IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Janet L. Brash, individually and as
Personal Representative of the Estate of
Larry R. Brash, Deceased.

Plaintiff-Appellant.

Case No. 20120313

Civil No. 41-2011-CV-00072

vs.

William M. Gulleson,
a/k/a Wm. M. Gulleson,

Defendant-Appellee.

BRIEF OF PLAINTIFF-APPELLANT

APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER FOR JUDGMENT AND JUDGMENT AND DECREE OF THE SAID DISTRICT COURT ENTERED ON DATED JUNE 8, 2012

SARGENT COUNTY DISTRICT COURT, SOUTHEAST JUDICIAL DISTRICT
HONORABLE JAY SCHMITZ

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6. Can a bailor rely upon statutory presumptions of wilful or gross negligence when a bailee does not return, nor account, for entrusted personal property?

STATEMENT OF THE CASE

This case exemplifies the difficulties experienced by cattle owners entrusting their living animals under bailment circumstances to a renter that ignores both his written contract and resulting duties to the cattle owners, and the cattle.

Janet L. Brash, individually and as Personal Representative of the Estate of Larry R. Brash, Deceased [hereinafter "CATTLE OWNERS" or "BAILORS" or "BRASH"], initiated

an action in the Sargent County District Court against William M. Gulleson, also known as Wm. M. Gulleson [hereinafter "BAILEE" or "CATTLE RENTER" or "GULLESON"], alleging the existence of a written "Cow/Calf Production Lease Agreement" [Appendix, page 11; Exhibit A of Complaint; see also, Plaintiff's Exhibit 2, at page 67, or Defendant's Exhibit 50] whereby the CATTLE OWNERS furnished 130 cows to be cared for by BAILEE/GULLESON in return for 40% of the calf crop each year.

CATTLE RENTER/BAILEE/GULLESON responded to the October 28, 2005, Complaint [App., p. 5] by Answer dated November 30, 2005 [App., p. 48] admitting "that Exhibit A referenced therein is a true and correct copy of the Cow/Calf Production Lease Agreement between the parties .." ¶ VI, App., p. 49. GULLESON acknowledges no written modifications exist, Transcript, page 89. CATTLE RENTER/BAILEE/GULLESON denied CATTLE OWNERS "furnished the 130 cows to be cared for by (CATTLE RENTER/BAILEE/GULLESON) pursuant to the terms of the Cow/Calf Production Lease Agreement." App., p. 49. CATTLE RENTER/BAILEE admits that he has not accounted for the 272 animals determined by CATTLE OWNERS that should exist ["Brash Cattle Count [Starting in 2000/ending on December 31, 2004]", Exhibit B of Complaint; p. 19, or Exhibit 2, p. 58]. App., p. 49, ¶ VIII of Answer.

Other than general factual denials, CATTLE RENTER/BAILEE/GULLESON only affirmatively asserts "accord and satisfaction, payment, release, estoppel, failure of consideration, latches, and waiver." App., p. 51. CATTLE RENTER/BAILEE/GULLESON has never brought any action seeking revision of the written contract – a form of "specific relief" pursuant to N.D.C.C. Chap. 32-04. N.D.C.C. § 32-04-01 clearly delineates, and

restricts: "Specific relief may be given in the cases specified in this chapter and in no other cases", to include relief under N.D.C.C. § 32-04-17 which allows for revision of a "written contract (that) does not truly express the intention of the parties" due to "fraud or mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected .."

CATTLE RENTER/BAILEE/GULLESON has never brought an action to cancel or reform the agreement, nor has he brought an action or counterclaim for breach of the contract. Tr., ps. 87-88. GULLESON had no claims against CATTLE OWNERS/BAILORS/BRASH. Tr., p. 88.

A two (2) day bench trial before the Honorable Jay Schmitz was held on April 25-26, 2012.

On April 26, 2012, District Judge Schmitz rendered a verbal decision [Tr., ps. 472-479] which resulted in written Findings of Fact, Conclusions of Law and Order for Judgment and Judgment and Decree dated June 8, 2012. App., p. 159.

CATTLE OWNERS timely filed Notice of Appeal dated August 1, 2012. App., p. 168.

STATEMENT OF FACTS

1. CATTLE OWNERS were residents of Sargent County, North Dakota. As a result of the death of Larry R. Brash, Janet L. Brash became the sole owner of all 130 cows, and their offspring, located at the GULLESON farm. Tr., p. 121-124; 136. BRASH had

other animals on their own farmstead, and leased cattle to Wade Anderson.[1] Tr., p. 128 [in 1997, 21 other cows and 1 bull,[2] and their offspring]; p.147 [after her husband's death, "Probably 30 cows, calves, and up to 700 sheep of all ages. And we were lambing at the same time."]; 156.

2. CATTLE RENTER/BAILEE/GULLESON is a resident of Sargent County, North Dakota, where he farmed and provided a place to care for livestock, his own, and cattle under various rental agreements. Tr., ps. 21-22; 277.

3. The Cow/Calf Production Lease Agreement originally involved Larry R. Brash D.V.M. and Janet L. Brash, as Owners, and Wm. M. Gulleson, as Renter, and resulted from a lawyer consultation with GULLESON participation. Tr., p. 322-325. The Cow/Calf Production Lease Agreement has at least one (1) "GENERAL TERM()" that has been specifically repudiated by CATTLE RENTER/BAILEE/GULLESON [punctuation from original] without ever invoking any form of "specific relief" pursuant to N.D.C.C. Chap. 32-04:

> "A. In exchange for the mutual promises and covenants contained in this agreement, Owner will furnish. One Hundred Thirty (130) cows which are presently situated on renter's farm in Sargent County, North Dakota to Renter and Renter will lease the cows from Owner under the terms and conditions set forth in this agreement."

Despite acknowledging receipt of One Hundred Thirty (130) cows owned by BRASH and "presently situated on renter's farm in Sargent County, North Dakota" [App., ps. 11; 12

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[1] Acknowledged by GULLESON, no BRASH animals leased to Wade Anderson ever arrived at Gulleson Farms. Tr., p. 66.

[2] Acknowledged by GULLESON, no BRASH "bull" was ever at the Gulleson Farms. Tr., ps. 79-80.

at § 3: "entire 130 cow herd"; 14 at § 7: "Owner and Renter to maintain the number of cows leased to Renter at One Hundred Thirty (130) head, or as near to that number as is possible and mutually agreeable"], CATTLE RENTER/BAILEE/GULLESON now asserts there was only 108 cows in 1997 [Tr., ps. 49-50, without doing a count; 51-52; "(108) comes off of Larry Brash's records" without doing a count; 59; 62; 311] or110 cows at the time of the agreement [Tr., ps. 48; 102 {sworn Answers to Interrogatories, Plaintiff's Exhibit 5, (partial) App., ps. 75-78}; 108], and incongruously, 84 cows at the time of the agreement [Defendant's Exhibit 53; App., p. 102], or 76 cows [Tr., ps 73-74].

4. CATTLE OWNERS/BAILORS/BRASH assert the existence of 130 cows, acknowledged to exist by CATTLE RENTER/BAILEE/GULLESON in writing, which were to be maintained at that level under the terms of the Cow/Calf Production Lease Agreement [§ 7; App., p. 14]. See, Tr., ps. 28; 40; 134-135; 165; 168; 151; 260; 269-270.

5. In 1997, BRASH had 108 cows under a verbal/oral cow/calf production lease to GULLESON, as a renter, and BRASH intended to expand the cow herd at the Gulleson Farms. Plaintiff's Exhibit 11; App., ps. 79; Tr., ps. 128; 130-132; 159.

6. Under the 2000 Cow/Calf Production Lease Agreement [App., p. 11], CATTLE RENTER/BAILEE/GULLESON was entitled to 40% of the calf crop each year [§ 3; App., p. 12], and he was obligated to care for the cows "as if they were his own cows .. so as to maximize production .." [§ 2; App., p. 12].

7. The Cow/Calf Production Lease Agreement provided for annual renewal – "the cows are to be retained by Renter for one or more additional calving seasons under the same terms" unless the agreement was terminated "by agreement of the parties or by virtue

of its non-renewal by the parties. Cow/calf inventory documentation shall be prepared by Renter and submitted to Owner prior to each renewal date." § 1(B), App., p. 11. GULLESON has never prepared, nor provided a cow/calf inventory document to the CATTLE OWNERS. Tr., ps. 76-77. No notice of termination is known to exist. Tr., ps. 75 [GULLESON never gave notice]; 227; 143.

