

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Paul K. Hanson,)
)
Plaintiff/Appellee,)
)
vs.)
)
Donald Boeder,)
)
Defendant/Appellant.)
)

Supreme Court No.: 20060114
Steele County Civil No.: 46-05-C-00026

Appeal From Judgment Entered After a Bench Trial
The Steele County District Court
Honorable Steven L. Marquart

BRIEF OF PLAINTIFF/APPELLEE

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TABLE OF CONTENTS

I. Statement of Issues1

II. Statement of Case2

 A. Nature of the Case.....2

 B. Course of Proceedings2

 C. The Disposition Below4

III. Statement of Facts.....5

IV. Argument14

 A. Introduction.....14

 B. Relevant Standards Of Review15

 C. The Doctrine Of Avoidable Consequences
 Is Not Available And Not Applicable.....17

 D. All Damages Were Reasonable, Within The
 Range Of Evidence Presented To The Court,
 And Are Not Clearly Erroneous.....20

 E. The Court Properly Awarded Hanson \$31,600.00
 For Loss Of Use Of The
 Grain Bins And Machine Sheds.....27

 F. The Court Properly Awarded Hanson \$24,542.00
 As The Value Of Fall Tillage.....29

 G. This Appeal Is Frivolous And Hanson Should
 Recover Interest, Double Costs And A
 Reasonable Attorney’s Fee31

V. Conclusion and Precise Relief Sought.....34

Certificate of Compliance.....36

Affidavit of Service by Electronic Means37

TABLE OF AUTHORITIES

FEDERAL CASES

United States v. Dunkel, 927 F. 2d 955 (7th Cir. 1991).....14

STATE CASES

Beaulac v. Beaulac, 2002 ND 126, 649 N.W.2d 21016

City of Grand Forks v. Hendon/DDRC/BP, LLC, 2006
ND 116, 715 N.W.2d 14517

Dixon v. McKenzie County Grazing Ass'n, 2004 ND 40,
675 N.W.2d 414.....16

Fladland v. Gudbranson, 2004 ND 118, 681 N.W.2d 431.....15, 16

Heng, v. Rotech Medical Corp., 2006 ND 176, 720 N.W.2d 5416,17

Int'l Feed Products, Inc. v. Alfalfa Products, Inc., 337
N.W.2d 154 (N.D. 1983)24

Keller v. Bolding, 2004 ND 80, 678 N.W.2d 578.....16, 24

Kulseth v. Rotenberger, 320 N.W.2d 920 (N.D. 1982)31

Landers v. Biwer, 2006 ND 109, 714 N.W.2d 476.....16

Leingang v. City of Mandan Weed Board, 468 N.W.2d
397 (N.D. 1991)22, 24

Leninger v. Sola, 314 N.W.2d 39 (N.D. 1981)17,25

Linrud v. Linrud, 552 N.W.2d 342 (N.D. 1996).....14

Livinggood v. Balsdon, 2006 ND 11, 709 N.W.2d 72323

Lochthowe v. C.F. Peterson Estate, 2005 ND 40, 692 N.W.2d 12025

Matter of Estate of Raketti, 340 N.W.2d 894 (N.D. 1983)31

Nelson v. Smith, 349 N.W.2d 849 (Minn. Ct. App. 1984).....26

Peterson v. Front Page, Inc., 462 N.W.2d 157 (N.D. 1990)16

<i>Pierce v. B.P.O. of Elks Lodge No. 1214</i> , 2004 ND 26, 673 N.W.2d 914	25
<i>Podoll v. Brady</i> , 423 N.W.2d 151 (N.D. 1988)	31
<i>Riemers v. O'Halloran</i> , 2004 ND 79, 678 N.W.2d 547	32
<i>Schmidt v. First Nat. Bank and Trust Co.</i> , 453 N.W.2d 602 (N.D. 1990)	31
<i>State Ex. Rel. Housing v. Center Mut.</i> , 2006 ND 175, 720 N.W.2d 425	16
<i>Wachter v. Gratech Company, LTD.</i> , 2000 ND 62, 608 N.W.2d 279	16

FEDERAL STATUTES

U.C.C. §1-106(1)	27
U.C.C. §2-708	27

STATE STATUTES

N.D.C.C. §32-03-06	22
N.D.C.C. §32-03-09	22, 23
N.D.C.C. §41-02-87	27
N.D.Civ.App.P. Rule 28(7)(B)	14
N.D.Civ.App.P. Rule 37	31
N.D.Civ.App.P. Rule 38	32

MISCELLANEOUS

North Dakota Supreme Court Appellate Practices	14
Restatement (Second) of Contracts §350 (1981)	25, 26
22 Am.Jur.2d Damages §45 (1988)	22

I. STATEMENT OF ISSUES

Paul K. Hanson, the Plaintiff/Appellee, "Hanson" presents these issues:

1. Were the issues presented by Donald Boeder, the Defendant/Appellant "Boeder" presented below, or are they argued for the first time on appeal?
2. Are the court's findings of fact on damages clearly erroneous or outside the range of the evidence presented?
3. Is this appeal frivolous?

II. STATEMENT OF THE CASE

A. Nature of the Case

This case is about the unequivocal, willful and unjustified breach of a one page five year cash rent farm lease (Boeder App. P. 60), between Hanson, the lessee, and Boeder, the lessor. Boeder unequivocally stated in his pleadings and deposition testimony that the lease was over and Hanson would no longer be able to use the farmland, buildings, grain storage facilities or other benefits of the lease.

B. Course of Proceedings

Hanson's complaint (Boeder App. P. 10), sought specific performance of the lease through November 30, 2008, but failing that, sought an "award of all actual damages caused by the breach". (Boeder App. P. 12).

Boeder's answer and counterclaim (Boeder App. P. 14), alleged that Hanson had breached the lease, and sought "an Order to cancel and declare void the farm lease" and "An Order enjoining Plaintiff from starting or completing any fall work or further farming activities...but specifically allowing Plaintiff to complete harvest and make the November 1, 2005 payment due and owing". (Boeder App. P. 18).

Boeder moved for a preliminary injunction and expedited trial (Boeder App. P. 20), seeking an order specifically restraining Hanson from doing any fall work, using any bin storage, using fuel tanks, placing machinery in the yard or using electricity.

Hanson responded with an Application for Temporary Restraining Order and Order to Show Cause (Hanson App. P. 9), supported by the Affidavit of Paul K. Hanson (Hanson App. P. 11). There, Hanson requested a temporary restraining order to maintain

the status quo, and for leave to deposit the fall cash rent of \$33,757.50 with the court. (Hanson App. PP. 9-10).

Boeder's response was Defendant Boeder's Brief Resisting Plaintiff's Application for Temporary Restraining Order and Order to Show Cause (Hanson App. P. 23). There, Boeder argued that a preliminary injunction would not be proper because Hanson had an alternative remedy in the form of money damages, and that "money damages would no doubt suffice and the Plaintiff cannot show irreparable injury". (Hanson App. P. 25).

