

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Willis G. Swenson, et al,

Plaintiff/Appellant,

v.

Kyle Mahlum and Third Party Defendants

Carol Hodgerson, Lee Alan Swenson,

Gerard Swenson and Mary Ann Vig,

Defendants/Appellees

Burke County Civil No. 07-2017-CV-00003

Supreme Court No. 20180345

BRIEF OF APPELLANT WILLIS G. SWENSON

APPEAL TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA
FROM THE ORDER DISMISSING PLAINTIFF'S COMPLAINT, DATED AND FILED
JULY 11, 2018, IN THE DISTRICT COURT OF BURKE COUNTY FROM THE
HONORABLE GARY LEE

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STATEMENT OF ISSUES

- ¶1 I. THE DISTRICT COURT ERRED WHEN DISMISSING WILLIS SWENSON'S CLAIM AGAINST KYLE MAHLUM.
- A. Neither the original lease between Junietta Swenson and Willis Swenson nor the lease between Willis Swenson and Kyle Mahlum were terminated and both leases were valid, enforceable leases for the 2013 farm year.
 - B. Kyle Mahlum is not protected from any claim made by Willis Swenson, rendering Kyle Mahlum liable to Willis Swenson for all of the 2013 lease payments.
 - C. Kyle Mahlum did not act in good faith when dealing with Lee Alan Swenson, in his capacity as guardian and conservator.

JURISDICTIONAL STATEMENT

¶2. This appeal, as authorized by North Dakota Century Code § 28-27-02, is from an Order to Dismiss signed by the Hon. Gary H. Lee, North Central District Court Judge, dated July 11, 2018. This Appeal was filed with Burke County District Court on August 28, 2018.

ISSUES PRESENTED

¶3. Whether the District Court erred when dismissing Plaintiff's complaint.

STATEMENT OF THE CASE

¶4. This is an appeal pursuant to North Dakota Century Code § 28-27-02 from the North Central Judicial District Order to Dismiss dated July 11, 2018 dismissing Plaintiff's claims against Defendant. Hon. Gary H. Lee denied Summary Judgment on May 17, 2018, held a bench trial, and entered an Order to Dismiss on July 11, 2018. Plaintiff appeals from the Order to Dismiss on the limited issue of rent payments.

STATEMENT OF FACTS

¶5. Plaintiffs, Willis Swenson (hereinafter "Swenson) and Dayna Johnson, brought an action against Defendant Kyle Mahlum, for payment of rent for agricultural land located in Burke County, North Dakota Order Dismissing Complaint (July 11., 2018) at ¶1. The real property at issue in this case is located in Burke County and is described as follows:

Township 163 North, Range 89 West:
Section 28: NW1/4

Township 163 North, Range 88 West:
Section 19: NE1/4
Section 29: NE1/4

Section 31: E1/2NE1/4

Section 32: SE1/4

Order at ¶3.

¶6. The above-described property was originally owned by Robert and Junietta Swenson. Id. at ¶4. The Plaintiff, Swenson, and third-party defendants, Carol Hodgerson, Gerard Swenson, Lee Alan Swenson, and Mary Ann Vig, are the children of Robert and Junietta Swenson. Id.

¶7. On July 16, 2004, Robert and Junietta Swenson signed a Quit Claim Deed conveying all of the above-described property to their five children as joint tenants. Id. at ¶5. Further, in the same deed, Robert and Junietta Swenson further reserved for themselves a life estate in the property. Id. This Deed was recorded with the Burke County Recorder on July 19, 2004 as document number 203934. Id.

¶8. Robert Swenson died on March 6, 2005, leaving Junietta Swenson as the sole life tenant on the property. Id. at ¶6.

