IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Dustin Alan LeClair, Appellee, v. Thomas Sorel, Director Department of Transportation, Appellant.	)	**Supreme Ct. No. 20180155** **District Ct. No. 09-2018-CV-00019**

APPEAL FROM THE APRIL 6, 2018
JUDGMENT OF THE DISTRICT COURT
CASS COUNTY, NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT

HONORABLE WADE L. WEBB

BRIEF OF APPELLANT

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STATEMENT OF ISSUE

[¶1] Whether the law enforcement officer's reading of the implied consent advisory before requesting LeClair submit to the Intoxilyzer test substantially complied with the requirements of N.D.C.C. § 39-20-01(3)(a) irrespective of his omission of the word "punishable" from the advisory.

STATEMENT OF CASE

[¶2] West Fargo Police Officer Kyle Johnson ("Officer Johnson") arrested LeClair on November 27, 2017, for the offense of driving while under the influence of intoxicating liquor. Appendix to Brief of Appellant ("App.") at 5, 7. After the conclusion of the December 26, 2017, administrative hearing, the hearing officer issued his findings of fact, conclusions of law, and decision suspending LeClair's driving privileges for a period of two years. Id. at 7-8. LeClair requested judicial review of the hearing officer's decision. Id. at 9-10.

STATEMENT OF FACTS

[¶3] On November 27, 2017, Officer Johnson approached a stopped vehicle that he previously had observed being driven by LeClair after he observed the vehicle being operated with what the officer described as "extremely bright lights." Transcript ("Tr.") at 4, l. 15 – 5, l. 16. Officer Johnson testified "I didn't activate any emergency lights at any time. Just approached just to talk with him casually. I wanted to make sure everything was all right. I informed him about the headlights and kind of inquired why he was stopped on that road." Id. at 5, ll. 12-16.

[¶4] Officer Johnson testified he could immediately detect an odor of alcoholic beverage as he was walking up to the vehicle and that "there was a real strong

odor of alcoholic beverage coming from the vehicle." Id. at 7, ll. 11-12, 18-20. Officer Johnson observed that LeClair had bloodshot eyes and "slurred speech when he spoke." Id. at 7, ll. 17-18. LeClair admitted he had been drinking and was coming from Rookies Bar. Id. at 7, ll. 20-22. When asked for his driver's license, LeClair "was very slow and methodical, slow and deliberate in his movements. And had difficulty getting out his ID." Id. at 7, l. 24 – 8, l. 2.

[¶5] Officer Johnson asked LeClair "if he was willing to do some standardized field sobriety tests in which he stated he would." Id. at 8, ll. 4-5. LeClair displayed "very strong" indicators of impairment while performing the horizontal gaze nystagmus test, the walk-and-turn test, and the one-leg stand test. Id. at 8, l. 14 – 11, l. 18. LeClair produced a result equal to or greater than .08 on the onsite screening test. Id. at 11, l. 19 – 12, l. 18.

[¶6] Officer Johnson then placed LeClair under arrest for driving while under the influence. Id. at 12, ll. 19-25. Officer Johnson testified he transported LeClair to the Cass County Jail where he "read the North Dakota implied consent advisory from the back of the Report and Notice. Asked for a chemical breath test, which he did say he would take." Id. at 13, ll. 12-17. The DVD of the incident shows Officer Johnson informed LeClair:

> I must inform you that North Dakota law requires you take a chemical, breath or urine test to determine whether you are under the influence of alcohol or drugs. Refusal to take a chemical, breath or urine test may result in the revocation of your driving privileges for a minimum of 180 days and up to three years. I must also inform you that refusal to take a chemical, breath or urine test is a crime in the same manner as a driving under the influence charge. Today you will be performing the chemical breath test. Do you consent to taking the chemical test that I'm requesting?

App. at 1, Index # 24 (Ex. 16 -- DVD at 2:46:36, et seq.). The results of the Intoxilyzer test established LeClair had a blood alcohol concentration of 0.206% by weight. Id. at 6.

