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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20030354

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FEB 17 2004

STATE OF NORTH DAKOTA

Timothy J. Karsky, in his official capacities)
as Commissioner of the North Dakota)
Department of Financial Institutions, and as)
Conservator of NoDak State Trust Company,)

Plaintiff and Appellee,)

v.)

Supreme Court No. 20030354

Jane Dorothea Kirby, an individual person,)

District Court No. 02-C-01152

Defendant and Appellant,)

and)

Dr. Thomas J. Clifford, in his capacity)
as president of NoDak State Trust Company,)

Defendant.)

APPEAL FROM THE DISTRICT COURT
BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE BURT L. RISKEDAH

BRIEF OF APPELLEE

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
Statement of the Issues	1
Statement of the Case	2
Statement of the Facts	3
Standard of Review	9
Law and Argument	10
I. The district court properly concluded that under the language of the Judgment Pursuant to Stipulation, Kirby agreed to waive her right to a hearing regarding the North Dakota State Banking Board's decision to disapprove her application to acquire control of NoDak State Trust Company	10
II. The North Dakota Supreme Court lacks the authority to remand the matter to the district court with directions to vacate an April 28, 2003, Judgment Pursuant to Stipulation from which no appeal was taken, and from which Kirby failed to first seek relief under N.D.R.Civ.P. 60 in the district court	15
Conclusion	18

TABLES OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<u>Binek v. Binek</u> , 2004 ND 5, 673 N.W.2d 594	11
<u>Botner v. Botner</u> , 545 N.W.2d 188 (N.D. 1996).....	10
<u>Fasciana v. Electronic Data Systems Corp.</u> , 829 A.2d 160 (Del. Ch. 2003).....	12
<u>Gale v. N.D. Bd. of Podiatric Medicine</u> , 2001 ND 141, 632 N.W.2d 424	13, 17
<u>Meide v. Stenehjem</u> , 2002 ND 128, 649 N.W.2d 532	11
<u>National Bank of Harvey v. International Harvester Co.</u> , 421 N.W.2d 799 (N.D. 1988).....	11
<u>Natural Springs, Inc. v. Copenhaver</u> , 1997 WL 256806 (Ark. Ct. App. 1997)	12
<u>Trinity Medical Center, Inc. v. Holum</u> , 544 N.W.2d 148 (N.D. 1996).....	16
 <u>Statutes</u>	
N.D.C.C. ch. 6-05.....	2
N.D.C.C. § 6-08-08.1	3, 12
N.D.C.C. § 6-08-08.1(3).....	12
N.D.C.C. § 6-08-08.1(6).....	12
N.D.C.C. § 6-08-08.1(4)(d)	12
N.D.C.C. § 6-08-08.1(4)(g)	12
N.D.C.C. § 9-07-03	11
N.D.C.C. § 9-7-06	11
N.D.R.Civ.P. 60.....	1, 16

STATEMENT OF THE ISSUES

I. Whether the district properly concluded that under the language of the Judgment Pursuant to Stipulation, Kirby agreed to waive her right to a hearing regarding the North Dakota State Banking Board's disapproval of her application to acquire control of NoDak State Trust Company.

II. Whether the North Dakota Supreme Court lacks the authority to remand the matter to the district court with directions to vacate the April 28, 2003, Judgment Pursuant to Stipulation from which no appeal was taken, and from which Kirby failed to first seek relief under N.D.R.Civ.P. 60 in the district court.

