regardless of whether the parties reached a written or oral contract for Genex's delivery of LN2 to petitioner's business, petitioner could not recover under either scenario (App. 19-20). It determined that under the one written

Service Agreement applicable here, even if Genex materially breached its terms by failing to give petitioner the 60-day cancellation notice and then provided him with inaccurate information about when the tanks were last filled, the claimed injury is the loss of semen and embryos, consequential damages which the Service Agreement does not cover and which could have been avoided if petitioner had "regularly" monitored this particular tank's LN2 levels (App. 24-25).

Nor could petitioner contend that Genex was estopped from asserting that he had failed to monitor the LN2 levels in the tanks because he reasonably relied upon its misrepresentation that the tanks were last filled on August 31, 2015, when in fact they were not (App. 22-24). As it ruled, petitioner had the means of knowing whether the tanks were full or empty by checking their levels with a dipstick or by checking their weight (App. 23-24). As such, all the elements of estoppel had not been made out (App. 24).

In reaching these results, the Panel *never addressed* petitioner's claim that there could not be a valid written contract between the parties for the delivery of LN2 because the one Service Agreement which pertained to the losses claimed by petitioner here was not fully executed by Dexter Edwards; because Nicholas' signature signified his assent only to the "Embryo Storage Policy" clause, *not* the entire Agreement since that signature space to signify such assent was left blank; because the language of the "Embryo Storage Policy" clause is ambiguous; and because the limitation of damages provision contained

in the Agreement's general provisions is unconscionable (App. 13).

Finally, the Panel concluded that even if the parties' course of dealing with each other was based upon an oral agreement, petitioner's claim still could not succeed because without pleading or proving the terms of such an agreement, it was terminable at will, giving Genex the right to terminate the contract at any time so long as it provided petitioner reasonable notice (App. 26). Thus its letter of September 17, 2015, received by petitioner on September 23, 2015, terminating the contract, was immediately effective and its failure to fill petitioner's tanks after that date was not a breach of their agreement (App. 26-27).

On July 10, 2019, the court of appeals denied petitioner's timely filed petition for panel rehearing (App. 40).

REASONS FOR GRANTING THE PETITION

The Court of Appeals' Refusal To Apply Established Principles of North Carolina Contract Law In Order To Determine The Rights And Liabilities Of the Parties Under Their Oral Agreement For Respondent's Delivery of LN2 To Petitioner's Elite Cattle Reproduction Business Violates *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) And The Pragmatic Federalism It Represents.

In moving for summary judgment, Genex submitted four Service Agreements, *only one* of which applied to the four tanks for which petitioner was making a claim in this suit. The three other Service

Agreements submitted by Genex pertained to tanks for which petitioner was making *no claim at all*. But even if Genex had submitted all four pertinent Service Agreements which link them with the four tanks at issue in this suit, their provisions have little, if any, relevance to the way the parties' actually conducted themselves as they carried out the terms of their oral agreement by which Genex simply delivered LN2 to petitioner's tanks on a regular basis and petitioner paid Genex for each delivery after receiving Genex's invoice.

That the parties considered this simple, understandable verbal agreement to be the crucial framework by which to measure their respective performances over the years rather than these Service Agreements is demonstrated by the undisputed facts that they always operated under this verbal agreement long before and even after Genex sought in 2004 to introduce these Service Agreements into their ongoing relationship; that these Agreements were never fully executed by the parties even then; that they stipulated a delivery schedule of 10 weeks when, in fact, Genex delivered LN2 to petitioner under their verbal agreement *every 12 weeks*; that petitioner's duty under the Agreements to monitor the LN2 levels "routinely" was never defined by any written policy or procedure; that Genex then sought in 2013 to modify the Agreements with a sticker disclaimer obligating petitioner to fill the tanks "regularly," a unilateral modification *prohibited* by the Agreements themselves; that Genex's Peters sometimes hung tags on the tanks when he serviced them, a procedure *unauthorized* by the Agreements and ignored by petitioner; and that, when terminating their relationship, Genex ignored the

60-day notice-of-cancellation provision the Agreements contained.

In short, the parties' conduct over the years demonstrated that neither party hewed to the terms of these written Agreements and each felt free to carry out the terms of their verbal agreement as efficaciously as possible from their respective perspectives regardless of these Agreements, i.e., Genex simply delivered LN2 to petitioner's tanks on a regular basis and petitioner paid Genex for each delivery after receiving Genex's invoice. As the district judge found, Genex admitted in its answer to petitioner's complaint that the parties operated pursuant to "a contract" whereby petitioner purchased LN2 from Genex, Genex regularly filled the tanks and petitioner then paid Genex's invoices for same (App. 32-33).