STATEMENT OF PROCEEDINGS ON APPEAL TO DISTRICT COURT

[¶7] At the hearing, LeClair objected to the form of the implied consent advisory he was provided as Officer Johnson "didn't advise him that it was a crime punishable in the same manner as a DUI correct? Just that it was a crime similar to DUI." Tr. at 16, ll. 11-13. Citing N.D.C.C. § 39-20-01(3)(a) and State v. O'Connor, 2016 ND 72, ¶ 7, 877 N.W.2d 312, LeClair claimed he "was not advised it's a crime punishable in the same manner as DUI. And says that it's a crime in the same manner as DUI. The legislature requires law enforcement to read the advisory verbatim." Id. at 17, ll. 7-14.

[¶8] Based on the evidence, the hearing officer found:

> While at the sally port of the jail, Johnson read the North Dakota Implied Consent Advisory to LeClair. Johnson informed LeClair that refusal to submit to the chemical breathe test that Johnson was asking for was "a crime in the same manner as driving under the influence charge." Johnson requested LeClair provide a breath test on the Intoxilyzer. LeClair consented to and provided a sample for the Intoxilyzer test.

App. at 7.

[¶9] The hearing officer determined:

> LeClair argued that this driving privileges should not be suspended pursuant to NDCC section 39-20-01, Subd. 3a and 3b as Johnson failed to state that refusing to submit to the chemical breathe test was "punishable in the same manner" as opposed to what Johnson did state which was "a crime in the same manner as driving under the influence charge." The law does not require an officer use the exact words of the statute. State v. Johnson, 2009 ND 167. The officer must advise the person about the implied consent and inform the

> person of the consequences of refusal, including the loss of driving privileges. LeClair was advised that refusing to submit to the chemical test was considered a crime in the same manner as a driving under the influence charge. LeClair, having been convicted of a DUI in the past, was aware that there are consequences such as jail time and a fine when convicted of DUI. Johnson's reading of the implied consent adequately advised LeClair of the consequences for refusing the breathe test.

Id. The hearing officer issued his decision suspending LeClair's driving privileges for a period of two years. Id.

[¶10] LeClair sought judicial review of the hearing officer's decision alleging:

> The hearing officer's findings of fact, conclusion of law and Decision are not in accordance with the law. Specifically, the hearing officer erred in concluding that the post-arrest implied consent advisory recited to Mr. LeClair satisfactorily complied with the requirements of N.D.C.C. § 39-20-01(3)(a). With that, the hearing officer erred in failing to exclude the chemical breath test pursuant to N.D.C.C. § 39-20-01(3)(b).

Id. at 9.

[¶11] The District Court issued its Memorandum Opinion and Order Reversing Hearing Officer's Decision on March 28, 2018, in which the Court reversed the Hearing Officer's Decision. Id. at 11-12. The District Court ruled:

> The incomplete post-arrest implied consent advisory recited to Mr. LeClair was noncompliant with the legislative mandate established under N.D.C.C. § 39-20-01(3)(a) and discussed in State v O'Connor, 2016 ND 72, and [] exclusion of the chemical breath test was required pursuant to N.D.C.C. § 39-20-01(3)(b).

Id. at 11.

[¶12] Judgment was entered on April 6, 2018. Id. at 13. The Department appealed the Judgment to the North Dakota Supreme Court asserting:

> The District Court erred in granting LeClair's appeal and reversing the Hearing Officer's Decision when it determined that the law enforcement officer's exclusion of the word "punishable" from

N.D.C.C. § 39-20-01(3)(a)'s implied consent advisory that "the law enforcement officer shall inform the individual refusal to take a breath or urine test is a crime punishable in the same manner as driving under the influence" warranted the exclusion of the test results under N.D.C.C. § 39-20-01(3)(b), and the reversal of the Hearing Officer's Decision.

Id. at 19-20. The Department requests this Court reverse the Judgment of the Cass County District Court and reinstate the Hearing Officer's Decision suspending LeClair's driving privileges for a period of two years.

