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JULY 10, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Skaw ND Precast, LLC, Plaintiff/Appellee, vs. Oil Capital Ready Mix, LLC, Agape Holdings, LLP, Scott Dyk and Samuel Dyk, Defendants/Appellants.	**Supreme Court Case No.: 20190138** **District Court Case No.: 53-2017-CV-01410** **ORAL ARGUMENT REQUESTED**

ON APPEAL FROM THE FROM THE JUDGMENT (DOC #115) ENTERED IN THIS ACTION ON THE 4TH DAY OF MARCH, 2019, IN THE DISTRICT COURT, COUNTY OF WILLIAMS, CASE NO.: 53-2017-CV-01410, BY THE HONORABLE PAUL JACOBSON

APPELLANTS' BRIEF

/s/ Mark A. Schwab
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STATEMENT OF THE ISSUES

[¶ 1] Whether the district court erred as a matter of law when it determined that a valid lease existed between the parties.

[¶ 2] Whether the district court erred when it found Appellee's property was converted when they were able to retrieve said property at any time prior to the expiration of the Access Agreement.

[¶ 3] Whether the district court erred when it awarded fees for a private investigator despite Appellants allowing for Appellee to retrieve its property, but Appellee refused to do so.

STATEMENT OF THE CASE

[¶ 4] The matter before the Court is an appeal from the judgment entered against Appellants on a conversion claim made by Appellee. The summons and complaint were served upon Appellants during December, 2016.

[¶ 5] A trial was held over the course of January 8 – 9, 2019. The Northwest Judicial District Court ruled in favor of the Appellee holding Appellants wrongfully converted the property of Appellee. The district court awarded Appellee $69,295.00 with $52,295.00 being awarded as a result of the conversion claim, and $17,000.00 being awarded as and for fair compensation for the time and money properly expended and accrued by Appellee hiring a private investigator.

[¶ 6] Appellants now bring forth this appeal alleging clear erroneous error by the district court in reaching its decision in holding Appellants liable on Appellee's conversion claim, as well as clear error in awarding $17,000.00 to cover the cost of the private investigator.

STANDARD OF REVIEW

[¶ 7] "We have held that the trial court's determination about whether a conversion has been committed is a finding of fact which will not be overturned on appeal unless it is clearly erroneous." Buri v. Ramsey, 2005 ND 65, ¶ 13, 693 N.W.2d 619 (quoting Paxton v. Wiebe, 1998 ND 169, ¶29, 584 N.W.2d 72). "A finding of fact is clearly erroneous when, although there is some evidence to support it, the reviewing court is left with a definite and firm conviction a mistake has been made." Id.

[¶ 8] "The appropriate standard of review in an appeal challenging a trial court's award of damages in a bench trial is whether the trial court's findings of fact on damages are clearly erroneous." Buri, 2005 ND 65, ¶ 17, 693 N.W.2d 619. "Under N.D.R.Civ.P 52(a), a finding of fact is clearly erroneous if there is no evidence to support it, if it is clear to the reviewing court that a mistake has been made, or if the finding is induced by an erroneous view of the law." Id.

STATEMENT OF FACTS

[¶ 9] On June 15, 2015, Appellants purchased real property and concrete equipment from Tioga Ready-Mix at a public auction at a purchase price of $450,000.00. App. #5-6. At auction, it was made known that an "agreement" was in place between Appellee and the previous owner (Tioga Ready-Mix) which allowed Appellee to use a 2-acre tract of land for the specified purpose of manufacturing concrete products. App. #77, pg. 21. Appellants took immediate possession of the real property purchased at the auction. App. #5-6. In the months between June 2015 – April 2016 several discussions took place regarding the "agreement" between Tioga Ready-Mix and Appellee regarding Appellee's use of the newly acquired property now owned by Appellants. App. #7-9, 11-15, 17-25, 27-29, 32-33, 35-40, 42-43, 46-47. The discussions centered around what obligations, if any, Appellee and Appellants had for each other. Id. Specifically, Appellee notified Appellants that it no longer wished to use the land or services it had contracted for with Tioga Ready-Mix; moreover, Appellee intended to vacate the property for new land no later than the end of December 2015, but would like to close out the season on the property. App. #14. In an effort to carefully navigate the situation, both parties, each represented by separate legal counsel, negotiated a new agreement. App. #11-12. The Appellee was required to pay Appellants $750 for the use of the 2-acre tract of land for a total payment of $3,750 spanning from August 1, 2015 – December 31, 2015. App # 14.

