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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Jan Reiser, and Auto-Owners Insurance Company, Plaintiffs and Appellants, vs. Roger Thorpe d/b/a Roger's Staining and Roger's Staining, Inc., Defendants and Appellees.	)	Supreme Court No.: 20120137 Cass County No.: 09-2010-CV-00645

APPEAL FROM CASS COUNTY DISTRICT COURT'S DECISION AWARDING COSTS AGAINST APPELLANTS

THE HONORABLE LISA K. FAIR MCEVERS PRESIDING

BRIEF OF APPELLEES

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STATEMENT OF THE ISSUES

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I. Whether the District Court Abused Its Discretion in Determining $98,543.84 of Roger's Staining, Inc.'s Requested Costs and Disbursements Were Reasonable.

I. STATEMENT OF THE CASE

2. Roger's Staining, Inc. (hereinafter "Roger's Staining") agrees with the procedural history contained in Jan Reiser and Auto-Owners Insurance Company's (hereinafter collectively referred to as "Reiser"), Statement of the Case.

II. STATEMENT OF THE FACTS

A. Introduction

3. It should be noted initially that Reiser's "Statement of Facts" contains very little about the facts, evidence, and testimony of this lawsuit and trial. This is a product of Reiser's failure to order a trial transcript. This significantly hampers this Court's ability to judge the application of the District Court's discretion on the costs issue. The District Court heard significant testimony and reviewed evidence on the costs of the experts in this case at the trial. Each expert was cross examined on their hourly fee, the time they spent, and the rates charged for similar services in the community. This was information contained in the record, and evaluated by the District Court, which this Court does not have to review.

4. Moreover, both parties agreed before the District Court that the equities of the case need to be considered in determining whether costs, particularly expert costs, are reasonable. This Court has recognized that a litigant "'cannot litigate tenaciously and then be heard to complain about the time necessarily spent' overcoming its vigorous defense." Duchscherer v. W.W. Wallwork, Inc., 534 N.W.2d 13, 19 (N.D. 1995) (quoting City of Riverside v. Rivera, 477 U.S. 561, 580 n.11 (1986) (plurality)) See also Thompson v. Schmitz, 2011 ND 70, ¶ 21,

795 N.W.2d 913. This was a hard fought case, without question pursued with great tenacity by the plaintiffs. Roger's Staining successfully proved at trial the case was driven by an early rush to judgment on the cause of the fire, facilitated by Reiser's experts, who went to great lengths to justify their initial conclusions even in the face of contrary evidence. In addition, testimony and evidence showed Reiser's experts deliberately withheld discoverable documents from the defense in an effort to impede the truth. R-181.

5. The defense expert costs in this case were not incurred in a vacuum, but rather in the context of a scientifically complicated and hard-fought trial only those who were there, like the trial judge, can fully appreciate. The absence of a trial transcript will significantly impair this Court's ability to fairly judge the issues raised by the Appellant on this appeal.

B. **The Fire**

6. Although there is no transcript, the following facts can be gleaned from exhibits and other documents contained in the record. On June 3, 2006, a home under construction in Fargo, owned by Jan Reiser, was damaged by fire. R-93. The home was insured by plaintiff Auto-Owners. Appellant's Brief, ¶ 4. Appellee, Roger's Staining, Inc., is owned by Roger Thorpe. R-2, at ¶ 2. His brother, Don Thorpe, was staining window frames at the Reiser residence on the day of the fire. Id. at ¶ 7.

7. An initial investigation was conducted at the scene by the Fargo Fire Department. Fargo Fire Department Captains Leroy Skarloken and Dane Carley were informed the night of the fire that the "painter" had left a "bucket" on the

west wall of the garage. R-80. Jan Reiser submitted a drawing to the fire department which noted "possibly stain rags in bucket." Id., see also R-93. The Captains investigated this area, and found what appeared to be the remains of a bucket and a paint roller. Id. They believed the burn patterns on the west wall emanated from these remains. Id. Consequently, on the night of the fire, one of the investigators completed a report indicating that the fire was caused by spontaneous combustion of stain rags. R-93, at 5. It is undisputed Don Thorpe did not leave a bucket in the garage and did not use or have in his possession a paint roller.

