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**THE SUPREME COURT OF THE STATE OF NORTH DAKOTA**

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State of North Dakota,

Plaintiff-Appellee

v.

Melissa Sue Olson,

Defendant-Appellant

State of North Dakota,

Plaintiff-Appellee

v.

Bryan James Bienek,

Defendant-Appellant

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Supreme Court No. 20060182  
Grand Forks Co. No. 18-05-K-04259

Supreme Court No. 20060183  
Grand Forks Co. No. 18-05-K-04260

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**APPEAL FROM THE DISTRICT COURT,  
GRAND FORKS COUNTY, NORTH DAKOTA  
NORTHEAST CENTRAL JUDICIAL DISTRICT  
THE HONORABLE KAREN BRAATEN, PRESIDING**

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BRIEF OF APPELLANTS

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## JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction of this matter pursuant to North Dakota Century Code § 29-28-06(1) and Rule 3 of the North Dakota Rules of Appellate Procedure. The defendants timely appealed after entering a conditional plea of guilty, via Rule 43 of the North Dakota Rules of Criminal Procedure, pending the outcome of this appeal.

## STATEMENT OF THE ISSUES

- I. **The evidence obtained by the arresting officer was the result of an unlawful stop and seizure which violated the defendant's right to be free from unreasonable searches and seizures under the North Dakota Constitution and the Fourth Amendment of the United States Constitution.**
  - A. *The community caretaker function should not be extended to individuals walking on a public sidewalk who are posing no immediate threat to themselves or any other individual.*
  - B. *The arresting officer was not acting as a community caretaker when he stopped and detained the defendants.*
  - C. *After unlawfully stopping and detaining the defendants, neither officer had reasonable articulate suspicion to detain, separate, arrest, and then cite both defendants for the crime on Minor In Consumption.*

## STATEMENT OF THE CASE

The Defendants, Melissa Sue Olson and Brian James Bienek, were arrested on December 9, 2005, for Minor in Consumption of Alcohol. The alleged offenses occurred on the 3100 block of University Avenue on the campus of the University of North Dakota. The defendants filed separate motions to suppress on January 12, 2006. A motions hearing was held on March 21, 2006, where the defendants and the state's attorney stipulated to the motions being combined as the issue was the same for both defendants. The Trial Court ruled in favor of the State and the evidence obtained after the stop was allowed into evidence over the objection by the Defendant.

After the motion hearing, the defendant's filed conditional pleas of guilty, via Rule 43 of the North Dakota Rules of Criminal Procedure, pending the outcome of this appeal. The Defendants were sentenced on April 10, 2005. A motion to stay the District Court's judgment was filed by the defendants on June 9, 2006. The state did not oppose the defendant's motion to stay. The Defendants now appeal the judgments in both cases to the North Dakota Supreme Court.

## **STANDARD OF REVIEW**

When reviewing a trial court's ruling on a motion to suppress, the Supreme Court will affirm the decision of the trial court, after resolving conflicting evidence in favor of affirming the decision, unless the court concludes there is insufficient evidence to support the decision or the decision goes against the manifest weight of the evidence. City of Jamestown v. Jerome, 2002 ND 34, ¶ 6, 639 N.W.2d 478. Questions of law are fully reviewable, and the ultimate conclusion of whether the facts support a reasonable and articulable suspicion is fully reviewable on appeal. State v. Gregg, 2000 ND 154, ¶ 20, 615 N.W.2d 515.

## **STATEMENT OF FACTS**

On December 9, 2005, at approximately 2:31 a.m., the defendants, Brian James Bienek and Melissa Olson, were walking along University Avenue. (Tr. p. 37). The couple, both University of North Dakota students, was returning from a Sigma Nu social function. (Tr. p. 37). Due to the cold temperatures on this date, Ms. Olson began running along the sidewalk in order to keep warm and to get home as quickly as possible. (Tr. p. 37). Mr. Bienek, however, chose to remain behind. (Tr. p. 37). At this moment, Officer Lund, of the University of North Dakota Police Department, was approaching the couple from the opposite direction on University Avenue in his police vehicle. (Tr. p. 13-14). Officer Lund saw Ms. Olson running and Mr. Bienek walking behind her. (Tr. p. 14). Officer Lund, from his vantage point across the street, saw the couple and drew the conclusion that they were arguing. (Tr. p. 8). Based solely on this observation, Officer Lund called for assistance from a second University of North Dakota Police Officer, Matt Beland, and proceeded to investigate the situation. (Tr. p. 10).