Hanson also filed an Ex-Parte Motion for Leave of Court to Deposit Funds with Court (Hanson App. P. 27), which was granted by the court's Order of October 25, 2005 (Hanson App. P. 28).

On November 4, 2005, the court denied Hanson's application for temporary restraining order, but allowed Hanson to deposit \$15,000.00 with the court "until further determination of the Court." (Boeder App. P. 22).

Judge Marquart had determined on November 2, 2005, that a money damages remedy would be appropriate. Findings P. 1 (Boeder App. P. 23).

Boeder was always represented by Tim O'Keeffe until after judgment was entered and through March 24, 2006, when Bruce Carlson substituted himself as counsel for Boeder in place of Mr. O'Keeffe (Hanson App. P. 36).

Hanson had initially sued both Boeder and Randy Richards ("Richards"), claiming that Richards had interfered with the lease. Although Richards apparently never filed an answer, Bruce Carlson was his attorney of record and Hanson and Boeder both served pleadings on him.

The first pleading filed by Richards was the November 15, 2005, Certificate of Non-Readiness, (Hanson App. P. 29).

Because Hanson wanted a trial earlier than June 1, 2006, the date stated in Richards' Certificate of Non-Readiness, and because Hanson was satisfied that Boeder could pay any judgment, Hanson stipulated on January 17, 2006, that the complaint against Richards should be dismissed with prejudice and without costs or disbursements (Hanson App. P. 30).

Although Hanson filed a trial brief (Docket No. 286) Boeder filed no trial brief.

C. The Disposition Below

After the court trial in Finley on February 7, 8, 9 and 16, the court entered its Memorandum Opinion, Findings of Fact, Conclusions of Law and Order for Judgment on March 2, 2006 (Boeder App. P. 23). Judgment was entered on March 16, 2006 (Boeder App. P. 42) against Boeder for \$315,194.26.

Hanson filed a motion to withdraw the \$15,000.00 on deposit with the court (Hanson App. P. 31) resulting in the Order Granting Plaintiff's Motion to Withdraw the \$15,000.00 on Deposit with the Court filed March 28, 2006 (Hanson App. P. 34). The \$15,000.00 has been applied in partial satisfaction of the Judgment. Boeder has deposited the balance with interest with the clerk of court for a stay pending appeal.

Hanson had initially cross appealed alleging that the court improperly failed to award damages for fertilizer applied to the farmland during 2005, which would be carried over into the 2006 crop season for the benefit of Boeder or a new tenant. Hanson withdrew the cross appeal resulting in this Court's July 14, 2006 Order of Voluntary Dismissal of Cross Appeal (Hanson App. P. 38).

Hanson might also have complained that the court discounted Hanson's damages to a present worth without expert testimony offered by Boeder or an explanation of what reasonable rate of return or current investment rate was used or how it was determined. (Boeder App. PP. 37, 38 and 40). The court looked after Boeder, where necessary, to achieve a just result not deserving of an appeal by Hanson or Boeder.

III. STATEMENT OF FACTS

All necessary facts come from the court's Memorandum Opinion, Findings of Fact, Conclusions of Law and Order for Judgment (Boeder App. PP. 23-41), none of which are clearly erroneous. Boeder does not challenge the findings that Hanson did not "breach" the lease by not farming the land in a good and farmerlike manner. (Boeder App. PP. 31 and 40).

As the court states in the findings, Hanson's complaint sought specific performance, and alternatively, an award of actual damages caused by Boeder's actual and anticipated breach of lease (Boeder App. P. 23). The court stated that Hanson had sought injunctive relief but that relief was denied by the court "on the grounds that Hanson had an adequate remedy at law and that equitable relief would not be available." (Boeder App. P. 23). The court noted that at the beginning of the trial, Hanson indicated that he was no longer seeking equitable relief (Boeder App. P. 23). However, Boeder had already indicated at his deposition of December 29, 2005, that the lease was over. Boeder was reminded of this testimony at the trial when he tried to suggest that the lease was not really over, should the court determine that Boeder had no just cause to cancel the lease (Tr. P. 659).

In discussing the lease, the court found that it was an unambiguous one-page document (Boeder App. P. 24). The court found that the lease required Boeder to provide 1,350.3 tillable acres, steel bin storage capacity of approximately 93,000 bushels and use of two machine sheds (Boeder App. P. 24). The court found that on August 2, 2005, Boeder told Hanson that he was renting the land to Richards and that “the lease was over” (Boeder App. P. 24). The court found that this amounted to a repudiation of the contract (Boeder App. P. 24), something Boeder admits in his brief to this Court “is a question of fact and that deference is given to the factual determinations of the trial court” (Boeder’s Brief P. 11). The court determined that following the anticipatory breach of the contract, Hanson harvested the crop and did fall tillage (Boeder App. P. 25). The court also found that “The fall tillage was an obligation he [Hanson] had under the terms of the lease agreement, which provided that he agreed to leave the land tilled in the same manner as when it was received.” (Boeder App. P. 25). The last sentence of the one page lease does require Hanson “to leave the land tilled in the same manner as when he received it.” (Boeder App. P. 60).

During opening argument, Boeder twice admitted that upon termination of the lease, he would have to reimburse Hanson for fall tillage. (Tr. PP. 21, lines 3-6 and 24, lines 2-7).

The key issue about whether Hanson himself had breached the lease was whether Hanson had farmed the land in a good and farmerlike manner. The parties had a prior lease, yet they entered into another lease on November 1, 2003 which term ended November 30, 2008 (Boeder App. P. 26 and Tr. PP. 697 and 104).

Hanson produced witness after witness testifying that he had farmed the land in a good and farmerlike manner. These witnesses included spray pilots, those responsible for maintaining fertility of the soil, a farm manager/consultant and many of Boeder's own neighboring farmers who knew the land intimately and knew Hanson's farming practices and Hanson's young daughters, Lindsey and Amber, who had helped farm the land. This was particularly significant because in farm country, it is almost impossible to get one farmer to say anything about another neighboring farmer or his tenant.

Other than himself, Boeder produced only two witnesses to say that Hanson had not farmed the land in a good and farmerlike manner.

First, there was Richards, the stocking horse used by Boeder against Hanson, and the individual who set out to poach the land. This witness was thoroughly discredited. The court found that Richards was biased against Hanson (Boeder App. P. 26). The court noted his angry testimony and Richards' "incredulous" testimony that Hanson had put too much of the Boeder land in prevent plant, while Richards himself had put 1,300 acres of his 2,700 acres in prevent plant in 2005 (Boeder App. P. 26). The court highlighted Richards' testimony that he had exchanged a paper with Boeder describing the terms of his new lease with Boeder, which he destroyed after he was served with the complaint and had retained counsel (Boeder App. P. 26). The court concluded that it finds "no credibility in Richards' testimony regarding this matter." (Boeder App. PP. 26 and 27).

