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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20170003

Loren Zundel and Richard Zundel,

Plaintiffs and Appellees,
and Cross-Appellants

v.

Stephen Zundel,

Defendant and Appellant.
and Cross-Appellee

On Appeal from Judgment entered on November 7, 2016
Southeast Judicial District, LaMoure County, North Dakota
LaMoure County Case No. 23-2015-CV-23

The Honorable Jay A. Schmitz

BRIEF OF APPELLEES

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STATEMENT OF ISSUES

[1] Did the district court err in awarding attorneys' fees to Loren and Richard Zundel for only part of the action, even though the court found that all the claims asserted or advanced by Stephen Zundel were frivolous and were not made in good faith, but instead were made "to harass [Loren and Richard] because of unrelated disputes and family tensions"?

[2] Other issues are set forth in Appellant's brief.

STATEMENT OF THE CASE

[3] This action concerns the parties' rights and obligations under a lease covering the family's longstanding bin site.

[4] Stephen Zundel (landlord and a tenant) made a multitude of demands on his brothers Loren and Richard Zundel and their children (tenants) to make unnecessary or unreasonable maintenance and repairs the family bin site. App. 47-50, 54-56; Doc. #73-75, 77. Stephen also demanded that they pay more rent than was due. App. 35-36; Doc. #76. They refused the demands to the extent inconsistent with the lease. Id. In early 2015, Stephen served his brothers and their children with a notice of intention to evict them from the bin site.

[5] Thereafter, Loren and Richard commenced this action seeking a declaratory judgment. App. 7-18. They asked the court to declare that they (and their children) were in compliance with the payment and repair provisions of the lease. Id. They also sought a modest amount of contribution from Stephen for the cost of repairs they had made. Id.

[6] Stephen asserted counterclaims to evict Loren and Richard and to have the lease declared void under the 10-year limitation on the lease of "agricultural land" set forth in N.D.C.C. § 47-16-02. App. 26-29.

[7] Judge Daniel Narum presided. App. 34-59.

[8] Loren and Richard moved for partial judgment on the pleadings. Doc. #26-27, 38. They argued that the lease unambiguously required rent of $400 from all tenants (and not $400 from each tenant, as Stephen wrongly claimed). Id. They also argued that, as a lease of a bin site on land not suitable for farming, the lease was not within the 10-year limitation on the leasing of agricultural land set forth in § 47-16-02. Id. The district court granted the motion. App. 34-41.

[9] The remaining pleaded claims were tried before the district court on January 20 and 21, 2016. See Trial Tr. Day One and Day Two.[1] Those claims consisted of Loren and Richard's claim for a declaratory judgment that they had complied with the lease and Stephen's obverse claim for eviction alleging that they had breached Section 6 (repair) and Section 8 (use) of the lease. Id. Loren and Richard's related claim for contribution also was tried. Id.

[10] At trial, Stephen also attempted to advance multiple unpleaded claims, including that a typographic error in the lease's legal description precluded Loren and Richard from using part of the bin site and that the lease was unconscionable. App. 45-46; Doc. #127.

[1] Day one of the trial transcript will hereafter be cited as "1Tr." and day two "2Tr.," with following references to the relevant page numbers.

[11] Following trial, the district court made detailed findings of fact. App. 42-59. Among them, the district court specifically found that "the evidence showed that Stephen did not make the claims in good faith, but to harass his brothers because of unrelated disputes and family tensions." App. 58. The district court also found, as a matter of fact, that Loren and Richard had maintained the bin site in good condition and repair and had not breached any provision of the lease. App. 51-56. The court therefore granted Loren and Richard's request for a declaratory judgment and dismissed Stephen's claim for eviction. App. 58-59. The district court also awarded Loren and Richard contribution in the amount of $1,345.76 for the cost of repairs they had made. Id.

[12] Additionally, the district court determined that Stephen's claims, made in bad faith and for the purpose of harassment, were frivolous and therefore awarded them attorneys' fees. App. 57-58. Prior to deciding the amount of fees, which were submitted on motion under Rule 54, Judge Narum recused himself. Doc. #160.

[13] Judge Jay Schmitz was assigned. Doc. #161. Based only on a cold review of the record, Judge Schmitz awarded Loren and Richard $21,182 in fees and costs. Supp. App. 1-30. Judgment was entered. App. 60-61. These appeals were timely filed. App. 62-63; Supp. App. 31.

STATEMENT OF FACTS

[14] The bin site at issue was established in 1969 by the parties' father, Edwin Zundel. 1Tr. 13. The land on which the bin site is located was owned by Edwin Zundel or his family partnership from the time it was established until 2006. 1Tr. 13-20. During that time, the bin site was used by Edwin and his children – Loren, Richard, Stephen, and Donald Zundel. Id.

[15] From 1969 until 2014, there were no disputes concerning the use of the bin site. 1Tr. 16-17, 42. It was used by all family members cooperatively and, until 2006, without a lease agreement or any formal payment or maintenance obligations. 1Tr. 13-26. During that time, the bin site was maintained cooperatively by those who used it. Id.