¶9. Willis Swenson and Junietta Swenson entered into a farm lease on July 22, 2008. Id. at ¶7. Per the terms of the lease agreement, Willis Swenson agreed to pay Junietta an annual rent of \$20,016, which was to be paid in two equal installments of \$10,008: one in March and the second in October. Id. This is not the controlling lease

¶10. Following the farm lease agreement, Willis Swenson entered into a crop share lease, which later became a cash rent lease, with Kyle Mahlum. Id. at ¶8. The second cash rent lease required Kyle Mahlum to pay Willis Swenson \$31,022.50 per year. Id. This second lease became effective as of March 2010,

and would expire on October, 2019. Id. The lease language stated that, upon Junietta Swenson's death, the payments were to be made to the "Swenson Farm Land Trust." Id. Additionally, under the lease language, Kyle Mahlum agreed to pay Willis Swenson two payments totaling \$31,022.50, in March of each year until Junietta's death.

¶11. On November 4, 2011, Willis Swenson and Junietta Swenson entered into the final lease. Id. at ¶9. The lease was agreed to begin in 2012 and would expire in 2022. Id. This lease included the following language: "This Lease shall bind the heirs, personal representatives, successors, and assigns of the parties hereto." Id.

¶12. In June 2012, Lee Alan Swenson commenced a guardianship proceeding for Junietta Swenson. Id. at ¶10. Lee Alan Swenson was appointed as guardian and conservator for Junietta Swenson on July 12, 2012. See Divide County District Court Case 12-2012-PR-0094. Lee Alan Swenson, in his capacity as guardian and conservator, then entered into a separate lease with Kyle Mahlum. Order at ¶10. The lease by Lee Alan Swenson stated that all payments shall be made to Junietta Swenson. Id. In turn, Kyle Mahlum made the 2013 lease payment to Junietta Swenson, and failed to make any payment to Willis Swenson, with whom he had the original lease. Id.

¶13. Junietta Swenson died on November 20, 2013. Id. at ¶11. A probate was commenced in Divide County District Court. See Divide County District Court Case 12-2013-PR-0233. Mary Ann Vig was appointed personal representative of the Estate of Junietta Swenson. Id.

¶14. In 2014, Mary Vig, in her capacity as personal representative of the estate of Junietta Swenson, directed Kyle Mahlum to make all future lease payments to each of the five siblings: one-fifth to each sibling. Order at ¶12. Kyle Mahlum proceeded to issue payment to each of the give siblings in the amount of \$6,350 for 2014, 2015, and 2016. Id.

¶15. In 2015, Willis Swenson initiated a partition action to divide the above-described real property. Id. at ¶15. After a trial, on October 24, 2016, the Court issued Judgment partitioning the real property. Id. Willis Swenson received the SE1/4, Section 32, Township 163 North, Range 88 West. Id. The remaining property was awarded to the other four siblings as tenants in common. See Swenson v. Hodgerson, Burke County District Court Case 07-2015-CV-00040. On January 11, 2017, Swenson initiated this action after the partition action and well within the six year statute of limitations for breach of contract.

¶16. Willis Swenson seeks to recover \$31,022.50 from Kyle Malhum for the 2013 farm lease year, as per the cash rent lease agreement between the two parties. Willis Swenson was not involved or contacted regarding any of the discussions or decisions regarding the 2013 rental payment. Willis Swenson did not mutually consent or agree to the termination of either of the leases he was involved in.

STANDARD OF REVIEW

¶17. Construction of a written contract to determine its legal effect presents a question of law, which is fully reviewable. Schwarz v. Gierke, 2010 ND 166, ¶ 11,

788 N.W.2d 302. As we said in Bendish v. Castillo, 2012 ND 30, ¶ 16, 812

N.W.2d 398 (quoting Moen v. Meidinger, 547 N.W.2d 544, 546–47 (N.D.1996)):

[O]n appeal, we independently examine and construe the contract to determine if the trial court erred in its contract interpretation. General Elec. Credit Corp. v. Larson, 387 N.W.2d 734, 736 (N.D.1986). A court's primary goal in interpreting a contract is to ascertain the mutual intentions of the contracting parties. National Bank of Harvey v. International Harvester Co., 421 N.W.2d 799, 802 (N.D.1988). "Section 9–07–06, N.D.C.C., requires that a contract be interpreted as a whole." Id. at 802. Under NDCC 9–07–12, "[a] contract may be explained by reference to the circumstances under which it was made." Id. at 803. "If the language of the contract is clear and unambiguous, and the intent is apparent from its face, there is no room for further interpretation." Habeck v. MacDonald, 520 N.W.2d 808, 811 (N.D.1994). Still, as Continental Cas. Co. v. Kinsey, 499 N.W.2d 574, 577 (N.D.1993), discussed, a contract is ambiguous when reasonable arguments can be made for different positions on its meaning.

