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NOVEMBER 1, 2019
STATE OF NORTH DAKOTA

In the Supreme Court
State of North Dakota

No. 20190247

Roger Feltman and TRRP, LLC,

Plaintiffs-Appellants,

v.

Daniel Gaustad and Pearson,
Christensen & Clapp, PLLP,

Defendants-Appellees.

APPEAL FROM THE MAY 14, 2019, JUDGMENT OF THE DISTRICT COURT OF GRAND FORKS COUNTY, NORTH DAKOTA, NORTHEAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE STACY J. LOUSER, PRESIDING

BRIEF OF APPELLEES

ORAL ARGUMENT REQUESTED

Ronald H. McLean (ID# 03260)
Peter W. Zuger (ID# 06282)
SERKLAND LAW FIRM
10 Roberts Street | PO Box 6017
Fargo, ND 58108-6017
Phone: 701.232.8957
rmclean@serklandlaw.com
pzuger@serklandlaw.com
ATTORNEYS FOR APPELLEES
DANIEL GAUSTAD AND PEARSON,
CHRISTENSEN & CLAPP, PLLP

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I. STATEMENT OF THE ISSUES

[¶1] Whether stipulating to dismiss a lawsuit is legal malpractice when a stipulation to dismiss has no effect on a party's ability to pursue a claim for breach of a settlement agreement.

[¶2] Whether it is legal malpractice to be paid for attorney's fees incurred out of a settlement agreement when the client agrees to the attorney being paid out the settlement agreement funds and when an attorney is permitted to obtain an attorney's lien out of settlement funds under N.D.C.C. § 35-20-08.

[¶3] Whether the District Court erred in dismissing the negligent infliction of emotional distress claim when Roger Feltman never pleaded a claim for negligent infliction of emotional distress and when Roger Feltman failed to show substantial bodily harm to support such a claim.

II. STATEMENT OF THE CASE

[¶4] Roger Feltman ("Feltman") and TRRP, LLC (collectively referred to as "Feltman" unless otherwise specifically noted) commenced this legal malpractice action on July 17, 2015, by serving a summons and complaint upon defendants Daniel Gaustad and Pearson Christianson and Clapp, PLLP (collectively referred to as "Gaustad"). Feltman's complaint alleged that Gaustad engaged in legal malpractice as a result of Gaustad's representation of Feltman in a lawsuit against Washington Mutual Bank, FA ("Washington Mutual"), JP Morgan, Chase Bank, NA, Chase Home Finance, LLC, n/k/a JP Morgan Chase Bank, NA ("Chase"), and the Federal Deposit Insurance Corporation ("FDIC") in its capacity as receiver of Washington Mutual. (App. 8-18).

[¶5] Gaustad moved for summary judgment on September 28, 2018. (Doc. #144). Feltman moved for summary judgment on September 28, 2018, as well. (Doc. #158).

[¶6] Gaustad contended the Court should grant summary judgment because the statute of limitations barred Feltman's claim, Gaustad had no duty to enforce the settlement agreement Feltman voluntarily agreed to, Feltman could not meet the requirements of the case-within-a-case doctrine, and Feltman failed to join Yvonne Feltman ("Yvonne") in the lawsuit. (Doc. # 145, at 5-16). Gaustad also contended that Feltman's claim that the stipulation to dismiss left him without a remedy failed because Feltman could commence a lawsuit for a breach of the settlement agreement. Id. at 11. Alternatively, Gaustad contended that Feltman's claim to $4 Million to $11 million in damages must fail because that claim belonged to a separate entity, TFM Construction ("TFM"), Gaustad did not have an attorney-client relationship with TFM, and TFM was not a party to this case. Id. at 15. Moreover, Gaustad contended that because this was a "settle and sue case", Feltman had to prove more than that Gaustad simply erred. Indeed, Gaustad contended Feltman had to prove that but for the alleged malpractice, "settlement of the underlying lawsuit would have resulted in a better outcome." (Doc. #196, at ¶22) (quoting Filbin v. Fitzgerald, 2011 Cal. App. 4th 154,166 (2012)).

[¶7] The Court entered an order on the parties' motions for summary judgment on May 14, 2019. (App. 206-224). The court granted total summary judgment in Gaustad's favor. Id.

