20130142

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Maggie Oakland, daughter of John T. Gassmann, Plaintiff and Appellant	
v.	Supreme Court No. 20130142
Bonnie G. Bowman, Evan B. Del Val, Dayna K. Del Val, and State Bank and Trust of Fargo North Dakota, Personal Representative of The John T. Gassmann Estate and Trustee of The John T. Gassmann Revocable Living Trust under agreement dated August 11, 2004, The Second amendment to and Complete restatement of the John T. Gassmann Revocable Trust Agreement dated December 16, 2011 and any other Amendment of these instruments, Defendants and Appellees	Appeal from Barnes County No. 02-2012-CV-00253

BRIEF OF APPELLANT + Addendum

Appeal from Summary Judgment of Dismissal Entered on March 14th, 2013

Barnes County District Court, Southeast Judicial District

The Honorable Judge James D. Hovey, Presiding

Margaret A. Oakland,
a.k.a. Maggie Oakland, pro se
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Appellant

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JURISDICTIONAL STATEMENT

Appellant Margaret A. Oakland timely appealed the Order for Judgment dated March 5th, 2013 and Judgment dated March 14th, 2013 in the Barnes County District Court in Case No. 02-2012-CV-00253. A Notice of Appeal was filed and served on April 30th, 2013. The Supreme Court of North Dakota has jurisdiction over this appeal pursuant to N.D.R.App.P. Rule 3(a)(1).

ISSUES

1.) **Whether appellant's objection to probate of will on ground of insane delusion indicated timely pursuit of "one of several available legal remedies" and met other criteria for equitable tolling previously outlined by this Court as follows: (1) providing adequate notice, (2) preventing prejudice to the adverse parties, and (3) demonstrating reasonable, good faith conduct.**

2.) **Whether the doctrine of equitable tolling could be compatible with statutory law set forth in N.D.C.C. §59-14-04(1), given that a "judicial proceeding" challenging appellant's father's testamentary capacity was timely commenced via an objection to probate of will.**

3.) **Whether the Court should adopt and apply equitable tolling in this case to allow appellant to pursue her claim against a revocable trust, where appellant was initially prevented from pursuing said claim in the proper manner by unforeseeable, extraordinary circumstances related to attorney neglect.**

STATEMENT OF CASE

John T. Gassmann, deceased, ("Gassmann") developed a clinically-diagnosed, chronic delusional disorder in mid-life that led him to become estranged from Appellant ("Oakland"), his only child. Specific delusions at issue included irrational beliefs that Oakland was supportive of others who conspired to poison Gassmann, that Oakland was not Gassmann's biological daughter, and that Oakland had herself attempted to poison Gassmann.

Oakland alleges Ms. Bonnie G. Bowman ("Bowman") and her children encouraged Gassmann's delusional ideas and discouraged mental health treatment on a long-term basis. Oakland contends this enabling of mental illness caused Gassmann to increasingly reject his natural family while becoming excessively attached to Bowman and her children, including Mr. Evan B. Del Val and Ms. Dayna K. Del Val.

In 2004, Gassmann signed a revocable living trust agreement, devising his property after death in a manner shaped by his delusions. He amended this trust three times in December 2011, remaining delusional throughout that time. Under the purported terminal trust amendment signed December 22nd, 2011, Gassmann devised all of his family farm property, as well as other family property over which he held a special power of appointment, to a trust for the benefit of Mr. Evan B. Del Val and Ms. Dayna K. Del Val, to the exclusion of Oakland and/ or other members of Gassmann's natural family.

John T. Gassmann passed away of Cancer that had metastasized to his brain and spinal cord on February 9th, 2012.

On March 13th, 2012, Oakland received notice of the revocable trust's existence, including copies of the original trust instrument and its December 2011 amendments, from Attorney William L. Guy III ("Attorney Guy") on behalf of primary trustee [Bell] State Bank and Trust ("Bell"). The notice referenced N.D.C.C. §59-14-04(1), which set forth a limitations period for contesting the revocable trust of 120 days from receipt of said notice. (Appendix 25)

On or around April 9th, 2012, Oakland retained Attorney Christopher Kennelly of Kennelly O'Keeffe Firm of Fargo, ND ("Kennelly") to contest the revocable trust, its amendments, and a related pour-over will on the ground of insane delusion. *See Also* Flaherty v. Feldner, 446 N.W.2d 760 (N.D. 1989), Matter of Estate of Koch, 259 N.W.2d

655 (N.D. 1977). A copy of the March notice received from Attorney Guy was given to Kennelly, along with copies of the revocable trust and will documents.

On April 10th, 2012, Kennelly filed an Objection to Probate of Will in the Barnes County District Court probate division (Appendix 29-30). Kennelly's paralegal advised Oakland this pleading should be sufficient to contest the revocable trust and its amendments as well as the will. Oakland asked Kennelly repeatedly over the next 7 weeks if the paralegal's statement was accurate and was never given any indication by Kennelly that it was not.

On or around June 8th, 2012, Oakland retained Attorney Michael Ward of Eaton and Ward Firm of Minot, ND, ("Ward") to replace Kennelly in representing her in her claims against the revocable trust and will. Well before the end of the limitations period, Oakland provided Ward all written information she had regarding the revocable trust, including but not limited to Bell's March 2012 notice referencing N.D.C.C. §59-14-04(1).

Oakland was concerned that the Objection filed by Kennelly did not *appear* clear in articulating her claim against the revocable trust and its amendments, and she made a point of asking Ward about this in June 2012. Ward indicated that any potential deficiency in the pleading could be corrected without much difficulty and that he would take whatever steps were necessary to ensure the revocable trust and its amendments were clearly contested. Ward eventually filed an "Amended Objection" with accompanying motion and brief in the probate division. (Appendix 53-55) It appears this was done in part to clarify Oakland's intent to contest the revocable trust and amendments as well as the will.