[¶]9 Whether a contract is ambiguous is a question of law. Myaer v. Nodak Mut. Ins. Co., 2012 ND 21, ¶ 10, 812 N.W.2d 345. Extrinsic evidence may not be used to vary or contradict the terms of an unambiguous agreement or to create an ambiguity. Schwarz, at ¶ 16.

¶18. If the court determines the lease to be valid, the question then remains as to the measure of damages. In Keller v. Bolding, 678 N.W.2d 578, 583 (N.D. 2004), this court held that "A [district] court's determination of the amount of damages is a finding of fact subject to the clearly erroneous standard of review." Findings of fact made by the trial court will not be reversed on appeal unless they are clearly erroneous. Tishmack v. Tishmack, 611 N.W.2d 204 (N.D. 2000). However, a finding of fact "is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after reviewing all evidence, we are left with a definite and firm conviction a mistake has been

made.” Moen v. Thomas, 627 N.W.2d 146, 152 (N.D. 2001); Tishmack, 611 N.W.2d at 207. On appeal, a presumption exists that the trial court’s findings of fact are correct, and the complaining party holds the burden of demonstrating that such finding is clearly erroneous. State ex rel. Heitkamp v. Family Life Services, Inc., 616 N.W.2d 826, 834 (N..D. 2000).

LAW AND ARGUMENT

I. THE DISTRICT COURT ERRED WHEN DISMISSING WILLIS SWENSON’S CLAIM AGAINST KYLE MAHLUM.

¶19. The District Court erred when dismissing Willis Swenson’s claim against Kyle Mahlum because there was a valid, enforceable lease between Willis Swenson and Kyle Mahlum that had not been terminated. Further, the Court erred when determining Kyle Mahlum was protected from any claim made by Willis Swenson under N.D.C.C. § 30.1-29-23.

A. Neither the original lease between Junietta Swenson and Willis Swenson nor the lease between Willis Swenson and Kyle Mahlum were terminated and both leases were valid, enforceable leases for the 2013 farm year.

¶20. Neither the lease between Junietta Swenson and Willis Swenson nor the lease between Willis Swenson and Kyle Mahlum were terminated: both leases were valid and enforceable for the 2013 farm year. Therefore, the obligations delineated in these leases were legally binding and enforceable.

¶21. The lease between Willis Swenson and Kyle Mahlum was a valid, enforceable lease which was never terminated. North Dakota Century Code § 47-16-14 provides the four conditions under which a lease of real property terminates:

1. At the end of the term agreed upon;
2. By the mutual consent of the parties;
3. By the lessee's acquiring title to the property leased superior to that of the lessor; or
4. By the destruction of the property leased.

¶22. It is clear the first condition was not met. The end of the term of the lease did not occur prior to the farming season and the required payments in March and October. Further, for a lease to be terminated in accordance with North Dakota law, N.D.C.C. § 47-16-15 requires notice of the termination of lease.

¶23. In the present case, Willis Swenson eventually received a letter from Attorney Steinberger stating the lease had terminated. However, the letter from Attorney Steinberger does not meet any of the four conditions in which a lease of real property terminates, as both parties did not mutually consent to the termination. The attempt to unilaterally terminate the leases here was not effective: both leases remained valid and enforceable for the 2013 farm year. Additionally, Attorney Steinberger's letter could have no legal bearing on the lease between Willis Swenson and Kyle Mahlum, as Lee Alan Swenson has no authority to act on behalf of Willis or Mahlum.

¶24. Parties to a contract, including a lease, may by mutual consent terminate, alter, or amend their agreement. N.D.C.C. §§ 9-09-06, 9-09-07; Moen, 627 N.W.2d at 151; Mitchell v. Barnes, 354 N.W.2d 680, 682 (N.D. 1984). Mutual consent is defined by N.D.C.C. §9-03-16 as follows:

Consent is not mutual unless the parties all agree upon the same thing in the same sense. In certain cases defined in 9-07, they are deemed to so to agree without regard to the fact.

