20100295

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Calvin Wahl and Laurie Wahl, Plaintiffs-Appellants, vs. Northern Improvement Company a/k/a McCormick Incorporated and United Rentals Highway Technologies, Inc., Defendants-Appellees.	SUPREME COURT NO. 20100295

ON APPEAL FROM THE AMENDED ORDER FOR JUDGMENT DATED JULY 20, 2010, THE AMENDED JUDGMENT ON JURY VERDICT DATED JULY 22, 2010, AND MEMORANDUM OPINION AND ORDER GRANTING TAXATION OF COSTS AND DISBURSEMENT DATED OCTOBER 5, 2010
STATE OF NORTH DAKOTA
STARK COUNTY DISTRICT COURT

BRIEF OF APPELLEE NORTHERN IMPROVEMENT COMPANY A/K/A MCCORMICK INCORPORATED

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STATEMENT OF THE ISSUES

I. **Did the Court err by separating the jury and continuing the last day of the jury trial to a date twelve days after evidence had been presented, but before the case was submitted to the jury?**

II. **Did the Court err in granting Northern Improvement Company a/k/a McCormick Incorporated's costs and disbursements?**

STATEMENT OF THE CASE

This case arises out of Plaintiff Calvin Wahl's ("Calvin") claim for personal injuries and Plaintiff Laurie Wahl's ("Laurie") claim for loss of consortium for injuries sustained by Calvin as a result of a motorcycle accident in May 2006. (Complaint at ¶¶ 4-6, 13, 17, Register of Actions 2.) The accident occurred on County Road 10 in Stark County, North Dakota. (Id. at ¶ 5.) A construction project was underway in that area at that time and Defendant Northern Improvement Company a/k/a McCormick Incorporated ("Northern Improvement") and Defendant United Rentals Highway Technologies, Inc. ("United Rentals") were involved in the project. (Id. at ¶ 12.) Essentially, Plaintiffs alleged both Northern Improvement and United Rentals were negligent in the maintenance and construction of the site thereby causing Calvin's accident and resulting injuries. (Id. at ¶¶ 7-11, 13-17.) Northern Improvement denied Plaintiffs' claims and affirmatively asserted Calvin was at fault for any injuries and damages sustained. (Answer and Demand for Trial by Jury of Nine at ¶¶ 4, 5, Register of Actions 6.)

Trial was held April 13, 2010 through April 16, 2010 and continued on April 28, 2010. (Appendix ("App.") at 10-11.) The jury deliberated for approximately two hours and returned a verdict in favor of Defendants. (Partial Transcript – Jury Instructions and Date and Time Adjourned at 20; Partial Transcript – Verdict reading at 3.) Northern Improvement and United Rentals submitted their respective Statement of Costs and

Disbursements. (App. at 16-22.) The Court issued its Order for Judgment on Jury Verdict and Amended Judgment on Jury Verdict granting Northern Improvement and United Rentals the entirety of their requested costs and disbursements. (App. at 60-63.) Plaintiffs appealed from the Amended Judgment on Jury Verdict and Order for Judgment on Jury Verdict. (App. at 66.)

Plaintiffs appeal (1) the District Court's refusal to grant a five-day jury trial, (2) the District Court's continuation of the last day of the jury trial for twelve days, and (3) the District Court's taxation of the entirety of Northern Improvement's costs and disbursements to Plaintiffs.

STATEMENT OF THE FACTS

This case arises out of Plaintiff Calvin Wahl's ("Calvin") claim for personal injuries and Plaintiff Laurie Wahl's ("Laurie") claim for loss of consortium for injuries sustained by Calvin as a result of a motorcycle accident in May 2006. (Complaint at ¶¶ 4-6, 13, 17, Register of Actions 2.) The accident occurred on County Road 10 in Stark County, North Dakota. (Id. at ¶ 5.) A construction project was underway in that area at that time and Defendant Northern Improvement Company a/k/a McCormick Incorporated ("Northern Improvement") and Defendant United Rentals Highway Technologies, Inc. ("United Rentals") were involved in the project. (Id. at ¶ 12.) Essentially, Plaintiffs alleged both Northern Improvement and United Rentals were negligent in the maintenance and construction of the site thereby causing Calvin's accident and resulting injuries. (Id. at ¶¶ 7-11, 13-17.)