STATEMENT OF THE CASE

Jane Dorothea Kirby ("Kirby") appeals a Judgment for Appointment of Receiver to Liquidate Assets of NoDak State Trust Company, which was entered by the district court on November 24, 2003. The Judgment incorporated by reference a November 12 Memorandum Opinion, in which the district court granted the plaintiff's Motion to Reopen Case for Appointment of Receiver to Liquidate Assets of NoDak Trust. In the Memorandum Opinion, which was issued after an October 8 hearing at which the plaintiff introduced into evidence the documents contained in his Supplemental Appendix, the district court ruled that under the language of a Judgment Pursuant to Stipulation entered in the case on April 28, 2003, Kirby agreed to waive her right to a hearing in the event the North Dakota State Banking Board disapproved her application to acquire control of NoDak State Trust Company. Kirby seeks reversal of the district court's November 26 Judgment for Appointment of Receiver. Kirby further requests the North Dakota Supreme Court remand the matter to the district court to set aside the Stipulation, which was incorporated into the April 28, 2003, Judgment Pursuant to Stipulation, and to permit her to proceed with the trial of the lawsuit.

STATEMENT OF THE FACTS

NoDak State Trust Company ("NoDak Trust") was incorporated on March 4, 1963, under the provisions of N.D.C.C. ch. 6-05 for the purposes of conducting and carrying on the business of an annuity, safe deposit, surety, and trust company. NoDak Trust was placed into conservatorship on November 9, 1990, by Order of the North Dakota Department of Financial Institution's former commissioner. (Appendix ("App."). at 4, 5, 13).

Plaintiff Timothy J. Karsky, in his official capacities as Commissioner of the North Dakota Department of Financial Institutions, and as Conservator of NoDak State Trust Company, ("Commissioner") commenced an action in district court on January 29, 2002, against defendants Jane Dorothea Kirby, an individual person, (Kirby") and Dr. Thomas J. Clifford, in his capacity as president of NoDak State Trust Company, ("Clifford") based upon representations made by Kirby in a December 21, 2001, "Application to Acquire Control of a Trust Company," and other documents Kirby submitted to the Commissioner in support of her Application. In his Complaint, the Commissioner asserted four causes of action as follows:

- (1) NoDak Trust lacks the power to carry on the business of banking.
- (2) Defendant Kirby lacks her alleged ownership in 910 shares of NoDak Trust stock.
- (3) Defendant Kirby has engaged in false advertising.
- (4) Involuntary dissolution and liquidation of NoDak Trust.

(App. at 3-12). In the defendants' Answer, Kirby denied that N.D.C.C. § 6-08-08.1 ("Sale or purchase of associations, banking institutions or holding companies – Notification to commissioner – Hearing"), applied to her situation. (App. at 13).

On February 11, 2003, the Commissioner, Kirby, and their respective counsel executed a Stipulation for Entry of Judgment. Clifford executed the Stipulation on April 9, 2003. The Stipulation established an administrative procedure the parties would follow in determining whether NoDak Trust would be released from conservatorship, or whether NoDak Trust would be dissolved as a

legal entity and its assets liquidated. (Supplemental Appendix ("Supp. App.") at 2-13).

The Stipulation was incorporated into a Judgment Pursuant to Stipulation, entered by the district court on April 28, 2003. (App. at 16-23). A Notice of Entry of Judgment was docketed on May 2. (App. at 1, Entry 31). The Judgment provided as follows:

4. **Fourth Cause of Action - Involuntary Dissolution and Liquidation:** With respect to the plaintiff's fourth cause of action that NoDak Trust should be dissolved and liquidated, the parties stipulate and agree to entry of judgment as follows:
 - a. N.D.C.C. § 6-08-08.1 ("Sale or purchase of associations, banking institutions or holding companies – Notification to commissioner – Hearing"), in its entirety, and N.D.C.C. Admin. Code Article 13-01.1 ("Department of Financial Institutions" – "Practice and Procedure"), is applicable to NoDak State Trust Company.
 - b. Defendant Kirby has not violated the change of control restrictions of N.D.C.C. § 6-08-08.1.
 - c. Defendant Kirby withdraws from consideration by the North Dakota State Banking Board, her December 21, 2001, Application to Acquire Control of a Trust Company, and her May 28, 2002, Application to Acquire Control of a Trust Company.
 - d. Defendant Kirby agrees that, should she intend to acquire to control of NoDak Trust, she must submit a revised application, which upon submission will be deemed "complete" by the Commissioner of the Department of Financial Institutions in accordance with N.D.C.C. § 6-08-08.1, without the need for the Commissioner to request additional information, and will be published and submitted to the North Dakota State Banking Board for approval or disapproval. Defendant's Kirby's application, among other required information, must designate the proposed permanent location of the principal place of business of NoDak Trust, and the names of the proposed directors and officers. The application must be accompanied by a