[¶8] The Court opined that Feltman was not able to direct the Court to any authority establishing a duty that an attorney has to ensure compliance with the settlement

agreement reached by the parties. Id. at ¶39. The Court also determined that the dismissal "with prejudice" in the underlying case did not leave Feltman without a remedy. Id. at ¶¶40-42. The Court determined Feltman did not have any damages since he had six years to sue Chase for enforcement of the settlement agreement and the dismissal did not preclude that remedy. Id. at ¶40. The Court denied Gaustad's summary judgment motion with respect to the statute of limitations running, concluding that genuine issues of material fact existed as to when Gaustad's representation terminated. Id. at ¶31. The Court also concluded that the case-within-a-case doctrine was not applicable to this lawsuit. Id. at ¶51. The Court determined that Yvonne not being a party to the action did not have a bearing on whether the case should be dismissed. Id. at ¶53. The Court also determined that the arguments relating to TFM were not necessary to address as a result of the Court's other rulings. Id. at ¶55.

[¶9] On the same day, May 14, 2019, the Clerk of Court entered judgment in accordance with the Court's order for summary judgment. Gaustad served a notice of entry judgment on June 26, 2019. (Doc. # 219). Feltman proceeded to appeal the District Court's determination to grant summary judgment on August 13, 2019. (Appellees' App. 1-2).[1]

III. ORAL ARGUMENT

[¶10] Gaustad requests oral argument. Oral argument would be helpful to the court for understanding the allegations of legal malpractice in this case.

IV. STATEMENT OF THE FACTS

[¶11] Feltman and Yvonne retained Gaustad to commence a lawsuit in 2007 against Washington Mutual relating to escrow account issues the Feltmans had with Washington

[1] Citations to (App.) refer to the Appellants' Appendix. Citations to the Appellees' Appendix are cited as (Appellees' App.).

Mutual. (App. 9). After the lawsuit started, the United States Office of Thrift Supervision seized Washington Mutual and placed it into receivership. (App. 9). The FDIC became the receiver for Washington Mutual. Id.

[¶12] On September 25, 2008, Chase acquired Washington Mutual's assets from the FDIC. Id. Feltman and Yvonne eventually amended their complaint to add Chase and the FDIC as defendants. (App. 9).

[¶13] On December 19, 2011, the parties attended an early settlement conference with Magistrate Judge Karen Klein. Feltman and Yvonne agreed to settle their lawsuit with Washington Mutual, Chase, and the FDIC at the early settlement conference. (Appellees' App. 5, at 102-03). Feltman testified in his deposition:

> A. She went, and Judge Klein went over there and, and they agreed and, and they came back with a settlement. And wife was still pretty emotional, so I just said: forget it. And we were getting nothing that we wanted. Not even close to the $2 million that we had, in excess of $2 million. But she was crying. And I said: well, if we get – he gets paid some fees and we get that letter that'll correct our credit, and I think it was like 50 some thousand dollars of, of escrow overage that we were supposed to get and they were going to clean -- all the loans would go back to original, no fees, no late fees, no anything, just start paying them. I says: well, that's, that's fine with me. Let's settle and be done.
>
> Q. And you agreed to that?
>
> A. Yes. . . .
>
> Q. Did Judge Klein happen to say to you, I'm only asking, because I've heard this before, that a good settlement is one where both sides are a little unhappy?
>
> A. Yep, yep. No, no, I've heard –
>
> Q. I take it that's where you were at?
>
> A. Yeah, yeah, --
>
> Q. You might not have liked it, but you at least agreed to it, right?

A. Right.

Id.

[¶14] At the conclusion of the settlement conference, Judge Klein went through the settlement agreement on the record paragraph by paragraph. Id. at 104. Feltman agreed to every term. Id. Feltman entered into the agreement with full knowledge as to the agreement's terms. Id. at 102-04. Further, Feltman admitted in his deposition, well after entering into the settlement agreement, that he still did not want a different result from what was contained in the settlement agreement. (Appellees' App. 4, 6-7, at pp. 39-40, 107, 114).

[¶15] Ultimately, the parties executed the settlement agreement in March 2012. (Doc. # 121). At his deposition, Feltman testified the settlement agreement reflected the agreement the parties reached at the settlement conference and the result he wanted in the lawsuit. (Appellees' App. 4-7, 10, at pp. 39-40, 102-03, 105, 114-15, at 174-75).