This was the basis of petitioner's claim under North Carolina law that pursuant to this oral agreement, Genex was bound to regularly fill his tanks with LN2 and it breached this agreement when in seeking to terminate this arrangement it negligently misstated twice to petitioner that it had filled his tanks on August 31, 2015, when, in fact, it had not, leading petitioner to reasonably rely on this fact and proximately causing him the irreparable loss of his stored genetically elite semen and embryos. Moreover, under North Carolina law, these same allegations support petitioner's claim that Genex should be equitably estopped from claiming that petitioner's failure to monitor the tanks rather than its own negligent performance of the agreement was the cause of petitioner's loss.

After all, the parties' oral agreement was not burdened by any requirement that petitioner "routinely," "regularly" or "aggressively" monitor his LN2 tanks. Instead, their verbal agreement contained a common sense appreciation----proven to be a workable and successful protocol for over fifteen years----that Genex should fill petitioner's tanks every 12 weeks or three months. That Genex mistakenly told petitioner twice in writing that it had filled his tanks on August 31, 2015, when it had not, could not possibly have put petitioner on inquiry so as to prevent Genex from being estopped under North Carolina law from claiming that his loss was due to his failure to adequately monitor his tanks.

Robust North Carolina decisional law recognizes the validity of petitioner's oral contract claim in these circumstances and the propriety of imposing upon Genex an estoppel from now claiming that petitioner's failure to properly monitor his tanks was the cause of his loss. Both courts below either ignored or misapplied this substantive State law, principles which create jury questions whether this oral contract is enforceable and whether Genex should now be estopped from claiming that petitioner's failure to monitor his tanks rather than its own negligent breach of the agreement was the cause of his loss.

Federal jurisdiction over this controversy is based on diversity of citizenship and both federal courts below were bound to apply the substantive law of the forum state, North Carolina, in deciding the rights and liabilities of the parties. *Colgan Air, Inc. v. Raytheon Aircraft Co.*, 507 F.3d 270, 275 (4th Cir. 2007). See *General Star Natl. Ins. Co. v. Universal Fabricators*,

585 F.3d 662, 669 (2nd Cir. 2009) citing *Omega Eng'g, Inc. v. Omega, S.A.*, 432 F.3d 437, 442 (2nd Cir. 2005). This refusal by the court of appeals to apply established principles of North Carolina contract law in order to determine the rights and liabilities of the parties under their oral agreement violates *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and the principles of pragmatic federalism it represents.

The Parties' Oral Agreement.

If the court of appeals had applied the substantive law of North Carolina, it would have concluded that the summary judgment record created a jury question whether the parties had entered into an open-ended oral contract of unlimited duration for Genex's delivery of LN2 to petitioner's seven tanks on a regular basis of 12-week intervals commensurate with petitioner's needs for his elite cattle reproduction business.

Petitioner's claim for breach of contract must be founded on a valid agreement and a breach of that agreement in some material way. *Brodkin v. Novant Health, Inc.*, 824 S.E.2d 868, 872 (N.C. App. 2019) citing *McKinnon v. CV Indus., Inc.*, 713 S.E.2d 495, 500 (N.C. App. 2011). A valid, enforceable contract exists when there is a meeting of the minds upon all essential terms and conditions of the contract and there is sufficient consideration. *Creech ex rel. Creech v. Melnik*, 556 S.E.2d 587, 591 (N.C. App. 2001). *Stillwagon v. Innsbrook Golf & Marine*, 2014 WL 5871188 at **2-3 (E.D.N.C. 2014) (interpreting North Carolina law). A verbal contract or a contract implied in fact arises where the intent of the parties is not otherwise

expressed, but an agreement in fact, creating an obligation, is implied or presumed *from their acts*. *Creech v. Melnik*, 495 S.E.2d 907, 911 (N.C. 1998) citing *Snyder v. Freeman*, 266 S.E.2d 593, 602 (1980). Mutual assent to the terms of the bargain so as to establish a meeting of the minds is not shown by some express agreement but rather by the actions of the parties showing an implied offer and acceptance. *Id*. at 911-912.

The uncomplicated and undisputed actions of the parties continuously from 1999 onward show a mutual assent to their verbal agreement whereby Genex delivered LN2 to petitioner's tanks on a regular basis, i.e., in 12-week intervals, and petitioner paid Genex for each delivery after receiving Genex's invoice. Moreover, under North Carolina law, because the parties acted as if there was no termination date, this verbal agreement was of indefinite duration which was terminable at will by either party upon reasonable notice. *J.M. Smith Corp. v. Matthews*, 474 S.E.2d 798, 800 (N.C. App. 1996) quoting *City of Gastonia v. Duke Power Co.*, 199 S.E.2d 27, 29 (1973). Thus under established North Carolina decisional law, the facts as pleaded by petitioner and as shown on the summary judgment record demonstrate a genuine issue of material fact for trial whether there was an enforceable oral contract and whether Genex breached that agreement when it mistakenly twice told petitioner that it had filled his tanks with LN2 on August 31, 2015, when, in fact, it had not. *Creech v. Melnik*, 495 S.E.2d at 911-912. *Stillwagon v. Innsbrook Golf & Marine*, *supra*.