business plan identifying, with specificity, the proposed nature of the activities involving the operation of NoDak Trust, and information, including their federal income tax returns for the tax years 2000, 2001, and 2002, and personal financial statements, sufficient to determine the character, reputation, general fitness, financial standing and responsibility of defendant Kirby as the proposed new stockholder, and the proposed directors and officers to operate NoDak Trust, and the experience of the proposed management with respect to financial institutions. The application also must be accompanied by a pro-forma operating statement in order to determine how much capital will be required to operate NoDak Trust, with the minimum capital requirement being \$500,000, and a statement defining the proposed source of the capital funds.

- e. Defendant Kirby agrees, in order to avoid further delay, to file her application to acquire control of NoDak Trust with the Commissioner in a timely manner, such date being no later than 5:00 p.m., July 10, 2003, in order that the matter can be brought for consideration before the North Dakota State Banking Board at its tentatively scheduled meeting date of August 5, 2003.
- f. Defendants Kirby and Clifford acknowledge that, should defendant Kirby's application to acquire control of NoDak Trust be disapproved by the North Dakota State Banking Board, in accordance with the terms and conditions of paragraph 5 of the "Stipulation of Settlement and Notice to Creditors, Debtor, Equity Security Holders of Adversary Proceeding Controversy No. 90-1042 and Conveyance by Trustee to Defendant in Adversary Proceeding 90-1042" filed in Karnes vs. Kirby, Adv. No. 90-4012 ((In re Charlie B. Brown, Bk. No. 90-40427) (Bankr. S.D.Ill.)), the "settlement agreement shall be held for naught, ab initio and each of the parties will be restored to their respective positions" in the bankruptcy adversary proceeding.
- g. Defendants Kirby and Clifford agree that, should defendant Kirby fail to submit her application by the above-stated deadline or should the North Dakota State Banking Board disapprove defendant Kirby's application thereby rendering the "Stipulation of Settlement" filed in In re Charlie B. Brown, void, the plaintiff may proceed with the administrative or judicial dissolution and liquidation of

NoDak Trust, on various grounds, to which they waive any objection, including abandonment of purpose. The defendants further agree the plaintiff's regulatory action shall not be subject to any automatic stay provisions of 11 U.S.C. § 362.

- h. The plaintiff agrees that, should defendant Kirby's application be approved by the North Dakota State Banking Board, NoDak Trust shall be released from conservatorship, and all assets of NoDak Trust held in his custody shall be transferred to defendant Kirby.

(App. at 19-22).

On the application deadline of July 10, 2003, Kirby submitted an "Application to Acquire Control of a Trust Company" ("Application") to the Commissioner, in which she proposed to sell her interests in NoDak Trust to Sage Financial Corporation, an Oklahoma corporation. (Supp. App. at 40-45). The supporting documentation provided to the Commissioner on that date included a "Stock Purchase Agreement" executed by Kirby and the president of Sage Financial Corporation. (Supp. App. at 49-58). In the cover letter which accompanied the Application, Kirby's counsel admitted to the Commissioner that the "Application is not fully completed." (Supp. App. at 40).

On July 11, 2003, the Commissioner notified Kirby's counsel of his receipt of Kirby's Application. The Commissioner advised Kirby's counsel that: "Pursuant to subsection 4(d) of the Judgment Pursuant to Stipulation, I deem the application complete, and do not intend to ask for further clarification or supplementation of the materials." The Commissioner provided Kirby's counsel with a copy of the Legal Notice to be published regarding the Application. (Supp. App. at 90-91).