On October 23rd, 2012, Ward commenced the action from which the instant appeal

is taken against Defendants Bowman, Mr. Evan B. Del Val, and Ms. Dayna K. Del Val. The complaint alleged undue influence and insane delusion and prayed the District Court to set aside the 2004 revocable trust, the December 2011 trust amendments, and the 2011 will as invalid. (Appendix 5-14) The Bowman-Del Val Defendants moved for summary judgment, contending that any claim against the revocable trust was time-barred by N.D.C.C. §59-14-04(1) and that therefore the merits of the case need not be addressed. Oakland argued that the Objection filed in the probate division timely set forth her primary cause of action as well as her intent to litigate and thereupon asked the District Court to apply the doctrine of equitable tolling to allow the case to be heard on its merits. Rejecting Oakland's arguments, the District Court dismissed the action with prejudice. (Appendix 20-22) This appeal is taken from that dismissal.

Oakland contends the April 2012 Objection effected sufficient notice to prevent prejudice to the trustees and fulfilled the statute of limitations' purposes. Oakland further contends that the combined effect of four related factors beyond her control prevented her from timely pursuing her claim against the revocable trust in the proper manner, and that these factors, considered together, indicate an extraordinary episode of attorney negligence that may warrant equitable tolling. Seitzinger v. Reading Hospital and Medical Center, 165 F.3d 236 (3rd Cir. 1999), Baldayaque v. U.S., 338 F.3d 145 (2nd Cir. 2003). Said factors are as follows: (1) the failure of Kennelly to pursue Oakland's claim against the revocable trust for 7 consecutive weeks until discharged; (2) Kennelly's de facto refusal to advise Oakland as to whether or not he was pursuing said claim; (3) the subsequent failure of Ward to pursue Oakland's claim against the revocable trust after his hire but before the end of the limitations period; and (4) Ward's assurances to Oakland, between Ward's date of hire and the end of the limitations period, that Ward

would ensure the revocable trust was clearly contested.

Oakland prays this Court to consider the salient departures from normal standards of care made by her former attorneys, who demonstrated marked disregard for Oakland's interests as well as numerous specific violations of the North Dakota Rules of Professional Conduct. Thereupon, and upon thorough analysis of the formulation previously established by this Court to denote those rare and remarkable cases for which equitable tolling may be appropriate, Oakland asks this Court to adopt and apply the doctrine of equitable tolling to allow her claim to proceed on its merits.

ARGUMENT

I. Standard of Review

Oakland appeals from an Order granting summary judgment. Whether a trial court properly granted summary judgment is a question of law this Court reviews *de novo* on the entire record. Wahl v. County Mutual Ins. Co., 640 N.W.2d 689, 691 (N.D. 2002). To prevail in a summary judgment motion, the movant must establish that there is no genuine issue of material fact *and* that he is entitled to judgment as a matter of law. Moen v. Thomas 628 N.W.2d 325, 328 (N.D. 2001). Even when facts are undisputed, summary judgment is inappropriate if conflicting inferences can be drawn from those facts. Burlington Northern Railroad Co., Inc. v. Scheid, 398 N.W.2d 114, 118 (N.D. 1986) Latendresse v. Latendresse, 294 N.W.2d 742, 748 (N.D. 1980)

In considering a summary judgment motion, the trial court must view evidence in the light most favorable to the resisting party, giving that party the benefit of all favorable inferences which can reasonably be drawn from that evidence. Titus v. Titus, 154 N.W.2d 391, 395 (N.D. 1967); Rice v. Chrysler Motors Corporation, 198 N.W.2d 247,

253 (N.D. 1972) It is not the role of the trial court to weigh evidence, make credibility determinations, or draw inferences other than those that can justifiably be drawn in the non-movant's favor. *See* Farmers Union Oil Co. v. Harp, 462 N.W. 2d 152, 156 (N.D. 1990). All assertions made by the party opposing summary judgment are assumed by the Court to be true. Fleck v. ANG Coal Gassification Co. 522 N.W.2d 445, 448 (N.D. 1994). Summary judgment is appropriate only if, after viewing all evidence in the light most favorable to the non-moving party and giving that party the benefit of favorable inferences, there is no dispute as to either the material facts *or* the inferences that may be drawn from undisputed facts. Eldridge v. Evangelical Lutheran Good Samaritan Society 417 N.W.2d 797, 800 (N.D. 1987)

The trial court's Order from which the instant appeal is taken pertains strictly to whether the statute of limitations absolutely precluded Oakland's claim as a matter of law, or, equivalently, whether equitable tolling could be applied to save that claim from being time-barred.

The few facts reviewed by the trial court are undisputed. Oakland's request for equitable tolling pertains primarily to questions of law hence may be reviewed by this Court *de novo*. Dakota Truck Underwriters and Travelers Insurance Company v. South Dakota Subsequent Injury Fund, 689 N.W. 2d 196, 201 (S.D. 2004)

Oakland's primary cause of action, i.e., Gassmann's insane delusions, involves an individual's state of mind and therefore indicates a case that could *only* be appropriate for summary judgment if the dispositive effect of the affirmative (statute of limitations) defense had been established with certainty. *See Also* Titus v. Titus, *Id.*, 396 The trial court nevertheless found summary judgment appropriate, holding important implications for the review process. Summary judgment indicates that, on appeal, all evidence must

again be viewed in the light most favorable to the resisting party, and all factual assertions made by that party are assumed true. Fleck, *Id.*, 448

The questions of whether an attorney's negligence may justify equitable tolling and, if so, what *degree* of negligence may warrant the doctrine's invocation, are questions of first impression in North Dakota. The broader question of whether equitable tolling should be adopted in North Dakota *in general* remains undecided by this Court, even though no fewer than seven cases have sought Its determination thereupon since 1992.

The trial court did not evaluate whether the instant case conformed to this Court's formulation for equitable tolling, given certain inferences that it held to indicate without further analysis that tolling was not appropriate. (Appendix 22, ¶7) (Appendix 68, lines 11-19) (Appendix 69, lines 3-7)

Inferences leading the District Court to cursorily dismiss Oakland's request for tolling were as follows: (1.) that the conduct of Oakland's former attorneys constituted "garden variety neglect" rather than egregious negligence as alleged by Oakland; (2.) that at the time when the limitations period expired, Oakland was capable of pursuing her claim against the revocable trust independently of the attorneys she had retained to represent her in that claim.