Contrary to the analyses of both the district court and the court of appeals, even if this terminable-at-will verbal agreement was terminated on September

23, 2015, when petitioner received Genex's written notice of same, it would not prevent petitioner from suing Genex for damages which he sustained after that date because Genex breached the agreement *on August 31, 2015*, more than three weeks *before* the agreement was terminated, when it failed to fill petitioner's tanks. As long as the alleged breach took place before the verbal contract was terminated, the claim survives under North Carolina law even if damages were sustained after termination. See *Brodkin v. Novant Health, Inc.*, 824 S.E.2d at 873 (summary judgment proper where no breach occurred before termination); *Stanback v.Stanback*, 254 S.E.2d 611, 616 (N.C. 1979) ("Damages for *injury that follows the breach* in the usual course of events are always recoverable provided the plaintiff proves the injury actually occurred as a result of the breach.") (emphasis supplied); *Stillwagon v. Innsbrook Golf & Marine*, 2014 WL 5871188 at *5 (in order to show breach of oral contract, breach must occur before the termination date). See also N.C.G.S. § 25-2-106(3) (3) ("Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged *but any right based on prior breach or performance survives*.) (emphasis supplied).

Equitable Estoppel.

North Carolina courts have long recognized the doctrine of equitable estoppel. *Whitacre Partnership v. Biosignia, Inc.*, 591 S.E.2d 870, 881 (N.C. 2004) citing *In re Will of Covington*, 114 S.E.2d 257, 259 (N.C. 1960). The doctrine requires that one should do unto others as,

in equity and good conscience, he would have them do unto him, if their positions were reversed; its compulsion "is one of fair play." *Hamilton v. Hamilton*, 251 S.E.2d 441, 443 (N.C. 1979) quoting *Nowell v. Great Atlantic & Pacific Tea Co.*, 108 S.E.2d 889, 891 (N.C. 1959). The conduct of both parties must be weighed in the balance of equity and the party claiming estoppel, no less than the party sought to be estopped, must have conformed to strict standards of equity with regard to the matter at issue. *Creech v. Melnik*, 495 S.E.2d at 913 quoting *Hawkins v. M & J Fin. Corp.*, 77 S.E.2d 669, 672 (1953).

As the party claiming estoppel against Genex on account of its repeated misstatements about when it filled his tanks, petitioner had to show (1) a lack of knowledge on his part and the means of knowledge of the truth about the facts in question; (2) reliance upon the conduct of Genex; and (3) his prejudicial change of position based on those misstatements. *Hawkins v. M & J Fin. Corp.*, *supra*. *Wade S. Dunbar Ins. Agency, Inc. v. Barber*, 556 S.E.2d 331, 336 (N.C. App. 2001). Under part (1) of this test, estoppel will be denied where the party claiming it "*was put on inquiry* as to the truth *and* had the available means for ascertaining it." *Hawkins*, 77 S.E.2d at 673.

Thus under established State law, before a party like petitioner loses the right to claim estoppel, he must *not only* have the means available to discover whether Genex filled his tanks on August 31, 2015, *but also* he must be "put on inquiry" as to the truth of whether Genex actually filled his tanks on that day. That is, it must be shown that having already been told twice by Genex that his tanks were filled on August 31, 2015, he

was nevertheless bound as a reasonable person to "be put on inquiry" to confirm that fact anew despite a course of dealing with Genex for over fifteen years under which deliveries were regularly made by Genex and regularly paid for by him.

In *Meacham v. Montgomery County Bd. of Ed.*, 267 S.E.2d 349, 354 (N.C. App. 1980) ("*Meacham I*") and *Meacham v. Montgomery County Bd. of Ed.*, 297 S.E.2d 192, 197 (N.C. App. 1982) ("*Meacham II*"), the point was repeatedly made that although the plaintiff claiming estoppel had the means of knowing the effect of her election to take disability retirement, she was not required to make extensive inquiry for herself after being advised by the school board that "the retirement aspect was just a formality." *Id.* That is, whether she should have been "put on inquiry" to confirm that asserted fact was a question of fact for a jury. *Meachum I*, 267 S.E.2d at 353-354. In reversing a directed verdict against the plaintiff, the *Meachum II* Court repeated the observation that all equitable factors must be considered in determining whether she was "put on inquiry" so as to be entitled to the benefits of equitable estoppel. *Meacham II*, 297 S.E.2d at197. Accord, *Creech v. Melnik*, 495 S.E.2d at 913 (where the evidence raises permissible evidence that the elements of equitable estoppel are present, it "is a question of fact for the jury...."); *Hawkins*, 77 S.E.2d at 672-673;677 (same).

