**UNITED STATES COURT OF APPEALS**
**FIFTH CIRCUIT**

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No. 93-1647

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WESTERN TRACTOR CORPORATION,

Plaintiff-Appellant,

versus

CONTINENTAL-EAGLE CORPORATION,

Defendant-Appellee.

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Appeal from the United States District Court
for the Northern District of Texas
(5:91-CV-162-BA)

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(May 24, 1994)

Before GOLDBERG, HIGGINBOTHAM, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:[*]

Western Tractor Corporation ("Western") brought suit against Continental-Eagle Corporation ("CEC"), claiming, *inter alia,* that CEC had breached its agreement to pay labor charges incurred by Western when servicing cotton burr extractors manufactured by CEC, and that CEC had breached its express warranty in violation of the Texas Deceptive Trade Practices Act ("DTPA"). The magistrate judge entered judgment against Western on all of its claims in accordance with the jury's verdict. Western appeals, contending that the

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

magistrate judge erred in not granting its renewed motion for judgment as a matter of law and motion for new trial regarding its breach of contract claim, and its motion for new trial regarding its claim under the Texas DTPA. Finding no reversible error, we affirm.

**I**

In 1984, Walter Bray, a representative of Western, entered into an oral agreement with Raymond Adams, a representative of Bush Hog/Continental Gin ("Continental Gin"), to sell and distribute cotton burr extractors.[1] According to the terms of the oral agreement, Continental Gin was obliged to pay for the labor costs incurred by Western in replacing parts or correcting defective workmanship on the cotton burr extractors. The burr extractors sold under this agreement included a factory warranty to the end user. The factory warranty was set out in a document included in the operator's manual provided to the end user.

In 1986, CEC acquired certain assets of Continental Gin, including the cotton burr extractor line. Adams, who at the time of the acquisition had left Continental Gin to become the Chief Operating Officer at CEC, testified at trial that CEC made no change in the prior arrangement between Western and Continental Gin. Don Weber, then a regional manager for CEC, also testified at

[1] A burr extractor attachment removes burrs, stems, dirt and other types of foreign material from the cotton when it is stripped from the stalk. The primary purpose of removing the burrs, stems, trash and other debris is to reduce the amount of material the farmer takes to the gin, resulting in less ginning costs since ginning charges are based upon the total weight of material ginned.

trial that despite the change of ownership, it would be "business as usual" between Western and CEC, just as it had been between Western and Continental Gin.

In late 1986, Adams resigned from his position at CEC. That next year, a written contract was executed by Don Weber on behalf of CEC and by Walter Bray on behalf of Western. The 1987 agreement granted Western the exclusive right to sell cotton burr extractors for a term of five years. The agreement also stated that Western shall be responsible for all service on all machines sold by Western, excluding service on those machines covered by the factory warranty, and that CEC shall have no responsibilities or liabilities beyond its factory warranty. The warranty referred to in the 1987 agreement was identical to the warranty which accompanied the 1984 oral agreement.

In 1988, Western submitted a warranty claim to CEC for reimbursement of parts and labor charges. The claim was for work done on a sixty-inch extractor unit sold to B.L. Miller of Tahoka, Texas. Western resubmitted this claim on the Warranty Report Nos. 290 and 291. This claim was initially rejected by CEC as being outside the warranty period because the equipment had been sold to Western more than three years earlier. Western informed CEC the extractor had been in its inventory for this time and had only recently been sold to the end user.

In August 1989, David Anderson, on behalf of CEC, reevaluated the claim and agreed to pay Western $1,698.03 of the claim for parts and personal labor charges provided by CEC at its Lubbock

facility, but not for $1,470.00 for other labor provided by or on behalf of Western. CEC denied Western's claim for $1,470.00 in labor charges because there was no provision for the reimbursement of labor charges in the 1987 agreement between Western and CEC. CEC interpreted the factory warranty as not covering labor performed by entities other than CEC.

Western filed suit against CEC in federal district court for breach of contract, breach of fiduciary duty, and violation of the Texas DTPA.[2] CEC counterclaimed seeking a declaration of the rights of the parties and attorney's fees under the DTPA. Both parties moved for summary judgment. The magistrate judge[3] denied both motions, except to the extent that the judge granted summary judgment for CEC on the claim that CEC breached its fiduciary duty.