Northern Improvement denied Plaintiffs' claims and affirmatively asserted Calvin was at fault for any injuries and damages sustained. (Answer and Demand for Trial by Jury of Nine at ¶¶ 4, 5, Register of Actions 6.) Northern Improvement presented

evidence through an expert, Dr. Sheldon Swenson ("Dr. Swenson"), regarding the fact that Calvin was not wearing a helmet at the time of the accident and the risk of injuries to Calvin's head and face as a result of the accident would have been greatly reduced had he been wearing a helmet. (Partial Transcript – Dr. Swenson's Testimony ("Swenson Testimony") at 41:11-44:11.) Prior to trial, Plaintiffs filed a Motion in Limine seeking to exclude evidence of Calvin's failure to wear a helmet; however, Plaintiffs did not object to Dr. Swenson being qualified as an expert for trial in that Motion. (Plaintiffs' Pretrial Motion in Limine at 1-2, Register of Actions 45.)

It was not until the trial itself that Plaintiffs objected to the qualification of Dr. Swenson as an expert. (Swenson Testimony at 5:12-18.) Voir dire of Dr. Swenson, an emergency physician, ensued and evidence was received that he treats and evaluates patients for head injuries in an emergency room setting. (Swenson Testimony at 8:9-9:3.) As part of his continuing medical education as an emergency physician, he receives education for trauma, which includes head injuries. (Id. at 16:22-17:8.) Further, Dr. Swenson testified that at the time of his deposition in the case, he knew that helmets prevented head injury and he knew that helmet usage saved lives. (Id. at 11:12-17.) After his deposition and prior to trial, Dr. Swenson reviewed the literature and articles on the subject in an effort to bring data to the trial to help educate the jury. (Id. at 11:19-21, 13:17-21.) Ultimately, the Court qualified Dr. Swenson as an expert witness and allowed him to testify with regard to helmet usage issues. (Id. at 19:1-15.)

After the jury verdict, as part of its Statement of Costs and Disbursements, Northern Improvement sought the amount of $4,150 for Dr. Swenson's expert witness fees. (App. at 19.) Plaintiffs objected to those fees, arguing Dr. Swenson should not

have been qualified as an expert, he spent an unreasonable amount of time reviewing literature regarding helmet usage and facial injuries, and the amount of fees were unreasonable in relation to the time expended by the expert. (App. at 24, 35.) The Court granted the taxation of the entirety of Dr. Swenson's fees and expenses against Plaintiffs, including his review of medical literature, in part because Dr. Swenson was asked by Plaintiffs at his deposition whether he had reviewed recent studies regarding helmet use. (Id. at 58.)

Northern Improvement called an additional expert, Thomas Alcorn ("Alcorn"), to testify at trial and sought his fees, in the amount of $24,915[1] in its Statement of Costs and Disbursements. (Id. at 19.) Plaintiffs objected to the amount of Alcorn's fees and argued, without any evidence in support, that a portion of Alcorn's fees were incurred prior to the initiation of the lawsuit and the amount of his fees were unreasonable in relation to the time expended by the expert. (Id. at 24-25.) The undersigned submitted an Affidavit in Support of Northern Improvement's Statement of Costs and Disbursements which indicated no fees incurred for Alcorn prior to the commencement of the lawsuit were included in the Statement of Costs and Disbursements. (Id. at 38.) Further, attached to that Affidavit were Alcorn's actual invoices. (Affidavit of Brenda L. Blazer in Support of Reply in Support of Statement of Costs and Disbursements at Ex. B, Register of Actions 152.) Alcorn was the only witness at trial who possessed the qualifications of a traffic safety engineer to review the constructions plans at issue in the case and render an opinion thereon. (App. at 31-32.) The Court granted the taxation of

