20180345
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
DECEMBER 14, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Willis G. Swenson and Dayna L. Johnson, Plaintiffs, Appellants and Cross-Appellees -vs- Kyle Mahlum, Defendant, Third-Party Plaintiff, Appellee and Cross-Appellant, -vs- Carol Hodgerson, Gerard Swenson, Lee Alan Swenson, and Mary Ann Vig, in their individual capacities and as heirs to the Estate of Junietta Swenson, Third-Party Defendants and Appellees.	**Supreme Court No. 20180345** **Burke Co. No. 2017-CV-00003**

APPEAL FROM THE DISTRICT COURT OF BURKE COUNTY
ORDER AND JUDGMENT DATED THE 11TH DAY OF JULY, 2017
NORTH CENTRAL JUDICIAL DISTRICT
DISTRICT COURT NO. 07-2017-CV-00003
THE HONORABLE GARY LEE

THIRD-PARTY APPELLEES' BRIEF

Elizabeth L. Pendlay (ID# 06372)
Attorney for Third-Party Defendants and Appellees
115 N. Main Street, P.O. Box 289
Crosby, North Dakota 58730
Tel. (701) 965-6036
liz@crosbylaw.net

TABLE OF CONTENTS

Page/Paragraph Nos.

TABLE OF AUTHORITIES

Cases **Paragraph Nos.**

N.D. Constitution

Statutes

Rules

ISSUES PRESENTED

[1] Are the district court's Order and Judgment, both dated July 11, 2018, appealable, in whole or in part, in light of the fact that the third-party claims as against Third-Party Defendants, Carol Hodgerson, Gerard Swenson, Lee Alan Swenson, and Mary Ann Vig, were dismissed without prejudice and the Judgment was not certified under Rule 54(b), N.D.R.Civ.P.?

[2] Did Plaintiffs-Appellants Willis G. Swenson and Dayna L. Johnson fail to preserve the arguments they now offer on appeal for "bad faith" on the part of Kyle Mahlum in connection with the January 24, 2013 lease between Kyle Mahlum and the Conservator of Junietta Swenson for the 2013 farm lease payments and further fail to preserve and/or waive the damages they presently claim on appeal?

[3] Were the district court's findings of fact in support of its decision to dismiss, with prejudice, the claims filed by Plaintiffs Willis G. Swenson as against Defendant Kyle Mahlum clearly erroneous?

STATEMENT OF THE CASE

[4] Plaintiffs-Appellants Willis G. Swenson ("Willis") and Dayna L. Swenson ("Dayna") commenced this action with the filing of a Summons a Complaint alleging they "operated a farming business" in Burke County, North Dakota, with regard to the following described real-property:

> In Burke County, North Dakota-
> Township 163 North, Range 89 West
> Section 28: NW¼
>
> Township 163 North, Range 88 West
> Section 19: NE¼
> Section 29: NE¼
> Section 31: E½NE¼
> Section 32: SE¼

Appellant's Appx. at 1. The Complaint named only Kyle Mahlum ("Kyle") as a defendant for the Plaintiffs' action; the action alleged Kyle had failed to pay certain lease payments alleged to be due and owing to Willis and Dayna from Kyle for the years "2013, 2014, 2015, and 2016" pursuant to an alleged December 2009 farm lease, for which annual

payments were stated as $31,022.50 per year, thus giving rise to a breach of contract or breach of lease action against Kyle. Id. at 1. Willis and Dayna alleged, therefore, that Kyle owed to them a total sum of "$124,090.00 as damages", together with accrued interest thereon for the years set forth in the Complaint. Id. at 2.

[5] In response to the Complaint, Kyle timely filed an Answer and Third-Party Complaint, answering the Plaintiffs' claims, denying the relief sought, asserting various affirmative defenses, and further asserting a third-party action as against Carol Hodgerson ("Carol"), Gerard Swenson ("Gerard"), Lee Alan Swenson ("Lee Alan"), and Mary Ann Vig ("Mary Ann"), in their individual capacities and as heirs of the Estate of Junietta Swenson (collectively referred to as the "Swenson Children"). Essentially, Kyle alleged conditional or vicarious liability in that he claimed that if it were "found that Mahlum owe[d] any amounts claimed by Willis Swenson in the instant suit . . . [the Swenson Children] ha[d] been unjustly enriched." Kyle's equitable third-party claim arose out the fact that Kyle continued to pay for use of the farmland under a subsequent farm lease entered into between Kyle and the guardian and conservator of the then-living life tenant of the premises, Junietta Swenson ("June") for the 2013 year, under which Kyle paid the 2013 lease payment to the guardian and conservator of June. Kyle further alleged that after June's death in November of 2013, and the related extinguishment of her life tenancy, he maintained and paid for a lease of the lands with the former remaindermen, who became undivided interest holder's after June's death, in equal and proportionate shares for their said interests. Appellant's Appx. at 6-7. Willis, however, never cashed the checks tendered by Kyle for payment.

[6] The Swenson Children each timely answered the Third-Party Complaint filed by Kyle, asserting various affirmative defenses as to the third-party claims and requesting that both the claims of Willis (indirectly) and those of Kyle (directly) be dismissed with prejudice. Appellant's Appx. at 8-20.