[¶ 10] At all times, Appellee was represented by attorney Jim Martens and Appellants were represented by attorney Dan Frisk. Id. Emails between the attorneys

were received at trial and clearly reflected the terms of the new agreement. App. #14. Said emails contained the relevant terms and authorized the new agreement replacing the former arrangement between Tioga Ready-Mix and Appellee, as well as solidifying the relationship between the new parties and created a termination date at the close of the 2015 season. Id. Unfortunately, the relationship between the parties broke down before the end of the 2015 season and Appellee left the 2-acre tract leaving behind its remaining inventory and failing to tender the full payment amount of $3,750.00 as agreed to. App. #17-18.

[¶ 11] After Appellee prematurely vacated the property, Appellants undertook the arduous task of cleaning up what was left behind by Appellee and Tioga Ready Mix, the former owners. App. #20. The emails between attorney Frisk and attorney Martens clearly state that, in any event, Appellee would no longer use the premises in the upcoming 2016 construction season. App. #11-12. Appellants removed several concrete pads and blocks from various fence lines, ditches and overgrown brush areas, and neatly stacked these pads and blocks along the main entrance of the property. App. #77 pg. 198.

[¶ 12] In March 2016, Appellee returned to the 2-acre tract stating it had changed its mind about relocating and wished to remain on the property. App. #23-25. Now represented by attorney Chad Anderson, the Appellee presented to Appellants, for the first time, the written "agreement" between Appellee and Tioga Ready-Mix. Id. Appellee now asserted it had a lease on a 2-acre tract and would stay through 2018. Id. Unsurprisingly, Appellants rejected any claim to "quiet enjoyment" of its real property

by Appellee given the expressed intentions of the parties the previous fall. Id. The dispute reached a head when law enforcement was called for assistance during April 2016 when Appellee demanded entry to Appellants' real property asserting a right to do so based off of an "agreement" between the previous owner despite agreeing to differing terms with Appellants. App. #26.

[¶ 13] Attorney Chad Anderson eventually conceded that the Appellee's "agreement" with the previous owners, Tioga Ready Mix, was not a lease, and elected to negotiate retrieval of Appellee's property left behind in December 2015. App. #28-29, 35-38. In an email from attorney Anderson to attorney Frisk, sent April 8, 2016, the Appellee wished to resolve the dispute by paying the remaining previously agreed upon payment, and requested at least sixty days to remove all of their tanks and blocks off of the property. App. #29. On April 14, 2016, Chad Anderson sent an email to Dan Frisk indicating (1) Appellee agreed to pay $750/month from November 2015 to the end term contained in the newly negotiated "Access Agreement", (2) that Appellee has completed an inventory (noting three missing tanks and that all of the concrete pads were located next to Appellants' office building), and (3) that Appellee now needed only at least thirty days to complete the process of removing any inventory. App. #35. Two hours after receiving Chad Anderson's email, Dan Frisk responded stating nothing has been removed from the property, that Appellants would allow three weeks to remove the inventory, and that a written agreement is a must. App. #35-37. On April 18, 2016, Chad Anderson presented the terms of the proposed access agreement to Dan Frisk, and Dan Frisk responded with revisions. Id. On April 20, 2016, Chad Anderson

presented a signed "Access Agreement" to Dan Frisk, as well as inquired about how to make the payment. App. #37. The "Access Agreement" was signed by all parties on April 21, 2016, and the term was to last until 6:00 P.M. on May 20, 2016. Id. The "Access Agreement" contained a "Schedule A" itemizing the inventory Appellee wished to remove from the property and it read as follows:

- 44 septic tanks w/lids
- 20 5.5" cylinders
- 49 25" cylinders (+6 scrap?)
- 25 36" cylinders
- 5 septic tank covers/lids
- 55+/- round septic tank hole covers
- About 10 or so cylinders with pipe in the sides
- Misc septic parts as show [sic] in from [sic] of camper. Camper and conveyor frame are not theirs
- 15 2x2x5 decorative blocks.