8. The full investigation of the fire was later assigned to Inspector Jon Arens of the Fargo Fire Department. R-81. This garage consisted of concrete walls lined with a polystyrene (essentially, Styrofoam) insulation. Id. Consequently, this fire burned extremely hot and spread quickly, making burn pattern analysis difficult if not impossible. The official position of the Fargo Fire Department remains, to this day, that the cause of the fire is "undetermined." Id.

9. The evidence at trial showed that Reiser's cause and origin expert, Steven Woodford, arrived at the scene of the fire a few days later, along with Auto-Owner's adjuster Tracy Dorscher. R-89, at 2. The evidence also showed Woodford and Dorscher quickly concluded stain rags caused this fire.

10. Ultimately, Woodford issued a report purporting that he had excluded all other possible causes of the fire besides spontaneous combustion of stain rags. R-89, at 7. As a part of his investigation and excavation of the scene, the defense alleged that Woodford and/or the firm hired to shore up the failing roof in the

garage for safety, spoiled the scene to the point that a reasonable cause and origin analysis could no longer be performed. R-58, at 5-10. Auto-Owners also hired electrical engineer Gary Hong as an expert, but Hong's role consisted solely of examining selected electrical artifacts collected by Woodford from the fire scene. R-163. Woodford's report was utilized to present a demand to Roger's Staining in excess of $480,000. App. 126. Roger's insurance limits were $100,000. Id.

11. Roger's Staining hired Chris Rallis to examine what was left of the scene and to determine cause and origin. Also hired was Mark Svare, an electrical engineer and master electrician, to evaluate the electrical aspects of Woodford and Hong's opinions. Both Rallis and Svare concluded that the combination of the hot-burning fire and spoliation of evidence made a cause and origin determination impossible. R-86. Focus then shifted to rebutting Woodford's opinion that all other possible causes of the fire were properly excluded pursuant to the scientific standards of the cause and origin expert community. Id.

12. Woodford's utilization of the process of exclusion had the effect of shifting the burden to the defense to establish causation or lack thereof. Every possible electrical and incendiary cause needed to be evaluated to determine if it had properly been ruled out under scientific principles. R-64. It made everything in the trial relevant to the experts' opinions, including Jan Reiser's testimony, the testimony of all of the firefighters, literally the testimony of every witness.

13. A review of the trial transcript would reveal that Woodford eventually admitted on cross examination he did not adequately rule out electrical as a cause. It would also reveal what the District Court noted in its opinion, that Rallis was

incensed at Woodford's investigation and the consequent injustice that was being foisted upon Roger's Staining. App. 160. He therefore discounted his hourly rate for trial, and capped his time for trial at 12 hours per day. Id. The District Court heard Rallis's testimony, and saw the level of vehemence with which he approached his role in this case. After a careful review of the evidence, the District Court determined the expert fees paid by the defendant were reasonable. App. 156-62.

III. LAW AND ARGUMENT

A. Standard of Review

14. This Court has held that the "determination of which witnesses are experts and which witnesses are necessary at the trial, and the amount of fees, are matters appropriately left to the discretion of the trial court." Thompson v. Schmitz, 2011 ND 70, ¶ 23, 795 N.W.2d 913 (quoting City of Bismarck v. Thom, 261 N.W.2d 640, 647 (N.D. 1977)). See also Patterson v. Hutchens, 529 N.W.2d 561, 567 (N.D. 1995) ("[t]he allowance of an expert witness fee for a witness who did not testify at trial is within the discretion of the trial court"). This Court defines abuse of discretion as "acts that are arbitrary, unreasonable, or unconscionable, not the product of a rational mental process leading to a reasoned determination, or a misinterpretation or misapplication of the law." Saefke v. Stenehjem, 2003 ND 202, ¶ 21, 673 N.W.2d 41 (citing Langness v. Fencil Urethane Sys. Inc., 2003 ND 132, ¶ 9, 667 N.W.2d 596).

15. Here, the District Court's determination of reasonableness is so intertwined with the evidence in the case that, in the absence of a transcript, it

cannot reasonably be found that its determination is "arbitrary, unreasonable...unconscionable [or]...not the product of a rational mental process leading to a reasoned determination..." The District Court's well-reasoned memorandum opinion belies such a finding. Moreover, there was no misapplication of the law here. The District Court clearly knew costs must be reasonable and accurately discussed the law. App. 158. It carefully analyzed the legal issues and included references in its opinion to the facts presented at the trial. App. 156-62.