Boeder now calls the paper describing the terms of his new lease with Richards a "term sheet". (Boeder brief P. 4). Richards described it at trial as "just a little piece of paper that listed the terms on it." (Tr. P. 511). Asked if he kept a copy of it, Richards testified "I destroyed it because I wasn't gonna-when I found I was being sued, I wasn't

involved in it.” (Tr. P. 511). Richards destroyed the paper after the sheriff served the summons and complaint on him. (Tr. P. 512).

Richards first testified that he had already destroyed the paper by the time he talked to his attorney. (Tr. P. 511). Later, on more direct and detailed questioning, he testified that he had destroyed the paper he had been working on with Boeder after he talked to his attorney (Tr. P. 516), and that he had specifically visited with his attorney about the paper. (Tr. PP. 516-517). He admitted that he told his attorney he was going to destroy the paper. (Tr. P. 517).

The other witness for Boeder was Joe Killoran and his employee. As the court found, he only agreed to testify for Boeder after he looked at “too many to count” pictures (taken by Boeder) until he finally noticed one he thought showed too many weeds. But as the court noted, he testified that “his opinion was not conclusive.” (Boeder App. P. 27). By the time he finally actually inspected the fields, they were covered with snow (Boeder App. P. 27). Again, the court found that his testimony was not credible (Boeder App. P. 27).

After the court summarized the testimony of the numerous witnesses describing Hanson’s farming practices, the court concluded that “Boeder’s anticipatory repudiation of the lease agreement on August 2, 2005, was unjustified.” (Boeder App. P. 31).

The court dismissed Boeder’s counterclaims (Boeder App. PP. 31-34), something unimportant because Boeder does not argue that the counterclaims were improperly dismissed.

The court awarded most of the damages for breach of contract Hanson sought, except for the value of fertilizer left behind in the land subject to the lease, paid for by Hanson, but which could not be used by Hanson after the unjustified lease termination.

Hanson retained a very qualified farm economist, Dwight Aakre, from the NDSU Extension Service to calculate and testify about damages. Boeder presented no expert witness to challenge Mr. Aakre's testimony or present an alternative theory of damages.

Although the court recognized that Hanson had a duty to mitigate his damages, it found he had done so by trying to find other land to rent. It also found that Hanson had the ability to farm up to 5,000 acres, and even when he was farming the Boeder property, he was only farming 4,000 acres (Boeder App. P. 36).

The court also awarded Hanson damages for loss of the use of the grain bins and machine sheds. The right to use these things is specifically addressed in the one page lease itself (Boeder App. P. 60). No one suggested or argued that the lease was divisible. Again, Dwight Aakre testified about the loss of the use of the grain bins and machine sheds, and no counter expert testimony was offered by Boeder.

The court refused to award Hanson what his agronomist testified was the \$27,184.00 value of the left over phosphate fertilizer. The court found that awarding this would be speculative (Boeder App. P. 38). Hanson initially cross appealed this point, but realized that a damage determination is a finding of fact, not to be reversed unless it is clearly erroneous. Just as Hanson could not argue in good faith that the court's determination that Hanson was not entitled to damages for phosphate was clearly erroneous, so too Boeder could not argue in good faith that other damages awarded to Hanson were clearly erroneous.

Hanson did, as the lease required (Boeder App. P. 60), “leave the land tilled in the same manner as when he received it.” As the court found, the lease requires Boeder to reimburse Hanson for fall tillage if the tenant does not farm the land. (Boeder App. P. 39). Dwight Aakre testified that the reasonable value of the fall tillage performed by Hanson was \$24,542.00. Again, Boeder presented no expert testimony to the contrary. The court on its own reduced that sum to a present value of \$21,800.00.

In short, all of the court’s findings and conclusions are sound. None of the findings are clearly erroneous. There is no error of law on an issue raised below. There is no claim of abuse of discretion.

The issues raised by Boeder in this appeal are all raised for the first time on appeal or were waived during opening argument. Boeder will have to show in his reply brief where the issues he raises in this appeal were presented to the trial court. This will be difficult because Boeder filed no trial brief. The undersigned, unlike Boeder’s present counsel, was actually present at and conducted the trial, and does not recall the arguments raised in this appeal being presented or reserved in any way.

Boeder’s opening statement is reported at pages 18 to 23 of the transcript and his closing argument is reported at pages 1,070 through 1,101.

There was a summary of the testimony to be presented and the testimony that was presented. There was argument that Boeder really sought a declaratory judgment, made silly by the court’s finding that the lease was breached on August 2, 2005 and Boeder’s unequivocal deposition testimony of December 29, 2005 that the lease was over and there was nothing Hanson could do to reinstate it, coupled with the court’s refusal to enjoin cancellation of the lease and provide the remedy of specific performance, because

Hanson had an adequate remedy, money damages. There was an ongoing effort in Boeder's opening and closings statements to justify termination of the lease and to spin the testimony about whether Hanson was farming the land in a good and farmlike manner.

But nowhere does Boeder even use the words "avoidable consequences" or even argue about Hanson's failure to mitigate damages. There was no mention whatever about a double recovery for loss of use of the bins and machine sheds. In the opening argument, Boeder gave away the third issue on appeal, whether Hanson was entitled to be reimbursed for fall tillage work. Boeder admitted that Hanson would need to be reimbursed for fall tillage work, if the lease were terminated. Boeder unequivocally admitted at his December 29, 2005 deposition, parts of which were re-read to him at the trial that the lease had been terminated.

Damage determinations are treated as findings of fact, not to be reversed on appeal, as long as the court's damages are within the range of the evidence presented. Here, the court believed Dwight Aakre's expert testimony, and awarded damages accordingly. This was easy to do, since Boeder presented no contrary expert testimony, nor meaningfully cross-examined Mr. Aakre.

Richards, and his counsel, Bruce Carlson, have had a detailed involvement and have occupied strange positions in this case when it was before the trial court and again now before this Court.

The trouble began when Boeder decided that he wanted to run Hanson off the lease. Boeder claims that on August 2, 2005, all he wanted to do was pressure Hanson to terminate the lease.

But Boeder didn't want to risk that, unless he had someone else lined up to do the fall tillage and rent the land. This is why Boeder had already visited with Richards, before going to see Hanson to pressure Hanson to voluntarily terminate the lease. In other words, Boeder was not bold enough to risk being successful in pressuring Hanson to terminate the lease, unless he had the comfortable feeling that he had another tenant, Richards, already lined up. Boeder even mentioned Richards by name so that Hanson would be fully intimidated. Richards was the stocking horse.

When this case began, Hanson named both Boeder and Richards as defendants; Boeder because of his breach of the lease, and Richards, because of his intentional interference with the lease.

Richards was initially represented by Bruce Carlson, now counsel in this appeal for Boeder. Boeder loses faith with tenants and attorneys, on equally quick and precipitous terms.