[7] Thereafter, all of the parties submitted for the district court's consideration, motions and cross-motions for summary judgment, together with supportive filings and briefing for the same. See Third-Party Appellees' Appx. at 10-107. After submission of the summary judgment filings and prior to trial, the district court determined that while there were several undisputed facts, there remained both factual disputes and legal issues that were not susceptible to summary disposition, which caused the district court to deny the summary judgment requests from each of the parties. Third-Party Appellees' Appx. at 108-112.

[8] All of the parties and their respective counsel proceeded to a bench trial on the merits of the claims and defenses at issue in this matter before the Honorable Judge Lee in Bowbells, Burke County, North Dakota. At the conclusion of the trial, but prior to ultimate ruling in the action, Judge Lee offered the parties an opportunity to submit post trial briefing on the matters before the Court, suggesting to the parties that such briefing focus on several central legal questions that presented in connection with the case. Trial Trans. at pg. 84, lines 19-26, pgs. 85-86, pg. 87, lines 1-20. All of the parties submitted post trial briefing to the district following the conclusion of trial. Third-Party Appellees Appx. at 161-195.

[9] After consideration of the all of the evidence submitted at trial, and consideration of the parties' arguments at trial and in their post-trial briefing, the district court found that

the 2009 farm lease between Willis and June expired at her death in late 2013, due to her status as life tenant in the premises, which caused his action for rental payments for 2014, 2015, and 2016 to fail as a matter of law because the 2009 lease between Willis and June was no longer binding after she passed away, thus disposing of Willis's contractual right to sublease the same in favor of Kyle under the primary lease he held with June prior to her death. The district court further found that Willis had been appropriately compensated by Kyle under quantum meruit theory, though Willis decided of his own volition not to cash Kyle's checks for Willis's one-fifth share of rental payments for the years 2014, 2015 and 2016. Appellant's Appx. at 48. As to the 2013 payment, the district court found that Willis was aware of the prospective diversion of the lease payment in favor of June alone as early as "November 19, 2012" because of the appearance of her guardian and conservator and his notice to Willis indicating the lease payments from Kyle would, under a subsequent farm lease between Kyle and June's conservator, be paid directly to June. Despite that notice, however, Willis completely failed to act or object to the lease payments being tendered to June directly and instead waited until years had passed to bring the instant action. The district court also found Kyle had relied, in good faith, upon the lease with June's conservator in making the 2013 payments to June alone. Appellant's Appx. at 34-49. Finally, as to Plaintiff Dayna Johnson, the district found her to be a "complete stranger" to the action, with no interests in the land or leases and no personal stake in the outcome of the litigation, meaning that she did not have standing in the suit at all. Appellant's Appx. at 38. For these reasons, the district court dismissed with prejudice all of the claims made by Willis and Dayna as against Kyle. Because Kyle's theory of liability against the Swenson Children was contingent in that it rested on the allegation that Kyle had paid them

(and Willis) for the use of the lands and if he were made to pay Willis again the Swenson Children would be unjustly enriched, and because the district court found no liability on the part of Kyle, the district court dismissed without prejudice the third-party claims as well. Appellant's Appx. at 49.

[10] On July 12, 2018, Kyle caused to be served a Notice of Entry of Judgment. Third-Party Appx. at 198.

[11] On August 28, 2018, Willis's timely filed a Notice of Appeal into the district court, which was thereafter filed into the Supreme Court. Appellant's Appx. at 50-51. According to his brief, Plaintiff-Appellant Willis Swenson challenges only the district court's decision with regard to the 2013 lease payment, rather than the totality of the lease payments he alleged due in the original Complaint. See page 9 of Appellant's Brief ("Willis Swenson seeks to recover $31,022.50 from Kyle Mahlum for the 2013 farm lease year . . .").

[12] On September 11, 2018, Kyle filed a Notice of Cross-Appeal, which presented the issue on appeal as being one of a contingent nature as to the Swenson Children in that the preliminary statement of the issue for cross-appeal was whether the district court erred in dismissing the claims against Kyle and, if so, did the court likewise err in dismissing the claims against the Swenson Children. Third-Party Appx. at 199-200. It does not appear, at least from the Notice of Cross-Appeal, that Kyle suggests the Order and Judgment are otherwise challenged on appeal from Kyle's perspective.

[13] The Swenson Children timely submit this Appellee's brief, but note that a reply brief will likely be necessary in light of the fact that Kyle's brief and the Swenson Children's briefs are simultaneously due, which eliminates the possibility that the Swenson Children can specifically respond to the contents of Kyle's briefing at this juncture. The

Swenson Children respectfully argue that the Order and Judgment are not appealable on whole because the judgment is not final under Rule 54(b), N.D.R.Civ.P. and was not certified in connection with that Rule, and further argue that, at a minimum, the third-party claims, as they relate to the Swenson Children, are not appealable because those claims were dismissed without prejudice by the district court. The Swenson Children also argue on appeal that Willis failed to preserve for appeal (or present at trial) the issues of bad faith reliance on the lease agreement for the 2013 farm year between Kyle and June's conservator, which Willis now appears to challenge on appeal. Finally, the Swenson Children argue the district court's findings of fact in support of its ultimate Order and Judgment are not clearly erroneous, and thus the Order and Judgment should be affirmed, should the Court have jurisdiction to consider the same.