Id.

[¶ 14] On May 18, 2016, two days before the end of the term contained in the "Access Agreement, Appellee noted that other blocks on the property were Appellee's as well, despite not including the blocks in "Schedule A". App. #46. Samuel Dyk, Owner of Oil Capital and Triple Aggregate, indicated that Appellee could remove the blocks and that he wanted to get it over with. Id. Dan Frisk notified law enforcement

by email, as well as Chad Anderson, that Appellants were allowing Appellee to remove the blocks, but that the removal period was limited to the "Access Agreement" signed by all parties. App. #47. In that email, Dan Frisk indicated that even if the blocks were not Appellee's that Appellants wished to gift the blocks to Appellee, as Appellants had no interest in retaining the blocks. Id. Interestingly, at trial Appellee presented a pad and block inventory sheet listing the value of the blocks, but also indicated that the blocks were valueless, as the excess cost to move the blocks was more than the cost to remanufacture the same blocks. App. #77 pg. 41-42.

[¶ 15] Although Appellants expressed the desire to allow Appellee to remove the blocks, or to gift the blocks to Appellee, Appellants received no communication as to Appellee's motives regarding the blocks. App. #47. The next communication Appellants received from Appellee was the summons and complaint served by Appellee's newest attorney, David Tschider. App. #2.

LAW AND ARGUMENT

A. The Agreement Between Appellee ND Pre-Cast and Tioga Ready Mix Did Not Constitute a Lease Agreement

[¶ 16] Section 47-16-01, N.D.C.C., defines leasing of real property as "a contract by which one gives to another the temporary possession and use of real property for reward and the latter agrees to return such possession to the former at a future time." A lease grants a lessee "a right of possession of the property leased and the **exclusive use or occupation of it for all purposes** not prohibited by the terms." Lee v. North Dakota Park Serv., 262 N.W.2d 467, 470 (N.D. 1977) (emphasis added);

see also Lindvig v. Lindvig, 385 N.W.2d 466, 472 n.7 (N.D. 1986) ("rather than holding a leasehold interest, the evidence indicates that [Defendant] may have been a mere licensee, allowed to use portion of the land for specific purposes.").

[¶ 17] By contrast, a license "merely grants permission to use the land for a specific purpose under certain conditions and restrictions." Riverwood Commercial Park, LLC v. Standard Oil Co., Inc., 2005 ND 118, ¶ 10, 698 N.W.2d 478; see also Hector v. Metro Centers, Inc., 498 N.W.2d 113, 117 (N.D. 1993) (a license is nothing more than permission to do what otherwise would be unlawful.). This Court articulated the difference between a lease and a license stating, "a lease confers exclusive possession against the world and owner, unless otherwise provided, grants exclusive possession and profits, grants a corporeal hereditament or an estate in the land; whereas a license merely grants permission to use the land under certain conditions and restrictions." Lee, 262 N.W.2d at 473; see also Riverwood, 2005 ND 118, ¶ 11, 698 N.W.2d 478 ("The major distinction between a lease and an easement or license is that a lease confers exclusive use and possession of the property against the world, including the landowner, whereas [a] … license merely grants a right or permission to nonexclusive use of the land for a specific, limited purpose.") [¶ 18] Section 47-10-11, N.D.C.C., states a transfer of real property "passes all easements attached to the property, in accordance with the fundamental rule that all easements appurtenant to real property and created expressly by deed will pass with it unless expressly excepted, even if not referred to in the instrument of transfer." A license, differing from a lease, "is generally not assignable." Riverwood Commercial Park, LLC v. Standard Oil Co., Inc.,

2011 ND 95, ¶ 10, 797 N.W.2d 770. "'A license creates a privilege personal to the licensee, which cannot ordinarily be transferred by him to another.'" Id. (quoting 3 Basil Jones, Tiffany, The Law of Real Property, § 832, at 407 (3d ed. 1939)).