Officer Lund turned his police vehicle around and pulled up behind the couple on the other side of University Avenue. (Tr. p. 14). Stepping out of his vehicle, Officer Lund ordered the couple to stop. (Tr. p. 15). Officer Lund was in front of his vehicle when he ordered the stop and the couple, who by this time were walking together, and were across the berm and on the sidewalk. (Tr. p. 15). Ms. Olson assured Officer Lund that she was fine, but cold, while he was still on the street. (Tr. p. 49.) Officer Lund continued to approach the couple, asked what was going on and demanded identification. (Tr. p. 9). Ms. Olson replied that she was not arguing with Mr. Bienek, that they were running due to the cold weather, and that they did not need any help. (Tr. p. 49). Despite of Ms. Olson's statement that she was okay and that she did not want any help, Officer Lund continued to question and approach both Ms. Olson and Mr. Bienek. (Tr. pp. 49-50). Officer Lund, and Officer Beland when he arrived, maintained approximately a six-foot distance from the couple. (Tr. pp. 29, 51). During this detention Officer Lund alleged that he could smell alcohol on the couple's breath. (Tr. p. 9).

Due to the evidence obtained via the detention, the officers separated the couple, placed each of them in the back seat of their patrol cars, and asked both to submit to an SD-2. (Tr. pp. 10-12, 25). Based on the result of the SD-2, Ms. Olson was cited for Minor in Consumption (MIC) in violation of N.D. Cent. Code § 5-01-08. (Tr. p. 25). Mr. Bienek was cited for MIC without a test. (Tr. p. 12).

### **ARGUMENT AND LAW**

- 1. The evidence obtained by the arresting officer was the result of an unlawful stop and seizure which violated the defendant's right to be free from unreasonable searches and seizures under the North Dakota Constitution and the Fourth Amendment of the United States Constitution.**

The Fourth Amendment of both the United States and North Dakota Constitutions guarantees “the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.” Jerome, at ¶ 5. In light of the rights protected by the Fourth Amendment, North Dakota case law instructs that “a ‘stop’ is a temporary restraint of a person’s freedom resulting in a seizure within the meaning of the Fourth Amendment.” State v. Sarhegyi, 492 N.W.2d 284, 286 (N.D. 1992) (citing Terry v. Ohio, 392 U.S. 1, 16 (1968)). Furthermore, “[a] seizure occurs within the context of the Fourth Amendment . . . when the officer, by means of physical show of force or show of authority, has in some way restrained the liberty of a citizen.” State v. Boline, 1998 ND 67, ¶ 25, 575 N.W.2d 906. To determine whether a police officer’s intrusion upon an individual’s Fourth Amendment rights is warranted, courts are to adhere to the policy of the Fourth Amendment which is “to minimize governmental confrontations with the individual.” State v. Wibben, 413 N.W.2d 329, 335 (N.D. 1987) (Levine, J., concurring) (citing United States v. Dunbar, 470 F.Supp. 704 (D.Conn. 1979)).

It is clear from North Dakota case law that a police officer’s approaching members of the general population is not a seizure if the officer “inquires of the [person] in a conversational manner, does not order the person to do something, and does not demand a response.” State v. Langseth, 492 N.W.2d 298, 300 (N.D. 1992). This concept is often called the “community caretaker” exception for acceptable police activity under the Fourth Amendment. Id. However, the North Dakota Supreme Court has explained that “even a casual encounter can become a seizure if the officer acts in a manner that a reasonable person would view as threatening or offensive . . . through an order, a threat, or display of weapon.” Id. (citing Wibben, 413 N.W.2d at 335 (VandeWalle, Justice,

concurring)).

