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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

City of Jamestown, Plaintiff and Appellee, vs. Santos Regalado Casarez, III, Defendant and Appellant.	**SUPREME COURT NO. 20200279** Criminal No. 47-2019-CR-00614 ORAL ARGUMENT REQUESTED

ON APPEAL FROM OCTOBER 16, 2020 JUDGMENT OF
THE DISTRICT COURT
COUNTY OF STUTSMAN
STATE OF NORTH DAKOTA
SOUTHEAST JUDICIAL DISTRICT
HONORABLE TROY J. LEFEVRE PRESIDING

APPELLANT'S BRIEF

Luke T. Heck (#08133)
Drew J. Hushka (#08230)
VOGEL LAW FIRM
Attorneys for Appellant
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
701.237.6983
Email: lheck@vogellaw.com
dhushka@vogellaw.com

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

[¶1] In North Dakota, municipalities are statutory creatures lacking authority to enact statutes superseding state law. Municipal ordinances conflicting with state law are void. Here, following the City of Jamestown's enactment of an ordinance criminalizing the refusal of a chemical DUI test, the North Dakota Legislature enacted a conflicting statute limiting criminal prosecutions for refusal of a chemical DUI test. The City prosecutes Appellant for violating the conflicting municipal ordinance. Does the City prosecute a valid law?

[¶2] The United States and North Dakota Constitutions generally prohibit warrantless seizures. A limited exception to the warrant requirement permits law enforcement to seize an individual upon reasonable suspicion of criminal activity. Here, law enforcement warrantlessly seized appellant for suspicion of DUI without observing him drive. Did law enforcement possess reasonable suspicion permitting the warrantless seizure?

STATEMENT OF THE CASE

[¶3] The City charged Appellant, Santos Regalado Casarez, III ("Mr. Casarez"), for driving under the influence. Apellant's App'x, at 6. Mr. Casarez moved to suppress evidence and dismiss the charge. Doc. ID #16. The district court denied the motion, holding law enforcement possessed reasonable suspicion to seize Mr. Casarez, and the Legislature's revisions to the North Dakota Century Code did not void the provision of the Jamestown Municipal Code used by the City to prosecute Mr. Casarez. *See* Appellant's App'x, at 7-11.

[¶4] Mr. Casarez conditionally pleaded guilty, preserving the above-outlined issues. *Id.* at 12-13. The district court accepted the conditional guilty plea, and entered a suspended sentence. *Id.* at 14-15. Mr. Casarez then appealed to this Court. *Id.* at 17-19.

REQUEST FOR ORAL ARGUMENT

[¶5] Mr. Casarez requests oral argument in accordance with Rule 28(h) of the North Dakota Rules of Appellate Procedure. The effect of the Legislature's 2019 amendments to state DUI law on corresponding municipal ordinances presents an issue of first impression for this Court, and oral argument allows for full exploration of the novel issue. Additionally, the reasonableness of a warrantless investigative seizure presents a fact-specific inquiry based on the totality of the circumstances, and oral argument allows for full exploration of all factual nuances.

STATEMENT OF THE FACTS

[¶6] On November 6, 2019, at approximately 11:17 p.m., Jamestown Police Department Officer Andrew Noreen ("Officer Noreen") observed a physical altercation occurring outside a bar in Jamestown while on routine patrol. *See* Tr. on Appeal – Mot. Hr'g ("Transcript"), at 9:3-10:1. Officer Noreen arrested a female participant in the altercation for disorderly conduct. *Id.* at 10:2-8.

[¶7] Jamestown Police Department Officer Chance Renfro ("Officer Renfro") provided assistance outside the bar. *Id.* at 16:4-13. Mr. Casarez's girlfriend—the female arrested for disorderly conduct—alleged to Officer Renfro that Mr. Casarez was intoxicated, and the altercation started when she was trying to prevent him from

driving home in his gold GMC Yukon. *Id.* at 16:22-17:8; *id.* at 17:17-24. Officer Renfro spoke with Mr. Casarez, observing the odor of alcohol, bloodshot watery eyes, and a lack of balance. *Id.* at 17:12-16.