The Legal Notice regarding Kirby's Application was published on July 16 in the Bismarck Tribune, and provided notice that: "[w]ritten comments must be submitted to the State Banking Board on or before July 25, 2003". The Legal Notice stated that: "The State Banking Board will act on this application at a special meeting to be held July 31, 2003." (Supp. App. at 94, 97).

On July 25, 2003, the Commissioner submitted a Memorandum regarding Kirby's "Change of Control Application of NoDak State Trust Company" to the members of the North Dakota State Banking Board. (Supp. App. at 100-103). The Commissioner recommended Kirby's Application be denied "[b]ased on the lack of information in the application to make a sufficient evaluation of the proposed trust company." (Supp. App. at 103).

On the deadline of July 25, 2003, for submitting comments regarding her Application, Kirby submitted an "Application to Acquire Control of a Trust Company" to the Commissioner, in which she proposed to sell her interests in NoDak Trust to Accent Oil and Gas Company, a Texas corporation. (Supp. App. at 106-109). The documents which accompanied the July 25 application included a July 24 "Stock Purchase Agreement" executed by Kirby and the chairwoman of the board of Accent Oil and Gas. (Supp. App. at 110-118). Kirby did not provide any explanation to the Commissioner regarding the relevancy of these materials to her pending July 10 Application or the status of her business relationship with Sage Financial Corporation.

At the July 31 North Dakota State Banking Board meeting, the Board disapproved and denied Kirby's July 10 Application to Acquire Control of a Trust

Company for the purpose of selling her interests in NoDak Trust to Sage Financial Corporation. (Supp. App. at 137-140). The Board determined that Kirby's July 25 documentation in which she proposed to sell her interests in NoDak Trust to Accent Oil and Gas was untimely and was not subject to consideration. (Supp. App. at 141). The Board ordered that NoDak Trust be dissolved as a legal entity and its assets be liquidated. (Supp. App. at 141). Neither Kirby nor her legal counsel attended the July 31 Board meeting. (Supp. App. at 128). The Board's determinations were memorialized in a July 31 Order for Dissolution and Liquidation of NoDak State Trust Company. (Supp. App. at 144-147).

The Commissioner notified Kirby's counsel of the Board's denial of Kirby's application, and provided her counsel with a copy of the Board's Order. (Supp. App. at 150-154). On August 1, 2003, Kirby's counsel confirmed his receipt of the State Banking Board's decision. Kirby's counsel considered the State Banking Board's decision to be that to "disapprove of the application of Jane Kirby and Accent Oil & Gas to acquire control of NoDak Trust Company," and stated "the applicants will decide within 20 days from the notice of disapproval whether or not to request a hearing." (Supp. App. at 157).

On August 7, 2003, the Commissioner filed a Motion to Reopen Case for Appointment of Receiver to Liquidate Assets of NoDak State Trust Company for the purpose liquidating the assets of the administratively dissolved entity. (App. at 32-44). On August 19, Kirby filed her Reply to Motion to Reopen Case for Appointment of Receiver to Liquidate Assets of NoDak State Trust Company. (App. at 45-53). On the date the Reply was filed, Kirby's counsel submitted a

request to the Commissioner for a hearing on behalf of Kirby and Accent Oil and Gas. (Supp. App. at 160). On August 29, the Commissioner informed Kirby's counsel that there was no right of appeal with regard to the untimely application relating to Kirby and Accent Oil and Gas. (Supp. App. at 163).