Richards apparently filed no pleadings until the November 15, 2005 Certificate of Non-Readiness (Hanson App. P. 29).

Until then, both Hanson and Boeder had been seeking an expected trial to make sure that the dispute could be resolved before the 2006 farming season began (Boeder App. P. 20 and Docket #58). The multi-peril crop insurance sign up deadline is March 15th.

But Richards, the stocking horse, who attempted to poach the land from Hanson, stated that he would not be ready for trial until after June 1, 2006 (Hanson App. P. 29).

With this, it was an easy decision for Hanson to simply drop Richards from the case. Hanson was convinced that Boeder could pay any money judgment.

Along the way, Richards, through counsel, assured Hanson that he would not be appearing at the trial.

Nevertheless, Richards did appear at the trial, thoroughly discrediting himself, as well as his counsel.

As the court noted, Richards had previously been a defendant, but was “biased against Hanson” (Boeder App. P. 26). The court noted that Richards was very angry because Hanson brought the lawsuit and Richards had to expend the attorneys’ fees in defending the case (Boeder App. P. 26).

It came out at the trial and the trial court found that Richards and Boeder had even exchanged a paper describing the terms under which Richards would rent the Boeder land after Boeder ran Hanson off the land (Boeder App. P. 26). The testimony was and the court found that this paper “was destroyed by him after he was served with papers in this lawsuit and after he had retained counsel.” (Boeder App. P. 26).

Not surprisingly, as a result, the trial court found “no credibility in Richards’ testimony regarding this matter.” (Boeder App. PP. 26-27).

Although Richards appeared at the trial, Bruce Carlson did not. Therefore, Mr. Carlson’s review and appeal must be based on what he has heard from Boeder, and has been able to glean from the exhibits and transcript.

Boeder filed no pre-trial nor post-trial brief, and thus Boeder’s current counsel is limited to appealing matters raised before with the court by the oral trial arguments of former counsel, Tim O’Keeffe. Counsel should have cited page and line of the transcript to show which arguments were orally presented to the court, which could be reviewed here. Parties cannot raise issues for the first time on appeal.

In addition, this Court specifically ruled last summer that damage determinations are factual determinations, not subject to reversal, unless they are clearly erroneous. Factual determinations will be affirmed if they are within the range of the evidence presented to the trial court.

IV. ARGUMENT

A. Introduction

Boeder's brief fails to comply with Rule 28(7)(B) because it does not contain a concise statement of the applicable standards of review. This Court's Appellate Practice Tips include this:

The standard of review most often determines the outcome of the appeal. Trial judges rarely have abused their discretion. Findings of fact usually aren't clearly erroneous. Most reversals are on questions of law, which are reviewed de novo (but clearly established precedent is seldom overruled).

Another states:

Summary judgment can't be reversed on appeal based on what you wish you had presented to the trial court, only on what was presented as competent evidence to the trial court.

Judges are not ferrets. *Linrud v. Linrud*, 552 N.W.2d 342, 345 (N.D. 1996).

Judges are not like pigs, hunting for truffles buried in briefs. *United States v. Dunkel*, 927 F. 2d 955, 956 (7th Cir. 1991).

Boeder's brief makes three new and novel arguments, one based on the doctrine of avoidable consequences, one based on alleged errors relating to recovery of damages for an alleged double recovery because of loss of use of grain bins and machine sheds and a third alleging an improper award to Hanson for doing fall tillage work. Nowhere does

Boeder cite the transcript to show where these arguments were raised before Judge Marquart. Since Boeder filed no pre- or post-trial brief, the citation must be to oral arguments raised at the trial. But none are made.

Boeder's answer and counterclaim raises none of the legal arguments raised here. The answer (Boeder App. PP. 14-19) contains the usual general denial and catchall affirmative defenses, but nowhere addresses specifically the issues raised on appeal.

We can find only three pre-trial briefs filed by Boeder. There was a Brief in Support of Motion for Preliminary Injunction and Expedited Trial dated September 26, 2005, a Defendant Boeder's Brief Resisting Plaintiff's Application for Temporary Restraining Order and Order to Show Cause dated October 21, 2005 and finally Defendant Donald Boeder's Response to Plaintiff's Ex-Parte Motion for Leave of Court to Deposit Funds with Court (docket entries 12, 25 and 35). Only docket no. 25 is reproduced in an appendix, (Hanson's App. PP. 23-26). That brief only argued about the propriety of an injunction, deposit of rent with the court and an expedited trial.

So too, the other briefs, docket no.s 12 and 35, also limited themselves to discussing the propriety of an injunction, an expedited trial and the propriety of a deposit of funds with the court.

B. Relevant Standards Of Review

Findings of fact are subject to the "clearly erroneous" standard of review, while conclusions of law are fully reviewable. *Fladeland v. Gudbranson*, 2004 ND 118, ¶7, 681 N.W.2d 431, 434. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, on the entire record,

the appellate court is left with a definite and firm conviction a mistake has been made.

Id.

An abuse-of-discretion occurs when the court acts in an arbitrary, unreasonable or unconscionable manner or when it misinterprets or misapplies the law. BeauLac v. BeauLac, 2002 ND 126, ¶10, 649 N.W.2d 210, 215. A court also abuses its discretion if its decision is not the product of a rational mental process leading to a reasoned decision. Dixon v. McKenzie County Grazing Ass'n., 2004 ND 40, ¶29, 675 N.W.2d 414, 424.

The amount of damages to which a party is entitled is a question of fact that will not be reversed unless it is clearly erroneous and the Court will sustain an award of damages if it is within the range of the evidence presented to the trier of fact. Landers v. Bower, 2006 ND 109, ¶¶13 & 14, 714 N.W.2d 476, 482.

Whether a contract has been substantially performed and whether a party has breached a contract are findings of fact, which will not be reversed on appeal unless they are clearly erroneous. Wachter v. Gratech Company, LTD., 2000 ND 62, ¶17, 608 N.W.2d 279, 284; and whether a party has breached a lease requires a finding of fact. Peterson v. Front Page, Inc., 462 N.W.2d 157, 158 (N.D. 1990); Keller v. Bolding, 2004 ND 80, ¶17, 678 N.W. 2d 578, 584.

The Supreme Court will not set aside a correct result merely because the district court assigned an incorrect reason, if the result is the same under the correct law and reasoning. State Ex. Rel. Housing v. Center Mut., 2006 ND 175, ¶12, 720 N.W.2d 425.

The Supreme Court does not address issues raised for the first time on appeal and the purpose of an appeal is to review the actions of the trial court, not to grant to the

appellant the opportunity to develop and expound upon new strategies or theories. *Heng. v. Rotech Medical Corp.*, 2006 ND 176, ¶9, 720 N.W.2d 54.

The credibility of expert witnesses and the weight to be accorded their testimony are matters to be determined by the jury, the Supreme Court will not invade the province of the jury to weigh the evidence or to assess the credibility of witnesses and the Supreme Court will sustain an award of damages if it is within the range of evidence presented to the trier of fact. *City of Grand Forks v. Hendon/DDRC/BP, LLC*, 2006 ND 116, ¶8, 715 N.W.2d 145, 147.