[¶8] Mr. Casarez asked Officer Renfro about posting bail for his girlfriend, and Officer Renfro advised he could take a cab to the jail and post bail there. *Id.* at 18:5-12. Officer Renfro then left the scene. *Id.* at 18:13-17.

[¶9] Officer Renfro then resumed his patrol. *Id.* 18:21-19:6. While on patrol, Officer Renfro observed a gold GMC Yukon parked outside the law enforcement center in Jamestown, and a man he believed to be Mr. Casarez in the lobby. *Id.* Officer Renfro did not have a license plate number for Mr. Casarez's Yukon, and did not confirm the Yukon parked outside belonged to Mr. Casarez. *Id.* at 33:19-22. Nevertheless, Officer Renfro entered the law enforcement center, and purposefully blocked Mr. Casarez's only exit. *See* Doc. ID #33, at 10:25-20:50.[1]

[¶10] Officer Renfro then subjected Mr. Casarez to field sobriety testing. Tr., at 22:8-24:19. Following Mr. Casarez's poor performance, Officer Renfro reviewed surveillance from the law enforcement center to confirm Mr. Casarez drove the gold GMC Yukon to the law enforcement center. *Id.* at 25:4-19. Officer Renfro then requested a PBT, and arrested Mr. Casarez for driving under the influence. *Id.* at 26:23-27:11.

[1] To avoid confusion with the internal surveillance timestamp rolling over at midnight, all references to time refer to the file time.

[¶11] Following the arrest, Officer Renfro provided Mr. Casarez with an implied consent advisory, requesting a chemical breath test. *Id.* at 30:15-22. Mr. Casarez refused to submit to the requested chemical breath test. *Id.* Officer Renfro advised Mr. Casarez that if he did not consent, he was going to be charged with criminal DUI – Refusal. *Id.* at 30:23-32:1. Mr. Casarez maintained his refusal. *Id.*

[¶12] Ultimately, the City charged Mr. Casarez with DUI – Refusal, in violation of Jamestown Municipal Code § 21-04-06(1)(e)(ii). *See* Appellant's App'x, at 6. Following the rejection of his motion to suppress and/or dismiss, Mr. Casarez conditionally pleaded guilty, reserving the below-outlined issues. *Id.* at 12-13. The district court accepted the conditional plea. *Id.* at 14. Mr. Casarez then filed this appeal. *Id.* at 17-19.

LAW AND ARGUMENT

I. The Legislature's 2019 amendment to Section 39-08-01 superseded the Jamestown Municipal Code, invalidating the provision used to prosecute Mr. Casarez.

[¶13] In North Dakota, "[i]t is axiomatic that '[c]ities are creatures of statute and possess only those powers and authorities granted by statute or necessarily implied from an express statutory grant.'" *Sauby v. City of Fargo*, 2008 ND 60, ¶ 6, 747 N.W.2d 65 (quoting *City of Bismarck v. Fettig*, 1999 ND 193, ¶ 4, 601 N.W.2d 247)). North Dakota statute specifically proscribes cities from enacting ordinances superseding state statutes. *See* N.D.C.C. § 12.1-01-05. Accordingly, "if the legislature enacts a statute which clearly conflicts with ordinances that have been enacted the statute prevails and the conflicting ordinances are superseded and

rendered invalid." *State ex rel. City of Minot v. Gronna*, 79 N.D. 673, 698, 59 N.W.2d 514, 531 (1953).

[¶14] Here, the City of Jamestown enacted Ordinance 1409 on July 26, 2013. In relevant part, it reads:

> (1) A person may not drive or be in actual physical control of any vehicle upon a street or upon public or private areas to which the public has right of access for vehicular use in this city if any of the following apply:
>
> . . .
>
> (e) That individual refuses to submit to . . . :
>
> . . .
>
> (ii) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under Section 39-20-01 of the North Dakota Century Code[.]

Jamestown Mun. Code Ord. 1409, *available at* Doc. ID #26.