¶25. Additionally, consent is deemed as communicated between the parties “as soon as the party accepting the proposal has put that party’s acceptance in the course of transmission to the proposer in conformity to section 9-03-18.”

N.D.C.C. § 9-03-19. Further, ratification and acceptance of a benefit of a transaction are deemed to be further modes of consent. N.D.C.C. §§ 9-03-24, 9-03-25.

¶26. There was a lack of mutual consent between any of the parties involved. Willis Swenson never consented to the termination of the lease between Junietta Swenson and himself, nor did Willis Swenson consent to the termination of the lease between himself and Kyle Mahlum. Attorney Steinberger’s attempt to unilaterally terminate the leases fails to meet the requirements of mutual consent, as Willis Swenson never consented, explicitly or by actions, to the termination of the leases.

¶27. The change in title did not occur until Junietta Swenson’s death, and this acquiring of title, as a remainderman, cannot be applied retroactively to the leases for the year of 2013.

¶28. Finally, there is no evidence the property was destroyed in any manner. Therefore, none of the four conditions under N.D.C.C. § 47-16-14 are met and neither lease was terminated for the 2013 farm year.

¶29. North Dakota Century Code § 47-16-16 allows a lessor to terminate a lease and to reclaim the property before the end of the lease term when the lessee:

1. Uses or permits a use of the property leased in a manner contrary to the agreement of the parties; or

2. Does not make such repairs as the lessee is bound to make within a reasonable time after a request is made.

¶30. In the present case, Willis Swenson did not use or permit a use of the property in manner contrary to the farm lease between Junietta Swenson and himself. Additionally, no repairs were required to be made to the property by Willis Swenson. Therefore, the lessor, Lee Alan Swenson, in his capacity as the guardian and conservator of Junietta Swenson, did not have cause to terminate the lease with Willis Swenson before the end of the lease term.

¶31. Additionally, N.D.C.C. § 47-16-17 allows a lessee to terminate a lease before the end of the lease term when:

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

¶32. When analyzing the scope of N.D.C.C. § 47-16-17 to Kyle Mahlum as the lessee, neither subsection applies. Willis Swenson did not fail to fulfill the lessor's obligations. Further, no material inducement was present to induce Kyle Mahlum into entering in the Cash Rent Lease.

¶33. As a matter of public policy, in this case and in all other lease and contract matters, one cannot simply walk away from contractual obligations, in the absence of fraud, duress, or unconscionability, without performing or receiving damages. It would be contrary, not only to public policy, but also to the foundations of legal precedent, to allow a party to disregard existing contracts

and freely enter into a new contract without consequences. If this were the case, there would no longer be a place for contract law nor any use for the requirements of good faith and fair dealing.

¶34. In conclusion, neither of the two leases in existence for the 2013 farm year were terminated in any manner permitted under North Dakota law. If Lee Alan Swenson or Kyle Mahlum sought for a termination of the lease, they could have sought to litigate the matter: seeking an action or court order to terminate the leases held with Willis Swenson. Willis Swenson did not terminate either lease for the 2013 farm year, and therefore, it must be determined Swenson is entitled to payment from Kyle Mahlum, as agreed upon in the contract, for 2013.

B. Kyle Mahlum is not protected from any claim made by Willis Swenson, rendering Kyle Mahlum liable to Willis Swenson for all of the 2013 lease payments.

¶35. Willis Swenson has a valid claim against Kyle Mahlum for the entirety of the 2013 lease payments, as outlined in the Cash Lease agreements and as agreed to by both parties. Kyle Mahlum breached the Cash Lease agreement between himself and Willis Swenson by refusing to pay the agreed upon rents, and is liable for the damages arising from such breach.