[¶ 18] At issue in this case is whether the agreement between Appellee and Tioga Ready Mix constitutes a lease agreement. The agreement contains several provisions and restrictions as to the use of Tioga Ready Mix's two-acre manufacturing site. See App. #4. – Appellee and Tioga Ready Mix agreement. The agreement specifically reads:

Tioga Ready Mix's 2-acre manufacturing site will be used by Appellee's:

A. To manufacture pre – cast concrete products.

B. A space to park One (1) RV/office. This RV would be used only by Appellee's from April 1st of any year until Nov 1st [sic] of any year and would sit empty during the winter months. This would have to be approved by the city of Tioga this would be conducted once and [sic] agreement has been made. Sanitary dump station is not available at this time.

C. Space to position one (1 or 2) [sic] 20' or (1)40' [sic] shipping container for storage of tools and smaller inventoried items.

D. Use of wireless Internet, currently being used by Tioga Ready Mix. Appellee's need to know the provider so we can secure a booster that will help insure [sic] service.

E. Use of Tioga Ready Mix bathroom facilities during normal business hours.

F. Appellee's is able to function with only the use of a gen set. [sic] Electricity availability would be helpful but not necessary.

Id.

[¶ 19] In addition, the agreement detailed, among other things, that: (1) Appellee would take over Tioga's account providing cement pads/bases to Hess, so long as Appellee agreed to pay 15% of the selling price of any bases poured by Appellee; (2) mutual use of a small end loader; (3) that Tioga's trucks will be batched out before Appellee's in the event of simultaneous need; and (4) what Appellee was to do with the existing inventory, how Appellee would sell the inventory, and whether Appellee may elect to fulfill any existing contracts between Tioga Ready Mix and its customers. Id. However, the most contentious portion of the agreement relates the provision particularizing what Appellee would pay to Tioga for access to the manufacturing site. The agreement reads:

> In exchange for the purchase of at least 500 yards of cement the first year (7 months of outdoor production) and up to 1000 yards in following years during each production (7 month season. [sic] Tioga Ready Mix agrees to provide an area not to exceed two acres at no charge. If concrete sales fall below 500 yds. [sic] A season or 71 yards a month for a 7 month out door season, Appellee's would pay a maximum rent of $700.00 a month if no concrete was purchased from Tioga Ready mix. If for example only

> 35.5 yards was purchased in a month Appellee's would owe Tioga Ready Mix $350.00 lot rent for that month. Who owes who can be determined at the end of each production season.

Id. This provision establishes that Tioga Ready Mix will provide to Appellee two acres for production, so long as Appellee meets a fixed purchase amount, or provides payment to Tioga Ready Mix to cover for unsold concrete sales. The district court relied upon this provision in the agreement as a basis for determining the existence of a lease. App. #74 pg. 10. The court noted the seasons in which payment would become due, the effective dates of the agreement, and that the agreement does not allow either party to unilaterally cancel the agreement. Id.

[¶ 20] Critically, the district court omitted from its findings the many other use restrictions and obligations included in the agreement. As mentioned above, a lease grants a lessee "a right of possession of the property leased and the **exclusive use or occupation of it for all purposes** not prohibited by the terms." Lee, 262 N.W.2d 467, 470 (N.D. 1977) (emphasis added). This agreement, on its face, cannot grant Appellee the exclusive use or occupation of the two-acre lot for all purposes given the many restrictions present. Moreover, it cannot be said that this agreement granted Appellee exclusive possession against the world and owner, exclusive possession and profits, or an estate in the two-acre plot. As detailed, the agreement restricts Appellee's use of the plot to six specified uses. Notably, the plot is to be used "to manufacture pre – cast concrete products" and nothing more. The agreement does call for the payment of money in the event that concrete sales fall below a set amount, but this payment

schedule cannot be the basis for a lease. It is not uncommon for fees to be included in licensing agreements. For example, Microsoft charges a set fee to be paid in exchange for use of its products, but that payment would not bind the consumer or Microsoft to a lease agreement.