[¶15] Subsequent to the City's enactment of Ordinance 1409, the Legislature revised the corresponding state DUI statute. Specifically, during the 66th Legislative Assembly, the Legislature revised Section 39-08-01 to read:

> 1. A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply:
>
> . . .
>
> e. That individual refuses to submit to . . . :

. . .

(2) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-20-01.

f. Subdivision e does not apply to an individual unless the individual has been advised of the consequences of refusing a chemical test consistent with the Constitution of the United States and the Constitution of North Dakota.

N.D.C.C. § 39-08-01 (emphasis added).

[¶16] Section 39-08-01, as revised in 2019, conflicts with Jamestown Municipal Ordinance 1409. Specifically, Section 39-08-01 expressly limits prosecutions for DUI – Refusal to circumstances where law enforcement advises a motorist of the consequences of refusal "consistent with the Constitution of the United States and the Constitution of North Dakota." *Id.* The law presumes the Legislature does not perform idle acts. *See Bickel v. Jackson*, 530 N.W.2d 318, 320 (N.D. 1995) ("There is a presumption the legislature acts with purpose and does not perform idle acts." (citation omitted)). Accordingly, by adding the limitation contained in subdivision f, the Legislature intended to limit DUI – Refusal prosecutions.

[¶17] Ordinance 1409, however, fails to contain the requirement added by the Legislature in 2019. Therefore, under Ordinance 1409, the City could prosecute an individual for refusing a chemical test request even if law enforcement failed to advise the motorist of the consequences of refusal in accordance with the United States and North Dakota Constitutions. In other words, Ordinance 1409 conflicts

with Section 39-08-01. And when the Legislature enacts a statute conflicting with a city's ordinance, "the conflicting ordinances are superseded and rendered invalid." *Gronna*, 79 N.D. at 698, 59 N.W.2d at 531. Therefore, Ordinance 1409 is invalid.

[¶18] Despite the conflict between Ordinance 1409 and Section 39-08-01, relying on *City of Bismarck v. Hoopman*, 421 N.W.2d 466 (N.D. 1988), the district court held the Legislature's subsequent amendments to Section 39-08-01 did not supersede Ordinance 1409. *See* Appellant's App'x, at 7-8, ¶¶ 2-3. In *Hoopman*, the city charged a motorist with DUI in violation of the city ordinance. 421 N.W.2d at 467. The municipal court dismissed the criminal complaint, finding the motorist was "on a private area which the public had no right of access." *Id.* at 468 n.2. The city appealed to the Burleigh County Court. *Id.* at 467. The district court dismissed the appeal, concluding the city lacked authority to appeal from the dismissal of its complaint. *Id.*

[¶19] On appeal, this Court considered only the city's right to appeal from the dismissal of a complaint. *Id.* at 468. The North Dakota Century Code provided "[a]n appeal may be taken by the state from[] . . . [a]n order quashing an information or indictment or any count thereof." *Id.* (citing N.D.C.C. § 29-28-07(1)). This Court found "there is no real distinction between a criminal information and a criminal complaint under our law for purposes of appealability under section 29-28-07(1)." *Id.* (citation and internal quotation omitted). Further, courts construe Section 29-28-07(1) "to accommodate the intended uniformity of practice and procedure between district and county courts." *Id.* (citation and internal quotation

omitted). Accordingly, this Court held Section 29-28-07(1) "authorizes a city to appeal from dismissal of its complaint when the complaint charges the defendant with an act proscribed by city ordinance which is also proscribed by a state statute." *Id.* (footnote omitted).

[¶20] *Hoopman* is inapposite—it did not analyze the validity of a municipal provision when conflicting with a state statute. Instead, *Hoopman* merely considered the applicability of a state statute to a municipality in the absence of an applicable municipal statute. But, unlike *Hoopman*, this case presents this Court with two on-point provisions of law: Section 39-08-01 and Jamestown Municipal Ordinance 1409. Because these provisions conflict, this Court has already answered the question of the appropriate remedy: when a municipal statute conflicts with a state statute, the municipal statute is void. *Gronna*, 79 N.D. at 698. The City cannot prosecute Mr. Casarez for violating a void statute. Accordingly, this Court should vacate Mr. Casarez's conviction, and remand with instructions to dismiss this case.