A hearing was held on October 8, 2003, at which the Commissioner introduced documents into evidence to explain the series of events that had occurred since the district court entered its Judgment Pursuant to Stipulation on April 28. After consideration of the matter, the district court issued its Memorandum Opinion in which the court ruled that under the language of the Judgment Pursuant to Stipulation, Kirby agreed to waive her right to a hearing in the event the North Dakota State Banking Board disapproved her application to acquire control of NoDak State Trust Company. (App. at 54-58). An Order and a Judgment for Appointment of Receiver to Liquidate Assets of NoDak State Trust Company were entered in conformity with the Memorandum Opinion on November 24, 2003. (App. at 59-63.) On December 3, 2003, Kirby filed a Notice of Appeal in which she appealed the November 24 Order and Judgment.

STANDARD OF REVIEW

In this case, the district court in the Memorandum Opinion, which was incorporated by reference into the Judgment for Appointment of Receiver to Liquidate Assets of NoDak State Trust Company, construed the language of the Judgment Pursuant to Stipulation as a waiver of additional proceedings if the Kirby's subsequent application was denied.

The North Dakota Supreme Court has ruled that:

when a stipulation is incorporated into a . . . judgment, we are concerned only with interpretation and enforcement of the judgment,

not with the underlying contract. Johnson v. Johnson, 527 N.W.2d 663 (N.D.1995); Anderson v. Anderson, 522 N.W.2d 476 (N.D.1994). Interpretation of a judgment is a question of law for the court. Sullivan v. Quist, supra, 506 N.W.2d at 398, 401. We review questions of law de novo. Anderson v. Anderson, supra, 522 N.W.2d at 478-479.

Botner v. Botner, 545 N.W.2d 188, 190 (N.D. 1996).

Accordingly, this case requires the North Dakota Supreme Court review the matter as a question of law de novo.

LAW AND ARGUMENT

- I. The district court properly concluded that under the language of the Judgment Pursuant to Stipulation, Kirby agreed to waive her right to a hearing regarding the North Dakota State Banking Board's decision to disapprove her application to acquire control of NoDak State Trust Company

In this case, the district court entered a Judgment Pursuant to Stipulation, which established the administrative procedure the parties were to follow in determining whether NoDak Trust would be released from conservatorship, or whether NoDak Trust would be dissolved as a legal entity and its assets liquidated. Kirby was unsuccessful in her attempt to acquire control of NoDak Trust through the designated administrative procedure. Kirby appeals the district court's interpretation of the stipulated judgment, which resulted in the Judgment for Appointment of Receiver to Liquidate Assets of NoDak State Trust Company. Kirby's challenge to the district court's decision, which at most is an attempt to suggest a minimum of ambiguity in the stipulated judgment, ignores basic principles of contract interpretation, as well as her own failure to comply with the stipulated judgment.

In Binek v. Binek, 2004 ND 5, ¶ 13, 673 N.W.2d 594, the North Dakota

Supreme Court ruled:

Contracts are to be interpreted in a manner that gives effect to the parties' mutual intent at the time of contracting. N.D.C.C. 9-07-03.

'When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible' N.D.C.C. 9-07-04. 'Construction of a written contract is a question of law.' Garofalo v. Saint Joseph's Hospital, 2000 ND 149, ¶ 7, 615 N.W.2d 160. 'If the intent of the parties can be ascertained from the agreement alone, interpretation of the contract is a question of law.' Id. 'Whether a contract is ambiguous is a question of law.' National Bank of Harvey v. International Harvester Co., 421 N.W.2d 799, 801 (N.D. 1988). 'A contract is ambiguous when rational arguments can be made for different positions about its meaning.' Id. 'Extrinsic evidence is properly considered only if the language of the agreement is ambiguous and the parties' intentions cannot be determined from the writing alone.' Miller v. Schwartz, 354 N.W.2d 685, 689 (N.D. 1984). 'On appeal, this [C]ourt will independently review the contract to determine whether it is ambiguous.' International Harvester, at 801.

Meide v. Stenehjerm, 2002 ND 128, ¶ 7, 649 N.W.2d 532.