Oakland respectfully maintains these findings were not properly made *as a matter of law* and asks this Court not to afford deference to the trial court thereupon. Both inferences will be fully addressed before reaching the more general question of whether this case satisfies this Court's well-established formulation for equitable tolling.

II. District Court Erred by Interpreting Evidence Without Allowing Appellant Benefit of All Reasonable Favorable Inferences Hence Prematurely Denied Request for Equitable Tolling:

Oakland respectfully maintains the inferences precluding the trial court from considering equitable tolling, i.e., one concerning the nature of attorney neglect affecting this case and another concerning Oakland's ability to pursue her claim independently of her hired counsel, were made *without* the benefit of favorable inference that is to be afforded to a party opposing summary judgment hence should not be affirmed by this Court.

The inferences at issue here were not drawn from conflicting evidence but from undisputed affidavits offered by Oakland and related information provided during oral argument. This limited evidence is entirely available to this Court on the record.

"Garden Variety Neglect"

The District Court found that Oakland's action against the trust was untimely as a result of mere "garden variety neglect" (Appendix 69, line 6). Oakland notes she has previously claimed *personal* "excusable neglect" in these proceedings but maintains this is entirely distinguishable from "excusable neglect" on the part of her former *attorneys*, the distinction being significant in regard to Oakland's request for equitable tolling.

Oakland filed affidavits and corroborating email evidence with the District Court to show that the conduct of her former attorneys indicated disregard for Oakland's interests clearly distinguishable from "*garden variety*" neglect and that Oakland was *personally* diligent in pursuing her claims. Oakland provided in part sworn facts as follows:

> [¶14] After reviewing the proposed petition referenced in paragraph 13, I contacted [Kennelly's paralegal] by phone [in April 2012] and expressed concern about the omission of language to contest the Trust. I was informed that I would need to speak with Mr. Kennelly about my question but that the petition was "probably" sufficient for my purposes as written. I left a message . . . for Mr. Kennelly to call me about this but did not receive a return call at that time.

[¶17] On May 17th, having received no response from Mr. Kennelly regarding the absence of language regarding the Trust in the petition described in ¶ 13, I sent an email to paralegal Kendra Dais asking her again to follow-up with Mr. Kennelly about this. . .

[¶19] I attempted to contact Mr. Kennelly by phone several times between April 10, 2012 and June 4, 2012 to discuss my concern about the relationship between the petition and the Trust. However, I was not able to obtain a direct response to my questions regarding this issue from Mr. Kennelly by phone or by email at any point in time. (Appendix 34, ¶14, 17) (Appendix 35 ¶19)

Two authenticated emails were submitted to the trial court regarding Kennelly's representation, including the May 17th email to Kendra Dais referenced in [¶17] of the affidavit (Appendix 41) and the following email sent directly to Kennelly by Oakland on May 31st, 2012 (Appendix 46):

> Hi Chris: I am concerned about what the strategy is for my case. Most importantly, I want to know if the petition you filed challenges the trust along with the will, or if it only challenges the will. Most of my Dad's intended property distribution was laid out via his trust, and it's my understanding that a revocable trust does not require a will or formal probate. So ***I am very concerned that state bank and trust might assert that his trust is still valid even if the will is shown to be invalid.*** I have asked you about this a couple of times now, but I don't recall that you've ever really answered my question. Please get back to me about it. Thank you. (emphasis added)

Oakland also apprised the trial court during oral argument that she asked Kennelly *directly*, on *two separate occasions,* whether the petition filed was sufficient to contest the revocable trust, and Kennelly deflected Oakland's questions both times, essentially responding that he could answer them "later."

Oakland's first affidavit, taken together with email evidence and with Oakland's statements during oral argument, indicated that Oakland contacted her first attorney or his staff to ask whether that attorney had effectively contested the revocable trust on her behalf, a *minimum* of *five times* over a period of just under two months, yet the attorney

never answered the question despite its obvious significance in light of the short statute of limitations imposed by §59-14-04(1). I.e., as opposed to failing to respond to a single missed message and/ or missing a single deadline unintentionally, Oakland's first attorney *consistently failed to answer a simple question that was critical to Oakland's claim, throughout seven consecutive weeks of representing Oakland and also thereafter, in disregard of N.D.R.Prof.Conduct 1.4 (2,3,4) and N.D.R.Prof.Conduct 1.16(e)* Oakland contends this occurred within a pervasive, general pattern of Kennelly neglecting to respond to inquiries regarding her claims.

In her second affidavit, Oakland presented sworn facts regarding her second attorney, Ward, as follows:

> [¶7] On or around June 8, 2012, I spoke with Mr. Ward by phone and confirmed that he was fully willing to take over my case at that time.
>
> [¶10] At the time Mr. Ward was hired by me, during the first half of June 2012, I confirmed that he had copies of all the written information I had pertaining to my case, including Mr. Bill Guy's letter dated March 12, 2012. I also informed Mr. Ward of my concern that the pleading filed by Mr. Kennelly on April 10, 2013 [sic.] appeared to lack language to explicitly contest the trust. Mr. Ward clearly assured me he would take whatever steps were necessary to ensure the revocable trust was properly contested . . .
>
> [¶19] On February 8th, 2013, I . . . asked [Mr. Ward] to apprise me of any communication he had with [Bell]'s Counsel regarding the revocable trust between June 6th, 2012 and July 11th, 2012. Mr. Ward told me that he "didn't do much of anything" with my case between June 6th, 2012 and July 11th, 2012, because he "didn't know [he] was representing [me]" prior to July 11th, 2012. . . . (Appendix 48, ¶7) (Appendix 49, ¶10) (Appendix 51, ¶19)

Oakland's second affidavit established that her second attorney affirmatively agreed to represent Oakland in her claim against the revocable trust approximately 30 days prior to the end of the limitations period and was advised of said limitations period in writing. It

established that the same attorney assured Oakland, before the statute ran, that he would take steps to ensure the revocable trust was properly contested. Finally, this affidavit established that several months afterward, the same attorney told Oakland he "didn't do much of anything" to pursue Oakland's claims from the time he agreed to represent her until after the statutory deadline had passed, because he "didn't know [he] was representing [Oakland]" during that time, his active representations to Oakland that he ***was*** representing her notwithstanding.