[16] In 2006, Edwin deeded the land he held in his family partnership, including the land on which the bin site sits, to his four sons. 1Tr. 27-29. Before doing so, however, Edwin wanted to ensure that the bin site would be available for use in the future by his sons and their children. As a result, Edwin engaged a lawyer to draft the lease and required that his sons sign it before deeding them any land. Id.

[17] In or about June 2006, the lease was signed by Edwin, as landlord, and by Loren, Richard, Stephen, and Donald, as tenants. App. 14-18.

[18] While Edwin's four sons were the only tenants to sign the lease, it included a provision to benefit third parties – namely, Edwin's grandchildren. App. 14. The lease defines "tenants" to include "all of Edwin Zundel's grandchildren living at the time of the commencement of this lease who engage in the practice of farming." Id. Such third-party beneficiary tenants include Loren's children (Justina Zundel, Jason Zundel, and Kyle Zundel) and Richard's children (Allexa Zundel and Kenan Zundel). 1Tr. 102.

[19] Since the location of the bin site was known to all parties to the lease, the lease describes the area of the bin site only generally, as follows:

> "Bin Site" shall mean the land not suitable for farming upon which storage bins owned by Landlord and Tenants are built, but does not include the house, yard area, quonset, and pasture land of the Leased Property. Landlord and tenant commonly refer to this land as the "bin site."

App. 14; 1Tr. 19, 31; Doc. #70-72.

[20] The lease also refers to the "Bin Site" as the "Leased Property." App. 14. It states that the Leased Property "shall mean the Bin Site." Id. Thus Bin Site and Leased Property are synonymous under the lease. Id.

[21] To allow for potential future expansion, the lease's definition of "Leased Property" also references an unspecified 40 acres on two 160 acre quarter sections. App. 14; 1Tr. 40. There never was, however, any intent that the bin site would take up a full 40 acres. Id. All parties understood the location of the bin site and intended the lease to cover approximately 4.85 acres, as depicted in Trial Exhibits 2, 3, and 4. Doc. #70-72.

[22] The lease contains the following provision concerning repairs:

> Repairs. Tenants shall, at their expense, make all repairs as shall be reasonably necessary to keep the Leased Property in good condition and repair. Tenants further agree that all damage or injury done to the Leased Property by Tenants or by any person who may be in or upon the Leased Property, except Landlord, Landlord's agents, servants and employees, shall be repaired by Tenants at their own expense. Tenants agree, upon the termination of this Agreement, to surrender the Leased Property in good condition and repair, reasonable wear and damage by act of God or fire or other cause beyond the control of Tenants excepted.

App. 15.

[23] The lease contains the following provision concerning the use of the bin site:

> Use of Premises. Tenants agree that the Leased Property shall be used and occupied only for the purpose of storing crop, farming equipment, and farming supplies and other purposes relating thereto, and for no other purpose or purposes without the Landlord's written consent. All Tenants agree that each Tenant, individually, shall have an equal right to use the Leased Property for the purpose stated above, including but not limited to, an equal right to use all storage bins on the Leased Property.

App. 15.

[24] Concerning default, the lease requires the landlord to give written notice of any default. App. 15-16. The tenants are afforded 30 days to cure a payment default and 90 days to cure any other default before the landlord may evict. Id.

[25] In or about 2006, after the lease was in effect, Edwin's partnership deeded to Stephen the land on which the bin site sits. 2Tr. 115-117. Stephen had previously signed the lease, had full knowledge of it, and took the land subject to the lease. Id. Stephen thus became the landlord under the lease, as well as remaining a tenant. Id.

[26] In 2013, Stephen, on the one hand, and Loren and Richard, on the other, had a series of disputes concerning a buy-sell agreement covering other land, their deceased brother Donald's estate, and other issues. 2Tr. 118-119. Ultimately, Stephen did not get what he demanded in any of those matters. 2Tr. 119.

[27] In January 2014, Stephen added the bin site to the disputed issues. Through counsel, he made a written demand for repair of a light fixture at the bin site. Doc. #73. Loren Zundel made the repair. 1Tr. 44. In February 2014, Stephen, again through counsel, then made two additional demands for repair, one demanding repair of a door on bin #8 and one demanding the repair of a roof door on bin #7. Doc. #74-75. Loren again addressed both issues. 1Tr. 45-50.

[28] In continuing correspondence between their counsel, Stephen then demanded $400 of rent from each tenant, including from each third-party beneficiary (Loren's and Richard's children). Doc. #76. In response, Loren and Richard, through their counsel, explained that the total annual rent due was only $400 from all tenants. Doc. #78. They also expressed their desire that any further repair issues "be handled

through an informal request between brothers, rather than from certified letters from Stephen's legal counsel." Id.