[¶16] As Feltman acknowledges in his brief, Chase represented it complied with all the settlement agreement terms prior to dismissing the lawsuit. Brief of Appellee, at ¶ 30. Indeed, Chase provided Feltman with the revised loan balances following execution of the settlement agreement. (Appellees' App. 11-14). On April 4, 2012, Gaustad emailed Chase's attorney, Bryant Tschida ("Tschida"), and indicated the Feltmans only needed "the letter on Chase letterhead regarding the credit correction and the payment of $30,000" prior to dismissal of the lawsuit. (Appellees' App. 15-18). Chase paid the $30,000 on April 10, 2012, and provided the credit correction letter the same day. (Appellees' App. 21-25). The parties thereafter filed a stipulation for dismissal with the court on April 13, 2012. (App. 112-13).

V. STANDARD OF REVIEW

[¶17] This Court reviews the District Court's decision to grant summary judgment de novo. Dunford v. Tryhus, 2008 ND 212 ¶ 5, 776 N.W.2d 539. Summary judgment is a procedural device used to promptly and expeditiously dispose of a case without a trial when there "is no genuine issue of material fact, or if the law is such that resolution of the factual disputes will not alter the result." Strom-Sell v. Council for Concerned Citizens, Inc., 1999 ND 132, ¶ 16, 597 N.W.2d 414. In deciding whether to grant a motion for summary judgment, the court must look at the evidence in a light most favorable to the party opposing the motion. Riemers v. Grand Forks Herald, 2004 ND 192, ¶ 4, 688 N.W.2d 167. However, when there is an absence of evidence creating any genuine issue of material fact, summary judgment is appropriate. State Farm Mut. Auto. Ins. Co. v. Estate of Gabel, 539 N.W.2d 290, 292 (N.D. 1995). The party moving for summary judgment bears the burden of establishing that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Hasper v. Center Mut. Ins. Co., 2006 ND 220, ¶ 5, 723 N.W.2d 409.

VI. LEGAL ARGUMENT

A. GAUSTAD DID NOT ENGAGE IN LEGAL MALPRACTICE BY STIPULATING TO DISMISS FELTMAN'S LAWSUIT BECAUSE THE STIPULATION TO DISMISS HAD NO EFFECT ON FELTMAN'S ABILITY TO COMMENCE A LAWSUIT FOR A BREACH OF THE SETTLEMENT AGREEMENT.

[¶18] Feltman argues for pages that Gaustad engaged in legal malpractice by stipulating to dismiss Feltman's lawsuit because the settlement agreement terms were not complete prior to dismissal. Feltman has not presented any admissible evidence that the settlement agreement terms were not complete, but rather has only raised a conclusory and

unsupported allegation that the settlement agreement terms were not complete. Even if Feltman had factual support for his claim that the settlement agreement terms were not complete, those facts are immaterial to this case. Indeed, for Feltman's argument to succeed, he must be able to cite some legal authority that supports his argument that signing a stipulation to dismiss forecloses an action for a breach of a settlement agreement. Feltman has not cited and cannot cite any authority that supports his argument. Signing a stipulation to dismiss has no effect on a party's ability to pursue a claim for a breach of a settlement agreement.

[¶19] A party to a settlement agreement does have a remedy and can commence a lawsuit to enforce a settlement agreement. See Fairfax Countywide Citizens Ass'n v. Fairfax Cty., Va., 571 F.2d 1299, 1304 (4th Cir. 1978) (opining a claim for breach of a settlement agreement is separate and distinct from the underlying claim); Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 382, 391 (1994) (holding that a federal court may retain jurisdiction to enforce a settlement agreement if there is an independent basis for federal jurisdiction, but if there is not then the state courts have jurisdiction to enforce the settlement agreement). That lawsuit can be in federal court if the federal court has jurisdiction over the action for breach of the settlement agreement. Myers v. Richland Cty., 429 F.3d 740, 745 (8th Cir. 2005). The action can otherwise be in state court if the federal court does not have a basis for jurisdiction. Id.