[¶ 21] A license, more appropriately, "grants a right or permission to nonexclusive use of … land for a **specific, limited purpose**." Riverwood, 2005 ND 118, ¶ 11, 698 N.W.2d 478 (emphasis added). Tioga Ready Mix granted Appellee a license for the limited use of the two-acre plot specifically "to manufacture pre – cast concrete products", as well as the five other uses the agreement authorized. A license is revocable at will without notice. See Hector v. Metro Centers, Inc., 498 N.W.2d 113, 117 (license "'is generally revocable at will without notice'"); Lee, 262 N.W.2d at 471 ("'a license is, ordinarily, revocable at the will of the licensor'"). If the license could pass to Appellants on sale, Appellants are able to cancel the license in question at will, which is what they did.

[¶ 22] Tioga Ready Mix granted Appellee permission to use the two-acre production lot for the purposes of manufacture pre-cast concrete products. Appellee, under the agreement, was not permitted to access the land for any other use or purpose. For this reason, and the arguments presented above, the district court erred in finding the agreement between Appellee and Tioga Ready Mix was a lease agreement. The district court, in concluding Appellants converted the property of Appellee, relied on a finding of a lease agreement between Appellee and Tioga Ready Mix. App. #74 pg. 10. The court reasoned, that in Appellants' attempts to terminate any license agreement tied

to the land, it was engaging in a self-help eviction not authorized by North Dakota law. Id. Any finding of conversion based upon the finding of the lease agreement between Appellee and Tioga is clearly erroneous. As stated above, the agreement between the two was nothing more than a license for Appellee to use the two-acre production lot for the specified purposes identified in the agreement. Appellants' attempts to terminate any license is not an attempt to self-help evict, but rather Appellants acting within their legal authority to terminate any license it may have been assigned.

B. Even if the "Agreement" Constitutes a Lease Between the Previous Owner, Tioga Ready Mix and Appellee, Appellee Agreed to Different Terms with the New Owner, the Appellants.

[¶ 23] Section 9-09-06, N.D.C.C., states:

> A contract in writing may be altered by a contract in writing or by an executed oral agreement and not otherwise. An oral agreement is executed within the meaning of this section whenever the party performing has incurred a detriment which that party was not obligated by the original contract to incur.

[¶ 24] The alteration of terms of a contract must be supported by new consideration, which includes any benefit conferred or detriment suffered. Godon v. Kindred Public School Dist., 2011 ND 121, ¶ 12, 798 N.W.2d 664. "Although a written contract can only be modified by a contract in writing or by an executed oral agreement, an oral agreement is executed 'whenever the party performing has incurred a detriment

which that party was not obligated by the original contract to incur.'" Sanders v. Gravel Products, Inc., 2008 ND 161, ¶ 11, 755 N.W.2d 826.

[¶ 25] For sake of argument, if the "agreement" between Appellee and Tioga Ready Mix was in fact a lease and did pass to Appellants at auction, then the parties to this appeal modified its original terms throughout the parties' relationship. From the outset and through several attorneys, Appellee expressed a desire to vacate the 2-acre tract of land due to Appellee relocating. App. #11-15. It was agreed that the new terms of the agreement were that Appellee would close out 2015 on the 2-acre tract and would vacate in December 2015. Id. Additionally, a reworked rental payment was agreed to calling for Appellee to pay Appellants $750 each month to stay on the property. Id. This agreement is documented throughout the several emails back and forth. Id. These writings modified the original agreement between the parties and required both parties to incur detriments to which, under the original agreement, the parties did not previously hold. Additionally, Jim Martens indicates in writing to Dan Frisk that Appellee has agreed to the modifications, as well as tendered payment. App. #14.

[¶ 26] If the original agreement between Appellee and Tioga Ready Mix was in fact a lease and transferred to Appellants, the parties modified that lease setting a new end of term and differing rental payments. The parties also modified the conditions on which the property could be used. When the modified agreement expired, Appellee abandoned its property on site and later returned to find it had been moved, safely and appropriately, to different locations within the real property. At no point did Appellants attempt to exercise dominion or control over the property, and continually offered to

make arrangements for Appellee to reacquire what it had left behind. Therefore, Appellee's claim of conversion cannot be supported by any agreement between itself and Tioga Ready Mix as the parties, if even necessary, modified that agreement and Appellee breached by not tendering the remaining agreed upon rental payments, and left behind several items of inventory with the understanding that the modified agreement expired at the close of 2015. Moreover, Appellants made no attempt to refuse access to Appellee to retrieve its inventory.