STATEMENT OF THE FACTS

[14] On July 16, 2004, Junietta W. Swenson ("June") and Robert W. Swenson ("Robert"), both of whom are now deceased, conveyed to their five children, Willis Swenson ("Willis"), Carol Hodgerson ("Carol"), Gerard Swenson ("Gerard"), Lee Alan Swenson ("Lee Alan") and Mary Ann Vig ("Mary Ann"), all of their interest in the surface of the following described property, subject to a reservation of a joint life estate in favor of June and Robert:

In Burke County, North Dakota-
Township 163 North, Range 89 West
Section 28: NW¼

Township 163 North, Range 88 West
Section 19: NE¼
Section 29: NE¼
Section 31: E½NE¼
Section 32: SE¼

(the "Subject Property"). This conveyance was filed of record with the Burke County recorder's office on the 19th day of July, 2004. Therefore, June and Robert were the life tenants in the Subject Property and their five children, above-named, were remaindermen since July of 2004.

[15] Robert passed away on March 26, 2005, leaving June as the sole life tenant in the Subject Property.

[16] On July 22, 2008, June executed a hand-written "Lease Agreement", a cash rent farm lease, in favor of Willis for the Subject Property. The cash rent lease provided for a term of 15 years, purporting to rent the lands to Willis from 2009 through 2024. The semi-annual rental payments due from Willis in March and October of each year of the lease were $10,008.00, for a total annual payment of $20,016 to be paid to June. At the time this lease was effected, June was merely a life tenant in the Subject Property and none of the other children executed ratifications of the lease as remaindermen interest owners. This lease also did not contain an express provision speaking to subleasing the Subject Property.

[17] On October 9, 2008, Willis and Kyle Mahlum ("Kyle") entered into a crop share farm lease (or a sublease in light of the lease between June and Willis) for the Subject property; this crop share farm lease was to commence on March 1, 2009 and to terminate on November 1, 2014, creating a lease term of five (5) years. This crop share lease was abandoned or superseded by a subsequent "Contract for Land Lease", a cash rent farm lease, dated December 15, 2009, which was entered into by Willis and Kyle. This lease provided for semi-annual cash rent payments, which came due on March 15 and October 15, in the amount of $10,008 each, totaling $20,016 annually. This cash rent lease was to

commence on "March 15, 2010 and continu[e] for the term of ten (10) years, until October 15, 2019".

[18] On December 16, 2009, Willis and apparent interloper to the chain of title, Dayna L. Johnson ("Dayna"), executed a second "Contract for Farmland Lease", which appears to be a cash rent lease given in favor of Kyle. At trial, Willis stated that he included Dayna on the lease in the event that something should happen to him. Dayna did not have any interest in the Subject Property that would have created an ability for her to represent or possess the authority to sublease the Subject Property in favor of Kyle. This lease purported to create a term of 9 years, commencing March 2010 and ending October 2019. The lease, prior to the death of June, called for annual payments to Willis in the amount of $31,022.50 each year of the lease on to be paid on March 1. While he appears to have abandoned his theory of recovery for the years 2014, 2015 and 2016 lease payments on appeal (though Willis asserted such arguments throughout the district court proceedings), Willis claimed in the district court proceedings and at trial that he was due those payments as well, despite the fact that Willis was aware -- or should have been aware by virtue of the recording of the July 16, 2004 quit claim deed described above -- that he merely possessed an undivided 1/5th (one-fifth) remainder interest in and to the Subject Property after June passed away. The other four remaindermen in the Subject Property, Carol, Gerard, Lee Alan and Mary Ann, did not execute any ratification(s) that would have potentially allowed for the perpetuation of this provision after the death of June. Thus, Willis (and interloper Dayna), attempted to create a term of lease with Kyle following the death of June unilaterally and without the consent of the other remaindermen. Willis has abandoned his

claims for the years 2014, 2015 and 2016 on appeal and challenges on the 2013 crop year according to his present briefing.

[19] On November 4, 2011, Willis entered into another lease agreement with June – Dayna was not included as a tenant in this lease. This lease purported to commence in 2012 and end in 2022, creating a ten year term of lease. This lease encumbered the Subject Property and would have superseded the prior hand-written July 22, 2008 cash rent farm lease between June and Willis. Under this instrument, Willis was to pay June a semi-annual rental in the sum of $10,008, totaling $20,016 annually.

[20] Ultimately, in or near June of 2012, the children of June, not to include Willis, became concerned about June's failing health and mental faculties, coupled with Willis's actions, which the Swenson Children believed detrimentally and abusively affected June's financial interests in the Subject Property. As a result of this combination of circumstances, Lee Alan commenced guardianship and conservatorship proceedings in Divide County, North Dakota. Lee Alan was appointed guardian and conservator of June in the course of those proceedings.

[21] Following his appointment as guardian and conservator, on January 24, 2013, Lee Alan, as guardian and conservator of June, entered into a Farm Lease with Kyle, on behalf of June, his ward. Willis was notified of Lee Alan's appointment as guardian and conservator by letter dated November 19, 2012, penned by Attorney John Steinberger, advising not only of the existence of letters of guardianship and conservatorship, but also Lee Alan's intention to enter into a lease with Kyle directly. The letter stated as follows:

> "He [Lee Alan] will be renting this land directly to Kyle Mahlum to the end of crop year 2015. It is contemplated at that time that the terms of the lease will be revisited and every

> expectation that I have at present is that the lease will be renegotiated and renewed."

[22] Pursuant to the lease directly between Kyle and June's conservator, Kyle tendered the 2013 lease payment directly to June.