[1] Plaintiffs argue in their Brief that Northern Improvement sought $26,010.45 for Alcorn's fees. In fact, only $24,915 was sought for Alcorn's fees. Of the total amount requested with regard to Alcorn, $1,095.45 was for his travel expenses to attend trial. (App. at 19.)

the entirety of Alcorn's fees and expenses against Plaintiffs, determining the Court could not determine the fees "were unreasonable and not in line with what Northern Improvement in good faith reasonably believed was necessary to adequately defend against Plaintiff's lawsuit." (Id. at 58-59.)

Trial was scheduled for four days and held April 13, 2010 through April 16, 2010 and continued on April 28, 2010. (App. at 10-11.) The Court set this matter for a four-day jury trial by way of notice to the parties on April 29, 2009. (Notice of Pretrial and Jury Trial, Register of Actions 24.) The record does not reflect an objection by any of the parties to the amount of time set for the trial. Further, no parties objected to the amount of time set for trial at the Pretrial Conference on October 20, 2009. (Pretrial Conference Tr. at 49:12-51:2.) Specifically, Plaintiffs declined the Court's request to set time limits to be fair to all sides in presenting testimony and agreed that the parties would "just have to get it done." (Id. at 50:4-23.) The record reflects no objections to the amount of time set aside for trial between the time of the Pretrial Conference and the beginning of trial on April 13, 2010.

Trial was not completed on April 16, 2010 and the Court continued the last day of trial to April 28, 2010 because the Court had master calendar duties the following week. (App. at 64.) Although the parties agreed that trial should be completed as soon as possible, the record does not reflect that any party objected to the continuation of the trial for twelve days. (Id.) The jury deliberated for approximately two hours and returned a verdict in favor of Defendants. (Partial Transcript – Jury Instructions and Date and Time Adjourned at 20; Partial Transcript – Verdict reading at 3; App. at 61.)

LAW AND ARGUMENT

I. The Court did not err by separating the jury and continuing the last day of the jury trial to a date twelve days after the evidence had been presented, but before the case was submitted to the jury.

Plaintiffs argue the District Court's refusal to grant a five-day jury trial and the twelve-day continuation of trial, and separation of the jury during that time, were prejudicial to Plaintiffs. It should first be noted that Plaintiffs did not object to any of those things prior to or during trial. This Court has held in other contexts that a failure to object operates as a waiver of rights. See, e.g., Reisenauer v. Schaefer, 515 N.W.2d 152, 158 (N.D. 1994) ("Failure to object to evidence during trial ordinarily waives any right to object to that evidence later."); Blessum v. Shelver, 1997 ND 152, ¶ 30, 567 N.W.2d 844 (failure to object waives a misstatement of the law). Failure to object to a court's decision with regard to a continuance of trial waives any error. Clarke v. Hunters Glen Cmty. Assoc., No. 14-03-00971-CV, 2004 WL 1313294, at *1 (Tex. App. June 15, 2004). Similarly, a failure to object to a jury's separation waives any error. State v. Bergeron, 340 N.W.2d 51, 59 (N.D. 1983); Veney v. Warden, Maryland Penitentiary, 271 A.2d 133, 137 (Md. 1970) (citing Stern v. United States, 219 F.2d 263 (4th Cir. 1955)); Elliott v. State, 753 P.2d 920, 922 (Okla. Crim. App. 1988) (failure to object to separation of jury, even when separation permitted in violation of law, waives any potential error caused by the separation).

Because Plaintiffs did not object to the continuation of trial, the length of trial, or the separation of the jury, their arguments with regard to these issues should be summarily rejected. Even if the Court addresses the merits of Plaintiffs arguments, the Court should reject the notion that the District Court committed error.