C. Appellee's Property was Not Converted

[¶ 27] A "trial court's determination about whether a conversion has been committed is a finding of fact which will not be overturned on appeal unless it is clearly erroneous." Doeden v. Stubstad, 2008 ND 165, ¶ 9, 755 N.W.2d 859 (quoting Buri v. Ramsey, 2005 ND 65, ¶¶ 13 – 14, 692 N.W.2d 619). "Conversion consists of a tortious detention or destruction of personal property, or a wrongful exercise of dominion or control over the property inconsistent with or in defiance of the rights of the owner." Id. "The gist of a conversion is not in acquiring the complainant's property, but in wrongfully depriving him of it, whether temporarily or permanently, and it is of little relevance that the converter received no benefit from such deprivation." Id. "Conversion does not require bad intent of the part of the converter, but only an intent to control or interfere with an owner's rights to use to an actionable degree." Id.

[¶ 28] The essence of conversion is not the acquisition of property by the wrongdoer, but a wrongful deprivation of it to the owner. Leach v. Kelsch, 106 N.W.2d 358, 363 (N.D. 1963).

> The intent required is not necessarily a matter of conscious wrongdoing, but rather *the intent to exercise control or interference of such a degree as to require a forced sale of the plaintiff's interest in the goods to the defendant.* The tort is generally committed by an unauthorized transfer or disposal of possession of goods to one who is not entitled to them. [C]onversion may [also] occur by way of refusal to surrender possession of the property to one who is entitled to it. Where there has been no wrongful taking or disposal of the goods, but rather the defendant rightfully come into possession, demand and refusal to return are usually necessary to the existence of the tort. (emphasis added.)

Dairy Dept. v. Harvery Cheese, Inc., 278 N.W.2d 137, 144 (N.D. 1979).

[¶ 29] The district court, in concluding Appellants converted the property of Appellee, relied on a finding of a lease agreement between Appellee and Tioga Ready Mix. App. #74. The court reasoned, that in Appellants' attempts to terminate any license agreement tied to the land it was engaging in a self-help eviction not authorized by North Dakota law. Id. at ¶ 31. Any finding of conversion based upon the finding of the lease agreement between Appellee and Tioga is clearly erroneous. As stated above, the agreement between the two was nothing more than a license for Appellee to use the two-acre production lot for the specified purposes identified in the agreement. Appellants' attempts to terminate any license is not an attempt to self-help evict, but rather Appellants acting within their legal authority to terminate any license it may have been assigned.

[¶ 30] Additionally, Appellants provided numerous opportunities for Appellee to retrieve its property throughout the entire duration of the negotiations between both parties. Following the purchase of Tioga Ready Mix's real property, Appellee approached Appellants requesting to leave its remaining inventory of septic tanks and concrete manhole structures on the property due to Appellee's new facility being unavailable until later in the year of which Appellants allowed. Notably, Appellee approached Appellants during the summer months of 2015 seeking to restart operations on Appellants' real property. The parties were unable to reach an agreement and during December of 2015 Appellee abandoned the property and any inventory left on the property.

[¶ 31] Appellants, in their attempts to clean up the property and believing the various concrete pads and blocks stacked against fence lines, ditches and overgrown brush areas were left behind, moved the pads and blocks to the main entrance of the property. The pads and blocks were left stacked and in plain view near the only driveway onto the real property. Through the spring of 2016, the parties attempted to work out an agreement that would allow Appellee to retrieve any property/inventory it left behind and for Appellants' enjoyment of its real property to go uninterrupted as much as possible. Despite several meetings, exchanging of draft documents detailing the inventory/property schedule of Appellee, and Appellee routinely driving by the blocks and pads, Appellee never asserted ownership of the blocks; rather, Appellee remained silent and focused solely on retrieving other inventory. Even after reaching an agreement which allowed Appellee access to the property to retrieve the agreed upon

items, Appellee made no effort to retrieve or even request additional time to remove any of the pads or blocks, and only made a claim to the blocks two days before the expiration of the "Access Agreement".