[29] In response, Stephen himself signed and sent a letter, dated May 29, 2014, demanding the repair of a multitude of items on and near the bin site. Doc. #77. Notwithstanding the demand, the bin site components worked and were functional. App. 48-50, 54-56; 1Tr. 42-70. That complied with the lease's repair provision, which was intended simply to maintain a functional bin site. Id.

[30] Additionally, in his demand letter, Stephen demanded that Loren and Richard undertake significant "repairs" to what were referred to as the red building and the white building. Doc. #77. With respect to those structures, Stephen demanded that Loren and Richard replace a door; replace broken windows; repair the roofs; repair the siding; and paint the buildings. Id.

[31] The buildings, however, were old and worn when they were moved to the bin site. App. 48-50; 1Tr. 42-70. The buildings were functional for their intended purpose, which was to keep snow and rain off of various pieces of equipment, and not for the storage of commodities. Id. Stephen's demand for the wholesale repair of the white building and the red building, as found by the district court, was patently unreasonable to the point of being absurd. Id.

[32] The same can be said for Stephen's request for the "repair" of a pole barn. App. 49-50; 1Tr. 42-70. The pole barn is outside the 4.85 acre bin site, was destroyed by a storm, and insurance proceeds had been paid as compensation. Id. The remnants of the pole barn were lying flat on the ground west of the 4.85 acre bin site. Id. All that was

left was a pile of lumber. Id. Stephen's demand that the pole barn be rebuilt was, as found by the district court, patently unreasonable and absurd. Id.

[33] After Loren and Richard refused to make unreasonable or unneeded repairs, and refused to pay rent not due, Stephen served them and their children with an eviction notice. Doc. #93-95. Loren and Richard then commenced this case to resolve the dispute concerning the amount of rent due and their compliance with the lease. App. 7-13.

ARGUMENT

I. THE LEASE IS NOT SUBJECT TO THE 10-YEAR LIMITATION SET FORTH IN N.D.C.C. § 47-16-02.

[34] Stephen seeks reversal of the district court's determination that the lease is not subject to the 10-year lease limitation in N.D.C.C. § 47-16-02. The district court determined that the bin site was not "agricultural land" and that the express terms of the lease prohibited the parties from using the lease for agricultural purposes, as those terms apply to N.D.C.C. § 47-16-02. App. 34-41. The district court did not reach the issues of whether the lease reserved rent or services, or whether a lease for the duration of lives was prohibited by the 10-year limitation. App. 40.

[35] In relevant part, § 47-16-02 states as follows:

> No lease or grant of agricultural land reserving any rent or service of any kind for a longer period than ten years shall be valid.

N.D.C.C. § 47-16-02.

[36] This Court has set forth the following four requirements to invalidate a lease under that statue:

> In the jurisdictions where the law restricts the duration of a lease of agricultural land, before a court is justified in declaring it invalid, it must find [1] that the lease is of agricultural land; [2] that the use of the land for

> agricultural purposes is not excluded; [3] that rent or service is reserved; and [4] that the term is within the restriction.

Anderson v. Lyons, 2014 ND 61, ¶ 12, 845 N.W.2d 01 (quoting Anderson v. Blixt, 72 N.W.2d 799, 803 (N.D. 1955)).

A. The Lease Does Not Cover "Agricultural Land."

[37] To be covered by § 47-16-02, the lease must be one of "agricultural land." The words of a statute must be given their plain and ordinary meaning, unless a contrary intention is shown by, for example, a specific definition. N.D.C.C. §§ 1-02-02, 1-02-03. There is no specific definition of "agricultural land" expressly applicable to § 47-16-02.

[38] The Oxford Dictionary defines "agriculture" as, "The science or practice of farming, including cultivation of the soil for the growing of crops and of the rearing of animals to provide food, wool, and other products."[2] Under common usage, then, "agricultural land" is land that is farmed, including by the cultivation of the soil for the growing of crops or by being used to rear animals to provide food or other products.

[39] The land subject to the lease is not used as, nor is it suitable for, that purpose. Rather, the land covered by the lease is used as a bin site to store crops produced on other agricultural land and to store farm equipment. App. 15. Indeed, the land subject to the lease not only is not used for farming, but also is not suitable for such use. App. 14. The lease describes the bin site as "the land not suitable for farming upon which storage bins . . . are built, but does not include the . . . pasture land of the leased property." App. 14. Accordingly, the land subject to the lease is not "agricultural land" within the meaning of § 47-16-02 and the 10-year limitation therefore does not apply.

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[2] See https://en.oxforddictionaries.com/definition/agriculture. Accessed May 17, 2017.

[40] Furthermore, the above common and ordinary definition of "agricultural land" is confirmed by another provision of the Century Code. That provision is N.D.C.C. § 47-10.1-02, which defines "agricultural land" for purposes of Ch. 47-10.1 (Agricultural Land Ownership by Aliens). The definition, of course, is in the same title as the relevant statute and, indeed, is the only such definition in the Century Code.