B. The Appellant Must Suffer The Consequences Of The Failure To File A Transcript Of The Trial

16. The reasonableness of the costs awarded in this case is inherently contingent on the nature of the case, Reiser's theories of liability, and the evidence that was presented at trial. None of that information is available to this Court, because a trial transcript was not ordered.

17. N.D.R.App. P. 10(b) requires that the Appellant furnish a transcript of proceedings on appeal. Here, Reiser ordered the transcript of the hearing on costs, but not the trial itself. There was significant discussion and cross examination of Roger's Staining's experts at trial on their fees and the extensive work they performed. In Wagner v. Miskin, 2003 ND 69, ¶ 9, 660 N.W.2d 593, this Court noted:

> An "appellant assumes the consequences and the risk for the failure to file a complete transcript. If the record on appeal does not allow for a meaningful and intelligent review of alleged error, we will decline review of the issue." State v. Clark, 2001 ND 194, ¶ 5, 636 N.W.2d 660 (citations omitted). The "[f]ailure to provide a transcript may prevent a party from being successful on appeal." Id. (quoting Owan v. Kindel, 347 N.W.2d 577, 579 (N.D. 1984)).

18. It is apparent both from its opinion and comments made at the hearing on costs that the District Court considered the evidence at trial in determining its award of costs. This was entirely appropriate and, in fact, necessary. This Court has recognized that "[t]he amount of fees to be allowed for an expert witness is left to the sound discretion of the trial court, which is in a much better position to determine the reasonableness and necessity of the costs and disbursements sought by the prevailing party." Huber v. Oliver County, 1999 ND 220, ¶ 24, 602 N.W.2d 710 (citing Vogel v. Pardon, 444 N.W.2d 348, 353 (N.D. 1989)).

C. **Roger's Staining's Costs And Disbursements Are Reasonable**

1. **Expert Fees**

19. North Dakota Rule of Civil Procedure 54(e) requires the awarding of costs to the prevailing party unless the Court directs otherwise. Braunberger v. Interstate Eng'g, Inc., 2000 ND 45, ¶ 14, 607 N.W.2d 904. "Recovery of expenses is not limited to evidence actually introduced at trial." Id. at ¶ 18. N.D.R.Civ.P. 54(e) states in relevant part:

> (e) Costs; Objections; Attorneys' Fees.
>
> (1) Costs Other than Attorneys' Fees. Costs and disbursements must be allowed as provided by statute. A party awarded costs and disbursements must submit a detailed, verified statement to the clerk. Upon receipt of the statement, the clerk must allow those costs and disbursements and insert them in the judgment. A copy of the statement must accompany the notice of entry of judgment.
>
> (2) Objections to Costs. Objections must be served and filed with the clerk within 14 days after notice of entry of judgment or within a longer time fixed by court order within the 14 days. The grounds for objections must be specified. If objections are filed, the clerk must promptly submit them to the judge who ordered the judgment. The court by ex parte order must fix a time for hearing

the objections. Unless otherwise directed by the court, the parties may waive the right to a hearing and submit written argument instead within a time specified by the court. ...

20. Section 28-26-06, N.D.C.C., provides:

> [T]he clerk of district court shall tax as a part of the judgment in favor of the prevailing party the following necessary disbursements:
> . . . .
>
> 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; and
>
> 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.

(Emphasis added).

21. This Court has never addressed the effect of the legislature's unusual dictate that the amount of fees of an expert, "including the amount of time expended in preparation for trial" is within the sole discretion of the trial court. See N.D.C.C. § 28-26-06(5). Clearly it does not prevent any appellate review of a district court's decision on expert fees. See Wahl v. N. Improvement Co., 2011 ND 146, 800 N.W.2d 700. In interpreting statutes, the Court should give each word, phrase, and sentence its plain, ordinary, and commonly understood meaning. Wheeler v. Gardner, 2006 ND 24, ¶ 10-11, 708 N.W.2d 315. The use of the terms "sole discretion" reflect legislative recognition that the trial court is in

the best position to determine the effectiveness of experts, their level of preparation, and the extent to which they were necessary in addressing the scientific issues in the case.