STANDARD OF REVIEW

[¶13] "The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs the review of a decision to [suspend] driving privileges." Haynes v. Dir., Dep't of Transp., 2014 ND 161, ¶ 6, 851 N.W.2d 172. The Court must affirm an administrative agency's order unless one of the following is present:

1. The order is not in accordance with the law.

2. The order is in violation of the constitutional rights of the appellant.

3. The provisions of this chapter have not been complied with in the proceedings before the agency.

4. The rules or procedure of the agency have not afforded the appellant a fair hearing.

5. The findings of fact made by the agency are not supported by a preponderance of the evidence.

6. The conclusions of law and order of the agency are not supported by its findings of fact.

7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any

> contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46.

[¶14] "In an appeal from a district court's review of an administrative agency's decision, [the Court] review[s] the agency's decision." Haynes, 2014 ND 161, ¶ 6. The Court "do[es] not make independent findings of fact or substitute [its] judgment for that of the agency; instead, [it] determine[s] whether a reasoning mind reasonably could have concluded the findings were supported by the weight of the evidence from the entire record." Id.

[¶15] "Statutory interpretation is a question of law, which is fully reviewable on appeal." Zajac v. Traill Cty. Water Res. Dist., 2016 ND 134, ¶ 6, 881 N.W.2d 666 (citing Nelson v. Johnson, 2010 ND 23, ¶ 12, 778 N.W.2d 773). "The primary purpose of statutory interpretation is to determine the intention of the legislation." Id. (citing In re Estate of Elken, 2007 ND 107, ¶ 7, 735 N.W.2d 842). "Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears." Id. (citing N.D.C.C. § 1-02-02). "Words and phrases must be construed according to the context and the rules of grammar and the approved usage of the language." N.D.C.C. § 1-02-03, see also In re F.F., 2006 ND 47, ¶ 13, 711 N.W.2d 144 ("The legislature adheres to commonly accepted grammatical rules.").

[¶16] "If the language of a statute is clear and unambiguous, 'the letter of [the statute] is not to be disregarded under the pretext of pursuing its spirit.'" Zajac, 2016 ND 134, ¶ 6 (citing N.D.C.C. § 1-02-05) (alteration added in Zajac). "If the

language of the statute is ambiguous, however, a court may resort to extrinsic aids to interpret the statute." Id. (citing N.D.C.C. § 1-02-39).

[¶17] "Further, [the Court] 'construe[s] statutes to avoid absurd or illogical results.'" State v. Stegall, 2013 ND 49, ¶ 16, 828 N.W.2d 526 ((quoting Mertz v. City of Elgin, Grant Cty., 2011 ND 148, ¶ 7, 800 N.W.2d 710) (citing N.D.C.C. § 1-02-38 ("In enacting a statute, it is presumed that: ... [a] just and reasonable result is intended.")). "Extrinsic aids may be used to interpret a statute to avoid an absurd result and to determine whether the interpretation is consonant with legislative intent." Id. (internal and external citations omitted).

LAW AND ARGUMENT

The law enforcement officer's reading of the implied consent advisory before requesting LeClair submit to the Intoxilyzer test substantially complied with the requirements of N.D.C.C. § 39-20-01(3)(a) irrespective of his omission of the word "punishable" from the advisory.

[¶18] "'Section 39-20-01, N.D.C.C., sets forth the implied consent requirements for motor vehicle drivers in general.'" State v. O'Connor, 2016 ND 72, ¶ 7, 877 N.W.2d 312 (citing State v. Bauer, 2015 ND 132, ¶ 7, 863 N.W.2d 534 (quoting State v. Birchfield, 2015 ND 6, ¶ 7, 858 N.W.2d 302)). At the time of O'Connor's arrest, section 39-20-01(3) provided:

> 3. a. The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take the test to determine whether the individual is under the influence of alcohol or drugs; *that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence*; and that refusal of the individual to submit to the test directed by the law enforcement officer may result in a revocation for a minimum of one hundred eighty days and up to three years of the individual's driving privileges.

> b. A test administered under this section is not admissible in any criminal or administrative proceeding to determine a violation of section 39–08–01 or this chapter if the law enforcement officer fails to inform the individual charged as required under subdivision a.

