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JUNE 7, 2019
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.	Burke County Civil No. 07-2017-CV-00003 Supreme Court Case No. 20180345

APPELLEE / CROSS-APPELLANT KYLE MAHLUM'S PETITION FOR REHEARING

APPEAL TO THE NORTH DAKOTA SUPREME COURT FROM THE
ORDER DISMISSING PLAINTIFF'S COMPLAINT DATED JULY 11, 2018
BURKE COUNTY DISTRICT COURT
THE HONORABLE GARY H. LEE PRESIDING

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¶1. **TABLE OF AUTHORITIES**

Paragraph No.

Cases:

Statutes & Other Authority

¶2. **STATEMENT OF THE ISSUES**

Should this Court grant Mahlum's Petition for Rehearing on the grounds that Swenson stated at trial he was only owed $11,000.00 for 2013 from Mahlum, and because Swenson raised issues related to N.D.C.C. §30.1-29-23 for the first time on appeal.

¶3. **STATEMENT OF THE CASE**

¶4. This case originates from a claim by Willis G. Swenson ("Swenson") for payment of rent for agricultural land in Burke County, North Dakota for four years: 2013-2016. The district court ordered Swenson's claims be dismissed on separate grounds for the years 2013, and 2014-2016. Swenson filed an appeal for the year 2013. On May 16, 2019, this Court reversed the dismissal of Swenson's claims. This Court indicated "the remaining issues are without merit or unnecessary to our decision." However, this Court failed to address the fact that Swenson stated, he was only owed $11,000 for 2013, and further raised new issues on appeal. Pursuant to Rule 40, N.D.R. App. P., Appellee Kyle Mahlum ("Mahlum") respectfully request this Court grant his Petition for Rehearing on the grounds that Swenson stated he was only owed $11,000.00 for 2013 from Kyle Mahlum, and because Swenson raised issues related to N.D.C.C. 30.1-29-23 for the first time on appeal.

¶5. **STATEMENT OF FACTS**

¶6. The pertinent facts regarding this matter are set forth in the parties' briefs and this Court's May 16, 2013 Opinion.

¶7. Provided however, at paragraph 7 of the Court's Opinion, the following statement was made "Willis Swenson alleged Mahlum was required to pay him $31,022.50 each year under the 2009 lease, and Mahlum failed to pay any rent in 2013, 2014, 2015, and 2016.

Willis Swenson requested $124,090 in damages." This statement is true of Swenson's *Complaint*, but it is not true of Swenson's proof of damages at trial.

¶8. *At trial,* Swenson sought only $11,000.00 per year from Mahlum. This *includes 2013*.

> A. I am owed $11,000 some dollars every year for four years up to partition. I am also owed after mother's death out of the 20,000, 20%. So we're at 46,000 some odd dollars on the lease contract. And now you have four years that I wasn't paid that technically I wasn't paid anything but I am entitled to another 16,000 on top of that 46- .
>
> 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 from 2013 forward?
>
> A. Yes.
>
> Q. Okay. So you're owed 11,000 per year for four years, plus 20% of whatever came through your mother's estate?
>
> A. The 20% of the $20,016 that went to my mother's lease. After she died I am entitled to 20% as much as they are.

(Appellee's App. Pg. 56, line 4 through App. Pg. 57, line 2, Transcript at pages 36-37.)

¶9. The District court also summarized the amounts being sought by the Plaintiff, and no objection was made to the contrary.

> THE COURT: Move on please, I don't think we're making any progress here. It's $124,000 is – he has basically said he is not looking for that. He's looking for his 43- or 44-, whatever the number was plus 20% of the balance. So to that extent we've trimmed down the damages substantially.

(Appellee's App. Pg. 60, lines 5-9, Transcript at page 44.) Neither Swenson nor his counsel objected to Judge Lee.

¶10. Further, questioning by Swenson's counsel shows that Swenson was undisputedly seeking only $11,000 per year. (Appellee's App. Pg. 65, lines 15-19, Transcript at page 63.)

¶11. The undisputed facts at trial show that Swenson sought only $11,000.00 per year from Kyle Mahlum for 2013, and 20% of the $20,016 that went to his mother from her estate.