[41] Consistent with the common ordinary definition, § 47-10.1-01 defines "agricultural land" as land capable of use "in the production" of agricultural crops, livestock, and related products, as follows:

> "Agricultural land" means land capable of use in the production of agricultural crops, livestock or livestock products, poultry or poultry products, milk or dairy products, or fruit and other horticultural products. . . .

N.D.C.C. § 47-10.1-01(1).

[42] Thus, the Century Code's only definition of "agricultural land" requires that the land be "capable of use in the production of agricultural crops" and other products. Id. That definition confirms that the term "agricultural land," as used in the Century Code's restrictions on the holding of farm land, means land used to produce corps and products, not land that merely has a broad connection to agriculture. See N.D.C.C. § 1-01-09 ("Whenever the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs in the same or subsequent statutes, except when a contrary intention plainly appears.").

[43] Stephen wrongly contends that a bin site is agricultural land within the meaning of § 47-16-02 by citing a 2010 decision from the Traill County District Court. Doc. #34. That decision, which used an expansive definition of "agricultural land," was

appealed to this Court. The Court, however, did not decide the issue, finding it unnecessary to its decision. See Knudson v. Kyllo, 2012 ND 155, ¶ 11, 819 N.W.2d 511.

[44] The district court's Knudson decision came to an erroneously broad view of "agricultural land" because it (1) did not follow persuasive precedent, (2) refused to apply the only definition of "agricultural land" found in the Century Code, and (3) ignored the implications of its decision.

[45] First, the Knudson decision did not follow precedent which counsels that "agricultural land" within the meaning of the statute is land that is actually farmed. The district court here cogently explained that in its decision. App. 36-34 (citing Trauger v. Helm Bros., Inc., 279 N.W.2d 406, 410 (N.D. 1979); Berry-Iverson Co. of North Dakota, Inc. v. Johnson, 242 N.W.2d 126 (N.D. 1976); Ryan v. Sioux Gun Club, 2 N.W.2d 681 (S.D. 1942); and Massachusetts Nat. Bank v. Shinn, 163 N.Y. 360 (Ct. App. N.Y. 1900).

[46] Second, as explained above, the Knudson decision wrongly rejected the Century Code's only definition of "agricultural land," which is found in § 47-10.1-01. In Knudson, the Court did not apply the definition of "agricultural land" in Chapter 47-10.1 to the statute at issue in Chapter 47-16 because it concluded "that these two chapters do not serve the same purpose." Doc. #34.

[47] But while the *specific* purposes of the two statutes may be different, their *general* purposes are similar. That is, both provisions govern and put certain limitations upon the acquisition or transfer of "agricultural land" in North Dakota. It goes without saying that no two statutory provisions ever will serve the same specific purpose. Otherwise there would be no reason for two statutes.

[48] Chapter 47-10.1 limits the ownership of agricultural land by certain non-citizens, and § 47-16-02 limits the leasing of agricultural land. The gist of both provisions is to regulate how North Dakota "agricultural land" may be held. In that light, the two provisions serve similar purposes, and the definition provided in one is applicable to the other. See Tino v. Palmer, 621 N.W.2d 420, 423 (Iowa 2001). ("When the same word or term is used in different statutory sections that are similar in purpose, they will be given a consistent meaning.").

[49] The definition of "agricultural land" in § 47-10.1-02 therefore should apply to § 47-16-02, particularly when it is the only definition in the Century Code, is consistent with the common-place definition described above, and both provisions serve a similar purpose. Section 47-10.1-01 defines "agricultural land" as that "capable of use" in the "production" of agricultural crops and products. N.D.C.C. § 47-10.1-01. Such land does not include the Bin Site, which is "land not suitable for farming." App. 14.

[50] Third, following the Knudson decision would result in a harsh, absurd, and apparently unintended result. If the Knudson decision were followed, and "agricultural land" broadly meant any land that might be used for a purpose relating to agriculture, a whole range of long-term leases could be struck down. For example, a long-term lease given or held by a railroad to move agricultural crops by rail could be struck down. A long-term CRP lease could be struck down. A long-term lease for land on which a grain elevator sits could be struck down. A long-term lease for a business manufacturing or selling agricultural equipment could be struck down. There is absolutely no suggestion in the text of § 47-16-02, or in the cases construing that statute or similar statutes in other

states, that such a wide-ranging prohibition was intended. And, of course, it is presumed that a "reasonable result" is intended by all statutes. N.D.C.C. § 1-02-38.

[51] Finally, even though the Knudson decision used an overbroad definition of "agricultural land," it is doubtful that that court would have come to the same decision if it were considering the lease at issue here. The lease here defines the bin site as "land not suitable for farming" and specifically excludes the "pasture land." App. 14. There is no indication that the lease in Knudson contained such a provision, and such land, under any definition, is not "agricultural land."

B. Use of the Land as "Agricultural Land" is prohibited.

[52] As noted above, to invalidate a lease under the statute, the court also must determine that "use of the land for agricultural purposes is not excluded." Lyons, 2014 ND 61, ¶ 12. In other words, even if a lease included "agricultural land," which this one does not, the lease would not fall within the statute if the lease excluded the tenants from using it as "agricultural land."