[¶20] In this case, Feltman does not dispute that he wanted exactly what he agreed to in the settlement agreement. (Appellees' App. 4, 5, 7, 10, at pp. 39-40, 102-03, 114-15, 174-75); Brief of Appellants, at ¶ 57 ("the Settlement and Release Agreement ¶¶ 3-6 were core needs of the Appellants."). The settlement agreement terms acknowledge the parties

could commence a lawsuit for a breach of the settlement agreement if they desired to do so:

> 22. Contractual Nature of Settlement Agreement. The terms and conditions of this Settlement Agreement are contractual in nature, and not a mere recital. This Settlement Agreement, when fully executed, shall constitute a legal, valid and binding obligation of the parties, enforceable in accordance with its terms and shall insure to the benefit of the parties and their successors and assigns. Chase and the FDIC represent and warrant that they have each respectively taken the necessary actions to approve this Settlement Agreement and have provided the undersigned with authority to execute and delivery [sic] this Settlement Agreement on behalf of Chase and FDIC.

(App. 107) (emphasis added).

[¶21] If Feltman wanted the settlement agreement terms enforced when Chase allegedly failed to comply with the terms, he could have commenced a lawsuit for a breach of the settlement agreement. The dismissal had no effect on Feltman's ability to enforce the settlement agreement since the settlement agreement, and a wealth of caselaw, dictates he could commence a lawsuit for a breach of the settlement agreement if he wanted to do so. Therefore, Feltman's argument that he did not have a remedy when Gaustad dismissed the lawsuit is incorrect as a matter of law.

[¶22] Feltman's argument is also unsupported and factually incorrect. Feltman has only made a conclusory allegation that four conditions precedent to the settlement agreement were unsatisfied, but has not explained what conditions were unsatisfied and has not submitted any admissible evidence to show what conditions were unsatisfied. Unsupported conclusory allegations are insufficient to create an issue of fact. Ag Acceptance Corp. v. Glinz, 2004 ND 154, ¶ 26, 684 N.W.2d 632.

[¶23] The emails filed by Feltman also establish that Chase represented it complied with the settlement agreement terms prior to dismissal. On March 20, 2012,

Chase provided Feltman with the loan balances following execution of the settlement agreement. (Appellees' App. 11-14). On April 4, 2012, Gaustad emailed Tschida and indicated, "the only items we are waiting on to file the dismissal is the letter on Chase letterhead regarding the credit correction and the payment of $30,000." (Appellees' App. 15-18). Chase paid the $30,000 on April 10, 2012, and also sent the credit correction letter on April 10, 2012. (Appellees' App. 21-25). Feltman further acknowledges in his brief that "**Gaustad provided Feltman with the Chase letter falsely stating all the requirements of the Settlement Agreement have been fulfilled**." Brief of Appellee, at ¶ 30 (emphasis in original); see also (Appellees' App. 9, at 134) ("Q. So am, am I correct in saying, Chase at least represented that it had complied with the settlement agreement terms, right? . . . A. Yes."). In other words, Chase represented it complied with the terms of the settlement prior to Gaustad dismissing the underlying lawsuit.

[¶24] Feltman also argues, for the first time on appeal, that there was an issue of fact regarding whether Gaustad had authority to impliedly modify the settlement agreement. Arguments not raised at the lower court are waived on appeal. Frison v. Ohlhauser, 2012 ND 35, ¶ 7, 812 N.W.2d 445. Further, Feltman only makes a conclusory allegation that the settlement agreement was impliedly modified without a citation to any evidence or any explanation as to what was impliedly modified in the settlement agreement.

[¶25] Feltman's malpractice argument rests on whether a lawsuit for a breach of the settlement agreement can be commenced when a lawsuit is dismissed. As a matter of law, Feltman's argument must fail because Feltman could have commenced a lawsuit for breach of the settlement agreement. Feltman's remedy for enforcing the settlement agreement