The Honorable Judge Braaten erred as a matter of law when she ruled that the community caretaking encounter did not escalate into an investigatory stop until the officers requested that Mr. Bienek and Ms. Olson be seated in separate patrol vehicles. Order Denying Defendants' Motions to Suppress, p. 4. This was no longer a community caretaking encounter when Officer Lund ordered the couple to stop. If an officer's reason for stopping and seizing an individual does not fall within the community caretaker function, the officer needs articulable and reasonable suspicion that a crime has been or is about to be committed. Langseth, 492 N.W.2d at 299. Officer Lund ordered the stop when he was across the berm and behind his car. (Tr. p. 15). He could not have smelled alcohol at this point and thus did not have the reasonable suspicion required for the seizure.

*A. The community caretaker function should not be extended to individuals walking on a public sidewalk who are posing no immediate threat to themselves or any other individual.*

All but two cases in which the North Dakota Supreme Court has discussed the application of the community caretaking doctrine involve vehicles. State v. Keilen, 2002 ND 133, ¶17, 649 N.W.2d 224. In both cases, the Court determined the function did not apply. See Keilen at ¶19; State v. DeCoteau, 1999 ND 77, ¶ 21, 592 N.W.2d 579.

In DeCoteau, four Mandan police officers responded to an anonymous report of a domestic disturbance. Id. at ¶ 2. Upon arrival, the officers saw a group of children pointing to the defendant's trailer. Id. The defendants were outside of their trailer unloading their car. Id. at ¶ 3. The female defendant told the officers there was nothing wrong and wanted them to leave. Id. The officers did not heed to the request and

followed the defendants inside the home where a marijuana pipe was found. Id. at ¶ 4. The Court in DeCoteau declined to extend the community caretaking role to allow police officers into the home when the defendant did not need or request their assistance. Id. at ¶ 22.

The other North Dakota community caretaker case not involving vehicles also involved an unwarranted home intrusion by the police. See Keilen, 2002 ND 133. In Keilen, officers responded to a domestic dispute where a neighbor reported yelling, fighting, and a loud crash. Id. at ¶ 2. The neighbor told the arriving officer that he was afraid someone was hurt. Id. The officer went to the door of the apartment where the disturbance had taken place and heard some “voices murmuring” and someone come to the apartment door and walk away. Id. ¶ 3. The officer continued to knock after the person left the door and, after no response, the officer and his partner entered the apartment. Id. Both of the individuals inside, one of whom had scratches on his face, refused help, but the officers continued interviewing. Id. at ¶ 4. A third police officer arrived at the apartment and observed marijuana and marijuana paraphernalia in plain view within the apartment. Id. The Court suppressed the evidence, saying the officers should not have entered the home “to check to see if everyone was all right.” Id. at ¶ 19.

Like it has done with warrantless home searches, the Court should be reluctant to extend the community caretaking function to the physical stop of persons on public sidewalks. Officer Lund, using the community caretaker function, could have been much less intrusive in this situation. See Wibben, at 335 (governmental intrusions with the individual should be minimized). Officer Lund could have simply observed Ms. Olson and Mr. Bienek for a short amount of time in order to determine whether a possible

physical domestic dispute would transpire from Ms. Olson running and Mr. Bienek walking behind. Instead, Officer Lund stopped Ms. Olson and Mr. Bienek and persisted to question the individuals even after he was informed that everything was okay and his assistance was not desired. (Tr. pp. 15-20).

A persons' physical body should be looked at like his home. In Keilen, the Supreme Court stated that in order to enter a home the police need a warrant or probable cause plus exigent circumstances. Keilen, at ¶ 19. While this is a higher standard than a reasonable suspicion stop, an individual who is walking on a public sidewalk still has a right to privacy. The walker poses less of a threat than one driving or sitting in a vehicle. If a walker is posing a threat, the officer would, through observation, have reasonable suspicion to make a stop and thus would not need the community caretaker function. Neither Ms. Olson nor Mr. Bienek attempted to flee or evade the officer after he maneuvered a U-turn, parked some distance behind them and ordered them to stop. (Tr. p. 14). Both continued on their way before being ordered to stop by the officer. (Tr. p. 15.) It seems a stretch to believe that Officer Lund was acting on the belief that a domestic situation was about to arise simply because Ms. Olson was running and Mr. Bienek had his hands in the air behind her. (Tr. p. 14). There was, at the worst, an argument taking place and a police officer is not needed nor desired to break up a couple's argument.