"Garden variety neglect" has been construed to describe an isolated, explicable incident of attorney error, such as failing to timely file a claim due to being out of the office when notice of the filing deadline is received. Irwin v. Dept. of Veterans Affairs, 111 S.Ct 453 (U.S. 1991). Conversely, it does *not* accurately depict the scenario wherein an attorney *persistently* fails to pursue a client's basic objectives in the absence of extenuating circumstances, consistently fails to provide information, and/ or misrepresents his actions or intentions to his client, especially when the client demonstrates personal diligence in making inquiries. Seitzinger v. Reading Hospital and Medical Center, 165 F.3d 236, 241 (3rd Cir. 1999).

Federal courts have found that when an attorney's failures clearly *exceed* the scope of good faith errors generally categorized as "garden variety excusable neglect," then equitable tolling may be appropriate to allow a case to proceed on its merits, even after a statute of limitations has expired. Seitzinger, *Id.*, Baldayaque v. U.S., 338 F.3d 145 (2nd Cir. 2003). Two examples are offered as follows:

In Seitzinger, *Id.*, a Pennsylvania worker sued her former employer, alleging age and gender discrimination. The plaintiff had a relatively brief window of time within which to file suit, i.e., 90 days from receipt of a "right-to-sue" letter. She retained an

attorney prior to receiving this letter and had a clear understanding with that attorney that he would represent her in her claim against the employer. About two weeks prior to the expiration of the limitations period, the plaintiff contacted the attorney by phone and asked if a complaint had been filed: the attorney indicated that it had. However, this was incorrect, and the attorney did not file the complaint until after the limitations period expired. The employer subsequently filed, and the district court granted, a motion for summary judgment of dismissal on the ground that the complaint was untimely. The Third Circuit Court of Appeals reversed this judgment and remanded the case for further proceedings, finding as follows:

> "We agree with the [defendant] that the mere fact that counsel failed to file the complaint in a timely manner probably constitutes garden variety excusable neglect. But his affirmative misrepresentations to his client about the very filing at issue here rise above that standard . . . We conclude that Seitzinger has adduced facts sufficient to overcome summary judgment on the equitable tolling issue. First (and importantly), Seitzinger appears to have been extremely diligent in pursuing her claim . . . She hired an attorney to help her file her civil complaint. She contacted him before the filing deadline, which she knew about in broad terms, to ensure that he had filed the complaint. In addition, she repeatedly called him, requesting a copy of the complaint and seeking information on how her case was progressing. We think that these examples of her consistent assiduousness, if true, would weigh heavily in favor of equitable tolling." (p.241)

In Baldayaque, *Id.*, a judgment of the U.S. District Court of Connecticut denying a petition for writ of habeas corpus was vacated and remanded by the 2nd Circuit Court of Appeals, which found "an attorney's conduct, if it is sufficiently egregious, may constitute the sort of 'extraordinary circumstances' that would justify the application of equitable tolling" *Id.* at 152, 153

In Baldayaque, *Id.*, the district court found the petitioner was personally diligent and had done everything in his power to have a § 2255 motion filed on his behalf. Nevertheless, the trial court denied equitable tolling, finding that previous case law held

attorney error could not indicate "extraordinary circumstances" to justify its application. This judgment was vacated by the Court of Appeals, which found that the type of attorney error discussed in previous case law amounted to "ordinary mistakes" and that such precedent did *not* indicate the actions of a petitioner's attorney could *never* constitute "extraordinary circumstances" to justify equitable tolling. *Id. at* 152. Baldayaque's attorney's actions, taken together, were found by the Court of Appeals to be extraordinary as follows:

> "In spite of being specifically directed . . . to file a '2255,' [the attorney] failed to file such a petition at all. By refusing to do what was requested by his client on such a fundamental matter, [the attorney] violated a basic duty of an attorney to his client . . . [the attorney] failed to keep his client reasonably informed about the status of the case and failed to explain the matter to the extent reasonably necessary to permit [the petitioner] to make informed decisions regarding the representation, as required by [Connecticut] Rule of Professional Conduct 1.4. . . [the attorney's] actions were far enough outside the range of behavior that reasonably could be expected by a client that they may be considered 'extraordinary'. . . while the normal errors made by attorneys may not justify equitable tolling, extreme situations such as the one presented here require a different result." Id. at 152

In the instant case, a factfinder could reasonably infer that the conduct of Oakland's former attorneys rose to a level of egregious professional negligence hence may warrant equitable tolling. Even if the trial court found the evidence available at the summary judgment hearing insufficient to make such a determination, that evidence *at minimum* indicated a reasonable difference of opinion existed on this issue in light of the undisputed facts, rendering summary judgment based on a single interpretation of those facts inappropriate. Keller v. Hummel 334 N.W. 2d 200 (N.D. 1983). Whether the principles of equitable tolling may render a proceeding timely can be a triable issue of

fact, precluding summary judgment. McDonald v. Antelope Valley Community College District, 194 P.3d 1026, 1031 (Cal. 2008)

Appellant's Ability to Act Independently of Counsel:

The District Court noted Oakland demonstrated an ability to "read and understand the law" (Appendix 70, line 4), therefore finding no reason why Oakland could not have undertaken her claim against the trust "on her own", i.e., independently of the attorneys she hired to represent her in bringing that claim (Appendix 70, lines 2-5) (Appendix 68, lines 11-19)

Oakland respectfully maintains this finding similarly does not indicate the facts set out in her affidavits were viewed in the light most favorable to her in accordance with the standard for summary judgment.