¶12. **STANDARD OF REVIEW**

¶13. If a petition for review is granted, this court may "(A) make a final disposition of the case without reargument; (B) restore the case to the calendar for reargument or resubmission; (C) issue any other appropriate order. N.D.R. App. P. 40(a)(4)

¶14. **ARGUMENT**

¶15. The Supreme Court Erred By Not Concluding Swenson's Damages Were Limited To $11,006.50.

¶16. If the this Court would have relied on the implied facts, which the trial court received, its decision would have been different because Swenson explicitly stated he is limiting his damages to $11,006.50.

¶17. The Supreme Court may rely on implied findings of fact when the record enable it to understand the factual determinations made by the trial court. See First Am. Bank West v. Berdahl, 556 N.W.2d 63, 65 (N.D. 1996). Further, "we will not set aside a correct result merely because the district court's reasoning is incorrect if the result is the same under the correct law and reasoning."Sanders v. Gravel Prods., 2008 ND 161, ¶ 9, 755 N.W.2d 826, 831. Based on the entire evidence, this Court can review the findings of fact by the trial court that Swenson was entitled to at most, $11,006.50 for 2013, and find they are not clearly

erroneous.

¶18. The district court found that Willis Swenson owe Junietta Swenson $20,016.00 for each year the Subject Property was leased. (Appellant's App. p. 40 at ¶ 22.) As a result, the most Willis Swenson would ever gain under his sublease with Kyle Mahlum would be $11,006.50 per year. This Court determined that the district court incorrectly interpreted the lease, and as such, any finding that Willis Swenson's damages for his 2013 breach of contract claim were limited to $11,006.50 because "$20,016 was first to be paid to Junietta Swenson" was clearly erroneous. However, because Swenson specifically admitted that he was only seeking payment of "$11,000", it is reasonable to believe the parties interpreted the leases together, which led to the district court's conclusion that Swenson's damages should be limited to $11,006.50. (Appellee's App. Pg. 56, line 4 through App. Pg. 57, line 2, Transcript at pages 36-37.)

¶19. Alternatively, the district court still reached the *correct result*. In Keller v. Bolding, 2004 ND 80, 678 N.W.2d 578, 583, this court held"A [district] court's determination of the amount of damages is a finding of fact subject to the clearly erroneous standard of review." The district court's determination of the amount of damages is clearly is the correct result. How could the district court have decided otherwise, when Swenson, at trial, said unequivocally "I am owed $11,000 some dollars every year for four years up to partition" (Appellee's App. Pg. 56, line 4 through App. Pg. 57, line 2, Transcript at pages 36-37.) Not once did Swenson testify he was owed any more than $11,000.00 *from Mahlum* at trial.

¶20. At the very least, by making this statement, confirmed by Judge Lee and Swenson's attorney, Swenson waived his contractual right to seek any further damages from Mr.

Mahlum at trial. A person may waive contractual rights and privileges to which that person is legally entitled. Waiver is a voluntary and intentional relinquishment or abandonment of a known advantage, benefit, claim, privilege, or right. Sanders v. Gravel Prods., 2008 ND 161, ¶ 10, 755 N.W.2d 826, 831. In this instance, even if Swenson *was* entitled to $31,022.50, he waived it by confirming different ways he was entitled to only $11,000.00 *from Mahlum.*

¶21. For clarification purposes, the testimony cited above applies the crop years *after* Junietta Swenson's death (2014,2015, and 2016), and the year *before* Junietta's death (2013). There is only testimony related to *four* years. So repeated reference to "four years" in the testimony refers to the years before and after Junietta's death equally.

¶22. The district court's findings of fact were not clearly erroneous as to the amount of damages Swenson would be entitled to. Mahlum requests that this Court confirm the district court's order that Swenson is entitled to $11,006.50 from Mahlum for the 2013 crop year.

¶23. The Supreme Court Erred By Allowing Swenson To Raise Issues Relating to the Conservatorship of Junietta Swenson for the First Time On Appeal.

¶24. This Court stated the district court found that Kyle Mahlum was protected by [N.D.C.C.§ 30.1-29-23] against claims by Willis Swenson, and that Willis Swenson's claims for 2013 payments should have been made against the guardian and conservator. Just as was argued by Kyle Mahlum in his post-trial brief (See Appellee's App. at pgs. 46-47.) This Court's then went on to interpret Section 30.1-29-23 N.D.C.C. This Court concluded the statute does not protect Mahlum against Swenson's claims. However, this Court erred because this issue was raised for the first time on appeal.