The Court should consider the precedent it will set by allowing an officer to base a stop on the community caretaker function each time he or she sees a potential argument taking place. This type of stop goes directly against United States and North Dakota Constitutional protection of people to be "secure in their persons" and for the

government's least restrictive confrontation policy with individuals.

*B. The original arresting officer was not acting as a community caretaker when he stopped and detained the defendants.*

According to Langseth and Wibben, there is a three-step analysis that is conducted in order to determine whether a police officer's stop was part of his community caretaking function. The approach is not a seizure if the officer 1) inquires the occupant in a conversational manner; 2) does not order the person to do something; and 3) does not demand a response. Langseth, at 300; Wibben, at 334-35.

1. The nature of the stop and subsequent conversation was not conversational.

The first step in determining whether the officer's stop falls under the community caretaker function is to determine whether the officer inquired in a conversational manner. Langseth, at 300. Here, the first action of Officer Lund was to exit his patrol vehicle and order Ms. Olson and Mr. Bienek to stop. (Tr. p. 15). He then questioned Ms. Olson as to her safety as he approached the couple. (Tr. p. 39.) Ms. Olson assured Officer Lund that the couple was all right before he reached the sidewalk. (Tr. p. 49). Officer Lund then continued his approach and asked for identification from Ms. Olson and Mr. Bienek. (Tr. p. 9). Officer Lund, by ordering the couple to stop and continuing approaching even after he was assured everything was all right, was notified of his unwanted presence early on and therefore did not approach in a conversational manner.

2. Officer Lund commanded Ms. Olson and Mr. Bienek to stop and engage in communication.

An encounter is removed from a community caretaker exception if the police officer orders the person to do something. Langseth, at 300; Wibben, at 334-35.

In this situation, Ms. Olson and Mr. Bienek were ordered to stop and speak with

Officer Lund. (Tr. p. 15). The Honorable Judge Braaten confused this question of law when she stated the community caretaking function continued until they were placed in the patrol car. Order Denying Defendants' Motions to Suppress, p. 4. While this is also an order, the order to stop came well before the order to the patrol vehicle. This order to stop should have been enough to invalidate the community caretaker exception.

3. Officer Lund demanded a response from Ms. Olson and Mr. Bienek.

In order to qualify as a community caretaker stop, the police officer must not demand a response from the individuals he is stopping. Langseth, at 300; Wibben, at 334-35.

Officer Lund's initial question to Ms. Olson, asking her if she was okay, garnered a quick response in the affirmative while he was still approaching from quite a distance away. (Tr. p. 49). However, Officer Lund continued to approach and question both parties. (Tr. pp. 15-20). By continuing to question even after Ms. Olson's insistence that the couple was not arguing and they did not need his help, Officer Lund violated their Fourth Amendment right to be free from unreasonable searches and seizures. In addition, Officer Lund demanded a physical response by commanding Ms. Olson and Mr. Bienek to produce identification. (Tr. p. 9).

The North Dakota Supreme Court in Wibben, 413 N.W.2d at 335, explains a similar situation in which a community caretaking encounter is changed into a Fourth Amendment stop. The Court in Wibben reasoned that even though the officer in the case had made a stop "partly for noncriminal, noninvestigatory purpose, i.e., to determine whether defendant Wibben was 'okay,' the 'reasonable suspicion' standard still applie[d] because the 'stop' was also made partly for the purpose of crime detection." Id. n.1, at

330 (emphasis added). The element of “crime detection” is a key differentiating point between a casual police-citizen encounter (i.e. “community caretaker”) and an authoritative stop. Id. When an officer acts in a formal and authoritative fashion, with a pretense toward crime detection or prevention, he has undoubtedly completed a Fourth Amendment stop and seizure. See Id. at 335 (“[an] encounter becomes a seizure if the officer engages in conduct which a reasonable man would view as threatening or offensive if performed by another private citizen”).