In National Bank of Harvey v. International Harvester Co., 421 N.W.2d 799, 802 (N.D. 1988), the state supreme court held:

Section 9-07-06, N.D.C.C., requires that a contract be interpreted as a whole:

'The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable. Each clause is to help interpret the others.'

The intention of the parties to a contract must be gathered from the entire instrument, not from isolated clauses, and every clause, sentence, and provision should be given effect consistent with the main purpose of the contract.

"Each term of a contract must be interpreted in a manner that leads to a harmonious reading of the entire agreement, and specific terms are construed to take precedent over general language." Natural Springs, Inc. v. Copenhaver, 1997 WL 256806, at *2 (Ark. Ct. App. 1997). "Where a general clause and a specific clause in a contract are repugnant or irreconcilable, the specific clause is controlling." Id. See also Fasciana v. Electronic Data Systems Corp., 829 A.2d 160, 173 (Del. Ch. 2003) ("It is, of course, a maxim of contract interpretation that more specific contractual terms will trump those that are more general.").

In this case, the main purpose of section 4 of the Judgment Pursuant to Stipulation was to give Kirby the opportunity to acquire control of NoDak Trust. This opportunity would be based solely on an application and supporting documents that were to be submitted to the Commissioner no later than July 10, 2003. No consideration was to be given to any documents submitted by Kirby after July 10.

N.D.C.C. § 6-08-08.1 was to be applicable to NoDak Trust. This general provision, however, was modified by a series of more specific provisions. Subsection 4(d) provided that upon submission, the application would be deemed complete "without the need for the Commissioner to request additional information". Subsection 4(d) modified N.D.C.C. § 6-08-08.1(3), which otherwise would have required the Commissioner independently determine whether the application was complete and provide Kirby an opportunity to supplement the application. Subsection 4(g) provided that if the Board disapproved her application, the Commissioner could proceed with the administrative dissolution to which Kirby waived any objection. Subsection 4(g) modified N.D.C.C. § 6-08-08.1(6), which

otherwise would have allowed Kirby to request a hearing on the Board's disapproval of her application.

The parties' modifications to the general administrative proceedings are consistent with the North Dakota Supreme Court's holding in Gale v. N.D. Bd. of Podiatric Medicine, 2001 ND 141, 632 N.W.2d 424. In Gale, the state supreme court held that:

Under N.D.C.C. § 28-32-05.1, the parties to an administrative proceeding may, by stipulation, waive the right to an administrative hearing and formal disposition, and agree to some other form of informal disposition. A party to an administrative proceeding may also waive the right to an appeal. Steen v. North Dakota Dep't of Human Servs., 1997 ND 52, ¶ 35, 562 N.W.2d 83.

2001 ND 141, ¶ 13, 632 N.W.2d 424.

The Commissioner's performance was consistent with the terms of the Judgment Pursuant to Stipulation. On the July 10 application deadline, the Commissioner received an "Application to Acquire Control of a Trust Company" in which Kirby proposed to sell her interests in NoDak Trust to Sage Financial Corporation. The Commissioner promptly notified Kirby's counsel of his receipt of Kirby's Application and advised the counsel the Application was deemed complete in accordance with the Judgment Pursuant to Stipulation. The Commissioner published Legal Notice regarding Kirby's Application, which included a deadline for the submission of written comments regarding the Application and the date the North Dakota State Banking Board would act on the Application.

At the July 31 State Banking Board meeting, the Board disapproved and denied Kirby's July 10 Application to Acquire Control of a Trust Company for the purpose of selling her interests in NoDak Trust to Sage Financial Corporation. The

Board ordered that NoDak Trust be dissolved as a legal entity and its assets be liquidated.

Kirby's performance, on the other hand, was not consistent with the terms of the Judgment Pursuant to Stipulation. Kirby's counsel admitted to the Commissioner that the July 10 Application was not "fully completed." On the deadline of July 25, 2003, for submitting comments regarding her Application, Kirby submitted an "Application to Acquire Control of a Trust Company" to the Commissioner, in which she proposed to sell her interests in NoDak Trust to Accent Oil and Gas Company, a Texas corporation. Kirby did not provide any explanation to the Commissioner regarding the relevancy of these materials to her pending July 10 Application or the status of her business relationship with Sage Financial Corporation. Neither Kirby nor her legal counsel attended the July 31 Board meeting to support her Application.