A district court has broad discretion over the conduct of a trial or hearing; accordingly, the court may impose reasonable restrictions upon the length of trial. Hartleib v. Simes, 2009 ND 205, ¶ 15, 776 N.W.2d 217. A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner. Ward v. Shipp, 340 N.W.2d 14, 17 (N.D. 1983). In the present case, the District Court set the trial for four days and no one objected. Further, the District Court inquired of the parties at the Pretrial Conference whether or not it needed to set time limits to be fair to all sides in presenting testimony and Plaintiffs declined. (Pretrial Conference Tr. at 50:4-23.) The District Court did not abuse its discretion in setting trial for four days.

Plaintiffs next essentially combine two issues, the continuation of the trial for twelve days and the separation of the jury during that time, into one when they argue "the twelve day separation of the jury was prejudicial to the Plaintiffs." (Appellant's Brief at 4.) Northern Improvement will address the issues separately.

A decision to continue a trial, and the length of that continuance, is committed to the discretion of the district court. Service Oil, Inc. v. State, 479 N.W.2d 815, 818 (N.D. 1992). A continuation of a jury trial for fifty-five days, even after the trial has begun and evidence has been taken, has been held by this Court not to be a violation of a party's rights. State v. Bonner, 361 N.W.2d 605, 610-11 (N.D. 1985). Plaintiffs contend the fact that a substantial amount of evidence had been heard by this jury makes this case more prejudicial than that present in Bonner. However, another court upheld a trial court's decision to continue a trial for over three weeks, albeit for different reasons, after thirteen days of trial had already occurred. Schnear v. Boldrey, 99 Cal.Rptr. 404, 406-07 (Cal. Ct. App. 1971). In Bonner, only one party's evidence was before the jury. Bonner, 361

N.W.2d at 611. In the present case, all of the evidence had been presented such that both "sides of the story" were in the jurors' minds for contemplation. Further, the continuance was for only twelve calendar days due to the District Court's schedule, no one objected to the continuance, and Plaintiffs readily admit they have no evidence any juror misconduct occurred during the continuance. The trial court did not abuse its discretion in continuing the trial for twelve days.

The separation of jurors is addressed by both Rule 6.11(c) of the North Dakota Rules of Court and Section 28-14-18 of the North Dakota Century Code, but Rule 6.11(c) addresses separation during all aspects of a trial whereas Section 28-14-18 only applies to separation of jurors when the case has been submitted to them. Rule 6.11(c) provides:

> **Rule 6.11. Predeliberation discussion by jurors**
>
> . . .
>
> (c) The jurors may be permitted to separate, or the jurors may be kept under the charge of a proper officer during each recess or adjournment during a trial. The officer must keep the jurors together as instructed by the court, refrain from and prohibit anyone from communicating with the jurors on any subject connected with the trial, and return the jurors into court.

N.D.R.Ct. 6.11(c). (Emphasis added.) Section 28-14-18 provides, in pertinent part,:

> **28-14-18. Conduct of jurors in retirement.** When the case finally is submitted to the jurors, they may decide in court or retire for deliberation. If they retire, they must be kept together in some convenient place under charge of an officer, until they agree upon a verdict, are temporarily dismissed by the court, or are permanently discharged by the court. . . .

N.D.C.C. § 28-14-18. (Emphasis added.) In the present case, the continuance occurred before the case had been submitted to the jury for deliberation; therefore, Section 28-14-18 does not apply. For the same reason, the Keyes case cited by Plaintiffs does not apply

to the facts of this case. Keyes v. Amundson, 343 N.W.2d 78, 81 (N.D.1983) (case was submitted to the jury prior to the separation of the jurors).