[23] June passed away in November of 2013. Her death caused the extinction of her life estate interest in and to the Subject Property; as a result, the remaindermen were vested with full undivided 1/5th (one-fifth) interests in the Subject Property at her death. An estate proceeding for June was opened as Divide County case no. 12-2013-PR-00233. A Notice and Information to Heirs and Devisees for June's probate was served on Willis on January 2, 2014. A Notice to Creditors was published on January 1st, 8th and 15th, 2014, in the said probate proceeding. Though Plaintiffs now claim that Kyle improperly paid directly to June the cash rent for the 2013 year, evidence submitted at trial showed that no creditors' claims appear of record from Willis and/or Dayna, or any other party and Willis did not explain this failure at trial and instead maintained that the action was properly taken as against Kyle alone.

[24] On January 27, 2014, Mary Ann wrote a letter to Kyle advising that June had passed away, and which stated as follows:

> "Lee Alan and I met with the attorney handling Mother's Estate, and his advise was to request that you split the land rent payment equally between the 5 owners of the Swenson Family farmland. The names and address below are who and where to send the 2014 rent to."

[25] In accordance with the above-quoted letter, Kyle made payments for the year 2014 directly to each of the current landowners (i.e., Willis, Carol, Gerard, Lee Alan and Mary Ann) in equal shares. The same payment method and amount was utilized by Kyle annually

to continue farming the Subject Property for the years 2015 and 2016, though no written farm lease existed for the Subject property during those years.

[26] After several years of the verbal lease and accompanying payments from Kyle had been in effect, Willis and interloper Dayna commenced the instant proceeding against Kyle in or near December of 2016 - more than three years after the properties owners began receiving separate and equal lease payments for their respective interests in the Subject Property. At the outset of the proceedings, Willis alleged he was entitled to the aggregate sum of $124,090 for rentals due from Kyle for 2013, 2014, 2015 and 2016 under the on December 16, 2009, "Contract for Farmland Lease". At trial, Willis testified that he was owed approximately "$11,000" for the 2013 crop year – not the $31,022.50 he now claims on appeal. Trial Trans. at page 36. Now, on appeal, contrary to his sworn testimony at trial, Willis asserts that he is due $31,022.50 for the 2013 farm year alone, arguing that his lease was improperly terminated under various provisions of Chapter 9, N.D.C.C., and that June's conservator (against whom Willis did not make any claims) did not have the authority to enter into the January 24, 2013 lease with Kyle due to the provisions of Chapter 9, N.D.C.C.

[27] Following the conclusion of trial, the district court afforded the parties an opportunity to submit post trial briefing; the district court suggested that the parties discuss several specific points of interest the court indicated would have bearing on the outcome of the proceeding. Trial Trans. at pg. 84, lines 19-26, pgs. 85-86, pg. 87, lines 1-20. All of the parties submitted post trial briefing to the district following the conclusion of trial. Third-Party Appellees Appx. at 161-195. Willis failed to brief the district court's inquiries regarding the authority of a conservator to enter into new or subsequent lease agreements

on behalf of a ward in his post trial filings, and what, if any, play such authority would bear in relation to the facts presented at trial. This is the true question on appeal, though it has been styled differently by Willis – and while this issue is the pivotal question in relation to the 2013 lease payment recovery sought by Willis from Kyle, it was not an issue that Willis presented at trial, meaning he has not preserved the same on appeal.

[28] As more specifically outlined in the Statement of the Case above, the district court determined that the claims made by Willis and Dayna as against Kyle were subject to dismissal with prejudice and the third-party claims made by Kyle as against the Swenson Children were dismissed without prejudice in turn.

LAW AND ARGUMENT

A. Jurisdictional Statement and Non-appealability

[29] Willis timely appealed the district court's Order and Judgment dated July 11, 2018. N.D.R.App.P. 4(a). The district court had jurisdiction under N.D.C.C. § 27-05-06. This Court has jurisdiction under N.D. Const. art. VI, § 6, and N.D.C.C. § 28-27-01, provided, however, that the order and judgment at issue are appealable in that they constitute a final order. That is not the case here and the appeal should be dismissed by the Court before any discussion of the merits of the appeal can be had.

[30] Before this Court can reach the merits of an appeal, the Court must first ascertain that it has jurisdiction. See, e.g. Shannon v. Shannon, 2012 ND 222, ¶ 6, 822 N.W.2d 35; In re Estate of Hollingsworth, 2012 ND 16, ¶ 7, 809 N.W.2d 328. "The right to appeal is a jurisdictional matter governed purely by statute, and even if the parties do not raise the issue of appealability, we must dismiss the appeal on our own motion if there is no statutory

basis for the appeal and we are without jurisdiction." Riemers v. Hill, 2014 ND 80, ¶4, 845 N.W.2d 364 (citing Shannon, at ¶ 6; Estate of Hollingsworth, at ¶ 7. "Only judgments and decrees which constitute a final judgment of the rights of the parties and certain orders enumerated by statute are appealable." Reimers, at ¶5 (citations omitted). If a judgment does not adjudicate all claims of all of the parties, it is deemed interlocutory and it is not appealable except in instances where the district court has expressly certified the judgment as final under N.D.R.Civ.P. 54(b). Reimers, at ¶5 (citing Shannon, at ¶6).