II. Officer Renfro unreasonably seized Mr. Casarez by violating Section 29-29-21 of the North Dakota Century Code, and the United States and North Dakota Constitutions.

[¶21] Even if this Court determines the City prosecuted a valid charge against Mr. Casarez, this Court should reverse as the district court erred in refusing to suppress unreasonably obtained evidence. "Unreasonable search and seizures are prohibited by the Fourth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, and by Article 1, § 8 of the North Dakota Constitution." *State v. Fasteen*, 2007 ND 162, ¶ 6, 740 N.W.2d 60. A seizure occurs

"whenever an officer stops an individual and restrains his freedom." *State v. Gay*, 2008 ND 84, ¶ 14, 748 N.W.2d 408. A "person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *State v. Fields*, 2003 ND 81, ¶ 11, 662 N.W.2d 424.

[¶22] Following the incident at the bar, Mr. Casarez was at the law enforcement center loading money to secure his girlfriend's release. *See* Doc. ID #33, at 06:54-10:24. Officer Renfro entered the lobby area, purposefully positioning himself between Mr. Casarez and the only available building exit. *Id.* at 10:25-10:42. Office Renfro then remains between Mr. Casarez and the exit—blocking the exit—while Mr. Casarez finishes his transaction. *Id.* at 10:42-15:10. When Mr. Casarez attempted to leave after finishing his transaction, Officer Renfro physically prevented him from leaving and began questioning him. *Id.* at 15:11-20:50. A reasonable person would not feel free to leave when leaving would require physically pushing through an officer, and when directed not to leave by law enforcement. Because Office Renfro seized Mr. Casarez without a warrant, the City bears the burden of establishing reasonableness. *Cf. City of Jamestown v. Snellman*, 1998 ND 200, ¶ 6, 586 N.W.2d 494 ("In suppression cases, the defendant has the initial burden of establishing a prima facie case of illegal seizure before the burden of persuasion shifts to the prosecution to justify its actions." (citations omitted)). The City cannot establish the reasonableness of Officer Renfro's seizure.

[¶23] Section 29-29-21 of the North Dakota Century Code confines when law enforcement may warrantlessly seize a person in public upon a showing of reasonable suspicion. Specifically:

> A peace officer may stop any person abroad in a public place whom the officer reasonably suspects is committing, has committed, or is about to commit:
>
> 1. Any felony.
> 2. A misdemeanor relating to the possession of a concealed or dangerous weapon or weapons.
> 3. Burglary or unlawful entry.
> 4. A violation of any provision relating to possession of marijuana or of narcotic, hallucinogenic, depressant, or stimulant drugs.

N.D.C.C. § 29-29-21.[2]

[¶24] Officer Renfro seizure of Mr. Casarez violated Section 29-29-21. Officer Renfro did not identify any suspected felony when seizing Mr. Casarez. Tr., at 19:11-17. Officer Renfro did not identify any suspected weapon possess by Mr. Casarez when seizing him. *Id.* Officer Renfro did not articulate a reason to believe Mr. Casarez was unlawfully present in the law enforcement center. *Id.* Similarly, while Officer Renfro articulated he believed Mr. Casarez had consumed alcohol based on their prior interaction, Officer Renfro provided no testimony that he

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[2] Section 29-29-21 does not apply to the warrantless seizure of a motor vehicle upon a showing of reasonable suspicion. *See City of Bismarck v. Uhden*, 513 N.W.2d 373, 376 (N.D. 1994). However, when seized by Officer Renfro, Mr. Casarez was not in a vehicle. Accordingly, Section 29-29-21 applies to Mr. Renfro's seizure of Mr. Casarez.

possessed a controlled substance. *Id.* In other words, Officer Renfro lacked cause to seize Mr. Casarez in accordance with Section 29-29-21. Because Officer Renfro violated Section 29-29-21, the seizure was unlawful, and the district court erred in failing to suppress the evidence obtained therefrom. *See State v. Linghor*, 2004 ND 224, ¶ 4, 690 N.W.2d 201 ("To realize this protection of individual rights, all evidence obtained by unreasonable searches and seizures is inadmissible against the defendant at trial.").