The court of appeals ruled that because petitioner had the means of knowing whether the tanks were full or empty by checking their levels with a dipstick or by checking their weight, he could not claim that Genex was estopped by its own misstatements

from asserting that his failure to check the tanks was the proximate cause of his loss (App. 23-24). *No analysis was made of whether petitioner should have been "put on inquiry" by the misstatements.* Yet North Carolina law requires that before a party like petitioner loses the right to claim estoppel, he must *not only* have the means available to discover the truth of the matter *but also* be "put on inquiry" as to the truth of whether, having been told twice by Genex that his tanks were filled on August 31, 2015, he must nevertheless confirm that fact anew despite a course of dealing with Genex for over fifteen years under which deliveries were regularly made by Genex and regularly paid for by him.

In fact, there was never any suggestions, directions or policy promulgated about how the tanks should be monitored; and the manner in which petitioner monitored his tanks had proven successful for over fifteen years until Genex misrepresented the fact that the tanks were filled on August 31, 2015. In these circumstances together with all the other facts adduced on this summary judgment record, it was an issue of fact for a jury under North Carolina law whether petitioner should have been "put on inquiry" by Genex's misstatements and whether he was entitled to claim that Genex was estopped from asserting that his failure to monitor the tanks was the proximate cause of his loss. The court of appeals' decision leaving out this analysis deprived petitioner of a viable answer to Genex's defense of proximate causation under North Carolina law.

The Erie Violation.

The court of appeals' decisionmaking fails to apply the substantive law of North Carolina, law which recognizes the validity and enforceability of this verbal agreement between the parties and the right of petitioner to assert a claim of equitable estoppel against Genex. It creates unprincipled federal common law in North Carolina on these subjects and undermines the principles for which *Erie* stands.

Under *Erie*, when a federal court exercises diversity jurisdiction over State law claims, "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Felder v. Casey*, 487 U.S. 131, 151 (1988) quoting *Guaranty Trust Co. York*, 326 U.S. 99, 109 (1945). Avoiding judge-made rules in federal court which undercut a litigant's rights which he otherwise would enjoy under State law promotes comity and federalism, discourages forum-shopping and acknowledges that the pronouncements of the State courts on the substantive rights of its citizens are in most cases expressions of their sovereignty. *Bush v. Gore*, 542 U.S. 692, 740-742 (2000) (Rehnquist, C.J., concurring).

The Court has made clear in various decisions after *Erie* that federal courts determine state law in the same manner by which they determine federal law, i.e., "with the aid of such light as [is] afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law," aided by the notion that a federal district judge is in the

best position to determine the efficacy of the substantive State law which applies to the controversy. *Salve Regina College v. Russell*, *supra*, quoting *Meredith v. Winter Haven*, 320 U.S. 228, 238 (1943). See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 730 (1979); *West v. A.T. & T. Co.*, 311 U.S. 223, 236-237 (1940); *Six Companies v. Highway Dist.*, 311 U.S. 180, 188 (1940).

Moreover, in view of the court of appeals' affirmative duty under the decisions of this Court to review the district court's determination of State law when fixing the rights of the parties, *Erie*, *supra*; *Salve Regina College v. Russell*, 499 U.S. at 231;234, it was incumbent on the court of appeals to carry out this task so that the doctrinal coherence between State and federal courts was advanced and the twin aims of *Erie*—"discouragement of forum-shopping and avoidance of inequitable administration of the laws," *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)—were accomplished.

However, the court of appeals failed in this fundamental regard. Creating federal "general" common law at odds with the substantive law of North Carolina in order to reach a particular result, see *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004), the court of appeals wrongly deprived petitioner of his right to have his contract claim and his estoppel claim fairly considered in the same manner they would be considered in State court. This "blatant federal-court nullification of state law," *Michael O. Leavitt v. Jane L.*, 518 U.S. 137, 144-145 (1996), is a matter which invokes this Court's power of superintendency over the federal courts so that the decision below does not damage

federal-state relations, does not lead to divergent opinions on the enforceability of oral contracts or the validity of a claim of equitable estoppel, and does not promote forum shopping, all factors which prompted the Court to decide *Erie* in the first place.

CONCLUSION

For the reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit and, ultimately, to vacate and reverse that judgment and remand the matter to the United States District Court for the Eastern District of North Carolina, Southern Division, for the entry of a judgment in petitioner's favor or for a trial on the merits of petitioner's contract claim; or provide petitioner with such further relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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