[31] In this case, the district court dismissed the claims of Willis as against Kyle with prejudice, but created an issue with regard to appealability of the action on the whole in that the third-party claims against the Swenson Children as alleged by Kyle, were dismissed without prejudice in the district court's order and judgment. Moreover, the district court did not certify the order and judgment as final in connection with Rule 54(b), N.D.R.Civ.P., thus meaning that the order and judgment Willis presently attempts to appeal, is not a final judgment that would allow this Court to reach the merits of the appeal at bar. This Court has clearly explained:

> "Under Rule 54(b), if more than one claim for relief is presented . . . the court may direct entry of a final judgment as to fewer than all claims only if the court determines there is no just reason for delay. The purpose of Rule 54(b) is to facilitate the longstanding policy to discourage piecemeal appeals of multi-claim litigation. Estate of Hollingsworth, 2012 ND 16, ¶ 9, 809 N.W.2d 328 (quoting Investors Title Ins. Co. v. Herzig, 2010 ND 138, ¶ 24, 785 N.W.2d 863). Without a Rule 54(b) certification, a judgment which leaves a counterclaim undecided is not final or appealable. See, e.g., Kouba v. Febco, Inc., 1998 ND 171, ¶ 8, 583 N.W.2d 810; Gillmore v. Morelli, 425 N.W.2d 369, 370 (N.D. 1988); Meyer v. City of Dickinson, 397 N.W.2d 460, 461 (N.D. 1986)."

Reimers, at ¶6. While the above-quoted passage speaks specifically to "counter claims" given the context of that particular action, the contents of the Rule 54(b), which the Court

analyzes above, specifically includes and treats similarly third-party claims. Therefore, the framework for considering appealability in this case remains the same as that utilized in Reimers.

[32] The order and judgment in the instant case does not adjudicate with finality all claims of all of the parties (because the third-party claims were dismissed without prejudice), and the district court did not certify the judgment as final under N.D.R.Civ.P. 54(b). As a result, the order and judgment for which Willis seeks review is not final and is likewise not appealable. The judgment dismissed Kyle's claims against the Swenson Children without prejudice. "A judgment dismissing an action without prejudice is ordinarily not appealable because either side may commence another action." Reimers, at ¶8 (citing White v. Altru Health Sys., 2008 ND 48, ¶ 5, 746 N.W.2d 173). Neither Willis nor Kyle has offered any exception that might overcome this general rule. For these reasons, the Swenson Children respectfully maintain that the appeal in total (or the cross appeal taken by Kyle, at minimum) should be dismissed for lack of jurisdiction.

B. Standard of Review

[33] Willis suggests that the standard of review to be applied to his arguments surrounding contractual interpretation and existence should be reviewed under a de novo standard of review. Certainly, to the extent that this Court is interpreting any statutes and their application to this case, that standard would be appropriate. A de novo standard of review would apply to the interpretation and application of any statutes offered by any of the parties. However, based upon the evidence received and presented (and not received and not presented) at trial, the district court also made factual determinations about Kyle's good faith reliance on the January 24, 2013 lease with June's conservator, and considered

those factual findings in connection with the provisions of N.D.C.C. 30.1-29-23. No party argued that the January 24, 2013 contract did not exist. Indeed, there was no contest as to that fact whatsoever by any party; instead, one of the most pivotal questions at trial, and here on appeal, is whether it was reasonable for Kyle to rely on the conservator's lease in making payments to June, rather than making payments to Willis under the prior sublease that existed between Willis and Kyle, which amounts to a finding of fact. Findings of fact are subject to the clearly erroneous standard of review. "This court will not reverse a trial court's finding of fact unless it is clearly erroneous." All Seasons Water Users v. Northern Improvement v. KBM, 399 N.W.2d 278, 280 (N.D. 1987). "A finding of fact is clearly erroneous when the reviewing court considering the entire evidence is left with a definite and firm conviction that a mistake has been made." Id. Willis correctly notes in his briefing at page 11, that when the clearly erroneous standard of review is applied to factual findings, the trial court's findings are presumed to be correct and the complaining party bears the burden of demonstrating such findings are clearly erroneous. It is both the de novo and the clearly erroneous standards of review that should be applied in the course of reviewing the true substance of this appeal, should the Court reach the merits of the arguments here at all.

C. Plaintiffs-Appellants Willis G. Swenson and Dayna L. Johnson failed to preserve the issue of "bad faith" reliance on the January 24, 2013 conservator's lease and waived the damages now claimed on appeal

[34] The bulk of Willis's arguments on appeal surround the validity of the November 4, 2011 lease between Willis, as the tenant, and June, as the landlord ("primary lease") and the December 16, 2009 lease between Willis and Dayna, as Landlords, and Kyle, a tenant ("sublease"). Willis spends a great deal of time articulating how and why the primary lease

and the sublease rose to the level of valid lease contracts and how Kyle failed to terminate them in connection with certain provisions of Chapter 9 and Title 47-16 of the North Dakota Century Code. The existence of these leases was openly acknowledged by the parties at trial and there was no contest as to whether or not they existed and were valid – at least during the times at which June was acting without a court ordered guardian and conservator to protect and effectuate her interests. For those reasons, the Swenson Children decline to spend a great deal of time engaging in the analysis under Chapter 9 and Title 47-16 as set forth by Willis for this appeal and instead the analysis focus on the more particular statutes that control, which are contained within Title 30.1-29, N.D.C.C.