¶25. Swenson raised any issues related to Section 30.1-29-23 N.D.C.C. for the first time on appeal. (Swenson Brief at ¶ 48-54.) He did not argue to the district court why Kyle Mahlum was not entitled to protection under Section 30.1-29-23 N.D.C.C.

¶26. Issues that were not raised in the district court may not be raised for the first time on appeal. Valentina Williston, LLC v. Gadeco, LLC, 2016 ND 84, ¶ 23, 878 N.W.2d 397.

> The purpose of an appeal is to review the actions of [***9] the trial court, not to grant the appellant an opportunity to develop and expound upon new strategies or theories. The requirement that a party first present an issue to the trial court, as a precondition to raising it on appeal, gives that court a meaningful opportunity to make a correct decision, contributes valuable input to the process, and develops the record for effective [**923] review of the decision. **It is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider.** Accordingly, issues or contentions not raised . . . in the district court cannot be raised for the first time on appeal.

Id. (Emphasis added)(quoting Working Capital #1 v. Quality Auto Body, Inc., 2012 ND 115, ¶ 13, 817 N.W.2d 346).

¶27. The purpose of an appeal is to review the decision of the district court, not to allow appellants to explore new theories of their case. (See Appellee's Brief at ¶55.)

¶28. Swenson never argued Mahlum interpreted Section 30.1-29-23 N.D.C.C. incorrectly at the district court level. Further, Swenson should have been aware of his opportunity to make arguments regarding the conservatorship, because the district court requested briefing on issues related to the conservatorship:

> Question number two is by what authority did the guardian and conservator -- what authority did he have to terminate the lease and put in the new farm lease? If Mr. Willis Swenson had a valid lease with Kyle Mahlum, that valid lease lasted until the day she died. And I don't see how the guardian or conservator can come in and step in and say that this is -- that we're going to now give you a new lease.

(Appellee's App. at pg. 70, lines 6-12.)

¶29. The district court's inquiry did not specifically ask about Section 30.1-29-23, but any inquiry related to the authority of a conservator should include reference to North Dakota's statutes regarding conservators. Mahlum, recognized this fact in his post trial brief. (See Appellee's App. at pgs. 29 and 46.) Swenson did not. (See Appellee's App. at pgs. 30-45.)

¶30. This Court has said "we are not ferrets and we will not consider an argument that is not adequately articulated, supported, and briefed." Jury v. Barnes Cnty. Mun. Airport Auth., 2016 ND 106, ¶ 12, 881 N.W.2d 10 (*citations omitted*). How could the district court consider an argument about 30.1-29-23 from Swenson if it was *never* briefed?

¶31. As such, Mahlum respectfully requests that this Court reconsider its order, and confirm the district court's dismissal of Willis Swenson's 2013 claim against Kyle Mahlum.

¶32. **CONCLUSION**

¶33. For the reasons stated above, this court should grant Kyle Mahlum's petition for rehearing and confirm the trial court's judgment.

¶34. Dated this 7th day of June, 2019.

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¶35. **CERTIFICATE OF SERVICE**

¶36. I, Ryan G. Quarne, attorney for the Defendant, Third-Party Plaintiff, Appellee, and Cross-Appellant, Kyle Mahlum, do hereby certify that on the 7th day of June, 2019, **APPELLEE / CROSS-APPELLANT KYLE MAHLUM'S PETITION FOR REHEARING** was e-filed and served on the following through the Odyssey E-Filing Portal and regular e-mail transmission:

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¶37. **CERTIFICATE OF COMPLIANCE**

¶38. I, Ryan G. Quarne, attorney for Defendant, Third-Party Plaintiff, Appellee, and Cross-Appellant, Kyle Mahlum, do hereby certify that the above Petition for Rehearing complies with all type-volume limitations as set forth in the North Dakota Rules of Appellate Procedure.

¶39. I further certify that the attached Petition for Rehearing contains fewer than 2,000 words, and was prepared using WordPerfect 10.0, Times New Roman font, size 12.

¶40. Dated this 7th day of June, 2019.

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