[53] The lease allows the tenants to use the land "only for the purpose of storing crop, farming equipment, and farming supplies and other purposes relating thereto." App. 15. It therefore does not permit the tenants to use the land as agricultural land. Accordingly, even if the lease included "agricultural land," which it does not, such use would be excluded and the lease would not fall within § 47-16-02.

C. The Lease is not for a "Longer Period than Ten Years."

[54] A lease is not limited by § 47-16-02 unless the term is for "a longer period than ten years." N.D.C.C. § 47-16-02. This Court has twice held that a lease that may (but will not necessarily) extend beyond 10 years, dependent on a contingency, is not for a "period" longer than 10 years and thus is not invalidated by the provision.

[55] In Lyons, the Court upheld a lease that extended "in perpetuity," but was subject to two contingencies (the tenant opting out of the lease or the landlord selling the land). See Lyons, 2014 ND 61, ¶¶ 10, 14. In Blixt, the Court upheld a lease that extended "so long as anyone of the said owners is still alive." Blixt, 72 N.W.2d. at 801, 805.

[56] In considering a lease for a term of lives, this Court reasoned as follows:

> A lease for life, although it may extend for a period longer than that specified in the prohibition, is not within the prohibition; where the term is specified in the lease and exceeds the limitation, it is void per se, but where it is left indefinite and its termination depends on the contingency of death, which may happen within the period of limitation, it cannot be said to be void ipso facto as being made for a period longer than that permitted by the restriction.

Blixt, 72 N.W.2d. at 805.

[57] To be sure, both Lyons and Blixt were decided before 10 years had passed from the commencement of the leases at issue. In other words, it was still possible that a contingency would occur and that the lease would not, in fact, last more than 10 years.

[58] Although this Court did not explicitly decide the validity of the leases after the 10 year period, it suggested that leases for the tenants' lives are valid by approvingly discussing the reasoning of Interurban Land Co. v. Crawford, 183 F. 630 (N.D. Ala. 1910). In Blixt, this Court stated as follows:

> In the case of [Interurban], it was held that the Alabama Statute . . . which provides that no leasehold estate in land can be created for a longer term than twenty years, applies only to tenancies for terms of years, and is not appropriate to or a restriction on tenancies for the life of the tenant or another. The statute, the court held, applies only to such leasehold estates as by the terms of the lease must endure longer than twenty years, and has no application to those which may or may not endure that long, contingent on the happening of a future event.

Blixt, 72 N.W.2d at 806.

[59] Under that reasoning, the lease, which lasts "for the life of all Tenants," is not one for a period, or term, "longer . . . than 10 years." App. 14; N.D.C.C. § 47-16-02. It is instead for an indefinite period subject to contingencies (i.e., an estate for lives). Accordingly, the lease is not invalidated or limited by N.D.C.C. § 47-16-02.

D. The Lease does not reserve "rent" within the meaning of the statute.

[60] The lease requires the cash payment of $400 of "rent" per year, which must be paid "in advance." App. 15. Under long-standing North Dakota precedent, however, "rent" within the meaning of § 47-16-02 has a specialized and limited meaning. It does not include mere cash consideration, such as is due under the lease.

[61] In Wegner v. Lubenow, 95 N.W. 442, 445 (N.D. 1903), this Court considered under the identical predecessor of § 47-16-02 a lease for the "full term of [the tenant's] natural life or during the term of his wife's natural life or both." 95 N.W. at 443. The lease required the entire rent of $200 to be paid in advance. Id. While the Court did not consider the life estate issue, it found the lease valid because the $200 payment was not "rent" within the meaning of the statue. Id. at 445.

[62] Considering other authorities, the Court noted that for purposes of agricultural lease restrictions,

> [A] rent is said to be a sum of money or other consideration, issuing yearly out of lands or tenements. [Citation omitted.] Blackstone defines rent or reditus as a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal inheritance. And it is defined to be a yearly profit issuing out of lands.

Wegner, 95 N.W. at 445.

[63] Simply stated, "rent" within the meaning of the statute must be "a yearly profit issuing out of lands," such as the reservation "of one-half of the crops" in Blixt.

See Id.; see also Blixt, 72 N.W.2d at 802. That is supported by the statutory mandate that rent be reserved ("reserving") (i.e., granting the estate, but reserving some of the profit).

[64] Rent is not "a given consideration" to be paid "for the estate." Wegner, 95 N.W.2d at 444. Accordingly, this Court concluded as follows:

> The $200 cash payment which was made at the execution of the lease was not profit issuing out of the land, and in no sense comes within the meaning of the term "rent," as used in the above section. On the contrary, it was merely a cash consideration for the transfer of the life estate in the land in question to the plaintiff and his wife. As has been seen, it is competent to make a grant of a life estate in agricultural lands. It is only leases of agricultural lands wherein rent or service is reserved which are declared invalid by [the statute].

Wegner, 95 N.W. at 445.