A trial court has discretion to permit the jury to separate during trial. Bonner, 361 N.W.2d at 611. "For separation to constitute reversible error, there must be an objection supported by an affirmative showing that the [party] was prejudiced because of the separation." Id. (citing Bergeron, 340 N.W.2d at 59. In Bonner, this Court upheld decisions by the trial court to continue the trial for fifty-five days after testimony had been taken and allow the jurors to separate during that time. Id. at 610-11. In that case, some of the jurors had even been exposed to news reports about the trial during the period of continuance. Id. at 610. "In the absence of contrary evidence, a presumption exists that a jury performed its duties in accordance with the law and was not influenced by outside events or evidence." Id. at 611 (citing State v. Ohnstad, 359 N.W.2d 827, 842 (N.D. 1984)). Plaintiffs here have made no claims of juror misconduct or actual prejudice to their case. The trial court did not abuse its discretion in allowing the jury to separate prior to the case being submitted to them.

II. The Court did not err in granting Northern Improvement's costs and disbursements.

Plaintiffs argue they should not be required to pay all of Northern Improvement's requested costs and disbursements. Specifically, Plaintiffs argue, with regard to Dr. Swenson, (1) they should not have to pay for the five hours Dr. Swenson spent to review literature on the topics he would be testifying about and (2) the amount of time Dr. Swenson spent reviewing medical records and preparing for and reviewing his deposition was unreasonable. With regard to Alcorn, Plaintiffs argue they should have been provided with an itemized statement of his charges in an effort to show he charged for

services provided before the action was commenced and that he did not spend the amount of time for which he claimed payment.

Pursuant to Rule 54(e) of the North Dakota Rules of Civil Procedure, costs and disbursements must be allowed as provided by statute. Section 28-26-02 of the North Dakota Century Code provides for the recovery of certain costs. Further, Section 28-26-10 of the North Dakota Century Code provides that costs may be allowed for or against either party in the discretion of the court. In addition, Section 28-26-06 of the North Dakota Century Code provides for disbursements to be taxed in the judgment in favor of the prevailing party, including "the necessary expenses of taking depositions and of procuring evidence necessarily used or obtained for use on the trial" and fees of expert witnesses:

> . . .
>
> 5. The fees of expert witnesses. The fees must be reasonable fees as determined by the court, plus actual expenses. The following are nevertheless in the sole discretion of the trial court:
>
> a. The number of expert witnesses who are allowed fees or expenses;
>
> b. The amount of fees to be paid such allowed expert witnesses, including an amount for time expended in preparation for trial; and
>
> c. The amount of costs for actual expenses to be paid the allowed expert witnesses.

§ 28-26-06(2),(5).

Further, Section 28-26-06(5) provides reimbursement for trial testimony, "including an amount for time expended in preparation for trial." N.D.C.C. § 28-26-06(5)(b). (Emphasis added.) Under the statute's plain language and rules of statutory

construction, the expert witness fees are not limited to trial preparation. A definition that uses the word "includes" is partial and non-exclusive. See Gross v. North Dakota Dept. of Human Services, 2004 ND 24, ¶ 8, 673 N.W.2d 910 (citing Hilton v. North Dakota Educ. Ass'n, 2002 ND 209, ¶ 12, 655 N.W.2d 60); see also Southeast Human Service Center, Dept. of Human Services v. Eiseman, 525 N.W.2d 664, 670, n. 3 (N.D. 1994) (quoting Americana Healthcare v. North Dakota Dept. of Human Services, 510 N.W.2d 592, 594-95, n. 2 (N.D. 1994)) ("'An exhaustive definition uses the word means, while a partial definition uses the word includes.'").

A. Northern Improvement is a prevailing party and entitled to its costs and disbursements.

It is well established that costs are assessed "'in favor of winners and against losers.'" Braunberger v. Interstate Engineering, Inc., 2000 ND 45, ¶ 14; 607 N.W.2d 904 (quoting State ex rel. Holloway v. First Am. Bank & Trust Co., 248 N.W.2d 859, 862 (N.D. 1977)). Here, there is no dispute that Northern Improvement is a prevailing party as to Plaintiffs' claims. The jury found no liability, and therefore no award of damages, against Northern Improvement. Plaintiffs do not argue they are prevailing parties or that they prevailed upon any of their claims. Rather, Plaintiffs argue essentially that Northern Improvement's claim for costs and disbursements is unreasonable.