[35] While the analysis of the Chapter 9 and Title 47-16, N.D.C.C., statutes is thorough in Willis's appellate briefing, this analysis alone ignores the "real" conflict and question at issue in this appeal. Willis's arguments, as presented in his brief, appear to exist within a vacuum that does not allow for and appropriately contemplate other applicable and specific law, which was expressly raised by the district court, even before its conclusion was reached, in requesting that the parties submit post trial briefs on the same. Answering that central question cannot be avoided on appeal. The true crux of the inquiry that must be answered here is: how do the Chapter 9 and Title 47-16, N.D.C.C., statutes surrounding general contract principles and leasehold interests intersect with the specific statutory provision contained in N.D.C.C. 30.1-29-23 in relation to parties who engage in transactions with conservators? Section 30.1-29-23 was the statutory provision upon which the district court relied in reaching its conclusion that Kyle's reliance on a lease extended by June's conservator on or near January 24, 2013 ("conservator's lease") did not create a breach of his prior sublease with Willis and thus avoided any liability for Kyle that

may have otherwise accrued for 2013 in connection with Kyle's nonpayment under the terms of the sublease. N.D.C.C. 30.1-29-23 reads as follows:

> "A person who in good faith either assists the conservator or deals with the conservator for value in any transaction other than those requiring a court order as provided in section 30.1-29-08 is protected as if the conservator properly exercised the power."

[36] Here, evidence at trial unequivocally demonstrated that June's conservator, Lee Alan, advised Kyle of the existence of the conservatorship when the same arose and represented to Kyle that a new lease with payment terms which directly benefited June, and not Willis, was to be executed between June's conservator and Kyle if Kyle wished to continue to rent the Subject Property for his farming activities. See, e.g., Trial Trans. at pg. 52, lines 3-9. Willis did not present any evidence at trial suggesting that Lee Alan or Kyle acted in "bad faith" in securing June, a ward, the best and most beneficial farm lease for her life estate in the Subject Property. Willis did not testify that he had any evidence suggesting "bad faith" or other impropriety on the parts of either Lee Alan or Kyle; rather, Willis simply and repeatedly testified at trial that he believed that his sublease was superior to the lease between June's conservator and Kyle and that a court order would be required to terminate the sublease he held with Kyle. Willis's legal opinions about the superiority of his own sublease, however, do not amount to evidence of "bad faith" dealings between June's conservator and Kyle. Thus, Kyle "dealt with" and "assisted in" a transaction involving a conservator (i.e., the "conservator's lease") "for value" (i.e., the annual payments due to June thereunder) and, having met those elements of the statute, the district court was correct in determining Kyle is protected from Willis's claims, especially in the absence of some evidence that bad faith dealings had transpired in creating the same. Frankly, Willis's beef regarding the conservator's lease should have been taken up with

and against the conservator – not a party who was merely attempting to continue to rent farmland from whomever had the appropriate authority to allow him to do so. However, Willis elected to commence and bring his action against Kyle alone and not the conservator of June's estate (which perhaps explains why the district court did not dismiss the third-party claims with prejudice at the conclusion of this case). Willis did not present at trial and has not shown on appeal evidence indicating bad faith dealings between Kyle and June's conservator. Willis cannot be permitted to create a case for a particular point of litigation at the appellate court by raising it first in the reviewing Court when he failed to raise and preserve that issue in the district court proceedings first. Willis was not caught unaware of the significance of the conservator's lease; indeed, the lease was referenced in Kyle's Answer and Counterclaim at the very outset of this lawsuit. Appellant's Appx. at 4. Therefore, Willis's failure to address and offer evidence at trial regarding the conservator's lease and his present allegation that Kyle and June's conservator acted in bad faith must be deemed issues that Willis failed to preserve for this appeal.

[37] Next, inasmuch as the legitimate authority of a conservator is concerned, N.D.C.C. 30.1-29-24(1) and (3)(j) reads, in pertinent part, as follows:

> **"Powers of conservator in administration.**
>
> 1. A conservator has all of the powers conferred herein and any additional powers conferred by law on trustees in this state. . . .
>
> . . . .
>
> 3. A conservator, acting reasonably in efforts to accomplish the purpose for which the conservator was appointed, may act without court authorization or confirmation, to:
>
> . . . .

j. Enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the conservatorship."

(Emphasis added). In the instant case, the Letters of Guardianship and Conservatorship, which issued to Lee Alan in 2012, were admitted into evidence at trial, along with the conservator's lease. Lee Alan, according to the above-quoted statute, had express statutory authority to enter into the conservator's lease with Kyle, without need to approach the court (or Willis) for advance authorization or subsequent confirmation of the same, provided the lease served June's financial interests, and it did. The authority recited above demonstrates that even without the provisions of N.D.C.C. 30.1-29-23, which covers good faith third-party reliance (Kyle's reliance here) on actions and representations of a conservator that may exceed the scope of actual and lawful authority, Lee Alan's actions in connection with the conservator's lease were actually within the scope of his statutory authority as a conservator, which again shows that such leasing activity, in and of itself, cannot be said do not demonstrate any "bad faith" allegations that Willis now advances on appeal.

[38] Because Willis's briefing focuses almost exclusively on the provisions contained within Chapter 9 and Title 47-16, N.D.C.C., and not the interplay of the above-quoted provisions of Title 30.1-29, N.D.C.C., his analysis remains incomplete. He simply asserts, without more, that the district court "erred when determining Kyle Mahlum was protected from any claim made by Willis Swenson under N.D.C.C. 30.1-29-23", but fails to specifically explain how so by engaging in analysis of N.D.C.C. 30.1-29-23 with regard to its application (or alleged lack thereof) to the facts in this case. Appellant's Brief, at ¶ 19. Therefore, a discussion of statutory interpretation, construction and the manner in which

statutes can be construed together seems to be prudent point of discussion. In that vein, this Court has explained:

> "'[W]e interpret statutes in context and in relation to others on the same subject to give meaning to each without rendering one or the other useless.' [Citation omitted.] Whenever possible, we harmonize statutes to avoid conflict between them. [Citation omitted.] Only when conflicting statutes cannot be harmonized and are irreconcilable will the special provision prevail and be construed as an exception to the general provision. N.D.C.C. § 1-02-07; In re K.G., 551 N.W.2d 554, 556 (N.D. 1996)."