Even assuming for the sake of argument that Kirby did not waive her right to a hearing regarding the Board's disapproval of her application, Kirby performance in this regard also was deficient. Under the terms of the Judgment for Stipulation, only the July 10 Application involving the proposed transaction with Sage Financial Corporation was appropriate for consideration. The July 25 documentation involving the proposed transaction with Accent Oil and Gas was untimely and was in effect, a legal nullity. Kirby failed to request a hearing regarding the Board's disapproval of her application regarding Sage Financial Corporation, and instead, requested a hearing on behalf of Kirby and Accent Oil and Gas. Even if Kirby had not waived her right to a hearing under the terms of the Judgment Pursuant to

Stipulation, she did so by her subsequent failure to request a hearing concerning the Application concerning Sage Financial Corporation.

The district court properly concluded that under the language of the Judgment Pursuant to Stipulation, Kirby agreed to waive her right to a hearing regarding the North Dakota State Banking Board's decision to disapprove her application to acquire control of NoDak State Trust Company. The Judgment for Appointment of Receiver to Liquidate Assets of NoDak State Trust Company should be affirmed.

II. The North Dakota Supreme Court lacks the authority to remand the matter to the district court with directions to vacate an April 28, 2003, Judgment Pursuant to Stipulation from which no appeal was taken, and from which Kirby failed to first seek relief under N.D.R.Civ.P. 60 in the district court

On appeal, Kirby raises a second issue, which in substance, appears to merely recast her first issue – i.e., whether she voluntarily waived her right to an administrative hearing following the State Banking Board's disapproval of her Application. With respect to this issue, however, Kirby attempts to alter the standard of review in this matter from a question of law to a question of fact. Kirby also attempts to alter the form of relief she requests from this Court for this particular issue to a remand to the district court with the direction that the Stipulation between the parties, which was incorporated into the Judgment Pursuant to Stipulation, be set aside and she be permitted to proceed with the trial of the entire lawsuit. In essence, Kirby does not directly challenge the Judgment for Appointment of Receiver to Liquidate Assets of NoDak State Trust Company as asserted in her Notice of Appeal, but requests this Court grant her relief from the

Judgment Pursuant to Stipulation – a remedy Kirby never pursued in the district court proceedings.

The North Dakota Supreme Court's "[s]uperintending control over inferior courts is used only to rectify errors and prevent injustice in extraordinary cases where no adequate alternative remedy exists." Trinity Medical Center, Inc. v. Holum, 544 N.W.2d 148, 151 (N.D. 1996). In this case, Kirby had the adequate alternative remedy to seek for relief from the Judgment Pursuant to Stipulation under N.D.R.Civ.P. 60 in the district court. Kirby had notice that the issue of waiver of her right to further proceedings would be raised at the October 8, 2003, hearing. The Commissioner used the hearing as an opportunity to introduce numerous documents relating to the events subsequent to the entry of the Judgment Pursuant Stipulation.

Kirby overlooks the fact that when she executed the Stipulation for Entry of Judgment both she and the Commissioner acknowledged the legal effect of the instrument as follows:

8. **Acknowledgment of Legal Effect:** Each of the undersigned parties acknowledge that the terms of this Stipulation have been completely read and are fully understood and voluntarily accepted for the purpose of making a full and final compromise, adjustment and settlement. Each of the undersigned parties also acknowledges and represents that they have been represented by counsel in connection with their respective considerations and the execution of this Stipulation. Each undersigned party further represents and declares that in executing this document they have relied solely upon their own judgment, belief, and knowledge and the advice and recommendation of their own independently selected counsel concerning the nature, extent, and duration of their rights and claims, and that they have not been influenced to any extent whatsoever in executing this document by the representations or statements except those referred to or contained in this document.