The burden is on the defendant to prove that “mitigation of damages was reasonably possible.” *Leninger v. Sola*, 314 N.W.2d 39, 48 (N.D. 1981). The question of whether the plaintiff had the ability to mitigate is a question of fact. *Id.*

Again, Boeder presented no expert testimony on the issue of damages, only on the issue of whether Hanson had been farming Boeder’s land in a good and farmerlike manner and whether he had damaged the grain bins.

Boeder’s new counsel has identified and raises issues not presented to Judge Marquart. He seeks to challenge Judge Marquart’s findings on damages, without showing why those findings are clearly erroneous.

Boeder does not cite the transcript to show where Boeder’s prior counsel raised the arguments in this appeal below.

C. The Doctrine Of Avoidable Consequences Is Not Available And Not Applicable

Boeder’s first legal argument is that the court erred in failing to apply the doctrine of avoidable consequences. We find no reference to this doctrine in any of the pleadings, the record, nor the oral arguments of Boeder’s former counsel at the trial.

Boeder alleges that he did not intend to breach the lease, but wanted Hanson to agree to end the lease. Of course, the best outcome for Boeder would have been to have put enough pressure on Hanson, so that Hanson would have simply agreed to end the lease, swallowing all of the damages.

Boeder argues in the conclusion in his brief to this Court that “If there was a repudiation of the contract entitling Hanson to damages, all future damages could have been avoided had Hanson continued to farm the Boeder land.” Boeder argues that the evidence discloses no circumstances which would have made Hanson’s continued farming of the Boeder land difficult or burdensome. Boeder argues that because Hanson declined to accept the Boeder land, he cannot recover damages he could have avoided.

Hanson had sought specific performance of the lease, in an effort to do just what Boeder now suggests. Hanson sought a temporary restraining order to keep Boeder from terminating or interfering with the lease to maintain the status quo (Hanson App. P. 9).

This was rejected by Judge Marquart because “Hanson had an adequate remedy at law and that equitable relief would not be available.” Page one March 2, 2006 findings (Boeder App. P. 23). Boeder suggested at the trial, that in effect, he wanted to take it all back, and apparently stick with the lease, if the court found that Hanson was complying with the lease. (Tr. P. 658). This was a surprising and total departure from Boeder’s December 29, 2005 deposition testimony stating that because of Boeder’s conversation with Hanson on August 2, 2005, Boeder “in no uncertain terms, indicated that this lease with [Hanson] was terminated.” (Tr. P. 659). At the trial Boeder admitted giving that testimony at his deposition (Tr. P. 659). Boeder was also reminded of his deposition testimony that as of “August 2, 2005, as far as [he was] concerned, the game was over

and there was nothing Hanson could have done or said on August 2nd that could have made [the lease] work.” (Tr. P. 660).

So by the time of trial, the court had denied Hanson a temporary restraining order to keep the lease in place, had determined that specific performance would not be available, because there was an adequate remedy at law (money damages) and Boeder had unequivocally testified at his deposition that the lease was over. Nothing in the record suggests that this position changed until Boeder took the contradictory position at trial that he apparently wanted to abide by the lease, if the court found that Hanson had not breached the lease.

The court found that it was Boeder who had committed an “anticipatory breach of the contract” (Boeder App. P. 25) and that finding is not clearly erroneous. The court found that “Boeder’s anticipatory repudiation of the lease agreement on August 2, 2005, was unjustified.” (Boeder App. P. 31). This finding too, is not clearly erroneous.

Even if the argument about the doctrine of avoidable consequences were properly raised in this appeal, it is answered by the court’s finding that Hanson made an effort to mitigate and minimize his damages. (Boeder App. P. 36). This finding too is not clearly erroneous.

Boeder complains that the complaint sounded in declaratory judgment but that at the outset of trial, Hanson announced that he would seek an award of damages. Boeder also complains that he took the position at the trial that the trial was primarily a proceeding for declaratory judgment (Boeder brief. P. 5).

But nowhere does the complaint (Boeder App. PP. 10-12) mention the words “declaratory judgment” but did specifically seek “all actual damages caused by the

breach". (Boeder App. P. 12). Nowhere does Boeder's answer seek a declaratory judgment (Boeder App. PP. 18-19). Any statement that "Boeder stood ready to honor the remainder of the terms of the lease" (Boeder brief P. 5) belies and impeaches Boeder's December 29, 2005 deposition testimony and trial testimony after he was reminded of his deposition testimony. It is not for Boeder, and his new attorney, to decide, after the fact, that after the lease was breached, and there would be substantial damages, that everyone should just go back to the beginning and treat the lease as if it had not been breached. It was Hanson who early in the litigation sought specific performance of the lease and a temporary restraining order to keep it from being canceled, all objected to by Boeder, every step of the way (Boeder App. P. 22 and Hanson App. PP. 23-26).

D. All Damages Were Reasonable, Within The Range Of Evidence Presented To The Court, And Are Not Clearly Erroneous

As part of the new "avoidable consequences argument" Boeder shifts into an argument that the damages awarded by the court were inappropriate (Boeder brief PP. 6-9 and 11-16). However, the only expert testimony offered on damages was by Dwight Aakre. He is a native of Hawley, Minnesota, attended the University of Minnesota-Crookston for two-years, and following his discharge from the army finished a bachelor's degree at NDSU in 1974. (Tr. PP. 25-26). He taught school and farmed and then went back for a master's degree at NDSU, graduating in 1983. (Tr. P. 26). His 1974 degree was in agricultural education and his master's degree was in agricultural economics. (Tr. P. 26). Mr. Aakre still farms in the Hawley, Minnesota area, using land he has bought and land he rents. (Tr. P. 26).

Mr. Aakre is employed by NDSU in the Department of Agribusiness and Applied Economics with a 100% extension appointment. (Tr. P. 27). His specialty is farm

management. Part of his job is to generate projected budgets for the NDSU Extension Service to be used as guidelines for producers and lenders and interested persons. (Tr. P. 27). The reports are done on an updated annual basis using information from surveys. (Tr. P. 28). Mr. Aakre testified that he had obtained all of the information from Mr. Hanson he needed to determine a realistic, true report and projection about the damages Hanson would suffer if his lease with Boeder were terminated, and if Hanson did not have to the machine sheds and bin storage. (Tr. P. 34).

Mr. Aakre's main exhibit was Plaintiff's Exhibit 1 (Boeder App. PP. 44-58). Mr. Aakre explained in detail how he prepared that exhibit (Tr. PP. 45-55). The exhibit was offered and received. (Tr. PP. 55-56). Then, Mr. Aakre went through the exhibit and explained the exhibit in detail, including annual losses from loss of use of the farmland of \$92,700.00 (Tr. P. 56), and for doing the fall tillage of \$24,542.00 (Tr. P. 57), the value of the loss of the use of the machine sheds of \$216.00 per year (Tr. P. 59), and the loss of the use of 93,000 bushels of bin storage at the rate of \$.02 per bushel. (Tr. PP. 62-63).