8. CATTLE OWNER/BAILORS/BRASH prepared a table identifying the number of animals that should have existed under the Cow/Calf Production Lease Agreement [App., p. 11], but were not returned at the end of 2004 by BAILEE/RENTER/GULLESON. The table, "Brash Cattle Count [Starting in 2000/ending on December 31, 2004", [App., p. 19; Plaintiff's Exhibit 2; Tr., ps. 138-144, 150-151; 195 {with culled cows properly replaced without expectation of calf for one year}; 206; see also, Plaintiff's Exhibit #20 {App., p. 20} showing all sales of cows or calves relating to GULLESON agreement supported by Plaintiff's Exhibits 15-19, inclusive, and other exhibits; 248, no BRASH records destroyed] establishes the existence of 272 BRASH animals[3] that were not accounted for by BAILEE/RENTER/GULLESON as required by written contract.

9. As to all BRASH cattle, including the missing 272 cattle, under the terms of the Cow/Calf Production Lease Agreement, BAILEE/RENTER/GULLESON was required to take care for the livestock so as to maximize production, which includes the obligation to

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[3] App., p. 27. Certain presumptions were made which were advantageous to GULLESON. For instance, if a cow is culled during the year, BRASH presumed that the culled cow did not produce any calf. This presumption operates to initially reduce the number of animals owned by BRASH. BRASH reduced the number of cows from 130 for the first year predicated upon 5 cows being culled from the initial recognized number of cows – 130 cows for which GULLESON acknowledged receipt. See specifically, App., p. 19 showing 5 cow reduction and App., p. 20 showing the 5 cow reduction.

feed and water the animals, and to guard against disease. [App., ps. 11-18; see specifically, § Two; § Four; and § Ten]. In the event of a death, BAILEE/RENTER/GULLESON was required to notify BRASH promptly before removing the remains so that a proper inspection could take place [including an inspection by the insurance company]. § 8, App., p. 14. CATTLE OWNERS/BAILORS/BRASH were never notified of any deaths, but learned of three dead cows. Tr., ps. 66; 68; 129; 135-136.

10. CATTLE OWNERS/BAILORS/BRASH were never notified of any sales of BRASH cattle by GULLESON other than the sales reflected in Plaintiff's Exhibit 2 [Exhibit B of Complaint; App., ps. 58-66], which concerned BRASH. Tr., ps. 150; 168-169; 171-172.

During the written contract, GULLESON did not sell the calves separately as required by the Cow/Calf Production Lease Agreement. App., p. 12, § 3; Tr., ps. 267-268; 385-386. The sale of BRASH cattle was always done at "Sisseton" or "Britton" sales rings [Tr., p. 85], and never at "Hub City". Tr., p. 85.

11. After 2000, CATTLE RENTER/BAILEE/GULLESON never gave the contractually required report or accounting of how many cows or calves were in his possession "prior to the annual renewal date" under the Cow/Calf Production Lease Agreement. App., p. 11; Tr., ps. 130; 152; 241; 171-173 ["(w)as he replacing those cows that he sold with heifers"]. As to the number of BRASH cows, GULLESON never did a "physical" cow count, and relied upon Larry Brash's 1997 records [Plaintiff's Exhibit 11; App., p. 79] because Larry Brash quit building up his herd in 1992 according to the testimony of GULLESON. Tr., ps. 51; 49-50; 285; 290-291 ["(I)t was '92 would have been the last

calf crop we kept for replacement heifers.]; 296; 376.

12. GULLESON'S testimony that BRASH herd building ended after 1992 is false – Larry Brash's 1997 records identify BRASH cows that are only three (3), four (4), or five (5) years old in 1997; at least forty (40) cows were added to the BRASH herd at Gulleson Farms between 1993 and 1997. Plaintiff's Exhibit 11, App., ps. 79-89; Tr., p. 61 [GULLESON speaking: "And if you just do a head count, that the younger cows that Larry had (in 1997) which would be, you know, three, four, five years of age, you know, after he mouthed them, there was approximately 40 cows in here, your honor."]. Plaintiff's Exhibit 11 [App., p. 79] establishes: 41 cows that were 3 years old in 1997, and 18 cows that were 4 years old in 1997, meaning the BRASH herd was increasing in size after 1992 – contrary to GULLESON'S testimony. Tr., ps. 379-380. Also incongruously, GULLESON testified that, prior to the December, 1997, marriage to Janet Brash, Larry Brash told GULLESON that he "wanted to increase his livestock inventory .." Tr., p. 316-317. Even GULLESON'S son testified that Larry Brash increased his herd from 40 head in 1990 to 108 cows in 1997 [and if no cow purchases, it had to involve retaining heifers and breeding heifers belying GULLESON'S testimony]. Tr., ps. 439-440.

13. CATTLE OWNER/BAILORS/BRASH would Bangs vaccinate heifers to be used in their breeding program ["to replace cows that needed to be replaced or added to the herd"], not to enhance heifer resale value(s). Tr., ps. 145-146, 240, 257. October 16, 2000, BRASH records show continuing Bang's vaccinations indicating BRASH herd building long after 1992. Plaintiff's Exhibit 13; App., p. 90.

14. The written contract and evidence establishes the existence of 130 BRASH

cows at the inception of the written contract. App., p. 11. GULLESON'S incompatible claims there only existed 108 BRASH cows, 110 BRASH cows, 84 BRASH cows, or 76 BRASH cows cannot be reconciled with the written contract which the District Court wrongfully repudiated – without the prior existence of any action, pleading, or testimony allowing for revision or reformation on the basis of "a scrivener's error, or mistaken recitation of fact, in stating that 130 cows [of Dr. Brash's] 'are presently situated on [Gulleson's] farm.'" Finding of Fact X, App., p. 162.

Further, the District Court's finding, "In fact, the Brash herd contained less than 100 cows as of April 14, 2000" is factually wrong, and incongruous with the District Court's additional erroneous finding within ¶ X: "Paragraph A (of the Agreement) obligated Dr. Brash to provide 130 cows, and Section Seven of the Agreement obligated him to maintain that number. Gulleson, through the parties' course of dealing, implicitly waived Dr. Brash's obligation to maintain a 130-cow herd." App., p. 162.

So far as was known to BRASH, the RENTER always replaced by natural addition from the BRASH share of the calf crop – there was never a report by GULLESON to the contrary.

15. As to the number of cows at the written contract's inception in 2000, BRASH were not aware of any attempt by GULLESON to return 24 cows in the fall of 1999. Tr., ps. 133; 182-183 [only "three (cows) were brought back (by GULLESON)"]. BRASHS' uncontradicted records also establish the falsity of GULLESON'S testimony concerning his claimed return of 24 cows in the fall of 1999 so that only 84 BRASH cows were under verbal bailment circumstances. Defendant's Exhibit 53, App., p. 102. Plaintiff's Exhibit 13 [App.,

p. 90] resulted from working BRASH cattle on October 16, 2000, indicating, on the last page, the existence of at least 105 live calves, and an additional 10 calves that are "lost" based upon a known quantity of "125" BRASH cows under bailment – 130 cows contractually acknowledged by GULLESON, less 5 cows sold on August 24, 2000. Plaintiff's Exhibit 20; App., p. 97; Exhibit B, App., p. 19.

GULLESON'S ephemeral cow numbers – "108", "110", "84" or "76" cows in 2000, *after* the claimed return of 24 cows – belie his signature and the original basis for this action – 130 BRASH cows "presently situated on renter's farm in Sargent County, North Dakota .." App., p. 11.

16. GULLESON'S claimed return of 24 BRASH cows in the fall of 1999 was also false. GULLESON never gave notice there were not 130 BRASH cows at the Gulleson Farms, nor did GULLESON ever protest the non-existence of 130 BRASH cows. Tr., ps. 37; 39. After initially claiming that GULLESON had returned 24 cows to the BRASH farm yard in 1999: "*(p)rior to the contract* there was 24 (cows that) went back .." [Tr., ps. 73-74; 104-107; *emphasized as to timing*], *GULLESON changed his testimony* to reflect the 24 BRASH cows were actually relocated to GULLESON pasture close to the BRASH farmstead. GULLESON actually "dropped off" 24 cows on pasture land then leased by GULLESON *prior to the written contract* ["We dropped them on Gulleson land."] – the 24 BRASH cows were not dropped off on BRASH land, nor BRASH farm yard, in 1999. Tr., ps., 105-107; 111; 328-331. Six (6) of those 24 cows on GULLESON pasture lands died, and GULLESON buried the carcasses. Tr., ps. 110-111. So far as known to BRASH, there were 130 BRASH cows "presently situated on renter's farm in Sargent County, North

Dakota", which was confirmed by the sworn notarized signature of Wm. M. Gulleson. App., ps. 11-18.