(Supp. App. at 10-11). Kirby understood or should have understood that under the terms of the Stipulation she waived her right to a hearing in the event the Board disapproved her application.

Kirby also overlooks the fact that in Gale, 2001 ND 141, ¶ 14, 632 N.W.2d 424, the North Dakota Supreme Court held :

Waiver is a voluntary and intentional relinquishment of a known existing advantage, right, privilege, claim, or benefit. Stuart v. Stammen, 1999 ND 38, ¶ 12, 590 N.W.2d 224; Diversified Fin. Sys., Inc. v. Binstock, 1998 ND 61, ¶ 16, 575 N.W.2d 677. A waiver can be made expressly or be inferred from conduct. Tormaschy v. Tormaschy, 1999 ND 131, ¶ 12, 596 N.W.2d 337; Diversified Fin. Sys., at ¶ 16. Once the right is waived, the right or privilege is gone forever, and the waiver cannot be extracted, recalled, or expunged. Tormaschy v. Tormaschy, 1997 ND 2, ¶ 19, 559 N.W.2d 813. When parties conduct themselves in a manner which clearly constitutes a waiver, they cannot later claim they did not know their actions amounted to a voluntary and intentional waiver of their rights, because one who consents to an act is not wronged by it. Tormaschy, 1999 ND 131, ¶ 12, 596 N.W.2d 337. Although existence of waiver is ordinarily a question of fact, if the circumstances of a claimed waiver are admitted or clearly established and reasonable persons can draw only one conclusion from those circumstances, the existence or absence of waiver is a question of law. Hanson v. Cincinnati Life Ins. Co., 1997 ND 230, ¶ 13, 571 N.W.2d 363.

As discussed in section I, supra, the circumstances of the claimed waiver are admitted or clearly established such that reasonable persons can draw only one conclusion from the circumstances and the existence or absence of Kirby's waiver is question of law.

The Supreme Court lacks the authority to remand this matter to the district court with the direction that the Stipulation between the parties, which was incorporated into the Judgment Pursuant to Stipulation, be set aside and she be permitted to proceed with the trial of the entire lawsuit.

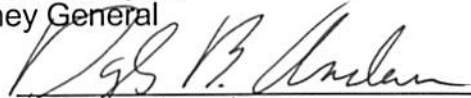
CONCLUSION

Based upon the foregoing law and argument, the Commissioner requests this Court affirm the district court's entry of Judgment for Appointment of Receiver to Liquidate Assets of NoDak State Trust Company.

Dated this 17th day of February, 2004.

State of North Dakota
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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Timothy J. Karsky, in his official capacities)
as Commissioner of the North Dakota)
Department of Financial Institutions, and as)
Conservator of NoDak State Trust Company,)

Plaintiff and Appellee,)

v.)

Jane Dorothea Kirby, an individual person,)

Defendant and Appellant,)

and)

Dr. Thomas J. Clifford, in his capacity)
as president of NoDak State Trust Company,)

Defendant.)

AFFIDAVIT OF SERVICE BY MAIL

Supreme Court No. 20030354

District Court No. 02-C-01152

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)


Donna J. Connor states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 17th day of February, 2004, I served the attached **BRIEF OF APPELLEE** upon Thomas F. Kelsch and Arlen M. Ruff, by placing a true and correct copy thereof in an envelope addressed as follows:

Thomas F. Kelsch
Arlen M. Ruff
Kelsch, Kelsch, Ruff & Kranda
103 Collins Avenue
P.O. Box 1266
Mandan, ND 58554-7266

and depositing the same, with postage prepaid, in the United States mail at
Bismarck, North Dakota.



Donna J. Connor

Subscribed and sworn to before me
this 17th day of February, 2004.



Notary Public