There was no counter expert testimony about these damages. There was no effective cross-examination of Mr. Aakre. The court believed Mr. Aakre and adopted his damages calculations even reducing them to present value with no expert testimony or explanation on that point (Boeder App. PP. 37, 38 and 40). They are not clearly erroneous and the damages ultimately awarded by the court were not only within the range of the evidence presented to the court, but exactly in keeping with the only expert testimony offered on the point but reduced to present value, a gift to Boeder. (findings PP. 12-18, Boeder App. PP. 34-40).

Boeder's argument that if the judgment is upheld, Hanson will receive three years of profits without being required to plant a crop, disregards the fact that lost profits are always an element of damages and that Mr. Aakre took into account future costs of production (Boeder App. PP. 57-58). In the case of the sale of goods, a merchant who loses a sale through the breach of another, recovers the profits the merchant would have made from the sale. It matters not that the merchant could probably just simply resell the goods to someone else, thus "avoiding consequences". The lost profits from a lost sale is a loss, just as the lost profits from lost farmland is a loss.

Where a party loses from a sale, a contract, or even an employment arrangement, those losses are recoverable, whether there could possibly be another sale, another contract or another employment arrangement.

Under Boeder's theory, there never could be an award to an employee in an employment discrimination case, because the employee could always be said to have been required to mitigate its damages by simply finding another job.

"For a breach of contract, the injured party is entitled to compensation for the loss suffered, but can recover no more than would have been gained by full performance." *Leingang v. City of Mandan Weed Board*, 468 N.W.2d 397, 398 (N.D. 1991) (citing N.D.C.C. §§32-03-09, 32-03-06). Moreover, contract damages "should give the nonbreaching party the benefit of the bargain by awarding a sum of money that will put that person in as good a position as if the contract had been performed." *Leingang*, 468 N.W.2d at 398 (citing 22 Am.Jur.2d Damages §45 (1988)).

N.D.C.C. §32-03-09 states:

For the breach of an obligation arising from contract, the measure of damages, except when otherwise expressly

provided by the laws of this state, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby or which in the ordinary course of things would be likely to result therefrom. No damages can be recovered for a breach of contract if they are not clearly ascertainable in both their nature and origin.

Livinggood v. Balsdon, 2006 ND 11, 709 N.W.2d 723.

In Livinggood, Supra, a farm tenant brought an action against landlord, seeking to have landlord ejected, seeking to reinstate the tenant's leasehold rights for the remainder of the lease term, and asking for treble damages. This Court, held:

1. The tenant was not entitled to specific performance;
2. Damages from the breach were not clearly ascertainable, beyond one year, and would be speculative; and
3. A remand was required to determine whether the tenant was entitled to treble damages.

This Court affirmed the trial court's finding that the tenant's damages from the landlord's breach of lease and eviction of tenant were not clearly ascertainable, beyond one year, and would be speculative. But this Court pointed out that even though the trial court's decision appeared to imply that damages for a breach of a farmland lease beyond one year are speculative and uncertain as a matter of law, this Court disagreed with this implication. *Id.* at ¶9. Boeder reads this as to mean that damages for lost farm income in excess of one year are not speculative as a matter of law. (Boeder brief P. 15). The court's reading of Livinggood, Supra, is that "as a matter of law damages can't be limited to a year, but it really is a fact question." (Tr. P. 1098).

The right of a lessee to recover for the loss of profits for a breach of the lease by the lessor has been recognized by North Dakota courts, provided there is a reasonably

certain basis upon which lost future profits to the lessee can be determined. “Where a plaintiff offers evidence estimating anticipated profits with reasonable certainty, they may be awarded.” Leingang, 468 N.W.2d at 398. Where it is “reasonably certain” that damages resulted from the breach, “mere uncertainty as to the amount will not preclude recovery or prevent the jury from awarding damages.” Further, when a plaintiff has suffered damages, “the best evidence which circumstances will permit is all that the law requires.” Int’l Feed Products, Inc. v. Alfalfa Products, Inc., 337 N.W.2d 154, 158 (N.D. 1983). See also Keller v. Bolding, 2004 ND 80, ¶21 (stating where damages have obviously been suffered and there is no definite evidence available for an exact determination of the amount of damages, the “best evidence which circumstances will permit is all the law requires.”).

Thus because Hanson provided uncontradicted, credible and detailed expert testimony about his lease damages, they are all recoverable. They have been proved by the best evidence the circumstances will permit by the best possible expert witness.

Mr. Aakre explained in detail how he did his analysis of the projected future losses from the lease (Tr. PP. 51-52). The bottom line is \$92,700.00 per year for labor, management and machinery. (Tr. P. 52). Mr. Aakre testified that those projections were in keeping with the actual projected costs based on the actual costs Mr. Hanson had incurred during 2001 to 2005. (Tr. P. 52).

Mr. Aakre noted that the \$92,700.00 per year was quite a bit less than some of the other actual figures from prior years. Some of those years had produced returns of over \$200,000.00 for the same land. (Tr. P. 53). The difference was that projected costs for 2006 were considerably more than the earlier years. (Tr. P. 53).

Mr. Aakre concluded that his projected losses were reasonably certain. (Tr. P. 63). None of the information used to project damages was speculative. (Tr. P. 63). Mr. Aakre knew of no other way to make the projections in Exhibits 1 and 1A (Boeder App. PP. 44-59), more accurate or certain. (Tr. P. 63). Mr. Aakre's projections were done on the best information he had available and were the best he could do based on his knowledge, training and experience. (Tr. PP. 63-64). Mr. Aakre knew of nobody who could have done any better. (Tr. P. 64).

A nonbreaching party does have a duty to minimize the damages resulting from the lessor's breach. *Pierce v. B.P.O. of Elks Lodge No. 1214*, 2004 ND 26, ¶11, 673 N.W.2d 914. The lessee has a duty to "make a reasonable effort" to mitigate the damages resulting from the lessor's breach. *Id.* Mitigation requires the injured party to "protect himself if he can do so with reasonable exertion or trifling expense, and recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided." *Lochthowe v. C.F. Peterson Estate*, 2005 ND 40, ¶21, 692 N.W.2d 120 (noting no credible evidence was presented that the plaintiff had ready resources to avoid or mitigate the damages and concluding the district court's finding that the plaintiff did not have sufficient resources to mitigate the damages was not clearly erroneous). The burden is on the defendant to prove that "mitigation of damages was reasonably possible." *Leninger v. Sola*, 314 N.W.2d 39, 48 (N.D. 1981). The question of whether the plaintiff had the ability to mitigate is a question of fact. *Id.*

Restatement (Second) of Contracts §350 (1981) entitled Avoidability As A Limitation On Damages states:

(1) Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.