[¶ 32] From the outset of the dispute, Appellants have consistently wanted the pads and blocks removed from the property it purchased. Appellants provided numerous opportunities for Appellee to assert ownership over the pads and blocks, and to remove said items from the property. Interestingly, as established through testimony at trial, the pads and blocks represent no economic value to either party due to the cost to remanufacture the pads and blocks were as costly as the expense associated with moving them. Appellant is burdened with storing and organizing the pads and blocks while Appellee has passively asserted ownership without making any significant attempts, despite Appellants' encouragement, to retrieve the blocks and pads.

[¶ 33] This Court has examined similar cases before. For example, in Paxton v. Wiebe, this Court affirmed a lower court's finding that conversion existed. Paxton v. Wiebe, 1998 ND 169, ¶ 37, 584 N.W.2d 72. This Court pointed out several factors in reaching its decision including:

1. That despite the locks being changed on the mobile home, "attempts, both preceding and following the change of locks, by the [Appellees] to arrange for [Appellant] to retrieve her personal property" occurred, yet Appellant failed to retrieve the property. Id at ¶31.
2. That the "necessary dominion or control over the personal property so as to deprive or interfere with [Appellant's] possessory rights to an actionable

degree" was not demonstrated. The Court quoted the following language, "[T]he fact that a defendant in possession of real property on which he finds chattels of another removes the chattels to a warehouse or other place of storage has been held in effect not to be such an assertion of ownership or control over the chattels as to render the defendant liable for conversion." Id at ¶ 30 (quoting 18 Am. Jur.2d *Conversion* § 38 (1985)).

3. Despite violating section 47-16-15, N.D.C.C., for failing to give notice before changing the locks, the "failure to give notice does not necessarily provide sufficient evidence to establish an action for conversion." Id at ¶ 33. "Even where the tenant alleges that he was wrongfully evicted the landlord is not liable in conversion for taking from the premises personalty belonging to the tenant, where the landlord in no way exercises dominion over the personal property in derogation of the tenant's rights." Id (quoting 49 Am.Jur.2d *Landlord and Tenant* § 239 (1995)).
4. That [Appellees] moved [Appellants] property "to their farmstead … where it was kept until the time of trial." [Appellant] made arrangements to retrieve the property, but flatly refused and made no efforts to remove the property until filing action.

[¶ 34] Based on the above-mentioned findings, the Court held that there was no showing of conversion and the lower court did not err in finding as such. The present case factually parallels the Paxton case. Much like in Paxton, several attempts were made to return the property to Appellee before and after effectively "changing the

locks" as the district court found. Appellants did move the pads and blocks from fence lines and overgrown brush in an attempt to clean up the property; however, Appellants did not hold the pads and blocks out as their own, but rather left the pads and blocks in plain view near the entrance of the property. During the entire negotiations between the parties on how to best resolve the issue, Appellee was aware of the pads and blocks. Appellee made no effort to include them on the "Schedule A" attached to the access agreement. Appellee exercised nearly every option conceivable to retrieve its property short of actually removing the pads and blocks from the property, and admitted at trial that the pads and blocks held no economic value to Appellee. Much like the Appellant in Paxton, Appellee has failed to show an actionable conversion committed by Appellants; thus, the lower court's decision is clearly erroneous.

D. The Lower Court Erred in Awarding $17,000 as and for Fair Compensation for the Time and Money Expended and Accrued by PMI

[¶ 35] Section 32-03-23(3), N.D.C.C., states, "The detriment caused by the wrongful conversion of personal property is presumed to be … [f]air compensation for the time and money properly expended in pursuit of the property." For the reasons stated above, Appellants assert that the lower court erred in finding for Appellee on its conversion claim. As such, the additional award of $17,000 for the time and money spent by Appellee in retaining Professional Management & Investigations (PMI) to assist Appellee was clearly erroneous.

[¶ 36] It was clear at trial that the monies expended on investigator Troy Lang was not necessary, and he rendered no benefit to the case. In fact, Lang's involvement

only frustrated the legal process. Lang is not a lawyer and did nothing to move the case forward. The only "benefit" that Appellee could state that Lang offered was to "drive him around", even though Appellee had a driver's license of his own. App. #77 pg. 145-147. Lang also "took some pictures", but Appellee also admitted they already had pictures. Id. Further, as stated above, Appellants did not want the blocks, and had offered them back through counsel. It is quite obvious that Lang and the money expended on him was not proper, nor needed. The Court, in its decision, does not offer any explanation for awarding any money for Lang's services, which was clearly erroneous.