17. GULLESON'S "counting" is not worthy of judicial acceptance for another reason. GULLESON testified under oath that the 1999 BRASH calf crop, and sold in 2000, consisted of 109 calves, meaning at least 109 cows existed [a calf is not born to an "open" cow, so if there exists a large number of "open" BRASH cattle as claimed by GULLESON [Tr., p. 301, "(a)s I state earlier that 50 percent of the younger cows were open."], there are even more cows – why not 130 cows, the exact number of cows acknowledged by GULLESON and BRASH to exist in the written agreement?]. Tr., ps. 91-102, citing Plaintiff's Exhibit 10, GULLESON's sworn deposition beginning at page 135; and also, Plaintiff's Exhibit(s) 4 and 5 recognizing "110 cows on (GULLESON'S) farm belonged to Larry Brash at the time we entered into the agreement", GULLESON'S sworn Answers to Interrogatories at Answer #2.[4]

18. BAILEE/RENTER/GULLESON'S verbal accounting in December, 2004, did not account for 272 animals [a minimum number], nor the monies possibly generated from the sale of the BRASH animals. Instead of the expected 272 animals at the end of the written contract, GULLESON claimed to have produced proceeds for seven (7) cows and three (3) calves upon termination. Tr., ps. 151 [actually it was 8 cows and 17 calves, Plaintiff's Exhibit 20, App., p. 97; App., p. 26, as shown in the "Brash Cattle Count"].

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[4] When confronted with his sworn testimony that "only 110 cows belonging to Larry (Brash) were placed on (his) farm" under the 2000 contract, when he had claimed to return 24 BRASH cows in the fall of 1999 [110 + 24 = 134 cows in 1999], GULLESON claims his testimony is only "guessing". Tr., p. 103.

19. By correspondence dated May 18, 2005, CATTLE OWNER/BAILOR/BRASH demanded the return of her personal property which should exceed 272 animals, to include, 122 bred cows, 50 calves born in the spring of 2004, and 100 calves born in the spring of 2003, or earlier. Plaintiff's Exhibit 2, App., ps. 55-74.

20. Neither BAILEE/RENTER/GULLESON, nor his identified legal counsel, ever responded to the May 18, 2005, letter. Admission to Complaint's ¶ 12; Answer, ¶ XIV; App., p. 50.

21. For the first time – at the April, 2012, trial– GULLESON attempted to account for the BRASH cattle subject to the 2000 Cow/Calf Production Lease Agreement [App., p. 11; Defendant's Exhibits Nos.53-59, App., ps. 102-153], but inexplicably started three (3) years earlier – in 1997, with only 108 cows (32 open/2 already calved), *and not the contractual 130 cows* [130 - 108 = 22] – **the first 22 cows, and all offspring, are automatically missing!** Tr., ps. 341-357.

GULLESON'S calculations reflected on Defendant's Exhibit 53 [App., p. 102] were created without having personal knowledge [Tr., ps. 359-360; and, violative of N.D.R.Ev. 602], and also erroneous for the following reasons:

A. **Calendar Year 1997**: GULLESON fails to account [Defendant's Exhibit 53] for the sale of any BRASH calves in 1998 from the 108 cows claimed to exist on December 31, 1997.[5]

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[5] BRASH recognize this time period is outside of the action; no claim is made for any 1997 GULLESON transgression.

B. **Calendar Year 1998**: There is no accounting whatsoever by GULLESON – no accounting for cows or calves. If no cows are sold, at least 108 BRASH cows are in verbal bailment with GULLESON.[6]

C. **Calendar Year 1999**: GULLESON fails to account [Defendant's Exhibit 53; App., ps. 102] for the sale of any BRASH 1998 calves in 1999 from the 108 cows claimed to exist on December 31, 1997, *plus* any retained heifers acting in accord with Larry Brash's statements to GULLESON that he "wanted to increase his livestock inventory .." Tr., p. 316-317.[7] GULLESON claims to have returned 24 cows to Gulleson Farms pasture. Even if true, there are missing BRASH calves. If no cows are sold, at least 108 BRASH cows are still in verbal bailment with GULLESON – 24 cows in the GULLESON pasture [GULLESON has no receipt from BRASH indicating the return of these animals; Tr., p. 399], and 84 cows at the Gulleson Farm.[8]

D. **Calendar Year 2000**: GULLESON'S calculations are incorrect for two (2) reasons, as to number of calves, and also, as to number of cows:

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[6] BRASH recognize this time period is outside of the action; no claim is made for any 1998 GULLESON transgression.

[7] BRASH recognize this time period is outside of the action; no claim is made for any 1999 GULLESON transgression.

[8] With the candor due the Court, Defendant's Exhibit 60 identifies the sale of 1 BRASH cow in 1999. This sales transaction preceded the written Cow/Calf Production Lease Agreement [App., p. 11], and the sold BRASH animal was not part of the 130 BRASH cows entrusted to GULLESON.

1. GULLESON claims 70.65 calves [Defendant's Exhibit 53, App., p. 102; BRASH share is 28.26 calves] born in 1999 were sold in 2000 [Defendant's Exhibit 54; App., p. 103]. Even if 24 cows were returned in the fall of 1999 as GULLESON claims, the 108 BRASH cows that calved in 1999 should have produced 108 calves – not something close to the 76 claimed to result from BRASH cows. GULLESON gave sworn testimony that the 1999 calf crop sold in 2000 consisted of 109 animals. See, discussion at ¶ 17, page 11 of this appellate brief. **Unless used as replacement heifers, there are 32 missing 2000 calves, 40% of which belong to BRASH [12.8 calves].**

2. GULLESON claims the sale of 8 BRASH cows [Defendant's Exhibit 53; App., p. 102] when BRASH records identify the sale of 16 animals [Defendant's Exhibit 61; App., p. 132], but concedes he "do(es) not know definite origin of the location" for the 8 BRASH cows – GULLESON claims the sale of 3 other cows owned by BRASH not under contract. See Plaintiff's Exhibit 2 [App., p. 19; confirmed by Defendant's Exhibit 61 showing "5 cows from Bill were sold"] showing only the sale of 5 BRASH cows under bailment with GULLESON. **There are 3 more missing BRASH cows under bailment with GULLESON!**

E. **Calendar Year 2001**: GULLESON'S calculations are incorrect for two (2) reasons, as to number of calves, and also, as to number of cows:

1. GULLESON claims 44.93 calves [BRASH share is 17.97 calves] born in 2000 were sold in 2001 [[Defendant's Exhibit 53, App., p. 102; Defendant's Exhibit 55, App., p. 110]. Even if (a) 24 cows were returned in the fall of 1999 as GULLESON claims and (b) 8 cows were sold as GULLESON claims, the 76 BRASH cows [108 - 24 - 8 = 76] that calved in 2000 should have produced 76 calves – not something close to the 45 calves claimed to result from BRASH cows. **Unless used as replacement heifers, there are 31 missing 2001 calves, 40% of which belong to BRASH [12.4 calves].** *Without any documentation whatsoever*, GULLESON also claims "16 calves and cows taken to Larry (born in 2000) - low end of bunch". Defendant's Exhibit No. 53, App., p. 102; Tr., p. 362. If true, GULLESON delivered *16 calves* when only GULLESON'S accounting indicates the need to only deliver 13 calves [12.8 calves; see discussion immediately above – GULLESON'S count cannot be trusted].

2. GULLESON claims the sale of 14 BRASH cows [Defendant's Exhibit 53, App., p. 102] when BRASH records identify the sale of 14 animals [Defendant's Exhibit 62], but concedes an "origin unknown" for the 14 BRASH cows – GULLESON claims the sale of

14 cows owned by BRASH when only 3 BRASH cows from GULLESON were sold [11 other BRASH cows were not under GULLESON contract]. See Plaintiff's Exhibit 2 showing only the sale of 3 BRASH cows under bailment with GULLESON. App., p. 21. *Without any documentation whatsoever*, GULLESON also claims "16 calves and cows taken to Larry (born in 2000) - low end of bunch". Defendant's Exhibit 53, App., p. 102. **There are 27 more missing BRASH cows [11 {purported sales} + 16 {purported delivery} = 27 cows] under bailment with GULLESON!** BRASH deny any delivery of these cows, and there is no receipt given by BRASH to the contrary. Tr., p. 446.