[65] In its reasoning, the Court also made it clear that the "consideration may be payable all at once, or by installments," so long as it is cash consideration and not the reservation of a profit issuing out of the land. Wegner, 95 N.W. at 444-45.

[66] Accordingly, the annual cash consideration payable under the lease, which must be "paid in advance," is not rent within the meaning of the statute. Stated differently, the lease reserves nothing but merely requires the payment of cash. The cash must be paid in advance and does not "issue" out of the land. And, of course, the land is not used for production and therefore does not turn a "profit." Accordingly, the lease is not invalidated or limited by § 47-16-02.

II. LOREN'S AND RICHARD'S CHILDREN ARE THIRD-PARTY BENEFICIARIES AND TENANTS UNDER THE LEASE.

[67] Stephen contends that the district court's determination that Loren's and Richard's children are third-party beneficiaries is clearly erroneous. The district court's decision, however, is well grounded in the evidence and should be affirmed.

[68] First, the lease defines "Tenants" as, among others, "all of Edwin Zundel's grandchildren living at the time of the commencement of this lease who engage in farming." App. 14. A plain reading of the provision means a tenant must (1) have been a living grandchild when the lease began and (2) farm at some time (and thus have use of the bin site). All of the grandchildren therefore are third-party beneficiaries, as all were alive when the lease began. 2Tr. 131-132.

[69] Second, the evidence showed that Stephen himself regarded all the children as tenants and therefore demanded payment from them. Doc. #76; 2Tr. 131-132 (demanding rent from, among others, Justina, Allexa, Keenan, Jason, and Kyle Zundel). That alone is a binding admission that they are third-party beneficiaries.

[70] Third, Stephen did not contest the issue before the district court. Neither his post-trial brief nor his post-trial reply brief contest the issue, even though Loren and Richard's complaint and post-trial briefs clearly alleged and argued that the children are entitled to third-party beneficiary status. App. 8, 11-12; Doc. #124, 127, 131 (post-trial briefs). Stephen cannot raise the matter for the first time on appeal.

III. LOREN AND RICHARD KEPT THE BIN SITE IN GOOD CONDITION AND REPAIR.

[71] The district court made fact findings and determined that Loren and Richard had maintained the bin site in good condition and repair. App. 47-50, 54-56. That determination is subject to a clearly erroneous standard of review. N.D.R. Civ. P. 52(a)(6). The district court's determination is well-grounded in the evidence and should be affirmed.

[72] First, the lease does not define "good condition and repair." After hearing the evidence, the district court found that the requirement of maintaining the bin site in

good condition and repair was intended to maintain a functional and operating bin site. App. 47-50, 54-56. That testimony is well grounded in the record and, in fact, there is no contrary testimony other than Stephen's conclusory and self-serving claim that he – and he alone – decides what is "good condition and repair." 1Tr. 42-70; 2Tr. 37-38; 2Tr. 132-159.

[73] The testimony was undisputed that Loren and Richard maintained the bin site in functional and operable condition. 2Tr. 136-137; Doc. #79-83. Not a shred of evidence even hinted that the bin site was not operable or capable of being used for its intended purposes. Stephen admitted the bin site was at all times fully functional. 2Tr. 136-137; Doc. #79-83.

[74] Furthermore, after hearing all the testimony, the district court found that Stephen's claim concerning the bin site's supposed poor condition was fabricated. App. 57-58. The district court found, after assessing the parties' credibility, that Stephen claimed disrepair simply in a disingenuous attempt to evict his brothers and not in an genuine effort to enforce the lease. App. 57-78. That finding, too, is well grounded in the record. 1Tr. 42-70; 2Tr. 116-119.

[75] Simply stated, Stephen is wrongly asking this Court to second-guess the fact findings made by the district court and find his testimony more credible than Loren's and Richard's. That is contrary to law. N.D.R. Civ. P. 52(a)(6). The district court's findings that Loren and Richard maintained the bin site in good condition and repair should be affirmed.

IV. THE DISTRICT COURT PROPERLY GRANTED LOREN AND RICHARD ATTORNEYS' FEES FOR STEPHEN'S FRIVOLOUS CLAIMS MADE IN BAD FAITH.

[76] The district court determined that Stephen's claims were frivolous and made in bad faith and therefore awarded them attorneys' fees under N.D.C.C. § 28-26-01(2). App. 57-78. The district court's discussion of the frivolous claims included every claim Stephen advanced in the case – the claim for $400 of rent from each tenant; the claim that the lease of land not suitable for farming was agricultural land therefore barred by the 10-year limitation in N.D.C.C. § 47-16-02; the claim that he was denied equal access to the bin site under section 8 of the lease; the claim for breach of the repair provision under section 6 of the lease; and the frivolous unpleaded claims advanced at trial. Id.

[77] Furthermore, after hearing all the evidence, the district court found that "Stephen did not make the claims in good faith, but to harass his brothers because of unrelated disputes and family tensions." App. 58.