Oakland's first affidavit indicated that prior to the end of the limitations period, Oakland was led to believe by her first attorney and his paralegal, and later by her second attorney, that her trust claim was being effectively brought before the court by the attorney retained to bring it. These assurances alone, given the credence a reasonable layperson would give them *regardless* of that layperson's latent, untested ability to read or understand the law, indicated legitimate reasons why Oakland was deterred from independently pursuing her claim against the revocable trust. Oakland furthermore included in her first affidavit the following statement:

> [¶26] Between the time that I hired Mr. Ward in June 2012 and November 2012, . . . I did not consider the possibility that Mr. Ward might fail to follow all necessary, relevant statutes and Rules to properly contest the Trust. (Appendix 36, ¶26)

This statement indicated, contrary to the oral finding of the trial court (Appendix 69, lines 15-25), that Oakland was *not* aware a statute of limitations was missed at the time when it was missed, because she believed instead at that time that her attorney was effectively contesting the revocable trust as he had been retained to do. Oakland's affidavits further indicate that her lack of awareness was attributable to misleading assurances made by trusted professionals rather than to inadvertence or a lack of diligence on her part.

The lack of information and/ or misinformation with which Oakland contended in this case raises an issue of fact as to whether Oakland was prevented from pursuing her claim by extraordinary circumstances despite due diligence as opposed to making any *reasonably informed* decisions that delayed the claim's pursuit, this question bearing direct relevance upon whether it is appropriate to apply equitable tolling. *See Also* Granger v. Aaron's Inc., 636 F.3d 708, 712, 713 (5th Cir. 2011). Had similar misinformation been offered to Oakland by *Defendants,* rather than by Oakland's own counsel, prior to the running of the statute, then the doctrine of equitable estoppel might apply to save Oakland's claim.

The known facts of this case do not allow Oakland to claim estoppel, yet the *general circumstance* of being lulled by misinformation into missing a statute of limitations resonates closely with the equitable considerations upon which estoppel was adopted in this state, by this Court, as a judicial remedy over a century ago. Peabody v. Lloyd's Bankers, 68 N.W. 92 (N.D. 1896)

The trial court did not address inferences evident in Oakland's affidavits as follows: (1) that Oakland was unable to ascertain whether her first attorney was pursuing her trust claim; and (2) that Oakland actively *believed* her second attorney was pursuing that claim until well after the statute of limitations had passed. These inferences indicated valid

reasons why Oakland was prevented from initiating an action against the revocable trust "on her own," *regardless* of any latent ability she may have possessed to understand the law, which, at the time the statute of limitations passed, was entirely untested. Oakland further contends that these inferences, offered in good faith, indicate equitable tolling *should* have been considered.

III. This case is the first in North Dakota to meet the *complete* formulation previously set forth for equitable tolling:

Statutes of limitations were *intended* "only to run against those who are neglectful of their rights and fail to use reasonable and proper diligence in the enforcement thereof." Huus v. Huus, 28 N.W.2d 385, 388 (N.D. 1947) The doctrine of "equitable tolling" may toll the running of a statute of limitations to serve the ends of justice, where technical forfeitures would unjustifiably prevent a trial on the merits. Ward v. Rooney-Gandy, 696 N.W.2d 64, 69 (Mich 2005). Equitable tolling may be appropriate when a plaintiff has not "slept on his rights" but has somehow been prevented from properly asserting them, provided that its application will not frustrate the legislative intent behind the pertinent limitations statute. *See Also* Dakota Truck Underwriters, *I.d*, 204, Burnett v. New York Central Railroad Company, 380 U.S. 424, 429 (1965). Equitable tolling may apply "where an action brought within the limitations period stands to lessen the harm that is the subject of a potential second action, where administrative remedies must be exhausted before a second action can proceed, or where a first action, embarked upon in good faith, is found to be defective for some reason." McDonald, *Id.*, 1032 Equitable tolling has been applied in the federal courts and in numerous state jurisdictions across the country, including South Dakota and Montana. Dakota Truck Underwriters, *Id.*, Lozeau v. GEICO Indeminity Co., 207 P.3d 316, 319 (Mont. 2009) It has not yet been applied in

North Dakota, although its merits have been discussed by this Court several times, most recently in 2011. Grand Forks Homes, Inc. v. State of North Dakota, 795 N.W.2d 335, 342 (N.D. 2011)

In previous opinions this Court has clearly and repeatedly identified a precise two-part formulation denoting the rare type of action It would find appropriate for equitable tolling. The formulation includes, as one of its components, three criteria for demonstrating compliance with the *purposes* of statutes of limitations, derived from California case law and most notably from Addison v. State, 578 P.2d 941, 943, 944 (Cal. 1978) as follows: (1) timely notice; (2) lack of prejudice to the defendants; and (3) reasonable and good faith conduct by the plaintiff. In addition to setting forth these three criteria, Addison also demonstrated a policy adhered to in certain jurisdictions, including California, which favors the use of equitable tolling "in cases when an injured person has several legal remedies and, reasonably and in good faith, pursues one". *I.d.*, p. 943, *See Generally* Lozeau, *Id.*, 319 (Mont. 2009), Irby v. Fairbanks Gold Mining, Inc., 203 P.3d 1138 (Alaska, 2009). This policy, which significantly limits the circumstances under which equitable tolling may apply, is the *second* component of the two-part formulation established by this Court, hereafter referred to as the "*Addison*" formulation.

In Reid vs. Cuprum SA, de C.U., 611 N.W.2d 187, 190 (N.D., 2000), this Court clarified its position that it is not only the three criteria adopted from *Addison* of timely notice, lack of prejudice, and reasonable and good faith conduct that must be met for the doctrine of equitable tolling to apply but that furthermore, as in *Addison*, the plaintiff must have had several available legal remedies and reasonably and in good faith, pursued one thereby tolling the statute of limitations for the others. See Reid, p. 190.

Despite this Court's unambiguous instruction in Reid, three cases were appealed in

North Dakota thereafter, in which equitable tolling was requested without the appellant having effectively pursued a related legal remedy prior to the end of the limitations period.[1] Kimball v. Landeis, 652 N.W. 2d 330, 339, 340 (2002), Reimers v. Ohmdahl, 687 N.W. 2d 445, 454 (2004), Superior, Inc. v. Behlen Mfg., 738 N.W.2d 19, 28 (2007). In Its published opinion on each of these cases, this Court reiterated the complete *Addison* formulation, including the three criteria *as well as* the requirement that one of several available legal remedies must have been timely pursued.