F. **Calendar Year 2002**: GULLESON'S calculations are known to be incorrect as to number of cows:

1. GULLESON claims the sale of 2 BRASH cows [Defendant's Exhibit 53; App., p. 102] when BRASH records identify the sale of 11 cows [App., ps. 22-23] all of which were to be replaced by BRASH heifers under the agreement, but also, GULLESON concedes an "origin unknown" for the 2 BRASH cows. GULLESON does not have the predicate "personal knowledge" to give testimony. N.D.R.Ev. 602. Incredibly, GULLESON'S supporting documention [Defendant's Exhibit 63, App., p. 141] contains a single page referencing BRASH cattle sales for the prior year on August 2, 2001, to include two (2)

black fat steers and a black bull – types of animals never under bailment with GULLESON. GULLESON'S count, doesn't count!

G. **Calendar Year 2003**: GULLESON'S calculations are known to be incorrect as to number of cows:

1. GULLESON claims the sale of 5 BRASH cows [Defendant's Exhibit 53, App., p. 102] when the cited BRASH records identify the sale of 5 cows, 2 bulls, and 6 steers [Defendant's Exhibit 64, App., p. 143], but concedes an "origin unknown" for the 5 BRASH cows – GULLESON claims the sale of 5 cows owned by BRASH when only 3 BRASH cows from GULLESON were sold [2 other BRASH cows were not under GULLESON contract]. See Plaintiff's Exhibit 2 [App., ps. 62-63] showing only the sale of 3 BRASH cows under bailment with GULLESON at "Sisseton" and "Britton". Significantly, all of the other animals [2 bulls, 2 cows, and 6 steers were sold at "Hub City Livestock Auction, Inc." – where no BRASH/GULLESON bailment cattle were ever sold. Tr., p. 85. **GULLESON wrongfully claims 2 cows known by him to be otherwise owned by BRASH.** GULLESON'S count, doesn't count!

2. *Without any supporting documentation*, GULLESON claims "Fall 2003 bulk of cows (30 approx) taken back to Larry Brash" leaving 9 cows with GULLESON. Defendant's Exhibit 53, App., p. 102. BRASH never received the animals, nor was there ever a receipt

given by BRASH. BRASH deny any delivery of these cows, and there is no receipt from BRASH showing contrary. Tr., p. 446.

H. **Calendar Year 2004**: GULLESON'S calculations are known to be incorrect as to number of cows:

1. GULLESON claims the existence of 9 BRASH cows at the end of 2003 [Defendant's Exhibit 53, App., p. 102], yet GULLESON seemingly claims credit for the sale of 48 cows while conceding an "origin unknown" for all 48 cows. As to 9 cows of the 48 with an unknown origin, GULLESON claims credit for 2 dead BRASH cows, and the sale of the remaining 7 BRASH cows admitted by GULLESON to exist. Defendant's Exhibit 53, App., p. 102. BRASH acknowledges the receipt and sale of 8 cows from GULLESON in 2004 [1 cow more than GULLESON claims to have delivered, if there are also 2 dead cows among the 9 cows]. Plaintiff's Exhibit 2, App., p. 64-65. If GULLESON'S testimony is to believed [Defendant's Exhibit 53, App., p. 102], **never** would GULLESON have any right to claim credit for more than 7 cows [no credit for 2 dead cows] and 3 calves, but Defendant's Exhibit 65 [App., p. 149] represents sales of BRASH cattle to include: 8 cows attributed to GULLESON [$4,194.25 for 7 cows and $448.63 for 1 cow]; 24 yearlings; 2 steers, 5 cows, 25 bred cows, 10 cows, and 16 calves [only 3 of which are claimed to be GULLESON/BRASH offspring].

BRASH gives credit to GULLESON for 7 cows and 17 calves [14 from the prior year – has GULLESON retained heifers to build up the herd?]. Plaintiff's Exhibit 2. GULLESON claims any sales of BRASH animals not shown to be involved with Wade Anderson – in this case, 41 cows [and other animals] greater than claimed by GULLESON to even exist. Tr., ps. 434-436; App., p. 149. GULLESON'S count, doesn't count!

22. While not accounting for BRASH cattle, GULLESON increased his herd, by claiming to buy cattle in 2002, and an additional 20 cows and 20 heifers in 2003. Tr., ps. 391-392.

23. Larry Brash never expressed any concern about the quality of the animals because of Johne's [Tr., ps. 152], nor did the BRASH cattle have Johne's according to veterinarian Larry Brash. Tr., ps. 258-259. Larry Brash did acknowledge GULLESON had once had cows with Johne's [Tr., p. 259], and, prior to trial, the only claim that Johne's exists in BRASH cattle comes from GULLESON in his 2007 Answers to Interrogatories – there is no written document from any source, to include the State of North Dakota or even GULLESON, establishing the existence of Johne's in a BRASH animal. Tr., ps. 272; 372.

Under the Cow/Calf Production Lease Agreement, CATTLE RENTER/BAILEE/GULLESON was responsible for the "care of them as if they were his own cows .. and to follow health and sanitation measures and guard against disease .." App., p. 12; § 2.

24. At time of trial, GULLESON claimed Johne's caused the collapse of the

BRASH herd of cattle, and also claiming there was a Johne's quarantine. Tr., ps. 298-300. During a deposition while under oath, GULLESON first asserted a Johne's quarantine, and then corrected his sworn testimony to assert a different quarantine only related to sheep ["There was only one quarantine and that was a sheep quarantine."]. Tr., ps. 372-375; see, App., ps. 52-54 {page 69, line 16} for deposition testimony.

25. Pursuant to N.D.C.C. § 60-01-25, CATTLE OWNERS/BAILORS/BRASH identified the value of the 272 animals as having a worth equal to, or greater than, (a) $818 per bred cow; (b) $561 per calf produced in 2004, and (c) $701 per calf produced earlier than 2004. At the end of 2004, the total value of the animals would exceed $197,946. Complaint, ¶ 11; App., p. 10. On May 18, 2005, CATTLE OWNERS/BAILORS/BRASH demanded delivery of the required number of animals immediately [and any offspring born to those bred cows in 2005]. Plaintiff's Exhibit 2; App., ps. 55-74.

26. CATTLE OWNERS/BAILORS/BRASH have never been notified by GULLESON that (a) the Cow/Calf Production Lease Agreement was altered, falsified, or changed in any fashion from the time that it was originally signed by the owners and the renter, (b) there was a written modification to the document, (c) that any of the terms of the document were waived, or (d) that there were any flaws in the contract or defects or breaches. Tr., ps. 137-138.

27. CATTLE RENTER/BAILEE/GULLESON has failed to account for the original130 cows, any replacements, and the resulting offspring – 272 animals pursuant to the "Brash Cattle Count".

BRASH were entitled to a money judgment for the reasonable value of the 272 cattle

that should have existed under bailment, and the District Court had no right to repudiate the written contract admitted to exist. Answer, ¶ VI; App., p. 49.

LAW AND ARGUMENT

Standard of Review

The appellate issues relate to the parties intentions expressed in a written contract, and the contractual duties set forth therein. All of these issues are matters of law and fully reviewable by this Court. Cavalier County Memorial Hospital Assocation v. Kartes, 343 N.W.2d 781, 783-784 (N.D. 1984). It is respectfully submitted that whether GULLESON breached his contractual duties to BRASH involves mixed questions of fact and law, and is reviewable by this Court without deference to the clearly erroneous standard. Malarchik v. Pierce, 264 N.W.2d 478, 479 (N.D. 1978).

POINT 1. THE COW/CALF PRODUCTION LEASE AGREEMENT IS A VALID CONTRACT IN WRITING THAT CANNOT BE ALTERED BY PAROL EVIDENCE.

At the onset of the case, BRASH objected to a late attempt to introduce any parol evidence seeking to alter a valid written contract. Tr., ps. 8-18. The Supreme Court has explained the parol evidence rule in Des Lacs Valley Land Corp. v. Herzig, 2001 ND 17,¶s 7-8, 621 N.W.2d 860:

> [¶ 7] Section 9-06-07, N.D.C.C, in part, codifies the parol evidence rule, *see Gajewski v. Bratcher,* 221 N.W.2d 614, 626 (N.D.1974), and provides:
>
> > The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.

The parol evidence rule is a rule of substantive law and precludes use of evidence of prior oral negotiations and agreements to vary the terms expressed in a written contract. *Radspinner v. Charlesworth*, 369 N.W.2d 109, 112 (N.D.1985); *Bye v. Elvick*, 336 N.W.2d 106, 111 (N.D.1983); *Gajewski*, at 626.