Rojas v. Workforce Safety and Ins., 2006 ND 221, ¶ 13, 723 N.W.2d 403 (internal citations omitted, in part, where indicated by bracketing). It appears that the Chapter 9 and Title 47-16 statutes carry particular termination provisions as indicated by Willis in his briefing. However, those statutes cited by Willis in his briefing to do not speak with specificity to competing contracts or, more specific competing contracts that involve a conservator as party to the contract. For this reason, N.D.C.C. 30.1-29-23 can be deemed the more specific statute or "special provision" and to the extent that it conflicts with the generalized provisions contained in Chapter 9 and Title 47-16, N.D.C.C. 30.1-29-23, it should be construed as an "exception" to the general provisions recited by Willis in his briefing.

[39] Finally, Willis failed to preserve and/or waived the claim for damages in district court, which he now appears to request on appeal. At trial, the following exchange occurred between counsel for the Swenson Children and Willis regarding his request for damages:

> "Q. Okay. So, I want to make sure we're figuring this out. So, you're asserting that you're individually owed the sum of $11,000 per year for four years; correct?
>
> A. Correct.

Q. And then you're asserting that via your mother's estate, you're owed 20% of what she received on the leases for 2013 forward?

A. Yes."

Trial Trans. at pg. 36, lines 16-23. Essentially, at trial Willis's own testimony shows that he is only requesting approximately $11,000 for lease payments he asserted he would have received under the sublease for 2013 had the conservator's lease not served to divert payments to June directly for the 2013 crop year; at trial, Willis did not request the $31,022.50 he now asserts he is due in his appellate briefing. Inexplicably, Willis also requested at trial that he be awarded twenty percent of any lease funds that were held by or distributed through his mother's estate, though Kyle had nothing to do with June's estate proceedings, Willis made no creditor's claim against June's estate when such a claim would have been timely in connection with the estate proceedings and the Estate of Junietta Swenson was not a named defendant for any of Willis's claims in the instant action.

[40] While the Swenson Children do not agree with Willis's request for $11,000 per year in lost lease payments as he requested at trial, Willis's request for roughly $11,000 per year in lost lease payments at trial did make some basic mathematical sense. His present request for $31,022.50 does not carry that same logic and would result in an unjust windfall is the same were awarded to him. The 2011 primary lease between Willis and then-life tenant June required Willis was to pay June a semi-annual rental in the sum of $10,008, totaling $20,016 annually. Willis's 2009 sublease with Kyle called for annual payments from Kyle in the amount of $31,022.50. Therefore, the net sum Willis would have received from Kyle, after deduction of the payments he owed to June, would equal $11,006.50, making his request and testimony at trial understandable from a mathematical

standpoint. Therefore, Willis not only waived the request for damages he now seeks on appeal based upon his testimony at trial, it is clear he would enjoy a windfall if the Court reversed and instructed the district court to award Willis $31,022.50 in damages because he would have been obligated to pay June $20,016.00 of those proceeds for the primary lease Willis had with June.

[41] For these reasons, not only did Willis fail to raise and then contest the issue of good faith dealings with a conservator at the trial court level, but he failed to bring the action against the correct entity in total, which means that he has not preserved the issue for appellate consideration here and the Order and Judgment should be affirmed. Further, Willis failed to preserve or waived the specific remedy he now seeks on appeal, having testified under oath at trial that he was requesting approximately $11,000 per year for lease payment damages as a result of the alleged breach, but on appeal asking for the sum of $31,022.50 for the 2013 crop year. The Court should affirm the district court's Order and Judgment on that premise as well.

D. The District Court's Findings in support of its Order and Judgment dismissing Willis G. Swenson's claims were not clearly erroneous

[42] Willis asserts in his briefing that Kyle cannot hide behind the "good faith" shield provided under N.D.C.C. 30.1-29-23. See Appellant's Brief, at pgs. 19-20. Essentially, Willis appears to challenge the district courts factual determination's surrounding the "good faith" analysis, which are quoted from the district court's Order as follows:

> "Prior to 2013, Kyle Mahlum dealt this Willis Swenson. He [Kyle] made payments to Willis Swenson as required by the various farm leases.
>
> In 2013, Lee Alan Swenson was appointed as guardian and conservator for Junietta Swenson . . . Lee Alan Swenson advised Kyle Mahlum that all future lease payments should be made directly to Junietta Swenson.

> On February 28, 2013, Kyle Mahlum paid $20,016 to Juniettta Swenson as land rent for 2013 . . . A second check was issued on December 2, 2013, after Junietta Swenson's death. This check was issued to Junietta Swenson in the amount of $11,500. The check was endorsed by Junietta Swenson by Mary Ann Vig, P.R.
>
> The two payments total the amount due from Kyle Mahlum for rental for the land in 2013.
>
> . . . .
> As noted above, Kyle Mahlum made his first payment to Junietta Swenson on February 28 [2013]. Willis Swenson made no demand for his share of that payment pursuant to the lease. He commenced no action against the guardian, or Kyle Mahlum for any portion of any payment.
>
> Willis Swenson was aware of this possible diversion of lease payments as early as November 19, 2012, when attorney John Steinberger, attorney for Lee Alan Swenson, Guardian, and Conservator, sent him [Willis] a letter advising that the guardian had entered into a new lease with Kyle Mahlum for the 2013 crop year. Yet again, Willis Swenson did nothing."