"One of Several Available Legal Remedies Timely Pursued":

In the instant case, Oakland filed an Objection to Probate of Will with insane delusion as the cause of action in the probate division well within the statutory time period[2]. At the time of filing, Oakland understood based on communications with her first attorney and his staff that the Objection's purpose was to bring her claim against the revocable trust in its original form and as amended *as well as* against Gassmann's pour-over will. Oakland acknowledges that the absence of language specifically identifying the revocable trust in the Objection raised concerns for her at the time of filing. However, as a reasonable, prudent layperson receiving legal services, Oakland repeatedly asked her attorney to address this issue with her but otherwise deferred to that attorney's expertise, believing the Objection viable to satisfy N.D.C.C.§59-14-04(1) for months after it was filed. Oakland was advised by her second attorney in June 2012 that the

[1]Two of these cases, like Reid, involved failed attempts to initiate an action within the limitations period due to service of process issues. They are distinguishable from the instant circumstance, wherein a proceeding was timely commenced to challenge testamentary capacity, but initial pleadings did not specify the revocable trust.

[2]The probate court later granted leave to amend this Objection to add undue influence by Bowman and her family as a secondary cause of action.

Objection should be modified to specifically identify the trust. However, this attorney also assured Oakland he would resolve this issue, and he did *not* inform Oakland the Objection was legally insufficient to satisfy N.D.C.C. §59-14-04(1).

Oakland was informed of the Objection's legal insufficiency to challenge the revocable trust in November 2012 by means of a letter from Bell's Counsel forwarded to her by Ward, who advised Oakland he planned to withdraw as her counsel around the same time.

At the February 21st Summary Judgment Hearing, Oakland argued the Objection to Probate of Will, which she understood at the time of filing to contest the revocable trust, which was filed in a court of competent jurisdiction over the affairs of decedents *See* N.D.C.C. §30.1-01-06, ¶9, and which inferred in accordance with N.D.C.C. §59-14-01 that Gassmann lacked the testamentary capacity to create or amend a revocable trust at the time the terminal amendment to the revocable trust was signed, could toll the statute of limitations. (Appendix 63, lines 20-25) (Appendix 64, lines 1-6) (Appendix 66, lines 10-20). The trial court rejected this argument, finding the Objection, as well as a then pending request for amendment thereof under Rule 15 to add a challenge to the revocable trust, to be irrelevant to the instant case.

This Court's opinion in Reid suggests the Objection in the probate division was not irrelevant here, as it was *one of several available legal remedies pursued reasonably and in good faith by Oakland to lessen the harm incurred by her father's insane delusions.*

The instant case is only the third to come before this Court wherein equitable tolling was requested to save a plaintiff's claim after the applicable statute of limitations had run, in which a legal remedy setting forth the same cause of action was pursued by the plaintiff prior to the end of the limitations period. The first such case was Burr v.

Trinity Medical Center, 492 N.W.2d 904 (1992), and the second was Braaten v. Deere and Co., 569 N.W.2d 563 (1997).

In both Burr and Braaten, this Court thoroughly discussed equitable tolling but declined to adopt it for the case at bar, finding the facts in both cases to indicate that the *Addison* criteria had not been met by the plaintiffs. I.e., this Court found that the plaintiff in Burr was not diligent in pursuing her claim and that her lack of diligence prejudiced the defendants *Id.* at 910, and It found that the plaintiff in Braaten filed in the wrong forum as a result of poor legal research and/ or to deliberately engage in "forum-shopping" while disregarding the law on diversity jurisdiction, suggesting a lack of reasonable, good faith conduct. *Id.* at 566 It may also be noteworthy that in Burr and Braaten, the legal remedies pursued within the limitations period, i.e., lawsuits filed in federal court, were dismissed *prior to* the plaintiffs filing their actions in state court. The instant case is distinguishable from Burr and Braaten primarily because Oakland has demonstrated all components of the *Addison* formulation but also because at no time since April 2012 has the related probate litigation regarding Gassmann's testamentary capacity been suspended or dismissed.

In light of its findings regarding "garden variety neglect" and Oakland's ability to pursue her claim "on her own," the District Court did not review this case for compliance with the *Addison* formulation. This Court is asked to do so.

Oakland has presented competent evidence to show that one of several available legal remedies was timely pursued, setting forth her primary cause of action in a judicial proceeding prior to the limitations period's end. In addition, the three *Addison* criteria have been demonstrated as follows:

Criterion #1: Timely Notice:

The statute of limitations set forth in N.D.C.C. §59-14-04(1) serves unique purposes, which distinguish it from the longer limitations periods set forth in Chapter 28-01 of the Century Code. This distinction is important in determining whether Oakland complied with the statute's purposes.

The theory behind most limitations statutes, including those contained in Chapter 28-01 of the Code, is as follows;

> "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. . . . even if one has a just claim, it is unjust not to put the adversary on notice to defend within the period of limitation . . . the right to be free of stale claims in time comes to prevail over the right to prosecute them," Burnett, *I.d.*, p. 428.

In contrast, N.D.C.C. §59-14-04(1) was enacted as part of a four-part strategy adopted from the Uniform Trust Code (UTC) *to facilitate the expeditious distribution of trust assets,* while circumscribing the liability faced by trustees in case of a contest.

The comments of UTC §604 delineate the purposes of §59-14-04, in all of its subparts, as follows:

> "This section provides finality to the question of when a contest to a revocable trust may be brought . . . to allow an adequate time in which to bring a contest while at the same time permitting the expeditious distribution of the trust property following the settlor's death. . .
>
> subsection (b) [§59-14-04(2)] addresses liability concerns by allowing the trustee, upon the settlor's death, to proceed expeditiously to distribute the trust property. The trustee may distribute the trust property in accordance with the terms of the trust **until and unless the trustee receives notice of a pending judicial proceeding contesting the validity of the trust** . . .[emphasis added]
>
> Even though distribution in compliance with subsection (b) discharges the trustee from potential liability, subsection (c) [§59-14-04(3)] makes the beneficiaries of what later turns out to have been an invalid trust liable to return any distribution received."

While §59-14-04(1) serves an important function regarding "timely notice," it is the *trustees* who must receive this notice as opposed to defendants in an action. This unique limitations period was enacted for purposes that do not include preserving evidence or witnesses' memories or otherwise protecting the rights of a party who must defend himself against a claim. Furthermore, the only mention of beneficiaries within §59-14-04, contained in §59-14-04(3), states that beneficiaries *are liable* to return distributions from a trust that is later found to be invalid.