did not change by dismissal of the case. The district court correctly opined that Feltman did not have any damages because he had a remedy in the underlying lawsuit available, as he could have commenced a lawsuit for a breach of the settlement agreement within six years of the breach. (App. 223); see also Boerger v. Levin, 812 F. Supp. 564, 565-66 (E.D. Pa. 1993) (stating a legal malpractice action is appropriately dismissed on nonjusticiability grounds when the client has an underlying claim that had not yet been adjudicated because the case is based on an anticipated loss and, as such, the client cannot point to an actual loss that constitutes an injury caused by the attorney); Bogart v. Gutmann, 2018-Ohio-2331, ¶ 18, 115 N.E.3d 711 (opining the client's claim that "in a new action a court would conclude that his commissions claim is barred by both the settlement agreement and res judicata is insufficient to demonstrate a present, justiciable controversy" and, as such, the client could not prove the case-within-a-case-doctrine); Fontanella v. Marcucci, 877 A.2d 828, 835 (Conn. App. Ct. 2005) (stating the plaintiffs could not obtain a remedy in the legal malpractice case until there was a final judgment in the underlying case because the plaintiffs did not have a justiciable controversy); Stonewell Corp. v. Conestoga Title Ins. Co., 678 F. Supp. 2d 203, 214 (S.D.N.Y. 2010) (concluding the case-within-a-case doctrine cannot be met until the underlying claim has been completed); Lucey v. Law Offices of Pretzel & Stouffer, Chartered, 703 N.E.2d 473, 477 (Ill. App. Ct. 1998) (opining the client's case was premature as the client did not have actual damages since the underlying claim was not yet resolved).

[¶26] Regardless of the dismissal, Feltman still had the ability to argue Chase failed to comply with the settlement agreement and still could have sued Chase to enforce the settlement agreement. The dismissal simply had no bearing on Feltman's ability to argue Chase

needed to comply with the settlement agreement. The district court did not err in determining to dismiss Feltman's case since the stipulation to dismiss had no effect on Feltman's ability to pursue a case for a breach of the settlement agreement.

B. GAUSTAD DID NOT ENGAGE IN SELF-DEALING BY RECEIVING PAYMENT FOR HIS ATTORNEY FEES.

[¶27] Feltman incredibly jumps to the conclusion that Gaustad conspired with Chase to breach the settlement agreement so Gaustad could be paid his attorney's fees. The settlement agreement Feltman signed belies Feltman's argument. Feltman agreed in the settlement agreement he signed that he needed to pay Gaustad's attorney's fees. Even if Feltman did not agree to pay Gaustad's attorney's fees, North Dakota law contemplates that an attorney may be paid for attorney's fees out of a settlement agreement anyway.

[¶28] First, Feltman's argument that Gaustad engaged in self-dealing by being paid for his attorney's fees is completely unsupported by any admissible evidence. The settlement agreement contemplated Gaustad receiving $30,000 for his attorney's fees. (App. 102) ("Chase agrees to pay to the Feltmans and their legal counsel the sum of $30,000.00." (emphasis added). Feltman clearly testified in his deposition that he knew he agreed in the settlement agreement to pay Gaustad $30,000:

> Q. And it says, "Chase agrees to pay Feltmans and their legal counsel the sum of $30,000..."?
>
> A. Yes.
>
> Q. And you knew that was -- you were agreeing to that in the settlement agreement, right?
>
> A. Yes.
>
> Q. And you recognized that you were agreeing to receive the sum of $30,000 from Chase, correct?

A. The check was to Dan.

Q. And I'll -- I, I -- that's my -- I'm going to get into that next. But just as far as the settlement agreement goes, --

A. Yes, --

Q. -- you knew that was --

A. -- he was supposed to get the 30,000.

Q. And, and you, you knew that Dan was supposed to get that to pay for his legal fees?

A. Yes.

(Appellees' App. 7-8, at pp. 116-17). Moreover, after the settlement conference Yvonne emailed Gaustad and indicated, "I just spoke with Roger, and it is OK to have the $30,000 check cover attorney fees just in your firms [sic] name. If I understand correctly, if the check is in the firm's name only, then you do not need a W-9 from Roger and me." (App. 96). Thus, it is undisputed that Gaustad had authority to use the settlement agreement funds to pay for his attorney's fees.

[¶29] Even if Gaustad did not have authority to use the settlement agreement funds to pay his attorney's fees, North Dakota law allows an attorney to be paid attorney's fees out of funds in the possession of an opposing party that are owed to the attorney's client. Indeed, the North Dakota attorney lien statute allows an attorney to obtain a lien in "[m]oney due the attorney's client in the hands of the adverse party, or attorney of such party." N.D.C.C. § 35-20-08. Thus, it is not self-dealing for an attorney to receive payment for attorney's fees owed out of a settlement agreement.