[¶ 8] In *Gajewski*, 221 N.W.2d at 627, we concluded oral testimony was incompetent and inadmissible (1) to vary or contradict an executed and delivered quitclaim deed; (2) to prove the deed was security for repayment of a loan; and (3) to nullify the grant contained in the deed. We said:

> The parol evidence rule has been variously defined and has been best stated as follows:
>
> > " ' " 'Where parties, *without any fraud or mistake*, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement:' ... 'all preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract ... and "*unless fraud, accident, or mistake be averred, the writing constitutes the agreement between the parties, and its terms cannot be added to nor subtracted from by parol evidence.*" ' " ' " *Associated Hardware Supply Co. v. Big Wheel Distributing Company*, 355 F.2d 114, 119 (3d Cir.1966), 17 A.L.R.3d 998.....
>
> The parol evidence rule is founded on experience and public policy and created by necessity, and it is designed to give certainty to a transaction which had been reduced to writing by protecting the parties against the doubtful veracity and the uncertain memory of interested witnesses. *Hanes v. Mitchell*, [78 N.D. 341, 49 N.W.2d 606 (1951)]; 32A C.J.S. Evidence § 851.
>
> We have approved and applied this rule in the interpretation of § 9-06-07, N.D.C.C., and have held:
>
> > "Where a written contract is complete in itself, is clear and unambiguous in its language and contains mutual contractual covenants agreed upon, such parts cannot be changed by parol testimony, nor new terms added thereto, in the absence of a clear showing of fraud, mistake or accident." *Larson v. Wood*,

75 N.D. 9, 25 N.W.2d 100 (1946).

Gajewski, 221 N.W.2d at 626 (emphasis in original).

Any attempt by CATTLE RENTER/BAILEE/GULLESON to suggest other terms, to include the argument that his written acknowledged receipt of 130 BRASH cows in 2000 was something different – merely a "cap" or a "target", and that less than 130 BRASH cows were delivered or existed – must fail as a matter of law.

Simply put, CATTLE RENTER/BAILEE/GULLESON has no legal right to assert less than 130 BRASH cows existed on GULLESON'S farm at the inception of the written contract ["Owner will furnish. One Hundred Thirty (130) cows which are presently situated on renter's farm in Sargent County, North Dakota .." App., p. 11]. The number of cattle in the GULLESON account was fixed at 130 BRASH cows.

For the first time, GULLESON'S Trial Memorandum [Docket Entry # 15, at pages 5-6], suggests a "doctrine of alteration" as cited in Biteler's Tower Service, Inc. v. Guderian, 466 N.W.2d 141, 143 (N.D. 1991). The District Court's "Conclusions of Law" [App., ps. 165-166], as well as his verbal comments [Tr., ps. 472-479], fail to identify a single statute, or even a single judicial decision to support its determination, so it cannot be said that the District Court relied upon the Biteler decision to suggest a different "executed oral agreement." To the extent there can be an alteration of a existing written contract, GULLESON [and the trial court] failed to identify a necessary ingredient to use the concept advanced too late, if factually possible – incurring "detriment which (BRASH, the party performing) was not obligated by the original contract to incur" so that it could be argued that there existed an "executed oral agreement". If Biteler was relied upon by the trial court,

both the trial court and GULLESON overlook the conclusion reached by the Supreme Court in Biteler, at page 144, "(f)urther, as a general rule, a court cannot alter the provisions of an existing contract, but can only interpret a contract created by the parties. 17A C.J.S. *Contracts* § 296(3) (1963)." Neither GULLESON, nor the trial court, had the right to "alter the provisions of an existing contract", and there was nothing ambiguous about the number of BRASH cows or their location on GULLESON land.

GULLESON claims that "(a)fter the contract was signed by the parties, in this case, Dr. Brash never delivered 130 cattle." Docket Entry #15. Unfortunate for GULLESON, the Cow/Calf Production Lease Agreement never provided for *later delivery* of 130 cattle – it recognized, at ¶ A, that "One Hundred Thirty (130) cows (were) presently situated on renter's farm in Sargent County, North Dakota". App., p. 11.

GULLESON acknowledged his prior receipt of 130 BRASH cows, which he had to care for, and return, when he affixed his signature to a binding written contract.

There cannot be a subsequent executed oral agreement as a matter of law – it violates the parol evidence rule. Nor can there be a claimed "scrivener's error, or mistaken recitation of fact" without any pleading, evidence, and statutory basis for so determining. Never once, did GULLESON plead, nor impliedly plead, the existence of "fraud or mistake", nor did GULLESON "state with particularity the circumstances constituting fraud or mistake" as mandated by North Dakota law. N.D.R.Civ.P. 9(b) [nor were there general allegations with respect to "fraud or mistake" under the rule].

The inviolate nature of the "130 cows" is also established by recognition of long-standing case law in North Dakota. In Foster v. Dwire, 199 N.W. 1017, 1020 (N.D. 1924),

a well settled legal concept was recognized:

> The rule seems to be well settled that an account stated, or a settled account, can be impeached or set aside only on the ground of mistake or fraud. (cases cited).

Without any allegation of "fraud or mistake" [which must be plead as a special matter pursuant to N.D.R.Civ.P. 9], it is settled that 130 BRASH cows were in the possession of CATTLE RENTER/BAILEE/GULLESON at the inception of the written contract.

It gets better! In Great Plains Supply Co. v. Mobil Oil Company, 172 N.W.2d 241, 247 (N.D. 1969):

> The intention of the parties to a written bailment must be determined not from what the parties thought, but from the language of the contract itself. 8 Am.Jur.2d, Bailments § 127, p. 1022.

According to law, neither GULLESON, nor the trial court, can repudiate the clear and unambiguous contractual term based upon GULLESON'S thoughts – no matter what GULLESON now thinks, there were 130 BRASH cows at the inception of the written contract admittedly providing for a bailment of 130 live animals owned by BRASH. Never did GULLESON, or his legal counsel, seek to amend his Answer. GULLESON, and the trial court, failed to honor N.D.R.Civ.P. 15(a)(2) which requires BRASH consent or the "court's leave" for amendment of pleadings – no motion was made, no consent was given, nor was any leave granted for an amended answer attacking a binding, written contract involving 130 BRASH cows.

Any accounting starting from a number of cows less than 130, and maintained by GULLESON at 130 cows, is legally and factually erroneous.

Under the guise of it being a different concept, GULLESON also attempted to thrust

forward an erroneous argument that "extrinsic evidence" is admissible. Docket Entry #15. GULLESON sought to confuse different evidence issues. In the paraphrased words of the North Dakota Supreme Court to explain the difference, BRASH uses language of Gawryluk v. Poynter, 2002 ND 205, ¶ 9, 654 N.W.2d 400:

> [¶ 9] When the language of a [Cow/Calf Production Lease Agreement] is plain and unambiguous and the parties' intentions can be ascertained from the writing alone, extrinsic evidence is inadmissible to alter, vary, explain, or change the deed. *See Minex*, 467 N.W.2d at 696. If a contract is ambiguous, extrinsic evidence may be considered to clarify the parties' intentions. *Minex*, at 696. A contract is ambiguous when rational arguments can be made for different interpretations. *Minex*, at 696; *Mueller*, at 453. [citing Muller v. Stangeland, 340 N.W.2d 450 (N.D. 1983) and Minex Resources, Inc. V. Morland, 467 N.W.2d 691 (N.D. 1991).

There was no ambiguity, and no "extrinsic evidence" was admissible to alter the terms of the valid written bailment contract.

POINT 2. THE COW/CALF PRODUCTION LEASE AGREEMENT IS A VALID CONTRACT IN WRITING THAT CANNOT BE "REFORMED".

At the onset of the case, BRASH objected to a late attempt to reform a valid written contract. Tr., ps. 8-18. For the first time known to the undersigned, GULLESON'S "Trial Memorandum" dated April 5, 2012 [Docket Entry #15, ¶ 4], suggests that "(t)his Court should use the equitable remedy of reformation to change the contract so that it reflects the true agreement that the parties operated under for four years."

GULLESON never initiated an action for the reformation of the Cow/Calf Production Lease Agreement – that option is not within the jurisdiction of the court to grant. GULLESON never invoked the "specific relief" found in N.D.C.C. Chap. 32-04.

In Heart River Partners v. Goetzfried, 2005 ND 149, ¶ 12, 703 N.W.2d 330, the

Supreme Court said,

> "Reformation is an '[e]quitable remedy used to reframe written contracts to reflect accurately [the] real agreement between contracting parties.' " *Biteler's Tower Serv., Inc. v. Guderian,* 466 N.W.2d 141, 143 (N.D.1991) (quoting *Black's Law Dictionary* 1152 (5th ed.1979)). Section 32-04-17, N.D.C.C., provides for the equitable remedy of reformation of a written contract:
>
> > When, through fraud or mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved so as to express that intention so far as it can be done without prejudice to rights acquired by third persons in good faith and for value.