22. This Court's most recent detailed analysis of a trial court's role in determining reasonable expert witness fees is outlined in Wahl, 2011 ND 146, 800 N.W.2d 700. In Wahl, this Court determined the trial court abused its discretion when it found expert witness fees were reasonable "without explaining why the fees were reasonable and without an itemized bill that allowed the Wahls to effectively challenge the reasonableness of Alcorn's expert witness fees." Id. at ¶ 19. This Court also set forth several "useful factors" to assist the trial courts in determining the reasonableness of expert fees. Id. at ¶ 18. Those factors are as follows:

> "In determining a 'reasonable' expert witness fee, the court should consider: (1) the common-law area of expertise; (2) education and training that is required to provide expert insight that is sought; (3) prevailing rates of other comparably respected available experts; (4) nature, quality, and complexity of discovery responses provided; (5) the fee actually being charged to the party who retains the expert; (6) fees traditionally charged by the expert on related matters; and (7) any other factor likely to be of assistance to the court in balancing the interests implicated."

Wahl, 2011 ND 146, ¶ 18, 800 N.W.2d 700 (quoting 98 C.J.S. Witnesses § 86 (2002)).

23. This appeal does not suffer from the same failings in Wahl. Rallis's billings were before the District Court, as well as proof those bills had all been paid by the defense. The District Court found, with respect to Rallis's fees:

> Defendant's next expert witness was Chris Rallis, a fire cause and origin investigator with over 40 years of experience who has investigated approximately 2,000 fires and has testified in at least eight states, both as a plaintiff and defense witness. Rallis testified

> that he charges $150 per hour for investigations and $250 per hour to testify. Rallis submitted billings to Nodak totaling $57,415.89 for his investigation, trial preparation and testimony. Rallis attended all six days of trial. Rallis testified that he was giving the Defendant a discount for his trial testimony, because he felt so strongly that the Plaintiffs' investigation came to the wrong conclusion, and that he was not charging his usual rates "as a matter of justice." Invoices from Rallis showed he charged $150 per hour to attend the trial, and capped the number of hours worked per day to 12 hours per day. Mr. Rallis' testimony was necessary to rebut the testimony of Steve Woodford, who testified that all other possible sources of the cause of the fire, other than spontaneous combustion, had been excluded.
>
> The Court found Mr. Rallis to be well prepared and testified effectively in his area of expertise, particularly in showing where Mr. Woodford's investigation failed to prove the theory of causation by exclusion. A review of Rallis' billings show he has been involved in the case for over five years. His rates are not outside the norm of his industry. While not admitted at trial, Rallis conducted tests that Plaintiffs' expert, Woodford, was not qualified to conduct, requiring Plaintiffs' to retain an additional expert who had the appropriate expertise. Based on the Court's review of the testimony, and considering the scientific expertise requires, the time involved in defending this claim as supported by the invoices, the charges were reasonable and necessary expenses.

24. The District Court analyzed Rallis's fees under each of the applicable Wahl factors. It included in its analysis information that could only have been gleaned from trial testimony and evidence. This includes the reference to the number of fires Rallis has investigated, and the fact that he testified at a reduced hourly rate. App. 160. The transcript of the hearing on costs also reflects the District Court carefully reviewed the billings submitted and questioned certain entries. App. 126-27. The District Court also asked for backup documentation for certain expenses. App. 128.

25. Reiser complains that Rallis's time descriptions lack sufficient specificity. There are several problems with this argument. First, as Reiser's counsel knows,

despite the fact that they are arguably work product, expert billings are routinely requested in discovery and provided to opposing counsel. That was done in this case. Consequently, it is standard that expert billings are not overly detailed in their descriptions of time spent. Counsel would certainly not want an expert bill stating: "discussion with attorney re: weaknesses in our case regarding X issue..." going to opposing counsel during the pendency of a lawsuit. Second, those involved in the case, including the trial judge, could easily match up the time spent in Rallis's bill to specific events in the case. For example, Reiser asserts in their brief that some of Rallis's time was spent performing "legal" work that was more appropriately done by counsel. A review of the timing of those entries reveals the work corresponded to the filing of a Daubert-type motion to exclude Woodford's expert opinions. R-58, at 5-13. Such motions are technical in nature and require the use of expert analysis and opinions.