[78] The issue is reviewed for an abuse of discretion, as Stephen's brief acknowledges. Appellant Br. ¶¶ 63-64.

[79] With respect to this issue, Stephen argues that, while his claims were dismissed, there was not "such a complete absence of actual facts or law that a reasonable person" would have known the claims would fail. But that "reasonable person" standard does not apply to Stephen because he made his claims in bad faith.

[80] Section 28-26-01(2) authorizes attorneys' fees for "frivolous" claims. N.D.C.C. § 28-26-01(2).

[81] A frivolous claim generally is considered one with little prospect of success; "often brought to embarrass or annoy the defendant." See Black's Law

Dictionary (6th Ed. 1990) (defining "frivolous action"). After hearing all the evidence, the district court determined that "the evidence showed that Stephen did not make the claims in good faith, but to harass his brothers because of unrelated disputes and family tensions." App. 58. That fact finding is solidly grounded in the record. 1Tr. 42-70; 2Tr. 116-119. That fact finding also was not challenged by Stephen on appeal.

[82] Thus, it has been conclusively established that Stephen brought the claims in bad faith and for the purpose of harassing his brothers. Such claims are frivolous within the meaning of N.D.C.C. § 28-26-01(2) and therefore the award of attorneys' fees was proper.

[83] Concerning the reasonable person standard, or "safe harbor," the statute states that when there is "such a complete absence of actual facts or law that a reasonable person could not have thought a court would render a judgment in that person's favor," the claim is frivolous, regardless "of the good faith of the attorney or party making the claim." N.D.C.C. § 28-26-01(2). A plain reading of that statute means that a claim is frivolous if (1) it is not supported by sufficient law and facts or (2) the claim was made in bad faith.

[84] That is the interpretation given in Stephen's appeal brief. In that regard, Stephen's brief states, "A party bringing a claim that is frivolous or in bad faith will be subject to reasonable attorney's fees." Appellant Br. ¶ 63 (emphasis added). The brief also states, "A safe harbor from an award of attorney's fees exists when a party argues for the modification or extension of existing law if they are made in good faith." Appellant Br. ¶ 65 (emphasis added).

[85] Since Stephen's claims were not made in good faith, but instead were made to harass his brothers, the safe harbor provision is not available to him. See N.D.C.C. § 28-26-01(2).

[86] Furthermore, even if the safe harbor were available, there was, as the district court determined, such an absence of facts and law in support of the claims that no reasonable person could have thought they would prevail. App. 57-58.

[87] Stephen's claim that he was entitled to $400 of rent from each tenant is frivolous. The lease plainly states, "Tenants shall pay to Landlord rent of $400 per year." App. 15. Stephen's claim that he was entitled to $400 from each tenant finds no support in the lease or any other part of the record.

[88] With regard to Stephen's claim for $400 from each tenant, the frivolity of his claims is highlighted. Prior to litigation, Stephen demanded $400 from Loren, Richard, and each of their five children. Doc. #76. Yet Stephen now claims that the children are not even third-party beneficiaries under the lease. That shows the frivolous and bad faith nature of his claims.

[89] Stephen argues that his claim that the lease is subject to the 10-year limitation set forth in N.D.C.C. § 47-16-02 was not frivolous because a Traill County district court found that a different bin site lease fell within the prohibition. While, as explained above, the Traill County district court's conclusion was error, the decision nonetheless provides no support for Stephen's position.

[90] In that regard, the lease at issue here covers only land "not suitable for farming" and specifically excludes the surrounding pasture. App. 14. No such restrictions were found in the lease at issue in the Traill County case. Doc. #34.

Additionally, Stephen's claim was made in bad faith to harass his brothers. App. 58. The Traill County case therefore does not support his claim of good faith.

[91] Stephen frivolously claimed that he was denied equal access to the bin site under Section 8, when there was no evidence to support that assertion and despite the fact that he failed even to given notice of such a default. App. 50, 52-54. A notice of default and 90-day opportunity to cure are plainly required by the lease. App. 15-16. Stephen's attempt to evict under section 8 therefore is frivolous.

[92] Stephen claimed that his brothers failed to keep the bin site in good condition and repair, notwithstanding the fact that he testified that the bin site was fully functional. 2Tr. 136-137. In addition, as the district court found, he made the claim not in a good faith attempt to enforce the lease, "but to harass his brothers because of unrelated disputes and family tensions" App. 58. That is frivolous.

[93] Similarly, Stephen attempted to advance multiple unpleaded claims at trial. Stephen's brief argues that his claim for repairs outside of the approximately 4.8 acre bin site and his claim that the lease was unconscionable were not frivolous. Yet Stephen plainly testified that he knew the location of the bin site and yet he demanded repairs outside of it. Doc. #79-83. Furthermore, he presented no evidence to support a claim of unconscionability. The unpleaded claims are therefore frivolous.