Id. at ¶ 7 (quoting N.D.C.C. § 39-20-01(3) (2015) (2015 N.D. Sess. Laws ch. 268, § 9)).

[¶19] "O'Connor moved to suppress the result of the Intoxilyzer chemical test because the officer failed to provide him with the complete implied consent advisory after he was arrested and before he submitted to the chemical test." Id. at ¶ 4. "It [was] undisputed that before O'Connor submitted to the Intoxilyzer chemical test the officer provided him with a partial implied consent advisory which failed to inform him that refusal to take a chemical test 'is a crime punishable in the same manner as driving under the influence.'" Id. at ¶ 3 (quoting N.D.C.C. § 39-20-01(3)(a) (2015)).

[¶20] The Court stated "[t]he Legislature has directed that a *specific warning* be provided to an arrested defendant before the results of a chemical test can be admitted in a criminal or administrative proceeding." Id. at ¶ 13 (emphasis added); see also id. at ¶ 18 (VandeWalle, C.J. concurring specially) ("I agree that the Legislature has established a bright line and the statutes leave no room for this Court to engage in a determination of legislative intent or whether or not a person was disadvantaged by an incorrect or incomplete advisory.").

[¶21] The Court determined "[t]he officer did not provide O'Connor a complete chemical test implied consent advisory after his arrest and before submission to the Intoxilyzer test." Id. ¶ 14. The Court concluded "[t]herefore, under N.D.C.C. § 39-20-01(3)(b), the Intoxilyzer test result is inadmissible in this criminal

proceeding." Id. See also State v. Ayala, 2017 ND 116, ¶ 6, 894 N.W.2d 865 ("When a law enforcement officer requests a chemical test to determine if a driver has alcohol in his system, the test results are not admissible 'if the law enforcement officer fails to inform the individual' of the implied-consent law.") (citing N.D.C.C. § 39-20-01(3)(b) (2015)).

[¶22] In rejecting the State's position that the implied consent advisory given before the onsite screening test was procedurally sufficient for the chemical test under State v. Salter, 2008 ND 230, 758 N.W.2d 702, the Court noted that "in 2015 the Legislature attached specific consequences to an officer's failure to give the advisory after the defendant's arrest and before submitting to a chemical test." O'Connor, 2016 ND 72, ¶ 11 (citing 2015 N.D. Sess. Laws ch. 268, § 9). The Court stated "the Legislature now has dictated that the test 'is not admissible in any criminal or administrative proceeding' if the officer fails to inform the 'individual charged' of the implied consent advisory before a chemical test. N.D.C.C. § 39-20-01(3)(b)." Id. "To the extent the *Salter* rationale would allow an onsite screening advisory to compensate for an incomplete advisory given after a defendant's arrest and before a chemical test is administered, it has been abrogated by the plain language of the 2015 amendment to N.D.C.C. § 39-20-01(3)." Id.

[¶23] The O'Connor Court, however, did not suggest the plain language of the 2015 amendment to N.D.C.C. § 39-20-01(3) abrogated the Court's ruling in Salter that "[t]he arresting officer does not have to use the exact language of N.D.C.C. § 39-20-01 in advising the driver to invoke the provisions of the implied consent law." Salter, 2008 ND 230, ¶ 7 (citing Asbridge v. N.D. State Highway Comm'r,

291 N.W.2d 739, 746-48 (N.D. 1980)). See also State v. Johnson, 2009 ND 167, ¶ 7, 772 N.W.2d 591 ("When informing the person about refusal to submit to the chemical test, the officer need not use the exact words of the statute, but must advise the person about implied consent and inform the person of the consequences of refusal, including the loss of driving privileges.") (citing Salter, 2008 ND 230, ¶ 7, 758 N.W.2d 702 (citing Brewer v. Ziegler, 2007 ND 207, ¶ 23, 743 N.W.2d 391; Asbridge, 291 N.W.2d at 746-48)); Demague v. Kan. Dep't of Revenue, No. 109,101, 2013 WL 5975985, at *2 (Kan. Ct. App. Nov. 8, 2013) (unpublished opinion) ("[A]n officer is not required to recite the exact words of the statute, and substantial compliance with the notice requirement in [the implied consent statute] generally suffices. To be in substantial compliance, 'notice must be sufficient to advise the party to whom it is directed of the essentials of the statute.'") (internal citation omitted) (emphasis omitted)); Cunningham v. State, 454 S.E.2d 176, 178 (Ga. Ct. App. 1995) ("Although Officer Gay admitted that he did not recite the statutory provisions of Georgia's implied consent law to defendant verbatim, Officer Gay's undisputed testimony shows that he sufficiently notified defendant of his implied consent rights prior to defendant taking the Intoximeter 3000 test.").