GULLESON brought no action, nor counterclaim,[9] for reformation, nor has he honored N.D.R.Civ.P. 9(b): "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

The trial court had no equitable power to reform the written contract admitted by GULLESON to exist.

POINT 3. BAILMENT IMPOSES SUBSTANTIAL BURDENS UPON THE BAILEE.

BRASH cannot conceive of any legal right for the trial court to repudiate a written contract admitted by GULLESON to exist [and without any claim of ambiguity of its terms].

The State of North Dakota was originally settled by thousands of people intent upon developing the land through farming and ranching activities. In the course of commerce, cattle owners entrusted their animals to others with the expectation that the best practices of

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[9] N.D.R.Civ.P. 13(a) provides for compulsory counterclaims; failure to make a compulsory counterclaim bars any possible later action.

animal husbandry would take place. Most times it did, but sometimes it did not; litigation ensued. The State of North Dakota stepped into the void, enacting laws especially applicable to the unique challenge presented in bailment circumstances.

N.D.C.C. Chap. 47-15, entitled "Hiring of Personal Property", and N.D.C.C. Chap. 60-01, entitled "Deposits – General Provisions", provide much of the legal basis for the Cow/Calf Production Lease Agreement. Other North Dakota statutes are also pertinent, to include N.D.C.C. Chap. 47-12 ["Loans of Personal Property for Use"] and N.D.C.C. Chap. 47-13 ["Hiring of Personal Property"].

For the Court's ease, photocopies of these four (4) code chapters are set forth in the Addendum.

Under N.D.C.C. § 47-15-01, CATTLE OWNERS/BAILORS/BRASH gave CATTLE RENTER/BAILEE/GULLESON the temporary possession and use of their personal property – 130 cows – which were to be returned at a future time. GULLESON was responsible for preserving the 130 cows, and the offspring, in safety, and in good condition. Under N.D.C.C. § 47-12-04, GULLESON had an obligation to treat BRASH animals "with great kindness and provide everything necessary and suitable for its general well-being." Under the circumstances presented, GULLESON would be considered a "depositary for hire" required to take care of the animals by both statute, and the written terms of the Cow/Calf Production Lease Agreement. App., p. 11.

Unless the BRASH cattle were sold [with proceeds properly paid to BRASH] or dead [because no notice(s) of death were given; and BRASH were made aware of only 3 dead cows – which were to be replaced by BRASH heifer(s) under the terms of the written

contract], then CATTLE OWNERS/BAILORS/BRASH were entitled to the immediate delivery of the 272 animals that should have existed at the end of the Agreement in 2004.

BRASH are also entitled to a statutory presumption which substitutes for evidence of the existence of the fact presumed until the trial of fact finds from credible evidence that the fact presumed does not exist. N.D.R.Ev. 301(a). Under the terms of N.D.C.C. § 60-01-24, BRASH can say the animals were lost by the *wilful* or *grossly negligent* acts of GULLESON:

> **60-01-24. Presumption of willfulness or gross negligence.** If a thing is lost or injured during its deposit and the depositary refuses to inform the depositor of the circumstances under which the loss or injury occurred so far as the depositary has information concerning them, or if the depositary willfully misrepresents the circumstances to the depositor, the depositary is presumed to have permitted the loss or injury to occur willfully or by gross negligence.

GULLESON admits that he never gave the annual accounting for the BRASH animals, and he admits that he did not return the 272 missing animals determined by BRASH.

In the same manner, "(a) borrower for use must repair all deteriorations or injuries to the personal property borrowed which are occasioned by the borrower's negligence, however slight." N.D.C.C. § 47-12-10. GULLESON failed in his responsibilities to BRASH, which was not discovered until 2004 – 272 missing animals, for which GULLESON is liable.

Despite the BRASH demands, GULLESON has failed to account for the animals, nor has he returned the animals that should have existed which causes the statutory presumption set forth in N.D.C.C. § 60-01-24 to be implemented. GULLESON is responsible for the

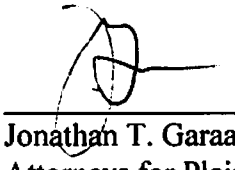
return of personal property belonging to BRASH, but he has failed to deliver the animals or make payment for the reasonable value of the animals that were not returned as required by contract, and the laws of the State of North Dakota.

CONCLUSION

BRASH has 130 cows which were entrusted to GULLESON'S care – the written contract provided assurance that at least 130 cows would exist at the end of any year. GULLESON did not come close to providing the number of animals that had to exist if he honored North Dakota statutes and his written contract. BRASH are entitled to judgment as a matter of law for the missing animals.

Respectfully submitted this 25th day of October, 2012.

Garaas Law Firm



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ADDENDUM

CHAPTER 47-12
LOANS OF PERSONAL PROPERTY FOR USE

47-12-01. Loan for use defined.

A loan for use is a contract by which a lender gives to a borrower the temporary possession and use of personal property and the borrower agrees to return the identical personal property to the lender at a future time without reward for its use.

47-12-02. Degree of care to be exercised by borrower.

A borrower for use shall exercise great care for the preservation in safety and in good condition of the personal property borrowed.

47-12-03. Degree of skill to be exercised by borrower.

A borrower for use is bound to have and exercise such degree of skill in the care of the personal property borrowed as the borrower causes the lender to believe the borrower to possess.

47-12-04. Humane treatment of animals.

One who borrows a living animal for use shall treat it with great kindness and provide everything necessary and suitable for its general well-being.

47-12-05. Retention of title and increase by lender.

A loan for use does not transfer the title to the personal property. Its total increase during the period of the loan belongs to the lender.

47-12-06. Use by borrower limited to anticipated purposes.

The borrower of personal property for use may use it for such purposes only as the lender might reasonably anticipate at the time of lending.

47-12-07. Lender's consent necessary in a third-party transaction.

The borrower of personal property for use shall not part with it to a third person without the consent of the lender.

47-12-08. Expenses in connection with borrowed personal property to be borne by borrower - Exception.

The borrower of personal property for use must bear all expenses in connection therewith during the time the same is held under the loan, except such expenses as are necessary to preserve the property from unexpected and unusual injury. For such expense, the borrower is entitled to compensation from the lender who, however, may exonerate the lender by surrendering the property to the borrower.

47-12-09. Lender to indemnify borrower for damages caused by concealed defects.

The lender of personal property for use shall indemnify the borrower for damages caused by defects or vices in it about which the lender knew at the time of lending and concealed from the borrower.

47-12-10. Reparation of personal property by borrower.

A borrower for use must repair all deteriorations or injuries to the personal property borrowed which are occasioned by the borrower's negligence, however slight.

47-12-11. Return of property on demand of lender.

The lender of personal property for use may require its return at any time even though the lender lent it for a specified time or purpose. If, on the faith of such an agreement, the borrower has made such arrangements that a return of the property before the time agreed upon would

cause the borrower loss exceeding the benefit derived by the borrower from the loan, the lender shall indemnify the borrower for such loss if the lender compels such return and the borrower has not violated the borrower's duty in any manner.

47-12-12. Time for return of personal property to lender.

If personal property is lent for use for a specified time or purpose, it must be returned to the len er without demand as soon as the time has expired or the purpose has been accomplished. In any other case, it need not be returned until demanded. The borrower of personal property for use shall return it to the lender at the place contemplated by the parties at the time of the lending, or if no particular place was contemplated by them, at the place where it was at the time of the lending.

CHAPTER 47-13
LOANS OF PERSONAL PROPERTY FOR EXCHANGE

47-13-01. Loan for exchange defined.

A loan for exchange is a contract by which one delivers personal property to another and the latter agrees to return to the lender a similar thing at a future time without reward for its use.

47-13-02. Loan for use or for exchange subject to provisions of chapter.

A loan which the borrower is allowed by the lender to treat as a loan for use or for exchange at the borrower's option is subject to all the provisions of this chapter.

47-13-03. Title transferred to borrower.

By a loan for exchange, the title to the thing lent is transferred to the borrower, and the borrower must bear all the expenses in connection therewith and is entitled to all the increase thereof.

47-13-04. Lender may not require change in obligations.

A lender for exchange may not require the borrower to fulfill the borrower's obligations at a time or in a manner different from that which originally was agreed upon.

47-13-05. Indemnity to borrower for concealed defects.

The lender of personal property for exchange shall indemnify the borrower for damages caused by defects or vices in it of which the lender knew at the time of the exchange and concealed from the borrower.

47-13-06. Time and place for return of personal property to lender.