¶36. Per N.D.C.C. § 32-23-02 allows a court to construe and determine any question of construction or validity which arises under a contract. See: Bagnen v. Bartelson, 553 N.W.2d 754, 756 (1996). In addition, N.D.C.C. § 32-23-03 permits the court to construe a contract before or after a breach occurs. See: Hoops v. Selid, 379 N.W.2d 270, 272 (N.D. 1985), where this court held it was not an abuse of discretion for the district court to view the contract under N.D.C.C. § 32-

23-03, especially where the court refused to enter declaratory judgment when doing such would not terminate the controversy giving rise to the proceeding.

¶37. North Dakota law establishes the elements for a prima facie case of breach of contract as: “(1) the existence of a contract; (2) breach of the contract; and (3) damages which flow from the breach.” WFND, LLC v. Fargo Marc, LLC, 730 N.W.2d 841, 848 (N.D. 2007); Kuhn v. Marquart, 178 N.W. 428, 429 (N.D. 1920). Non-performance of a contractual obligation when it is due constitutes a breach of the contract. WFND, LLC, 730 N.W.2d at 848. The plaintiff alleging the breach of contract holds the burden for proving the elements of breach of contract. Id.

¶38. North Dakota Century Code Section 9-01-01 defines a valid, enforceable contract as follows:

1. A contract is an agreement to do or not to do a certain thing.
2. An obligation is a legal duty by which a person is bound to do or not to do a certain thing.

¶39. For a contract to spring into existence, there must be parties capable of giving consent, consent of all parties involved, a lawful object, and “sufficient cause or consideration.” N.D.C.C. § 9-01-02.

¶40. There is no factual dispute as to the existence of a valid and enforceable Cash Lease contract between Willis Swenson and Kyle Mahlum, nor did Judge Lee make a determination the contract was not valid. The terms of the contract are clear and enforceable: Kyle Mahlum consented to the terms of payment (two payments a year to Willis Swenson in March and October, totaling \$31,022.50 due each year under the contract terms.

¶41. The breach occurred when Kyle Mahlum, who was actively farming the property described in the Cash Lease agreement in 2013, failed to make both 2013 required payments to Willis Swenson for lease of the property. Kyle Mahlum's non-performance of the contractual obligations, as due in both March and October of 2013, constitutes a breach of the contract between himself and Willis Swenson.

¶42. Per N.D.C.C. § 32-03-09, damages for breach of contract are laid out as follows:

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

¶43. This court held in Jalbert v. Eagle Rigid Spans, Inc., 891 N.W.2d 135 (N.D. 2017), that contract damages should award the non-breaching party the benefit of the bargain, by allowing a sum of money that would put that party in as good a position as if the contract had been performed according to the contractual terms.

¶44. In the present case, the amount of damages, at minimum, suffered by Willis Swenson, stemming directly from Kyle Mahlum's non-performance for the 2013 farm year, amounts to \$31,022.50. At the least, the contractual damages awarded to Willis Swenson would be this amount, as this would put Willis Swenson in the same position he would have been in if the contract had been performed according to its terms.

¶45. The District Court's Order to Dismiss (p.7) states "[t]he most Willis Swenson would ever receive under the lease would be \$11,006.50." The Court calculates that it must first remove the \$20,016 Willis Swenson contractually owes per year under his lease with Junietta Swenson. This conclusion is inappropriate within the scope of the issue at hand: Willis Swenson is owed \$31,022.50 per year from Kyle Mahlum, under their contract with one another. The award of damages must be limited strictly to the contractual obligations between Willis Swenson and Kyle Mahlum.

¶46. In the present case, the District Court recognized that Willis Swenson was unaware of any of the discussions and decisions between Lee Alan Swenson and Kyle Mahlum regarding a leasing of the land. Kyle Mahlum had crops on the property, and Willis Swenson reasonably believed that Kyle Mahlum was continuing to farm under the terms of their valid, enforceable lease agreement. Willis Swenson could not have reasonably found another tenant or performed other minimizing actions when he was unaware of the bad faith actions of both Lee Alan Swenson and Kyle Mahlum with leasing the land. Willis Swenson is still entitled to damages arising from Kyle Mahlum's breach of contract.