CONCLUSION

[¶ 37] The Complaint was wholly devoid of any claim for breach or wrongful termination of lease. The sole claim in the case is of conversion by Appellants. The district court based its finding of liability for conversion on a mistake of law and fact that the agreement between Appellee and the previous landowner, Tioga Ready Mix, constituted a lease rather than a license. In doing so, the district court committed clear error. The agreement between Appellee and Tioga Ready Mix was in fact a license, and even if found to be a lease, the parties modified that lease as evidenced through the numerous conversations and documents provided in the appendix to this appeal. Appellee has been the catalyst for chaos by agreeing, reneging on promises, escalating tensions and passive-aggressively attempting to retrieve its inventory left behind. Appellants approached the situation with a willingness for the parties to work together in fashioning a deal that would allow both parties to walk away satisfied. Instead, with

two days left on the term of the "Access Agreement", Appellee for the first time claimed ownership of the blocks at the center of this lawsuit. Upon being informed for the first time that the Appellee now lay claim to cement blocks not previously listed on the written schedule, the Appellants immediately and without hesitation told the Appellee they could and should take all of the blocks. When no immediate action was taken, the attorney for Appellants, in writing, expressly told Appellee to remove the items requested and "consider it a gift" even if the blocks had been the property of the previous owner. The conversion claim is unsupported in evidence, fact and law, and the district court committed clear error in awarding damages to Appellee on its claims. For the reasons stated above, Appellants request the Court to reverse the decision issued by the district court.

REQUEST FOR ORAL ARGUMENT

[¶ 38] Defendants/Appellants hereby request oral argument in this matter. Oral argument is requested for this matter given the complex interaction between the timeline of events and law.

Dated: July 10, 2019

/s/ Mark A. Schwab

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CERTIFICATE OF COMPLIANCE

[¶ 39] I, Mark A. Schwab hereby certify that the Brief of Defendants/Appellants containing a total of 28 pages complies with N.D.R.App.P, Rule 32(8)(e).

Dated: July 10, 2019

/s/ Mark A. Schwab

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20190138
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JULY 10, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Skaw ND Precast, LLC, Plaintiff/Appellee, vs. Oil Capital Ready Mix, LLC, Agape Holdings, LLP, Scott Dyk and Samuel Dyk, Defendants/Appellants.	**CERTIFICATE OF SERVICE** **Supreme Court Case No.: 20190138** **District Court Case No.: 53-2017-CV-01410**

[¶1] I hereby certify that on the 10th day of July, 2019, the following documents:

1. Appellants' Brief; and

2. Appellants' Appendix.

were served, via email, upon the following:

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Dated: July 10, 2019

By: /s/ Mark A. Schwab
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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Skaw ND Precast, LLC, Plaintiff/Appellee, vs. Oil Capital Ready Mix, LLC, Agape Holdings, LLP, Scott Dyk and Samuel Dyk, Defendants/Appellants.	**CERTIFICATE OF SERVICE** **Supreme Court Case No.: 20190138** **District Court Case No.: 53-2017-CV-01410**

[¶1] I hereby certify that on the 22nd day of July, 2019, the following documents:

1. Appellants' Brief; and

2. Appellants' Appendix.

were served, via email, upon the following:

David A. Tschider
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Dated: July 22, 2019

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Skaw ND Precast, LLC, Plaintiff/Appellee, vs. Oil Capital Ready Mix, LLC, Agape Holdings, LLP, Scott Dyk and Samuel Dyk, Defendants/Appellants.	**CERTIFICATE OF SERVICE** **Supreme Court Case No.: 20190138** **District Court Case No.: 53-2017-CV-01410**

[¶1] I hereby certify that on the 22nd day of July, 2019, the following documents:

1. Appellants' Brief; and

2. Appellants' Appendix.

were served, via email, upon the following:

David A. Tschider
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Dated: July 22, 2019

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