If personal property is exchanged for a specific time or purpose, a similar article shall be returned to the lender without demand as soon as the time has expired or the purpose has been accomplished. In any other case, it need not be returned until demanded. The borrower of personal property for exchange shall return a similar article to the lender at the place contemplated by the parties at the time of the exchange, or if no particular place was contemplated by them, at the place where it was at the time of the exchange.

CHAPTER 47-15
HIRING OF PERSONAL PROPERTY

47-15-01. Hiring defined.

Hiring is a contract by which one gives to another the temporary possession and use of personal property, other than goods subject to chapter 41-02.1 or money, for reward, and the latter agrees to return the same to the former at a future time.

47-15-02. Obligations of letter.

One who lets personal property must:

1. Deliver it to the hirer;
2. Secure the hirer's quiet enjoyment thereof against all lawful claimants;
3. Put it into a condition fit for the purpose for which the letter lets it; and
4. Repair all deteriorations thereof not occasioned by the fault of the hirer and not the natural result of its use.

47-15-03. Remedy against letter.

If a letter fails to fulfill the letter's obligations as prescribed by section 47-15-02, the hirer, after giving the letter notice to do so, if such notice may be given conveniently, may expend any reasonable amount necessary to make good the letter's default and may recover such amount from the letter.

47-15-04. Ordinary care.

The hirer of personal property must use ordinary care for its preservation in safety and in good condition.

47-15-05. Limitation of use to purpose for which let.

When personal property is let for a particular purpose, the hirer must not use it for any other purpose. If the hirer uses it for a purpose other than that for which it was let, the letter may hold the hirer responsible for its safety during such use in all events, or may treat the contract as thereby rescinded.

47-15-06. Title to products.

The products of personal property hired, during the hiring, belong to the hirer.

47-15-07. Injuries - Reparation by hirer.

The hirer of personal property must repair all deteriorations or injuries thereto occasioned by the hirer's ordinary or gross negligence.

47-15-08. Expenses borne by hirer.

A hirer of personal property must bear all such expenses concerning it as naturally might be foreseen to attend it during its use by the hirer. All other expenses must be borne by the letter.

47-15-09. Termination of hiring in general.

The hiring of personal property terminates:

1. At the end of the term agreed upon;
2. By the mutual consent of the parties;
3. By the hirer's acquiring a title to the property hired superior to that of the letter;
4. By the destruction of the property hired; or
5. If the hiring is terminable at the pleasure of one of the parties thereto, by notice to the other of the party's death or incapacity to contract, but in no other case is it terminable thereby.

47-15-10. Termination before end of term by letter.

The letter of personal property may terminate the hiring and reclaim the property before the end of the term agreed upon when the:

1. Hirer uses or permits a use of the property hired in a manner contrary to the agreement of the parties; or
2. Hirer does not make, within a reasonable time after request, such repairs as the hirer is bound to make.

47-15-11. Termination before end of term by hirer.

The hirer of personal property may terminate the hiring before the end of the term agreed upon:

1. When the letter, within a reasonable time after request, does not fulfill the letter's obligations, if any, as to placing and securing the hirer in the quiet possession of the thing hired, or putting it into a good condition, or repairing it; or
2. When the greater part of the property hired, or that part thereof which was, and which the letter at the time of the hiring had reason to believe was, the material inducement to the hirer to enter into the contract, perishes from any cause other than the ordinary or gross negligence of the hirer.

47-15-12. Payment of proportionate hire.

When the hiring of personal property is terminated before the time originally agreed upon, the hirer must pay the due proportion of the hire for such use as the hirer actually has made of the property unless such use is merely nominal and of no benefit to the hirer.

47-15-13. Return of property by hirer.

At the expiration of the term for which personal property is hired, the hirer must return it to the letter at the place contemplated by the parties at the time of hiring, or if no particular place was contemplated by them, at the place at which it was at the time of hiring.

TITLE 60
WAREHOUSING AND DEPOSITS

CHAPTER 60-01
DEPOSITS - GENERAL PROVISIONS

60-01-01. Deposit - Classification.
A deposit may be voluntary or involuntary and may be made for safekeeping or for exchange.

60-01-02. Voluntary deposit - Depositor - Depositary - Definitions.
A voluntary deposit is one which is made by one person giving to another with that person's consent the possession of personal property to keep for the benefit of the former or of a third person. The person giving is called the depositor and the person receiving the depositary.

60-01-03. Involuntary deposits - Definition - Obligation of depositary.
An involuntary deposit is made:
1. By the accidental leaving or placing of personal property in the possession of any person without negligence on the part of its owner; or
2. In cases of fire, shipwreck, inundation, insurrection, riot, or like extraordinary emergencies, by the owner of personal property committing it out of necessity to the care of any person.

The person with whom a thing is so deposited is bound to take charge of it if able to do so.

60-01-04. Deposit for safekeeping - Definition.
A deposit for safekeeping is one in which the depositary is bound to return the identical thing deposited.

60-01-05. Deposit for exchange - Definition.
A deposit for exchange is one in which the depositary is bound only to return a thing corresponding in kind to that which is deposited.

60-01-06. Gratuitous deposit - Definition.
A gratuitous deposit is a deposit for which the depositary receives no consideration beyond the mere possession of the thing deposited.

60-01-07. Involuntary deposit - Gratuitous.
An involuntary deposit is gratuitous, the depositary being entitled to no reward.

60-01-08. Care required by gratuitous depositary.
A gratuitous depositary must use at least slight care for the preservation of the thing deposited.

60-01-09. Duties of gratuitous depositary - Termination of duties.
The duties of a gratuitous depositary cease:
1. Upon the depositary restoring the thing deposited to its owner; or
2. Upon the depositary giving reasonable notice to the owner to remove it and the owner failing to do so within a reasonable time. An involuntary depositary under subsection 2 of section 60-01-03 cannot give such notice until the emergency that gave rise to the deposit has passed.

60-01-10. Storage - Definition - Depositary for hire - Definition.
Storage shall mean a deposit which is not gratuitous. The depositary in such case shall be called a depositary for hire.

60-01-11. Depositary for hire must use ordinary care.

A depositary for hire must use at least ordinary care for the preservation of the thing deposited.

60-01-12. Depositary for hire - Right to compensation.

In the absence of a different agreement or usage, a depositary for hire is entitled to one week's hire for the sustenance and shelter of living animals during any fraction of a week and to half a month's hire for the storage of any other property during any fraction of a half month.

60-01-13. Delivery on demand - Exceptions.

A depositary, on demand, must deliver the thing to the person for whose benefit it was deposited, whether the deposit was made for a specified time or not, unless the depositary has a lien upon the thing deposited or has been forbidden or prevented from doing so by the real owner thereof or by an act of the law, and has given notice as required by section 60-01-16.

60-01-14. Demand - Prerequisite to delivery.

A depositary is not bound to deliver a thing deposited without demand even when the deposit is made for a specified time.

60-01-15. Place of delivery.

A depositary must deliver the thing deposited at the depositary's residence or place of business as may be most convenient for the depositary.

60-01-16. Prompt notice of adverse claims - Given by depositary.

A depositary must give prompt notice, to the person for whose benefit the deposit was made, of any proceedings taken adversely to the person's interest in the thing deposited which may tend to excuse the depositary from delivering the same to the person.

60-01-17. Notice of wrongful detention.

A depositary who believes that a thing deposited with the depositary is detained wrongfully from its true owner may give the true owner notice of the deposit. If within a reasonable time afterward the true owner does not claim it and sufficiently establish the true owner's right thereto and indemnify the depositary against the claim of the depositor, the depositary is exonerated from liability to the person to whom the depositary gave the notice, upon returning the thing to the depositor, or assuming in good faith a new obligation changing the depositary's position in respect to the thing to the depositary's prejudice.

60-01-18. Delivery to disagreeing owners by depositary.

If a thing deposited is owned jointly or in common by persons who cannot agree upon the manner of its delivery, the depositary may deliver to each the person's proper share thereof, if it can be done without injury to the thing.

60-01-19. Indemnity to depositary for damages.

A depositor must indemnify the depositary:

1. For all damage caused to the depositary by the defects or vices of the thing deposited.
2. For all expenses necessarily incurred by the depositary about the thing other than such as are involved in the nature of the undertaking.

60-01-20. Care of animals by depositary.

A depositary of living animals must provide them with suitable food and shelter and must treat them kindly.

60-01-21. Deposit - Permission to use.

A depositary may not use the thing deposited nor permit it to be used for any purpose without the consent of the depositor. The depositary may not open it, if it purposely is fastened by the depositor, without the consent of the latter except in case of necessity.