Before trial, the magistrate judge denied Western's motion for judgment as a matter of law on its breach of contract claim. The jury returned a verdict against Western on all of its claims. The jury specifically found the following: (1) that the terms of the 1984 oral agreement obliged Continental Gin and its successor, CEC, to pay the labor costs incurred by Western in replacing defective parts or correcting defective workmanship on cotton burr extractors; (2) that the 1987 written agreement modified the 1984 oral agreement by eliminating the obligation that CEC pay the labor costs incurred by Western; and (3) that the breach of an express

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[2] Jurisdiction was based on diversity of citizenship. *See* 28 U.S.C. § 1332.

[3] The case was reassigned to a magistrate judge in accordance with 28 U.S.C. § 636(c).

warranty, if any, by CEC was not a producing cause of damages to Western. Following the verdict, but before entry of judgment, the magistrate judge denied Western's renewed motion for judgment as a matter of law and motion for new trial regarding its breach of contract claim, and Western's motion for new trial regarding its DTPA claim. The magistrate judge then entered a final judgment in accordance with the verdict, from which Western timely appealed.

**II**

**A**

Western first contends that the magistrate judge erred in denying its renewed motion for judgment as a matter of law and its motion for new trial regarding its breach of contract claim, because the evidence did not support the jury's finding that the 1987 agreement modified the terms and conditions of the 1984 agreement. CEC, in turn, contends that as a matter of law the 1987 agreement substituted for and replaced the 1984 agreement based on the inconsistent terms of the two contracts. CEC therefore argues that the judgment regarding Western's breach of contract claim should be affirmed. We agree with CEC.

The effect of a substituted agreement is that it discharges the obligations imposed under the old agreement. *See Scalise v. McCallum,* 700 S.W.2d 682, 684 (Tex. App.)Dallas 1985, writ ref'd n.r.e.) (stating that a substituted agreement supersedes and extinguishes the old agreement);[4] *see also* Restatement (Second) of

[4] We apply Texas substantive law to this diversity suit because Texas is the forum state. *See Ideal Mut. Ins. Co. v. Last Days Evangelical Ass'n, Inc.,* 783 F.2d 1234, 1238 (5th Cir. 1986)

Contracts § 279 Comment a (1981) ("A substituted contract is one that is itself accepted by the obligee in satisfaction of the original duty and thereby discharges it."). "The substitution of a new agreement occurs when a later agreement is so inconsistent with a former agreement that the two cannot subsist together." *Scalise,* 700 S.W.2d at 684; *see also Willeke v. Bailey,* 144 Tex. 157, 160, 189 S.W.2d 477, 479 (1945). Because this determination is made solely from the language of the contract, it is a question of law. *See Transource Int'l, Inc. v. Trinity Indus., Inc.,* 725 F.2d 274, 289-90 (5th Cir. 1984) (stating that whether the terms of two agreements are inconsistent is a matter of law).

Our review of the terms of the two contracts leads us to conclude that the contracts are inconsistent regarding the payment of labor costs incurred by Western. It is undisputed that pursuant to the 1984 oral agreement, Continental Gin (and its successor, CEC) was obliged to pay the labor costs incurred by Western in replacing defective parts and correcting defective workmanship.[5] This oral agreement was accompanied by a factory warranty to the end user which was included in the operator's manual.

The 1987 agreement provides:

> For the Mutual Benefits that will accrue to the parties, CONTINENTAL EAGLE CORPORATION, hereinafter called CEC, and WESTERN TRACTOR CORPORATION, hereinafter called Western, covenant and agree as follows:

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(applying substantive law of forum state to diversity suit).

[5] By finding that the 1987 agreement eliminated CEC's obligation to pay labor costs incurred by Western, the jury implicitly found that CEC had a pre-existing obligation to pay such costs. CEC does not contest this finding.

> (1) CEC has granted and does hereby grant unto Western the exclusive right to sell all burr extractor machines produced by it and adaptable to International Harvester and John Deere cotton harvesting equipment.
>
> (2) This exclusive right shall be for a term of five (5) years; PROVIDED, as part of the consideration for which this agreement is entered into, Western shall have and is hereby granted the option to extend this agreement for two successive five-year periods, each of which options shall be exercised sixty (60) or more days prior to the expiration of the ensuing period for which it is exercised.
>
> (3) Western shall be responsible for all service on all machines sold by Western under this agreement, excluding service on machines covered by CEC's factory warranty on the basic machines.
>
> (4) CEC shall have no responsibilities or liabilities beyond its factory warranty on the basic machines.

The 1987 agreement does not address the payment of labor costs. It does, however, explicitly state that "CEC shall have no responsibilities or liabilities beyond its factory warranty on the basic machines."