[¶24] The Salter and Johnson holdings were justified by the practical realities of law enforcement as recognized by the Court in Asbridge. In Asbridge, the driver "argue[d] that in order for a lawful arrest to occur, the arresting officer must place the suspect under arrest and *inform* him that he 'will be charged with the offense of driving or being in actual physical control of a vehicle upon the public highways

while under the influence of intoxicating liquor.'" 291 N.W.2d at 746 (citing N.D.C.C. § 39-20-01) (emphasis added). "Asbridge assert[ed] that because Officer O'Connell failed to use these precise words when making the arrest, the arrest was unlawful and improper." Id.

[¶25] The Court recognized that ***"[f]rom a practical standpoint**, however, we cannot expect a police officer to recite the exact words of the statute* when arresting a motorist for being in actual physical control of a motor vehicle upon a public highway while under the influence of intoxicating liquor." Id. at 749 (emphasis added). Cf. State v. Webster, 2013 ND 119, ¶ 12, 834 N.W.2d 283 ("Miranda does not require a verbatim recital of the words of the Miranda opinion, but requires words with substance that fully convey the rights as required by *Miranda*.") (citing United States v. Street, 472 F.3d 1298, 1311 (11th Cir. 2006)).

[¶26] In this case, at the time of LeClair's arrest, section 39-20-01(3) provided:

> 3. a. The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take a chemical test to determine whether the individual is under the influence of alcohol or drugs and that refusal of the individual to submit to a test directed by the law enforcement officer may result in a revocation of the individual's driving privileges for a minimum of one hundred eighty days and up to three years. *In addition, the law enforcement officer shall inform the individual refusal to take a breath or urine test is a **crime punishable** in the same manner as driving under the influence.* If the officer requests the individual to submit to a blood test, the officer may not inform the individual of any criminal penalties until the officer has first secured a search warrant.
>
> b. A test administered under this section is not admissible in any criminal or administrative proceeding to determine a violation of section 39-08-01 or this chapter if the law enforcement officer fails to inform the individual charged as required under subdivision a.

N.D.C.C. § 39-20-01(3) (2017) (2017 N.D. Sess. Laws ch. 268, § 4)) (emphasis added).

[¶27] Whereas, O'Connor *was not advised of the entire phrase* that refusal to take a chemical test "is a crime punishable in the same manner as driving under the influence" [under 2015 N.D. Sess. Laws ch. 268, § 9], LeClair *was advised* that "*refusal to take a chemical, breath or urine test is a crime in the same manner as a driving under the influence charge*" [under 2017 N.D. Sess. Laws ch. 268, § 4]. App. at 1, Index # 24 (Ex. 16 -- DVD at 2:46:36, et seq.). ***In other words, Officer Johnson's sole omission – in sharp contrast to the substantial deviation in O'Connor -- was the single word "punishable."***