B. Northern Improvement's expert witness fees are reasonable.

The amount of fees to be paid an expert witness, including actual expenses and travel expenses, if reasonable, is left to the discretion of the trial court. Peterson v. Hart, 278 N.W.2d 133, 137 (N.D. 1979); see also, Munch v. City of Mott, 311 N.W.2d 17, 23 (N.D. 1981). In all actions, the prevailing party has a statutory right to expert witness fees. Munch, 311 N.W.2d at 23. Actual invoices from Dr. Swenson and Alcorn for their

services were submitted to the District Court with regard to Northern Improvement's request for costs and disbursements. (Affidavit of Brenda L. Blazer in Support of Reply in Support of Statement of Costs and Disbursements at Exs. A, B, Register of Actions 152.)

Dr. Swenson's fees are reasonable. The District Court qualified Dr. Swenson as an expert and authorized him to testify on helmet usage and injuries that can be prevented by a person wearing a helmet under the circumstances of this case. (Swenson Testimony at 19:1-15.) It was clear from Dr. Swenson's trial testimony that he did not become an expert in head injuries and helmet usage to prevent those injuries simply for purposes of this trial. After his deposition and prior to trial, Dr. Swenson reviewed the literature and articles on the subject in an effort to bring data to the trial to help educate the jury. (Id. at 11:19-21, 13:17-21.) It was entirely reasonable for him to do so because he was cross-examined at his deposition, and again at trial, on the sources of his conclusions, specifically his review of studies regarding helmet usage. (App. at 58; Swenson Testimony 56:24-62:10.) The District Court further found that the length of Dr. Swenson's deposition transcript may have required a couple hours to review. (App. at 58.) The District Court did not abuse its discretion in determining Dr. Swenson's fees were reasonable.

Alcorn's fees are also reasonable. He was the only witness at trial who possessed the qualifications of a Registered Professional Traffic Engineer and Professional Traffic Operations Engineer. (App. at 52; Thomas A. Alcorn's Curriculum Vitae, Register of Actions 114.) There is no claim by Plaintiffs that he was not an expert in his field. Fees for expert witnesses can be quite expensive. Patterson v. Hutchens, 529 N.W.2d 561, 567

(N.D. 1995). Had Plaintiffs ordered a complete transcript, as required by Rule 10(b)(1)C) of the North Dakota Rules of Appellate Procedure, this Court would have before it the lengthy testimony given by Alcorn. His testimony contained the activities he undertook with regard to this case and the basis for his conclusions. He was the only witness at trial who possessed the requisite expertise as a Registered Professional Traffic Engineer and Professional Traffic Operations Engineer, and his expertise was necessary to assist the jury in understanding the plans and circumstances at issue in this case with regard to Plaintiffs' claims. Plaintiffs have brought forth no evidence that Alcorn falsified his invoices.

There is no requirement that the actual itemized statements from expert witnesses be submitted to the court when seeking costs and disbursements as a prevailing party. One North Dakota case addressed a similar issue. Taghon v. Kuhn, 497 N.W.2d 403 (N.D. 1993). In Taghon, the prevailing party sought costs for an expert witness. Id. at 404-05. The losing party objected to the requested costs and argued the expert's fees were not detailed and verified. Id. at 405. Without being ordered to do so by the trial court, the prevailing party filed an affidavit which attached copies of the expert's itemization of costs, time, and work. Id. After a hearing, the prevailing party filed another affidavit describing the documents given to the expert for trial preparation. Id. This Court, on review, discussed the fact that an itemization of costs and time records was presented and the fact that the trial court had presided at trial when the expert testified. Id. at 406-07. Further, the Court stated the losing party presented no evidence contradicting the reasonableness of the expert's fees. Id. at 407. The trial court's award of costs and expenses was upheld. Id. Although in the Taghon case, itemized statements