(2) The injured party is not precluded from recovery by the rule stated in Subsection (1), to the extent that he has made reasonable but unsuccessful efforts to avoid loss.

A Minnesota case has a similar fact pattern. There the jury decided Nelson lost some farming profits based on lessor Smith's contract breach of a farmland lease. The court acknowledged that a nonbreaching party has a duty to use reasonable diligence to minimize his damage. However, Nelson claimed the land he leased after the breach was not replacement land but land he would have leased regardless of the breach because he was in the process of expanding his farm operation. The jury instructions included: Nelson's damages, if any should not include any loss which he could have avoided or prevented with reasonable effort to obtain other land to replace lessor's land. The jury believed Nelson's assertion that other lands leased subsequent to the breach were part of his expansion plans and not replacement lands. The Minnesota Court of Appeals found that a jury could reach that conclusion based on the evidence. See Nelson v. Smith, 349 N.W.2d 849 (Minn. Ct. App. 1984).

Nothing in the record shows that Hanson has been able to replace the Boeder land. Even if he could, as the court ruled:

The fact that he [Hanson] may find some rental land in the future, does not necessarily reduce his claim to future loss[t] profits. Hanson testified that he has the manpower and the equipment to farm up to 5,000 acres. When he was farming the Boeder property, he was farming 4,000 acres. Thus, even if Hanson would find as much as another 1,000 acres to farm, he still would suffer damages because of his inability to farm the 1,300 acres of the Boeder property.

(Boeder App. PP. 36-37)

We submit that Hanson properly recovered damages for three years anticipated loss of net profits from Boeder's lease because Hanson has always been looking for other land, has always been in a position to further expand his farming operation, and Boeder did not carry his burden of proof to show that Hanson had not done everything necessary to mitigate his damages.

By analogy, the law of sales would allow a recovery of three (3) years lease damages.

U.C.C. §1-106(1) provides that all Code remedies "shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed."

A seller who has resold may in some cases not be adequately compensated by the contract/resale differential. Many sellers have a relationship to their own suppliers such that the seller can obtain as many items as it can sell. When the customer breaches the contract and the seller resells the item to another customer at the same price, the seller will end up making one fewer sale because of the breach. U.C.C. §2-708 allows the seller to recover the lost profit. See N.D.C.C. §41-02-87 (Seller's damages for nonacceptance or repudiation).

Even if this were not a lease case, but a lost sale case, lost profits would still be recoverable.

E. The Court Properly Awarded Hanson \$31,600.00 For Loss Of Use Of The Grain Bins And Machine Sheds

Boeder argues that the court erred in awarding damages for loss of the use of the grain bins and machine sheds, because somehow that resulted in a double recovery.

Again, a damage determination is treated as a finding of fact, not to be set aside unless clearly erroneous. Boeder has cited no case law to support the proposition that awarding damages for loss of use of the grain bins and a machine sheds will result in a double recovery. In fact, this argument boils down to an argument that the lease was somehow divisible and that parts of it could be breached without the other parts being breached, and so there could not be damages awarded for a breach of one part (the land) but not another part (the bins and sheds). This argument is raised for the first time on appeal.

Mr. Aakre testified about the various values Hanson would receive from the lease. He testified about the profits Hanson could expect from being able to farm the land. He testified about the value of the use of the 93,000 bushels of grain storage. He testified about the value of the use of the machine sheds. All of these things add value, and since the lease was indivisible and breached, all three of these values were lost. Boeder never argued that Hanson will still be able to use the bins and sheds, even though someone else (Richards) is now farming the land.

It matters not whether Hanson used the bins and the machine sheds in connection with farming the Boeder land. The fact is Hanson had access to the bins and the machine sheds, and did use them. If Hanson had had to store grain grown on Boeder's land at another place, he would have had to pay for the storage. The same thing is true if he would have needed to rent space to store machines elsewhere.

This argument is little different from saying that the losses from the theft of a car and a travel trailer should be confined to the loss of the car only, since the travel trailer was only used with the car. This sounds strange, but Boeder argues that since the bins

were only used with the land, the only damages should be for loss of use of the land itself.

Nothing in the lease (Boeder App. P. 60) required Hanson to only use the bins with crops coming from Boeder's land. Hanson could have, without breaching the lease or even violating the spirit of the lease, farmed the land, sold the crops off the combine, and simply rented the bins to other farmers. The lease would specifically permit this. Nothing in the lease prohibits this use or Hanson from subleasing any of his rights under the lease.

**F. The Court Properly Awarded Hanson \$24,542.00
As The Value Of Fall Tillage**

The lease (Boeder App. P. 60), specifically requires Hanson to "leave the land tilled in the same manner as when he received it". By doing the fall tillage, this is exactly what he did.

Mr. Aakre testified about the value of the fall tillage work. No one impeached that testimony or introduced other testimony.

Boeder argues in his brief that he was taking the position at the trial that the proceeding was principally for a declaratory judgment and that he was seeking approval of the court to terminate the lease. He also proclaimed that he "stood ready to honor the remainder of the term of the lease". (Boeder brief P. 5). He highlights the fact that Boeder argued in his opening statement that:

Now, if Mr. Boeder is wrong, he will be a man about it and say that he was wrong, and then I think the appropriate remedy in this case is to allow Mr. Hanson to fulfill the terms of the lease.

(Boeder brief PP. 5-6).

So, at the time of trial, Boeder's position was still apparently that on August 2nd, he only hoped to bully Hanson into terminating the lease, but that it was still up to the court to determine whether Boeder had breached or repudiated the lease.

Boeder can't have it both ways. If he wants to argue that the lease had not been repudiated, and that he would be a man about it and allow Hanson to fulfill the terms of the lease, then he should explain how that could be done if that determination was made (as it was) during the winter of 2006 and 2007, after the fall work in 2006 had to be (and was) already done.

This argument too is raised for the first time on appeal, and challenges a factual damages determination, that cannot be shown to be clearly erroneous, since the value of the fall tillage is the same as that testified to by Hanson's expert witness, Dwight Aakre.

The court refused to specifically enforce the lease, and allowed Hanson to deposit the second half cash rent with the court. (Hanson App. P. 28). Later, the court reduced the deposit to \$15,000.00 (Boeder App. P. 22) because the court felt that might be the approximate value of the fall tillage. The point is everyone knew that Hanson was not only going to harvest the 2005 crop, but also do the fall tillage. Even using hindsight, this was wise because as Boeder notes, at the beginning of his trial, he "retracted any repudiation". (Boeder brief P. 10). Then, in that same brief, just a few pages later, Boeder asserted that by the time of trial Hanson had suffered no damages other than litigation costs "and, arguably the expenses of fall tillage for 2005". (Boeder brief P. 14).