60-01-22. Damages for wrongful use of deposit.

If a thing deposited with a depositary is damaged by the wrongful use thereof by the depositary, the depositary is liable for such damage unless such damage inevitably must have happened though the property had not been used in that manner.

60-01-23. Sale of deposit by depositary - When permissible.

If a thing deposited is in actual danger of perishing before instructions can be obtained from the depositor, the depositary may sell it for the best price obtainable and retain the proceeds as a deposit, giving immediate notice of these proceedings to the depositor.

60-01-24. Presumption of willfulness or gross negligence.

If a thing is lost or injured during its deposit and the depositary refuses to inform the depositor of the circumstances under which the loss or injury occurred so far as the depositary has information concerning them, or if the depositary willfully misrepresents the circumstances to the depositor, the depositary is presumed to have permitted the loss or injury to occur willfully or by gross negligence.

60-01-25. Measure of liability of depositary for negligence.

The liability of a depositary for negligence cannot exceed the amount which the depositor informs the depositary, or which the depositary has reason to suppose, the thing deposited is worth.

60-01-26. When deposit may be terminated.

In the absence of an agreement as to the length of time during which a deposit is to continue, it may be terminated by the depositor at any time and by the depositary upon reasonable notice.

60-01-27. Termination of deposit by payment for full time.

Notwithstanding an agreement respecting the length of time during which a deposit is to continue, it may be terminated by the depositor on paying all that would become due to the depositary in case the deposit continued for such length of time.

60-01-28. Sale of unclaimed and perishable property.

The provisions of sections 8-03-09 and 8-03-10 relating to the sale of unclaimed and perishable property shall apply to hotelkeepers and warehousemen.

60-01-29. Hotelkeeper's liability for loss or injury to guest's property.

No hotelkeeper who constantly has in the hotelkeeper's inn or hotel a metal safe or suitable vault in good order and fit for the custody of money, bank notes, jewelry, articles of gold and silver manufacture, precious stones, personal ornaments, railroad mileage books or tickets, negotiable or valuable papers and bullion, and who keeps on the doors of the sleeping rooms used by guests suitable locks or bolts, and on the transoms and windows of said rooms suitable fastenings, and who keeps a copy of this section printed in distinct type constantly posted in not less than ten conspicuous places in said hotel or inn, shall be liable for loss or injury suffered by any guest, unless such guest has offered to deliver the same to such innkeeper or hotelkeeper for custody in such metal safe or vault, and such innkeeper or hotelkeeper has omitted or refused to take it and deposit it in such safe or vault for custody and to give such guest a receipt therefor. The keeper of any inn or hotel shall not be obliged to receive from any one guest for deposit in such safe or vault any property hereinbefore described exceeding the total value of

three hundred dollars and shall not be liable for any excess for such property, whether received or not.

60-01-30. Special arrangement between hotelkeeper and guest.

A hotelkeeper by a special arrangement with a guest may receive for deposit in a safe or vault of the character mentioned in section 60-01-29 any property upon such terms as such keeper and guest may agree to in writing, but every hotelkeeper shall be liable for any loss of the articles enumerated in section 60-01-29 of a guest in the hotel after said articles have been accepted for deposit, if such loss is caused by theft or negligence of the hotelkeeper or any of the hotelkeeper's servants.

60-01-31. Duties of guest and hotelkeeper.

Every guest, and everyone intending to be a guest, of any hotel, upon delivering any of the person's baggage or other article of property to the proprietor of the hotel, or to the proprietor's servants, for safekeeping elsewhere than in the room assigned to the guest, shall demand a check or receipt for such property to evidence the fact of such delivery, and the proprietor shall give such check or receipt. A hotel proprietor shall not be liable for the loss or injury to such baggage or other article of property of the hotel guest unless the same actually has been delivered by such guest to the hotel proprietor or to the proprietor's servants for safekeeping, or unless the loss or injury occurred through the negligence of the hotel proprietor or of the proprietor's servants or employees.

60-01-32. Character of liability - Limitations.

The liability of the keeper of a hotel for the loss of or injury to personal property placed by hotel guests under the keeper's care, other than that described in sections 60-01-29 through 60-01-31, shall be that of a depositary for hire. Such liability, in no case, shall exceed the sum of one hundred fifty dollars for each trunk and its contents, ten dollars for each box, bundle, or package and its contents, and fifty dollars for all other miscellaneous effects, including wearing apparel and personal belongings, unless the hotelkeeper has consented in writing with such guest to assume a greater liability. If the loss or injury is caused by a fire not intentionally produced by the hotelkeeper or the hotelkeeper's servants, the hotelkeeper is not liable.

60-01-33. Baggage left at hotel or forwarded to hotel - Liability of hotelkeeper.

Whenever a person allows the person's baggage or property to remain in a hotel after leaving the hotel as a guest, and after the relation of hotelkeeper and guest has ceased, or whenever a person forwards the person's baggage to a hotel before becoming a guest thereof, and the same is received in such hotel, the hotelkeeper may hold such baggage or property at the risk of the owner.

60-01-34. Finder - Depositary for hire - Assumption of ownership by finder.

One who finds a thing lost is not bound to take charge of it but, if the person does so, the person is thenceforward a depositary for the owner with the rights and obligations of a depositary for hire. Notwithstanding chapters 36-22 and 47-30.1 or any other provision of law, an individual who finds lost personal property or money and places the property or money in the custody of a law enforcement agency is entitled to assume ownership of the property or money if the property or money is not claimed by its owner within two years after the property or money was placed in the custody of the law enforcement agency.

60-01-35. Finder must notify owner.

If the finder of a thing knows or suspects who is the owner, the finder must give such owner notice of the finding with reasonable diligence. If the finder fails to do so, the finder is liable in damages to the owner and has no claim to any reward offered by the owner for the recovery of the thing nor to any compensation for the finder's trouble or expenses.

60-01-36. Finder may require proof of ownership.

The finder of a thing, before giving it up, may require in good faith, reasonable proof of ownership from any person claiming it.

60-01-37. Compensation and reward to finder.

The finder of a thing is entitled to compensation for all expenses necessarily incurred by the finder in its preservation and for any other services necessarily performed by the finder about it and to a reasonable reward for keeping it.

60-01-38. Storing releases finder from liability.

The finder of a thing may exonerate the finder from liability at any time by placing it on storage with any responsible person of good character at a reasonable expense.

60-01-39. When finder may sell.

The finder of a thing may sell it, if it is a thing which is commonly the subject of sale, when the owner, with reasonable diligence, cannot be found, or, being found, refuses upon demand to pay the lawful charges of the finder in the following cases:

1. When the thing is in danger of perishing or of losing the greater part of its value; or
2. When the lawful charges of the finder amount to two-thirds of its value.

60-01-40. Manner of sale.

A sale under the provisions of section 60-01-39 must be made as the sale of a thing pledged is made.

60-01-41. Claim against owner exonerated by surrender to finder.

The owner of a thing found may exonerate the owner from the claims of the finder by surrendering it to the finder in satisfaction thereof.

60-01-42. Things abandoned by owner.

The provisions of this chapter have no application to things which intentionally have been abandoned by their owner.

60-01-43. Deposit for exchange - Transfer of title.

A deposit for exchange transfers to the depositary the title to the thing deposited and merely creates between the depositary and the depositor the relation of debtor and creditor.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Janet L. Brash, individually and as Personal Representative of the Estate of Larry R. Brash, Deceased,

Plaintiff-Appellant,

vs.

William M. Gulleson, a/k/a Wm. M. Gulleson,

Defendant-Appellee.

Case No. 20120313

Civil No. 41-2011-CV-00072

AFFIDAVIT OF MAILING

State of North Dakota
County of Cass

Pat Doty, being first duly sworn on oath, deposes and says: Affiant is a resident of the City of Fargo, North Dakota, and over the age of eighteen years, and not a party to the above entitled matter.

On the day of 25th day of October, 2012, Affiant deposited in the United States Post Office at Fargo, North Dakota, a true and correct copy of the following documents in the above entitled action: BRIEF OF PLAINTIFF-APPELLANT and APPENDIX TO BRIEF OF PLAINTIFF-APPELLANT.

The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:

John Bullis
Lies & Bullis
P.O. Box 275
Wahpeton, ND 58074-0275

To the best of Affiant's knowledge, the address above given was the actual post office address of the party intended to be so served. The above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Pat Doty

Pat Doty

Subscribed and sworn to before me this 25th day of October, 2012.

JONATHAN T. GARAAS
Notary Public
State of North Dakota
My Commission Expires Dec. 28, 2015

Notary Public

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