[¶28] The common understanding of the word "crime" within the implied consent advisory conveys sufficient notice that the "crime" of a "refusal to take a breath or urine test," is "punishable." "The American Heritage Dictionary of the English Language (4th ed. 2000) defines . . . . '[c]rime . . . as '[a]n act committed or omitted in violation of a law forbidding or commanding it and *for which punishment is imposed* upon conviction.'" Littlefield v. Acadia Ins. Co., 392 F.3d 1, 8 (1st Cir. 2004) (emphasis added). "***There are few words in the legal lexicon with a more widely understood plain meaning than 'crime,' defined generally as '[a]n act that the law makes punishable; the breach of a legal duty treated as the subject-matter of a criminal proceeding.***'" Snyder v. King, 745 F.3d 242, 248, n.1 (7th Cir. 2014) (quoting Black's Law Dictionary (9th ed. 2009). See also New Hampshire Ins. Co. v. Blue Water Off Shore, LLC, Civil Action No. 07-0754-WS-M; 2009 WL 1509458, at *3 (S.D. Ala. May 4, 2009) ("'Crime' . . . is defined as 'an

act or the commission of an act that is forbidden or the omission of a duty that is commanded by a public law and that makes the offender liable to *punishment* by that law.'") (emphasis added) (quoting Merriam Webster's Collegiate Dictionary 274 (10th ed. 1993)); United States v. Grier, 475 F.3d 556, 562 (3d Cir. 2007) ("A crime is defined as conduct that is punishable by the state. Conduct is punishable by the state when it exposes the individual to new or additional penalties."); Bohner v. Burwell, No. CV 15-4088, 2016 WL 8716339, at *8 (E.D. Pa. Dec. 2, 2016) ("[A] crime is defined as an *act* that the law makes punishable."); Crime, Black's Law Dictionary (10th ed. 2014) (defining crime as "[a]n act that the law makes punishable; the breach of a legal duty treated as the subject-matter of a criminal proceeding"); United States v. Jordan, 509 F.3d 191, 196 (4th Cir. 2007) ("The term 'crime' is a legal term of art; it is an 'act that the law makes punishable.'") (quoting Black's Law Dictionary 399 (8th ed. 2004)).

[¶29] The omission of the single word "punishable" was not a material deviation. LeClair did not present evidence through his testimony that he did not fully understand that the crime of refusing to take a chemical test would be *punishable*, nor did LeClair testify he was prejudiced by the omission of the word. See Geiger v. Hjelle, 396 N.W.2d 302, 303 (N.D. 1986) ("[f]ailure of a party to testify permits an unfavorable inference in a civil proceeding" and "the hearing officer could also consider the lack of contrary evidence").

[¶30] The law enforcement officer's reading of the implied consent advisory before requesting LeClair submit to the Intoxilyzer test substantially complied with

the requirements of N.D.C.C. § 39-20-01(3)(a) irrespective of his omission of the word "punishable" from the advisory.

CONCLUSION

[¶31] The Department requests this Court reverse the Judgment of the Cass County District Court and affirm the Hearing Officer's Decision suspending LeClair's driving privileges for a period of two years.

Dated this 29th day of May, 2018.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Dustin Alan LeClair, Appellee, vs. Thomas Sorel, Director Department of Transportation, Appellant.	)	**CERTIFICATE OF COMPLIANCE** **Supreme Ct. No. 20180155** **District Ct. No. 09-2018-CV-00019**

[¶1] The undersigned certifies pursuant to N.D.R.App.P. § 32(a)(8)(A) that the text of Brief of Appellant (excluding the table of contents and table of authorities) contains 3,974 words.

[¶2] This Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 word processing software in Arial 12 point font.

Dated this 29th day of May, 2018.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Dustin Alan LeClair, Appellee, v. Thomas Sorel, Director Department of Transportation, Appellant.	)	**Supreme Ct. No. 20180155** **District Ct. No. 09-2018-CV-00019** **AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

[¶1] Karen Roberts states under oath as follows:

[¶2] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶3] I am of legal age and on the 29th day of May, 2018, I served the **BRIEF OF APPELLANT and APPENDIX TO BRIEF OF APPELLANT** upon Dustin Alan LeClair by and through his attorneys, Nathan Severson and Lee Grossman, by electronic email as follows:

Lee Grossman
Attorney at Law
lee.grossman@swlattorneys.com

Nathan Severson
Attorney at Law
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Karen Roberts

Subscribed and sworn to before me
this 29th day of May, 2018.

Notary Public

DONNA J CONNOR
Notary Public
State of North Dakota
My Commission Expires Aug. 6, 2021