[¶25] Officer Renfro's violation of Section 29-29-21 notwithstanding, his seizure of Mr. Casarez was unreasonable as lacking the reasonable suspicion required by the United States and North Dakota Constitutions. An exception to the warrant requirement allows law enforcement to conduct a temporary "Terry Stop" upon a showing of reasonable and articulable suspicion of criminal activity. *Richter v. N.D. Dep't of Transp.*, 2010 ND 150, ¶ 9, 786 N.W.2d 716. When determining whether law enforcement possesses reasonable suspicion justifying a stop, a court examines the information known to the officer at the time of the stop. *State v. Robertsdahl*, 512 N.W.2d 427, 428 (N.D. 1994). The standard requires "more than just a vague 'hunch' or other non-objective facts[.]" *Bryl v. Backes*, 477 N.W.2d 809, 811 n.2 (N.D. 1991) (citation and internal quotation omitted). Instead, "[r]easonable suspicion for a stop exists when a reasonable person in the officer's position would be justified by some objective manifestation to suspect the defendant was, or was about to be, engaged in unlawful activity." *City of Devils Lake v. Lawrence*, 2002 ND 31, ¶ 8, 639 N.W.2d 466 (citing *State v. Kenner*, 1997 ND 1, ¶ 8, 559 N.W.2d

538). In making this assessment, this Court "use[s] an objective standard and look[s] to the totality of the circumstances." *Id.* (citations omitted). Officer Renfro lacked reasonable suspicion to seize Mr. Casarez.

[¶26] In *Lies v. North Dakota Department of Transportation*, 2019 ND 83, 924 N.W.2d 448, an off-duty officer observed a "'white HHR'" vehicle driving erratically, reporting the tip to the North Dakota Highway Patrol. *Id.* at ¶ 2. Within an hour of the tip, an on-duty officer encountered a white HHR, seizing it, without observing any traffic violation or erratic conduct. *Id.* Law enforcement arrested the driver for DUI based on his performance on field sobriety testing and a PBT. *Id.*

[¶27] On appeal, this Court considered whether law enforcement permissibly seized the white HHR and motorist. *Id.* at ¶¶ 5-11. This Court concluded the officer had not, reasoning "the basic description provided . . . did not allow for officers to properly identify the vehicle as the one reported in the tip. Because officers could not reasonably identify the vehicle, reasonable articulable suspicion did not exist to support stopping [the motorist's] vehicle." *Id.* at ¶ 11.

[¶28] *Lies* controls this case. The district court found reasonable suspicion because "[t]he timeline of Officer Renfro's recent interaction with [Mr.] Casarez outside the Office Bar, the parked vehicle, and [Mr.] Casarez inside of the law enforcement center provided Officer Renfro with the necessary reasonable and articulable suspicion that the crime of DUI had recently taken place." Appellant's App'x, at 9-10, ¶ 9. But this analysis mistakenly assumes Officer Renfro possessed reasonable articulable suspicion to believe Mr. Casarez drove the vehicle parked near the law

enforcement center. Absent evidence of the commonality of gold GMC Yukons—the vehicle observed by Office Renfro—Officer Renfro lacked articulable basis to conclude the vehicle outside bellowed to Mr. Casarez, let alone that Mr. Casarez drove the vehicle. *Cf. Lies*, 2019 ND 83, ¶ 8 (error to put weight on identification of vehicle make and model when "neither party presented evidence at the administrative hearing regarding whether white HHRs are a common vehicle"). Had Officer Renfro confirmed the vehicle as Mr. Casarez's prior to seizing him reasonable suspicion may exist. However, Officer Renfro failed to take any step to identify the vehicle as Mr. Casarez's until after seizing him.