of the expert's work were provided to the trial court, this Court did not decide doing so was mandatory. Id. at 406-07. To make the filing of an expert's itemized statements mandatory would force a prevailing party to disclose to the losing party its work product and trial strategy; in the event a new trial was ordered upon appeal, the losing party would be privy to information it otherwise would not be entitled. The prevailing party is then placed in an untenable position – either forego costs it is entitled to receive or protect its work product in the event of a retrial. The District Court below listened to the trial testimony of Alcorn and was in the best position to determine the reasonableness of Alcorn's fees. Plaintiffs have brought forth no evidence to contradict the reasonableness of Alcorn's fees; no other traffic engineer or traffic operations engineer testified that Alcorn's hourly rates were unreasonable or that the things Alcorn did in this case (as shown by his trial testimony) were unnecessary.

Here, the prevailing party is entitled to reimbursement for reasonable expert witness fees, including but not limited to the expert fees incurred for trial preparation. Although Alcorn was contacted by Northern Improvement before the actual lawsuit was commenced, fees incurred before the commencement of the lawsuit are not included in the Statement of Costs and Disbursements. (App. at 38; Affidavit of Brenda L. Blazer in Support of Reply in Support of Statement of Costs and Disbursements at Ex. B, Register of Actions 152.) With regard to Alcorn's fees, Northern Improvement sought the amount of $24,915. (App. at 19.) A review of Alcorn's invoices reflects that an amount of $1,524 had been paid to Alcorn on February 21, 2007, prior to the commencement of the action. (Affidavit of Brenda L. Blazer in Support of Reply in Support of Statement of Costs and Disbursements at Ex. B, p. 1, Register of Actions 152.) That amount was not

included in the requested costs and disbursements; only the amount of invoices received after the commencement of the action were taxed to Plaintiffs. (Id. at Ex. B.) The District Court did not abuse its discretion in determining Alcorn's fees were reasonable.

CONCLUSION

The Court should deny Plaintiffs' appeal in its entirety.

Dated this 8 day of April, 2011.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Calvin Wahl and Laurie Wahl, Plaintiffs-Appellants, vs. Northern Improvement Company a/k/a McCormick Incorporated and United Rentals Highway Technologies, Inc., Defendants-Appellees.	**SUPREME COURT NO. 20100295**

AFFIDAVIT OF SERVICE BY HAND DELIVERY AND US MAIL

STATE OF NORTH DAKOTA)
) SS
COUNTY OF BURLEIGH)

Debra Forsberg, being first duly sworn upon oath, deposes and says that she served the attached **Brief of Appellee Northern Improvement Company** upon Brenda Neubauer, Daniel Oster, and Robert Bolinske, Jr., the attorneys for Calvin and Laurie Wahl, by leaving a true and correct copy thereof with a member of the staff at the below addresses on the 8th day of April, 2011:

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On April 8, 2011, Affiant deposited in the United States Post Office at Bismarck, North Dakota, a true and correct copy of the following document:

Brief of Appellee Northern Improvement Company

A copy of the foregoing was securely enclosed in an envelope with postage duly prepaid and addressed as follows:

Douglas Gigler
PO Box 2626
Fargo, ND 58108-2626

To the best of Affiant's knowledge, the address above given was the actual post office address of the party intended to be so served. The above document was duly mailed in accordance with the provisions of the Rules of Civil Procedure.

Debra Forsberg

Subscribed and sworn to before me this 8th day of April, 2011.

(SEAL) HOLLY KLEMISCH
Notary Public
State of North Dakota
My Commission Expires Dec. 9, 2014

Notary Public, Burleigh County, North Dakota