Here, it was unreasonable for the police officers to stop the couple from carrying on with their walk home without the development of reasonable suspicion that a crime had been committed. The evidence shows that this stop was not completely divorced from a pretext toward crime detection or prevention. Officer Lund testified he knew there were fraternity parties taking place that night. (Tr. p. 13). Officer Lund continued approaching the couple even after he was assured Ms. Olson was not in any sort of danger. (Tr. p. 49-50). Officer Lund quickly asked for the identification of Ms. Olson and Mr. Bienek upon stopping them. (Tr. p. 9). In addition, Officer Lund continued the conversation with the couple once he knew that Ms. Olson was not in any potential harm. (Tr. pp. 15-20). These factors seem to point in a direction that Officer Lund had a hope or hunch the couple could have been walking home from a party and possibly consuming alcohol. If this were the case, Officer Lund, in accordance with Wibben, would have needed reasonable and articulate suspicion of a crime before stopping and seizing Ms. Olson and Mr. Bienek. Witnessing Ms. Olson running and Mr. Bienek walking behind did not give Officer Lund reasonable suspicion that a crime was or was about to be committed.

C. *After unlawfully stopping and detaining the defendants, neither officer had a basis for reasonable articulate suspicion to detain, separate, arrest, and then cite both defendants for the crime on Minor In Consumption.*

An objective standard and view of the totality of circumstances is used to determine whether an investigative stop is valid, and the Court considers whether a reasonable person in the officer's position would be justified by some objective manifestation to suspect the defendant was, or was about to be, engaged in unlawful activity. State v. Torkelson, 2006 ND 152, ¶ 13, 718 N.W.2d 22 (citing State v. Smith, 2005 ND 21, ¶ 15, 691 N.W.2d 203. The Court considers whether a reasonable person in the officer's position would be justified by some objective manifestation to suspect the defendant was, or was about to be, engaged in unlawful activity. Torkelson, at ¶ 13. In City of Devils Lake v. Lawrence, 2002 ND 31, ¶ 8, 639 N.W.2d 466 (quoting City of Fargo v. Ovind, 1998 ND 69, ¶ 9, 575 N.W.2d 901 (citations omitted)), the Court explained:

We do not require an officer to isolate single factors which signal a potential violation of the law; but instead, "officers are to assess the situation as it unfolds and, based upon inferences and deductions drawn from their experience and training, make the determination whether all of the circumstances viewed together create a reasonable suspicion of potential criminal activity." When assessing reasonableness, we consider inferences and deductions an investigating officer would make which may elude a layperson. Torkelson, at ¶ 13.

Ms. Olson and Mr. Bienek were traveling westbound on University Avenue. (Tr. p. 8). It seems unlikely that Officer Lund would have had a proper vantage point on the opposite side of University Avenue, however, he turned around, stopped his patrol car and ordered the couple to stop. (Tr. p. 8). Officer Lund continued approaching the couple even after Ms. Olson's assurances that everything was all right. (Tr. p. 49).

Officer Lund did not let the situation unfold in order to draw deductions from his experience and training. See Ovind, at ¶ 9. In all likelihood, Officer Lund saw two individuals on the sidewalk, had a hunch they were coming from a party and stopped them on the pretext he was investigating an argument. This pretext evaporates once she says she is okay and Ms. Olson's running on a cold night and Mr. Bienek's waving his arms in the air does not rise to reasonable suspicion and thus the seizure was not permissible.