The purpose of the statute as formulated was not to provide Appellees in this case with notice of a claim being brought against them, albeit Appellees have raised the statute of limitations as an affirmative defense. Rather, the statute's purpose was to provide notice of a proceeding challenging the validity of the revocable trust to trustee Bell and to Bowman *in her role as a trustee*. Oakland demonstrated substantial compliance with this purpose via the April 2012 Objection, which read, in pertinent part, as follows:

> "The Petitioner has personal knowledge to believe that the decedent, **John T. Gassmann, was not of sound mind at the time he executed the purported December 6, 2011 will** and that said will was wholly predicated upon **insane delusions**, making said document void." (emphasis added)

N.D.C.C. § 59-14-01, which defines the requisite capacity of a settlor of a revocable trust, reads as follows:

> "The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, **is the same as that required to make a will.**" (emphasis added).

The April 2012 Objection notified Bell and Bowman, in compliance with the Rules of Civil Procedure, that a judicial proceeding was pending to determine whether Gassmann possessed testamentary capacity in December 2011 to make a will, or,

equivalently, to amend a revocable trust. A copy of a psychiatric evaluation from 1993 was attached to the Objection by Kennelly, which would have additionally alerted those served that Gassmann's problems with delusions began many years before the original revocable trust instrument in question was drafted in 2004. *By definition*, the symptoms of a delusional disorder persist over time, rendering any distinction drawn between a specific date in December 2011 and the general timeframe of "December 2011" to be artificial. *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders [DSM- IV-TR], p. 323, ¶4 (2000)

It is also noteworthy that whereas Bell had accepted duties as both primary trustee of the revocable trust and as personal representative of the estate, Bowman had duties *only* under the revocable trust and *not* under the will. Service of the Objection upon a trustee who did not have specific responsibilities in executing the will was significant *in itself* in providing constructive notice of *intent* to challenge to the trust.

Pleadings are construed liberally to do substantial justice. See N.D.R.Civ.P. Rule 8(e), Reule v. Bismarck Public School District, 376 N.W.2d 32 (N.D. 1985) As long as the claim involved is *generally* indicated, a claimant need not allege every specific element thereof, See N.D.R.Civ.P. Rule 8(a), Jablonsky v. Klemm, 377 N.W.2d 560 (N.D., 1985). This holds true regardless of whether a pleading has been filed in the probate or the general equity division of the District Court. See Also N.D.C.C. §30.1-02-04

Although the Objection made no *explicit* mention of the revocable trust, it is reasonable to expect a competent trustee acting in good faith would consider the challenge logically inferred thereto, especially given that the trust in this case, rather than

the will, directs the manner in which the testator's assets are to be disposed.

Bell's counsel in fact acknowledged in July 2012 that it was aware Oakland *intended* to contest the trust, and Bell did not raise the statute of limitations issue at that time. (Appendix 57)

Criterion #2: Lack of Prejudice:

Again, it is the *trustees* whose interests are protected by the statute of limitations and not the trust's beneficiaries in their roles as potential defendants in a civil action, or, for that matter, in their roles as purported beneficiaries.

The trustees received timely notice of a judicial proceeding and thereby were prompted to take appropriate self-protective measures, which may have included suspending the distribution of trust assets until the judicial proceeding was resolved, petitioning the court for special instructions as to how to manage the trust in light of the pending proceeding, or doing both. For the trustees to ignore the April 2012 Objection and continue distributing trust assets as if no issues regarding the settlor's testamentary capacity had been raised would defy N.D.C.C.§ 59-14-01 (defining settlor's capacity to create or amend a revocable trust) and suggest forfeiture of any protection offered by N.D.C.C.§ 59-14-04(2).

At no point in time was the primary trustee, Bell, disadvantaged by a lack of information regarding this litigation: Bell has been involved in *parallel* litigation in the probate division for over a year now. In its capacity as "Personal Representative of the Estate of John T. Gassmann," Bell has defended Gassmann's testamentary capacity continuously from April 2012 through the present time, remaining privy to all related discovery involving facts *identical* to those of this case.

Furthermore, if one looks *beyond* the intended purpose of the statute and considers

the *Appellees'* interests, it is evident that these parties similarly do not stand to be prejudiced by the requested tolling. Appellant's primary cause of action involves a mental illness that persisted in her father for over 20 years. Because the facts of this case developed over two decades, the relatively brief delay in serving a pleading that explicitly identifies the revocable trust, i.e., a delay of approximately 3 months, has no discernible effect upon the quality or quantity of evidence available to any party hence upon Appellees' ability to defend themselves against Oakland's claims.

The Appellees have made no specific allegation of prejudice in opposition to Oakland's request for tolling, most likely because none is feasible.

Criterion #3: Reasonable and Good Faith Conduct:

The instant action was filed in District Court approximately 6 months and one week after Oakland initially retained an attorney to contest the revocable trust. Shortly after filing, Oakland was informed that Bell was raising a statute of limitations defense, indicating to Oakland for the first time that the April 2012 Objection was *legally insufficient* to satisfy the requirements of N.D.C.C. §59-14-04(1) and indicating further that Ward had done nothing to modify or supplement said Objection to explicitly identify the revocable trust prior to the end of the limitations period.

At no point in time did Oakland engage in dilatory behavior, waiver in her commitment to pursuing her claim, "sleep on her rights," or demonstrate conduct indicating less than good faith. Instead, Oakland has shown reasonable, good-faith conduct through behaviors including, but not limited to, the following:

1. Oakland retained an attorney to contest the revocable trust within **30** days of receiving written notice of that trust's existence.
2. Oakland ensured her attorneys had timely access to all information pertinent to

her claim.