26. Finally, Reiser submits no standard as to the level of specificity required in expert billings. They cite no case holding time descriptions are inadequate. They cite only Wahl, a case remanded by this Court because the defense provided no billings whatsoever. Wahl, 2011 ND 146 at ¶ 19, 800 N.W.2d 700. There was evidence at trial establishing the extensive work performed by Rallis. That evidence justifies his billing. Proof of payment was provided showing the bills were actually paid by a sophisticated consumer of experts. App. 82-92.

27. Next, Reiser complains that Rallis did not submit an "affidavit" establishing his costs were reasonable. There are several problems with this argument. First, this Court has repeatedly held a statement of expert witness costs

need not be supported by an affidavit from the expert if the trial court had the attorney's sworn statement of the costs and the trial court also presided over the trial at the time the expert testified so that the costs could be challenged by the opposing party. Taghon v. Kuhn, 497 N.W.2d 403, 407 (N.D. 1993). Receipts and personal attestation by the expert witness are not necessary for the opposing party to have an opportunity to challenge the reasonableness of costs before the trial court. Huber v. Oliver County, 1999 ND 220, ¶ 23, 622 N.W.2d 710.

28. Here, there was not only a sworn statement of costs, but that statement was supported by the itemized billings submitted by the experts. This, combined with the testimony at trial regarding the prevailing rate in the community for experts, the lengthy discussion of the defense experts' qualifications, and the description of the work they performed, was more than sufficient to justify the costs incurred.

29. Next, Reiser compares the supposed cost of their experts ($59,697.41) to those incurred by the defense ($90,810.89). This argument is fallacious. There is no precedent for the proposition that expert expenses on both sides must be equal. Reiser's total loss in this case was over $480,000. App. 126. Roger's Staining's insurance limits were $100,000. Id. This was a scientifically complicated case and an important trial. The defense prevailed, presumably on the strength of its experts' preparation, expertise and persuasive force. Put simply, the defense experts worked harder, put in more hours, and ultimately presented a more persuasive scientific case than the plaintiffs' experts. It would be unfair to say they can only be paid equal to the plaintiffs' experts.

30. Finally, Reiser's argument ignores the differences in experience and qualifications between the experts. There was extensive testimony on this issue at trial. As pointed out by the District Court, Rallis has over 40 years of experience, has investigated approximately 2,000 fires, and has testified in at least eight states. App. 160. He charged $150 per hour. Woodford has less experience and charged $125 per hour. App. 158-59. The District Court also pointed out that Mark Svare was an electrical engineer, a master electrician, and an instructor for the Bureau of Alcohol, Tobacco and Firearms. Id. at 159. He charged $225 to $250 per hour for case work and $500 per hour for deposition and trial time. Id. This was significantly more than the hourly rate charged by Reiser's electrical expert Gary Hong. Id. More experienced and sought after experts charge more for their time. The District Court recognized that, and, after comparing the expert fees of both sides, determined Rallis and Svare's fees were reasonable. App 160.

31. Next, Reiser's argument that counsel agreed each side would bear its own expert witness fees for depositions is misleading at best. N.D.R.Civ. P. 26 requires that the party deposing the expert pay the expert's fee for preparation and attendance at the deposition. This often results in disputes after the deposition as to the amount of the fee. That counsel agreed to avoid those disputes by each paying their own experts has nothing to do with costs awarded to a prevailing party in litigation. Had that agreement not been reached, Roger's Staining would be requesting the costs of deposing Reiser's experts, and they would be awarded without question. Reiser's plea that they had already paid their own experts and

should not have to pay Roger's Staining's too, flies in the face of the law on recoverability of costs and disbursements.