[¶29] Mr. Casarez anticipates the City will argue Mr. Casarez's evasive responses to Officer Renfro's questioning provided the link to create reasonable suspicion. But, when evaluating reasonable suspicion, this Court only considers information known to an officer at the time of a stop. *See State v. Westmiller*, 2007 ND 52, ¶ 10, 730 N.W.2d 134 ("In order to determine whether an investigative stop is valid, we consider the totality of the circumstances and examine the information known to the officer at the time of the stop." (emphasis added) (citations omitted)). And the surveillance footage clearly shows Officer Renfro only questioned Mr. Casarez after already seizing him—after Officer Renfro prevented Mr. Casarez from leaving by clearly and intentionally blocking the only available exit. Accordingly, Mr. Casarez's answers to questioning—suspicious or otherwise—do not factor into this Court's reasonable suspicion analysis.

[¶30] "Only a vague description of the color and model of a vehicle is not enough for a positive identification." *Lies*, 2019 ND 83, ¶ 9. In other words, while the existence of a gold GMC Yukon outside the law enforcement center may have provided Officer Renfro with a hunch Mr. Casarez drove to the law enforcement center, his mere hunch did not justify seizing Mr. Casarez. *Cf. id.* ("A 'mere hunch' that [the motorist's] vehicle was the one [the off-duty officer] saw 'is not enough to justify the detention of a motorist.'" (citation omitted)). Officer Renfro impermissibly seized Mr. Casarez, and the district court erred in failing to exclude all evidence derived from that seizure. *See Linghor*, 2004 ND 224, ¶ 4 ("To realize this protection of individual rights, all evidence obtained by unreasonable searches and seizures is inadmissible against the defendant at trial."). If this Court concludes the City charged Mr. Casarez with violating a valid statute, this Court should vacate and remand with instructions to suppress all evidence stemming from Officer Renfro's warrantless seizure of Mr. Casarez.

CONCLUSION

[¶31] "Mere curiosity, suspicion, vague hunches, or other non-objective facts will not suffice." *City of Minot v. Keller*, 2008 ND 38, ¶ 6, 745 N.W.2d 638. Instead, the courts use an objective standard that looks to the totality of the circumstances to assess the reasonableness of a seizure. *State v. Olson*, 2007 ND 40, ¶ 11, 729 N.W.2d 132. Officer Renfro's seizure fails that object test—his suspicion that Mr. Casarez drove failed to satisfy the standards imposed by law. Accordingly, even if

this Court does not find state law voids the Jamestown municipal code, this Court should reverse, suppressing all evidence following the unlawful seizure.

Respectfully submitted December 30, 2020.

VOGEL LAW FIRM

/s/ Luke T. Heck

BY: Luke T. Heck (#08133)
Drew J. Hushka (#08230)
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
701.237.6983
Email: lheck@vogellaw.com
dhushka@vogellaw.com
ATTORNEYS FOR APPELLANT

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 19 pages.

Dated this 30th day of December, 2020.

VOGEL LAW FIRM

/s/ Luke T. Heck

BY: Luke T. Heck (#08133)
Drew J. Hushka (#08230)
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
701.237.6983
Email: lheck@vogellaw.com
dhushka@vogellaw.com
ATTORNEYS FOR APPELLANT

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

CITY OF JAMESTOWN, APPELLEE, vs. SANTOS REGALADO CASAREZ, III, APPELLANT.	**SUPREME COURT NO. 20200279** Civil No. 47-2019-CR-00614

CERTIFICATE OF ELECTRONIC SERVICE

[¶1] I hereby certify that on December 30, 2020, the following documents:

Appellant's Brief;

Appellant's Appendix

were e-mailed to the address below and are the actual e-mail addresses of the parties intended to be so served and said parties have consented to service by e-mail:

Abbigail Geroux, Jamestown City Prosecutor
dalstedandryan@dakotalaw.net

VOGEL LAW FIRM

By: */s/ Luke T. Heck*

Luke T. Heck (#08133)
lheck@vogellaw.com
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
Telephone: 701.237.6983
ATTORNEYS FOR APPELLANT