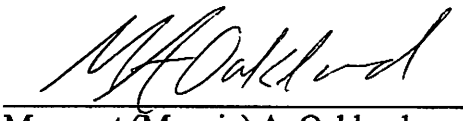
3. Oakland made significant efforts to communicate with her attorneys and to inquire as to the status of her case.
4. Oakland made a difficult decision to change counsel, believing at the time that this change would cause her claim to be more diligently pursued.
5. When Ward informed Oakland in November 2012 that the statute of limitations had been missed and that he was withdrawing as her counsel, Oakland assiduously sought another attorney, inquiring upon 11 different law firms in 7 weeks.
6. Rather than allowing her claims to be abandoned for lack of replacement counsel, Oakland personally commenced countless hours of legal research, making every effort to preserve those claims by resorting to self-representation in the instant action as well as in the parallel probate proceeding.

IV. Conclusion:

Based on the foregoing, Oakland respectfully prays this Court to adopt and apply the doctrine of equitable tolling to preserve this rare type of case anticipated by the *Addison* formulation, seizing the opportunity to enable more perfect justice while faithfully upholding the enduring purposes of statutes of limitations.

Oakland respectfully prays this Court to reverse the Order for Summary Judgment and remand this case to be tried on its merits.

Dated this 26th day of July, 2013



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ADDENDUM to APPELLANT'S BRIEF:

N.D.C.C §59-14
"Revocable Trusts"

Derived from UTC Article 6, Sections (601, 602, 603, 604)

CHAPTER 59-14
REVOCABLE TRUSTS

59-14-01. (601) Capacity of settlor of revocable trust.

The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.

59-14-02. (602) Revocation or amendment of revocable trust.

1. Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This subsection does not apply to a trust created under an instrument executed before August 1, 2007.
2. If a revocable trust is created or funded by more than one settlor to the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses; to the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution; and upon the revocation or amendment of the trust by fewer than all of the settlors, the trustee shall promptly notify the other settlors of the revocation or amendment.
3. The settlor may revoke or amend a revocable trust by substantial compliance with a method provided in the terms of the trust or, if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by a later will or codicil that expressly refers to the trust or any other method manifesting clear and convincing evidence of the settlor's intent.
4. Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.
5. A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust or the power, exercised in writing and delivered to the trustee.
6. A conservator of the settlor or, if no conservator has been appointed, a guardian of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the conservatorship or guardianship.
7. A trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust had not been amended or revoked.

59-14-03. (603) Settlor's powers - Powers of withdrawal.

1. While a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.
2. During the period the power may be exercised, the holder of a power of withdrawal has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.

59-14-04. (604) Limitation on action contesting validity of revocable trust - Distribution of trust property.

1. A person shall commence a judicial proceeding to contest the validity of a trust that was revocable immediately before the settlor's death within the earlier of three years after the settlor's death or one hundred twenty days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding.
2. Upon the death of the settlor of a trust that was revocable immediately before the settlor's death, the trustee may proceed to distribute the trust property in accordance

with the terms of the trust. The trustee is not subject to liability for doing so unless the trustee knows of a pending judicial proceeding contesting the validity of the trust or a potential contestant has notified the trustee of a possible judicial proceeding to contest the trust and a judicial proceeding is commenced within sixty days after the contestant sent the notification.

3. A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received.
4. This section does not impose a duty upon the trustee to give notice under this section unless the notice is expressly required in the trust agreement.

20130142

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JUL 26 2013

STATE OF NORTH DAKOTA

AFFIDAVIT OF SERVICE BY MAIL

Maggie Oakland
vs.
Bonnie G. Bowman et al.
Supreme Court Case No. 20130142
Appeal from Barnes County Court File
No. 02-2012-CV-00253

STATE OF NORTH DAKOTA)
)ss.
COUNTY OF GRAND FORKS)

I, Donald R. Forsman, being duly sworn, depose and say that I am a resident of the City of Grand Forks, State of North Dakota, that I am of legal age, that I have no interest in the above-entitled action, and that I served the within:

1.) APPELLANT'S BRIEF
2.) APPELLANT'S APPENDIX

on July 26th, 2013, by placing true and correct copies thereof in envelopes addressed as follows:

Mr. Robert Manly
Vogel Law Firm
P.O. Box 1077
Moorhead, MN 56561-1077

Mr. Berly D. Nelson
Serkland Law Firm
P.O. Box 6017
Fargo, ND 58108-6017

And depositing the same with postage prepaid in the United States mail at Grand Forks, North Dakota.

To the best of affiant's knowledge, the addresses given above are the actual post office addresses of the parties intended to be so served. The above documents were mailed in accordance with the provisions of the Rules of Appellate Procedure.

Donald R. Forsman

Subscribed and sworn to before me this 26th day of July, 2013

KATHY JOHNSON
Notary Public, State of North Dakota
My Commission Expires December 3, 2014
(SEAL)

Notary Public
Grand Forks County, North Dakota
My Commission Expires:

20130142

AFFIDAVIT OF SERVICE BY MAIL

Maggie Oakland
vs.
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STATE OF NORTH DAKOTA)
)ss.
COUNTY OF GRAND FORKS)

I, Anneetta J. Christman, being duly sworn, depose and say that I am a resident of the City of Grand Forks, State of North Dakota, that I am of legal age, that I have no interest in the above-entitled action, and that I served the within:

1.) APPELLANT'S BRIEF CORRECTED COVER
2.) APPELLANT'S APPENDIX CORRECTED COVER
3.) PAGE #2 of APPELLANT'S APPENDIX

on August 12th, 2013, by placing true and correct copies thereof in envelopes addressed as follows:

Mr. Robert Manly
Vogel Law Firm
P.O. Box 1077
Moorhead, MN 56561-1077

Mr. Berly D. Nelson
Serkland Law Firm
P.O. Box 6017
Fargo, ND 58108-6017

And depositing the same with postage prepaid in the United States mail at Grand Forks, North Dakota.

To the best of affiant's knowledge, the addresses given above are the actual post office addresses of the parties intended to be so served. The above documents were mailed in accordance with the provisions of the Rules of Appellate Procedure.

Anneetta J. Christman

Subscribed and sworn to before me this 12th day of August, 2013

Chelsey Filipi
Notary Public
Grand Forks County, North Dakota
My Commission Expires:

(SEAL)

CHELSEY FILIPI
Notary Public
State of North Dakota
My Commission Expires May 18, 2018