¶47. Kyle Mahlum, while bound by the terms of the Cash Lease agreement with Willis Swenson, made a decision to render payment to Lee Alan Swenson, as guardian and conservator of Junietta Swenson. Kyle Mahlum's decision to render payment to Lee Alan Swenson did not and does not excuse him from making payments under his contract with Willis Swenson. Therefore, Kyle Mahlum is still

liable for failing to perform under the terms of the valid and enforceable Cash Lease agreement with Willis Swenson.

D. Kyle Mahlum did not act in good faith when dealing with Lee Alan Swenson, in his capacity as guardian and conservator.

¶48. The District Court erred by ruling that Kyle Mahlum acted in good faith with Lee Alan Swenson, in his capacity of guardian and conservator of Junietta Swenson. Kyle Mahlum and Lee Alan Swenson had knowledge of the valid, unexpired leases with Willis Swenson. Kyle Mahlum cannot be shielded by claiming protection under N.D.C.C. § 30.1-29-23.

¶49. Lee Alan Swenson, in his capacity as guardian and conservator of Junietta Swenson, entered into a separate farm lease with Kyle Mahlum, directing Kyle Mahlum to make payments under that lease to Junietta Swenson.

¶50. North Dakota Century Code Section 30.1-29-24(03)(j) describes the powers conferred upon a conservator, which require the conservator to act reasonably when:

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.

¶51. Further, North Dakota Century Code provides protection for those who deal in good faith with a guardian or conservator. North Dakota Century Code Section 30.1-29-23 states as follows:

A person who in good faith either assists a 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 he conservator properly exercises the power.

¶52. Good faith was not present in this case, as both parties had knowledge of the existence of the valid, enforceable leases between the following parties which were signed prior to the guardianship. Despite this knowledge, Lee Alan Swenson and Kyle Mahlum attempted to enter into a separate lease in the absence of any termination of the existing leases. Kyle Mahlum did not act in good faith: he signed a lease with full knowledge that he already had a binding lease with Willis Swenson.

¶53. Kyle Mahlum cannot hide behind the alleged “shield” of good faith to cover his dealings with Lee Alan Swenson. Kyle Mahlum was well aware of his lease with Willis Swenson and the terms of such lease. To allow Kyle Mahlum to simply walk away from an unterminated lease without any damages would be contrary to all contract law precedent and public policy.

¶54. The District Court seems to assert that any lease made by a conservator would cancel all existing leases made previously by the ward. Willis Swenson is unaware of any legal theory that supports this position, outside of the absence of any of the provisions allowing cancellation of an unconscionable contract. If this were the law, there would be no need for provisions relating to the scope and discretion of the conservator, as well as no place for a “good faith” safe harbor for those dealing with the conservator. It is impermissible for this view to prevail: Lee Alan Swenson and Kyle Mahlum had knowledge of the valid leases with Willis Swenson yet attempted to avoid contractual obligations and create a new contract in bad faith. Kyle Mahlum cannot be protected by N.D.C.C. § 30.1-29-23.

CONCLUSION

¶55. In conclusion, the District Court erred in dismissing the claim against Kyle Mahlum for any 2013 cash rent payment due to Willis Swenson. Kyle Mahlum, not Lee Alan Swenson as guardian and conservator, is the proper party from whom Willis Swenson may recover lease payments from. Kyle Mahlum failed to render payment to Willis Swenson under a valid and enforceable lease, rendering him liable to Willis Swenson for \$31,022.50.

¶56. For the foregoing reasons, the Plaintiff respectfully request that the District Court's Order to Dismiss be reversed and remanded, as to the limited issue of the 2013 Crop Lease Rent, to order rent due to Plaintiff.

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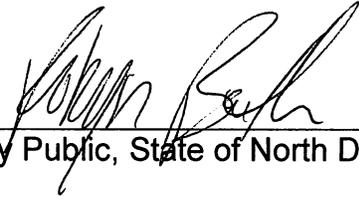
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¶2. The above documents were served by electronic mail in an attachment and addressed to the above-named attorney at the e-mail address listed above.


Mattie Richardson

Subscribed and sworn to before me this 16 day of November,
2018.


Notary Public, State of North Dakota