32. Finally, Reiser criticizes Rallis's bills for including five days spent at the trial of this matter. They assert Rallis did not need to be there except for his testimony and all other time should be disallowed. The following passage from Byron v. Gerring Industries, Inc., 328 N.W.2d 819, 824 (N.D. 1982), accurately sets forth the law in North Dakota:

> We also believe that it was essential for the defendants' expert to be present for portions of the trial in addition to the time during which he was actually testifying so that he could listen to, and subsequently counter, the testimony proferred by plaintiff's expert witness and also aid counsel in understanding the expert witness testimony. Accordingly, we find no abuse of discretion in this instance.

33. The same is certainly true in this case. The technical evidence necessary in this trial was complicated and broad in scope. It was broad in scope because Woodford utilized the "exclusion" method of cause and origin determination. As a consequence of his choosing that method, all of the evidence was critically relevant to the cause and origin determination, including the testimony of eyewitnesses to the fire and fire department personnel. The District Court noted the holding in Byron in determining it was appropriate for Rallis to attend five days of trial. App. 158.

34. Reiser's criticism of Svare's bills appear to be a less vehement version of their attacks on Rallis's. It should be noted that despite his significantly higher hourly rate, Svare's total billings are only $13,000 higher than Hong's. App. 159. Svare's bills do not appear to be a significant issue on this appeal.

2. **Miscellaneous Expenses**

35. The "miscellaneous" expenses Reiser challenges on pages 17 of their brief appear to consist of three items: 1) FedEx charges ($60.47); 2) subpoena and duplication fees for procuring the videotape of the news report on the fire from WDAY and KVLY ($125); and 3) photocopy expenses for trial exhibits.

36. As to FedEx fees, Reiser attributes those to "procrastination which ostensibly necessitated using an expedited courier." Appellant's Brief, p. 17. In reality, the FedEx charge to "You've Been Served" was for service of a subpoena on ATF Agent Burt Rudder and AUSA Kent Rockstad in a last-minute attempt to obtain Rudder's testimony at trial. This was necessitated as a result of Reiser withholding the Rutter report from Roger until immediately before trial. R-181.

37. As Reiser knows, the subpoena to WDAY and subpoena and dub fee for KVLY (total: $125) were to obtain the news report several of the witnesses reported seeing the evening after the fire. This news report reflected statements made to the fire department on the night of the fire that stain rags were the cause. This was clearly to obtain evidence for use at the trial. Evidence does not actually need to be used at the trial in order to recoverable. The video was in fact on both parties' exhibit lists.

38. Reiser criticizes the photocopy charges for trial exhibits as excessive because Roger did not submit a great number of exhibits at trial. While it is true that Roger's Staining did not submit a great number of exhibits at trial,

nevertheless, those exhibits were prepared and in the courtroom in the event they were needed, and in the event plaintiff's counsel did not submit them. As it turned out, Reiser submitted a great number of exhibits that Roger's Staining intended to submit. This included a great number of color photocopies of photographs. Roger's Staining had no way of knowing that in advance, and those exhibited needed to be marked and ready. The District Court saw this, and after requesting backup documentation, found these charges to be reasonable.

3. **Depositions**

39. At oral argument on the objection to costs, Reiser waived objection to deposition transcripts for witnesses who testified at trial. App. 122-23. They now object only to the deposition of Dane Carley ($231.20), a firefighter who was subpoenaed to testify at trial but did not actually testify. Id. As the District Court pointed out: "Section 28-26-06(2), N.D.C.C., allows costs for procuring evidence necessarily used or obtained for use on the trial. Recovery of expenses is not limited to evidence actually introduced at trial." App. 158, quoting Braunberger, 2000 ND 45 at ¶ 18, 607 N.W.2d 904 (citations omitted) (emphasis in original). There is no basis to object to the deposition of a single firefighter out of many who worked on this fire who ultimately did not testify.

IV. CONCLUSION

40. Without a trial transcript this Court simply does not have an adequate record to determine the reasonableness of the costs at issue on this appeal. The District Court had the benefit of the entire record and there is no evidence it abused its discretion. Consequently, Roger's Staining requests that the Order of

the District Court awarding costs be affirmed in its entirety.

Dated this 29th day of May, 2012.

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CERTIFICATE OF COMPLIANCE

41. The undersigned, as attorneys for the defendants/appellees in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 4,662.

Dated this 29th day of May, 2012.

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CERTIFICATE OF SERVICE

42. I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEES** was on the 29th day of May, 2012, emailed to the following:

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