This was further confused by the trial testimony. Hanson testified that Boeder had told him Richards would be doing the fall work. (Tr. P. 151). Yet, Boeder testified later in the trial that the lease hadn't been terminated because Boeder was "trying to

terminate it”. (Tr. P. 827). Then, at closing, Boeder still suggested that there was a valid lease and he’ll “respect the court’s decision”. (Tr. P. 1,071). If this is all true, then Hanson had to do the fall work or he would have been in breach himself.

The problem is that Boeder is always trying to find a way to have his cake and eat it too. He tries to force Hanson to agree to terminate the lease, thus avoiding any breach damages. He tries to argue that, even as of the late date of the trial, the lease had not really been terminated. But at the same time, he argues that Hanson should not be paid for fall tillage, something required by the lease itself.

Hanson is also entitled to recover on the basis of quantum meruit. He provided the best (and only) testimony available about customary and usual rates for fall tillage.

Even if the lease itself did not provide for payment for fall tillage, and the lease had been terminated as of August 2, 2005, Hanson would still be entitled to recover the reasonable value of the services of the fall tillage. As stated in Matter of Estate of Raketti, 340 N.W.2d 894, 901 (N.D. 1983) a person who performs services for another without an express agreement for compensation ordinarily is entitled to the reasonable value of the services. See also Kulseth v. Rotenberger, 320 N.W.2d 920 (N.D. 1982); Podoll v. Brady, 423 N.W.2d 151 (N.D. 1988) and Schmidt v. First Nat. Bank and Trust Co., 453 N.W.2d 602 (N.D. 1990).

G. This Appeal Is Frivolous And Hanson Should Recover Interest, Double Costs And A Reasonable Attorney’s Fee

Rule 37, N.D.R.Civ.App.P. requires that where a judgment for money is affirmed, whatever interest is allowed by law is payable from the date the judgment was entered.

Rule 38, N.D.R.Civ.App.P. states that if the court determines that an appeal is frivolous, it may award just damages and single or double costs, including reasonable attorney's fees.

This appeal represents the second time Richards has attempted to "shake down" Hanson. First, Richards provided the security for Boeder to repudiate Hanson's Lease on August 2, 2005, without having to worry about finding a new tenant or doing the fall work himself. Recall that Richards and Boeder had prepared a written agreement that Richards destroyed after being sued and retaining counsel.

Using that same counsel now, Boeder appeals. Although Richards was present, and discredited at the trial, Boeder's present counsel, and Richard's former counsel, was not present at the trial.

This appeal is based on arguments raised for the first time on appeal. It attacks factual determinations of damages based on the uncontradicted testimony of the only expert witness in the case to testify about damages.

Boeder hoped that by simply bringing the appeal, Hanson would need the money and have to settle at a discount to avoid the delay. Hanson has had to go through the 2006 harvest without the Boeder land.

Hanson therefore seeks double costs, reasonable attorney's fees, and interest on the judgment from the date of entry.

An appeal is frivolous if it is flagrantly groundless, devoid of merit, or demonstrates persistence in the course of litigation, which could be seen as evidence of bad faith. *Riemers v. O'Halloran*, 2004 ND 79, ¶16, 678 N.W. 2d 547.

This appeal is frivolous because all of the issues raised are raised for the first time on appeal or were waived at opening argument. There was no trial brief, and the issues raised on appeal do not appear in Boeder's opening or closing statements at the trial. Boeder did, however, admit away the third issue, damages for fall tillage work, in the opening statement when he agreed that Hanson should be paid for the fall tillage work, if the lease were terminated.

The damages were all awarded in keeping with uncontradicted expert testimony so no good faith argument can be made that those damage determinations were clearly erroneous.

This appeal is a continuation of the course of litigation that suggests bad faith.

Boeder set out trying to bully Hanson into walking away from the lease, relieving Hanson of any breach damages. Boeder made sure he could safely do so by lining up Richards to take over the lease. Boeder and Richards prepared a "term sheet" about the details, something Richards destroyed after being sued and after consulting with counsel. Boeder unequivocally stated at his December 29, 2005 deposition that the lease was over and there was nothing Hanson could do to reinstate it. Then the general theme during the trial was that Boeder was really still asking for a declaratory judgment and would be bound by the lease if the court determined that Hanson had not breached it. Boeder argued that if Hanson had not breached the lease, Hanson would need to mitigate his damages by continuing to farm for the next three years.

Boeder fought Hanson's initial efforts to specifically perform the lease. How then, can Boeder argue that specific performance would, in effect, be the proper remedy, as a result of the trial?

Why does Boeder get a second chance with this appeal to shake down Hanson again, this time using Richards' original attorney, after Boeder's relationship with Mr. O'Keeffe ended?

Boeder's conduct shows a bad faith course of litigation characterized by shifting theories, shifting alliances, shifting counsel, inconsistent admissions, and finally frivolous arguments not raised before Judge Marquart. And now this Court too is involved. This appeal was brought for delay, to increase the cost of litigation, to try to shake Hanson down again.

V. CONCLUSION AND PRECISE RELIEF SOUGHT

This was a very enjoyable case to try. Judge Marquart was respectful and attentive at all times to the parties, all witnesses and the attorneys. The same is true of Boeder's trial counsel, Tim O'Keeffe. Mr. O'Keeffe did the best he could under the facts and circumstances presented to him, and the support Boeder provided him.

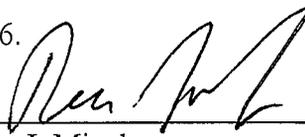
However, this appeal is frivolous, raises issues for the first time on appeal, does not demonstrate that any of Judge Marquart's detailed findings of fact are clearly erroneous, does not show that Judge Marquart made any errors of law or that Judge Marquart abused his discretion in any way.

Judge Marquart carefully followed all of the testimony and carefully considered the only expert testimony presented on damages. Although he did not award Hanson everything Hanson sought, discounted damages to present value with no testimony about how to do so and Hanson had originally cross-appealed because he was not awarded damages of \$27,184.00 for the cost of phosphate fertilizer left in the ground; Hanson voluntarily dismissed that appeal knowing that just as Judge Marquart has made no

clearly erroneous factual determinations against Boeder, he has not done so against Hanson either.

For all of these reasons, we submit that the judgment should be in all ways affirmed, the Court should determine that Boeder's appeal is frivolous, and it should therefore award double costs and reasonable attorney's fees of \$5,000.00 against Boeder, or such actual attorney's fees that might be determined by the trial court on a remand on the issue of attorney's fees only.

Dated this 16th day of October 2006.



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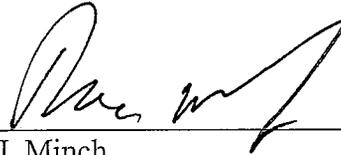
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ATTORNEY FOR PLAINTIFF/APPELLEE

CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Plaintiff/Appellee in the above matter, and as the author of the above brief, hereby certifies, in compliance with Rule 32(a)(7) of the North Dakota Rules of Appellant Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 9,806.

Dated this 16th day of October 2006.



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