The factory warranty provides:

> Each new machine or component manufactured by Bush Hog/Continental Gin is warranted by Bush Hog/Continental Gin to the original purchaser to be free from defects in material and workmanship under normal use and service. The obligation of Bush Hog/Continental Gin under this warranty is limited to the repair or replacement of defective parts or correction of improper workmanship of any part(s) of such machines(s) or component(s) thereof which shall, within one year from the date of Bush Hog/Continental Gin's original delivery or 90 days from the date first operated (if for a seasonal use), whichever is first, be returned to Bush Hog/Continental Gin's factory, transportation charges prepaid, and which Bush Hog/Continental Gin shall determine to its satisfaction upon examination thereof to have been defective. When it is impractical to return the defective part(s) of such machine(s) or component(s) to Bush Hog/Continental Gin's factory, then Bush Hog/Continental Gin shall have no liability for the labor cost involved in repairing or replacing any such part(s)

> and shall be liable solely for supplying the material necessary to replace or repair the defective part(s), provided that prior thereto Bush Hog/Continental Gin shall have determined to its satisfaction that any such part(s) are defective.

Nowhere does the factory warranty state, either explicitly or implicitly, that CEC is obliged to pay the labor costs incurred by Western, or any other entity.[6] Because CEC's obligation to pay Western's labor costs is not reflected in the factory warranty, and the 1987 agreement expressly states that CEC shall have no liabilities beyond those reflected in the factory warranty, the terms of the 1987 agreement are inconsistent with the terms of the 1984 agreement. We therefore hold that the 1987 agreement substituted for the 1984 agreement, thereby discharging CEC's

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[6] We reject Western's contention that the factory warranty "clearly evidences that [CEC] is liable [to Western] for the labor cost involved in repairing or replacing a defective part when it is practical to return the part." First, by Western's own admission, the representations and warranties in the written factory warranty "are to the retail purchaser and are separate and distinct from, and are not to be confused with, the representations and warranties made to Western." Record on Appeal vol. 1, at 4 (Complaint). Second, the factory warranty states that "[t]he obligation of [CEC] under this warranty is limited to the repair or replacement of defective parts or correction of improper workmanship of any part(s) or such machine(s) or component(s) thereof which shall . . . be returned to [CEC's] factory . . . ." The factory warranty further states that "[w]hen it is impractical to return the defective part(s) . . . to [CEC's] factory, then [CEC] shall have no liability for the labor cost involved in repairing or replacing any such part(s) and shall be liable solely for supplying the material necessary to replace or repair the defective part(s), provided that prior thereto [CEC] shall have determined to its satisfaction that any such part(s) are defective." We think it clear from this language that CEC's obligation to pay for labor costs turns on whether the part is returned to CEC's factory, where CEC itself provides the labor, and not whether return of the part is theoretically practical. Consequently, the terms of the factory warranty do not oblige CEC to pay the labor costs incurred by Western.

obligation to pay the labor costs incurred by Western. Consequently, the magistrate judge did not err in denying Western's renewed motion for judgment as a matter of law and motion for new trial regarding its breach of contract claim.[7]

**B**

Western also contends that the magistrate judge erred in denying its motion for new trial regarding its claim under the Texas DTPA. Western specifically challenges the jury's negative response to Question No. 5, which asked "was the breach of an express warranty, if any, by Continental-Eagle a producing cause of damages to Western Tractor?"

The parties do not dispute that an affirmative answer to Question No. 5 required that the jury determine that CEC made an express warranty and that the express warranty was breached. "Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." Tex. Bus. & Com. Code Ann. § 2.313(a)(1) (Tex. UCC) (Vernon 1968). Western argues that an express warranty arose when CEC, prior to the 1987 agreement, promised to pay the costs of parts and labor incurred by Western in repairing the cotton burr extractors. Western also argues that CEC

[7] That the breach of contract issue was submitted to the jury, rather than decided as a matter of law, constitutes only harmless error in light of our legal conclusion that implicit substitution occurred. *See* Fed. R. Civ. P. 61.

breached this express warranty by refusing to pay Western's claim for $1,470.00 in labor costs.

For the reasons we have already provided, the 1987 agreement eliminated CEC's obligation to pay Western's labor costs. Therefore, assuming *arguendo* that an express warranty arose from CEC's promise to pay Western's labor costs, we conclude as a matter of law that no breach of an express warranty occurred. Accordingly, we hold that the magistrate judge did not err in denying Western's motion for new trial on its DTPA claim.

**III**

For the foregoing reasons, we AFFIRM.