[43] The above-quoted passage shows the district court engaged in specific factual findings and a chronology of events that allowed the district court to engage in "natural reasoning" in ascertaining whether Kyle's actions in relation to the conservator's lease were undertaken in good faith. The district court's findings allowed the district court to "naturally reason" that 1) prior to the intervention of the conservator, Kyle had regularly and timely made payments to Willis, which showed a good faith intention on Kyle's part to comply with a known contractual obligation in favor of Willis prior to the existence of the conservator's lease; 2) Lee Alan was actually appointed and did represent to Willis he had the authority, as the conservator of June, to manage and handle, thus giving Kyle reasonable assurance of his authority and ability to negotiate the conservator's lease and take in lease payments for June in accordance therewith, again showing good faith reliance on Kyle's part; 3) the amount or value of payments to Willis and the amount or value of

payments to June under the competing leases was essentially the same and did not provide any financial benefit to Kyle in determining that he would make the payments to June, again suggesting good faith on Kyle's part; 4) Willis was aware months earlier of the possibility of the diversion of lease payment funds in favor of June as a result of Steinberger's November 2012 letter, and Willis did not object or complain of such diversion to Kyle, which means Kyle would have had zero notice that the upcoming 2013 payments to June were subject to a prospective legal or other challenge; and 5) after the payments did not timely arrive in Willis's hands, and instead reached June pursuant to the conservator's lease, Willis made no effort to contact Kyle, or otherwise lodge objection or disagreement to the absence of payment, again providing Kyle no notice that Willis was objectionable to the payment arrangement for the 2013 year or any indication that Willis suspected or perceived Kyle and Lee Alan to have engaged in some lacking or sketchy dealing with regard to the conservator's lease under which Kyle was making payments. The district court's findings constitute "natural reasoning", which this Court has explained constitute a finding of fact when examining issues of surrounding "good faith" and fair dealing:

> "'On appeal, this Court must determine whether the existence of good faith and good cause for termination of a dealership agreement is a finding of fact or a conclusion of law. In distinguishing between a finding of fact and a conclusion of law, this Court has held that a finding of fact is reached by natural reasoning while a conclusion of law is reached by fixed rules of law. '"

Nygaard v. Robinson, 341 N.W.2d 349, 345 (N.D. 1983) (quoting E.E.E., Inc. v. Hanson, 318 N.W.2d 101, 104 (N.D. 1982). Findings of fact are subject a clearly erroneous standard of review as discussed above. By "considering the entire evidence" in this case, the is no reason, fact or inference that could be drawn or relied upon by this Court that would create

"a definite and firm conviction that a mistake has been made" by the district court. For this reason, Willis's appeal must fail and the Order and Judgment should be affirmed because Willis's arguments do not overcome the heavy burden that this standard of review imposes on the complaining party.

CONCLUSION

[44] For the foregoing reasons, the Swenson Children respectfully assert that the appeal should be dismissed for non-appealability. Alternatively, should the Court determine that appealability is a non-issue in this case, based upon the foregoing discussion, the Swenson Children respectfully assert that the Order and Judgment of the district court should be affirmed because Willis has failed to preserve or waived the arguments he now makes on appeal or he has failed to meet his burden in relation to the standard of review imposed in this case. Finally, the Swenson Children respectfully request that this Court order Willis to pay reasonable attorney's fees and costs incurred as a result of this appeal, first because Willis has sought to appeal a proceeding which cannot be heard as a result of non-appealability, resulting in great expense to the Swenson Children for a fruitless proceeding and, secondly, because the primary issues raised by Willis in connection with this appeal have not been effectively preserved for appeal, even if the merits could be reached. For these reasons, the Swenson Children respectfully request reasonable attorney's fees and costs incurred as a result of this appeal.

Dated this 14th day of December, 2018.

ELIZABETH L. PENDLAY (ID#06372)
Attorney for the Third-Party Defendants and Appellees
115 N. Main Street - P.O. Box 289
Crosby, ND 58730
Tel: (701) 965-6036
Fax: (701) 965-6428
liz@crosbylaw.net

CERTIFICATE OF SERVICE

I, Elizabeth L. Pendlay, do hereby certify that true and correct copies of the foregoing **Third-Party Appellee's Brief** and enclosed **Third-Party Appellee's Appendix**, were served upon the following-named individual(s) at the respective mailing address(es) appearing below his/her/their name(s):

Taylor Dawn Olson & Peter H. Furuseth
Furuseth, Olson & Evert, PC
P.O. Box 417
Williston, ND 58801

-and-

Ryan G. Quarne
Olson & Burns, PC
P.O. Box 1180
Minot, ND 58720-1180

on the 14th day of December, 2018, via U.S. Priority Mail, postage prepaid.

Dated at Bigfork, Montana, this 14th day of December, 2018.

ELIZABETH L. PENDLAY (ID# 06372)
Attorney for Third-Party Defendant and Appellees
115 N. Main Street, P.O. Box 289
Crosby, North Dakota 58730
Tel. (701) 965-6036
liz@crosbylaw.net