V. THE DISTRICT COURT ERRED IN GRANTING FEES FOR ONLY PART OF THE ACTION.

[94] The case was litigated and tried in front of Judge Narum. Judge Narum presided over the trial, heard the evidence, made credibility determinations, and ultimately entered findings of fact, conclusions of law, and an order for judgment. Judge Narum determined that the claims were frivolous, including because they were not made

"in good faith, but to harass [Loren and Richard] because of unrelated disputes and family tensions." App. 57-58.

[95] Judge Narum determined that every claim advanced by Stephen in the case was frivolous. Id.

[96] After hearing Loren and Richard's motion to set the amount of attorneys' fees, Judge Narum recused himself. Doc. #160. Judge Schmitz was assigned. Doc. #161.

[97] As Judge Schmitz stated, he was tasked with deciding the amount of attorneys' fees "based on a 'cold' reading of the transcript." Supp. App. 8. There can be no doubt that was a difficult task.

[98] He awarded only $21,182 in costs and attorneys' fees under N.D.C.C. § 28-26-01 (as opposed to the approximately $70,000 sought) because, he determined, that provision allows attorneys' fees only for frivolous claims and not for prosecuting a party's own claims. Supp. App. 6-10. Judge Schmitz then inferred that Loren and Richard "would not, or should not, have had to spend two days [at trial] refuting [the] single, frivolous counterclaim" that survived the motion to dismiss. He reduced their attorneys' fee recovery accordingly and effectively overturned Judge Narum's decision.

[99] In other words, the district court determined that Loren and Richard were entitled to attorneys' fees only for that portion of the case in which they were defending the counterclaims and not for that portion in which they were prosecuting their own claims.

[100] But, as the district court noted in its order, the declaratory claim Loren and Richard asserted was simply the "obverse" of Stephen's claims. Supp. App. 8. In other

words, Stephen was, in a practical sense, the real plaintiff in the case. He made that clear by serving Loren and Richard with an eviction notice. Doc. #93. The only reason Loren and Richard were the plaintiffs was because they chose to bring the dispute to the attention to the court to get a judicial determination. There is no legal basis to reduce their attorney fee recovery solely for that reason.

[101] Additionally, assuming for purposes of argument that § 28-26-01 does not allow fees for the entire action here, all fees would be authorized under N.D.C.C. § 28-26-31, which states as follows:

> Allegations and denials in any pleadings in court, made without reasonable cause and not in good faith, and found to be untrue, subject the party pleading them to the payment of all expenses, actually incurred by the other party by reason of the untrue pleading, including a reasonable attorney's fee, to be summarily taxed by the court at the trial or upon dismissal of the action.

N.D.C.C. § 28-26-31.

[102] The district court found that Stephen's allegations and denials were made in bad faith, were made without reasonable cause, and were untrue. App. 48-58. Thus Loren and Richard should be entitled to fees for the entire action under either N.D.C.C. § 28-26-01(2) or § 28-26-31.

CONCLUSION

[103] Loren and Richard Zundel respectfully request that the Court affirm the judgment, in all respects, except for ¶ 6 of the judgment which granted Loren and Richard attorneys' fees for only part of the action. With respect to that part of the judgment, Loren and Richard respectfully request that the Court reverse the judgment and remand the case to the district court for a determination of the reasonableness of their fees with respect to the entire action.

Dated: May 17, 2017

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for Loren and Richard Zundel in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 7,154.

Dated: May 17, 2017

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20170003

Loren Zundel and Richard Zundel, Plaintiffs and Appellees, vs. Stephen Zundel, Defendant and Appellant.	)))))))))	**AFFIDAVIT OF SERVICE**

Andrea Nowak, being first duly sworn on oath, deposes and states that she is a resident of the City of West Fargo, North Dakota, of legal age, and not a party to the above-entitled matter. On May 17, 2017, affiant served a true and correct copy of the following:

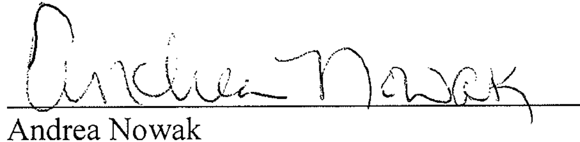
Brief of Appellees

Supplemental Appendix of Appellees

Copies of the foregoing were served, via email, as follows:

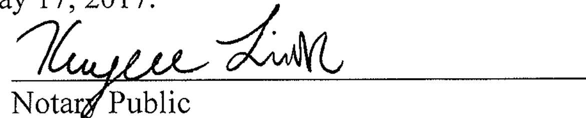
Fallon M. Kelly
fkelly@drtel.net

To the best of affiant's knowledge, the address above given was the actual address of the party intended to be so served. The above documents were served in accordance with the provisions of the Rules of Civil Procedure.



Andrea Nowak

Subscribed and sworn to before me on May 17, 2017.



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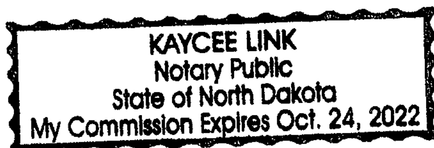

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