The District Court, in its order denying the defendant's request for suppression of evidence, stated that the seizure of Ms. Olson and Mr. Bienek did not begin until the officers requested that Ms. Olson and Mr. Bienek be seated in their separate patrol vehicles. Order Denying Defendant's Motion to Suppress, pp. 3-4. Before this time, the court reasoned, the stop was part of the community caretaker exception and thus was not a seizure under the Fourth Amendment. Id. Ms. Olson and Mr. Bienek, however, certainly did not feel they were free to leave after Officer Lund's request to stop. In fact, Officer Meland acknowledged that the couple was not free to leave just a short time after his arrival. (Tr. p. 29). Surely, the two were reasonable in their assumptions and thus were seized at the moment they were ordered to stop by Officer Lund. See United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("A reasonable person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding an incident, a reasonable person would have believed he was not free to leave.")

Running along University Avenue is not a crime and the community caretaker function evaporates at the time an officer orders a stop. Officer Lund had no reasonable

suspicion for a stop and seizure until long after he ordered them to stop. The stop and seizure, therefore, was invalid.

**CONCLUSION**

Because the stop and detention of Ms. Olson and Mr. Bienek was unlawful, their right to be free from unreasonable searches and seizures under the United States Constitution and the North Dakota State Constitution were violated. For the above stated reasons, the defendants, Brian James Bienek and Melissa Sue Olson, respectfully request that the North Dakota Supreme Court reverse the Honorable Judge Braaten's denial of the suppression motions and reverse their convictions of minor in consumption dated March 21, 2006.

Dated this 26 day of September, 2006.



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**CERTIFICATE OF SERVICE**

I hereby certify that on the 26 day of September, 2006, a copy of the foregoing Brief for Appellant was electronically filed with the North Dakota Supreme Court Administrator according to N.D. Sup. Admin. Order 14 at:

supclerkofcourt@ndcourts.com

I hereby certify that on the 26 day of September, 2006, a copy of the foregoing Brief for Appellee was served electronically upon Faye Jasmer, Grand Forks County State's Attorney according to N.D. Sup. Ct. Admin. Order 14 at:

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**THE SUPREME COURT OF THE STATE OF NORTH DAKOTA**

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State of North Dakota,

Plaintiff-Appellee

v.

Melissa Sue Olson,

Defendant-Appellant

State of North Dakota,

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Supreme Court No. 20060182  
Grand Forks Co. No. 18-05-K-04259

Supreme Court No. 20060183  
Grand Forks Co. No. 18-05-K-04260

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**APPEAL FROM THE DISTRICT COURT,  
GRAND FORKS COUNTY, NORTH DAKOTA  
NORTHEAST CENTRAL JUDICIAL DISTRICT  
THE HONORABLE KAREN BRAATEN, PRESIDING**

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**BRIEF FOR APPELLANTS**

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**AFFIDAVIT OF FILING AND SERVICE BY E-MAIL**

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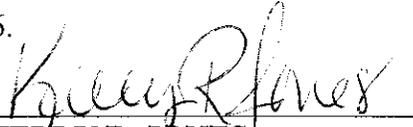
Kelly R. Jones, being first duly sworn, deposes and says that on the 27<sup>th</sup> day of September, 2006, she filed by email the attached APPENDIX and COVER PAGE according to the N.D. Sup. Ct. Admin. Order 14 upon:

**[supclerkofcourt@ndcourts.com](mailto:supclerkofcourt@ndcourts.com)**

Kelly R. Jones, being first duly sworn, deposes and says that on the 27<sup>th</sup> day of September, 2006, she served by email the attached APPENDIX and COVER PAGE as required by N.D. Sup. Ct. Admin. Order 14(D)(1), in Adobe PDF Format (document formatting and page numbering may be slightly different than Word), upon:

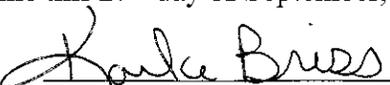
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Dated this 27<sup>th</sup> day of September, 2006.

  
\_\_\_\_\_  
**KELLY R. JONES**

~~SUBSCRIBED AND SWORN~~ to before me this 27<sup>th</sup> day of September, 2006.

**KARLA M. BRISS**  
NOTARY PUBLIC  
(SEAL) STATE OF NORTH DAKOTA  
My Commission Expires: Jan. 31, 2012

  
\_\_\_\_\_  
Notary Public, State of North Dakota