C. THE DISTRICT COURT DID NOT ERR IN DISMISSING FELTMAN'S NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIM WHEN FELTMAN NEVER PLEADED THE CLAIM AND WHEN FELTMAN FAILED TO PRESENT ANY EVIDENCE THAT HE HAD SUBSTANTIAL BODILY HARM TO SUPPORT THE CLAIM.

[¶30] The district court did not need to address whether Feltman was entitled to emotional distress damages because Feltman's liability claim failed. However, Feltman is not entitled to recover emotional distress damages under a negligent infliction of emotional distress claim because Feltman failed to plead a negligent infliction of emotional distress claim. (App. 11-17).

[¶31] Even if Feltman did plead the claim, it would fail under North Dakota law. There can be no negligent infliction of emotional distress claim unless the plaintiff suffers "substantial bodily injury." Hysjulien v. Hill Top Home of Comfort, Inc., 2013 ND 38, ¶ 44, 827 N.W.2d 533. Under North Dakota law, in the absence of physical injury, a plaintiff seeking emotional distress damages much show "substantial bodily harm". Id. Severe emotional anxiety, loss of sleep, and loss of weight are not sufficient to show bodily harm when the plaintiff has not shown that the conditions are anything other than transitory. See id. (indicating severe headaches, anxiety, fear, becoming short-tempered, and having a diminished sex life were insufficient to establish emotional distress); see also Muchow v. Lindblad, 435 N.W.2d 918, 921-22 (N.D. 1989) (stating severe emotional anxiety, loss of sleep, and loss of weight is not sufficient to sustain a claim for negligent infliction of emotional distress).

[¶32] Feltman failed to provide evidence he suffered bodily harm or physical impairment necessary to establish his claim for emotional distress. Notably, Feltman has failed to even allege substantial bodily injury to support an emotional distress claim. Feltman

has not presented any evidence to raise a reasonable inference that he has any symptoms that constitute substantial bodily harm or that Gaustad caused those symptoms. Therefore, Feltman's negligent infliction of emotional distress claim not only fails because he failed to plead the claim but also because he failed to present any evidence of substantial bodily injury to support the claim.

VII. CONCLUSION

[¶33] Gaustad respectfully requests this court affirm the district court's decision to grant summary judgment.

Dated this 1st day of November, 2019.

/s/ Peter W. Zuger
Ronald H. McLean (ID# 03260)
Peter W. Zuger (ID# 06282)
SERKLAND LAW FIRM
10 Roberts Street | PO Box 6017
Fargo, ND 58108-6017
Phone: 701.232.8957
rmclean@serklandlaw.com
pzuger@serklandlaw.com
ATTORNEYS FOR APPELLEES DANIEL GAUSTAD AND PEARSON, CHRISTENSEN & CLAPP, PLLP

CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellees in the above matter, and as the author of the above brief, hereby certifies, in compliance with N.D. R. App. P. 32, that the above brief complies with N.D. R. App. P. 8(A) in that the total number of pages in the brief totals 19 pages.

Ronald H. McLean (ID# 03260)
Peter W. Zuger (ID# 06282)
SERKLAND LAW FIRM
10 Roberts Street | PO Box 6017
Fargo, ND 58108-6017
Phone: 701.232.8957
rmclean@serklandlaw.com
pzuger@serklandlaw.com
ATTORNEYS FOR APPELLEES DANIEL GAUSTAD AND PEARSON, CHRISTENSEN & CLAPP, PLLP

By: */s/ Peter W. Zuger*
Peter W. Zuger

ACKNOWLEDGEMENT OF SERVICE BY ELECTRONIC MEANS

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Roger Feltman and TRRP, LLC,

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v.

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Defendants-Appellees.

I hereby certify that on November 1, 2019, the following document(s):

BRIEF OF APPELLEES *and* APPENDIX OF APPELLEES

were served by electronic means as follows, to-wit:

DeWayne Johnston
dewayne@wedefendyou.net

The email address above given is the actual email address of the party intended to be so served. The above documents were sent in accordance with the provisions of the North Dakota Rules of Appellate Procedure.

Dated this 1st day of November, 2019.

/s/ Peter W. Zuger
Ronald H. McLean (ID# 03260)
Peter W. Zuger (ID# 06282)
SERKLAND LAW FIRM
10 Roberts Street | PO Box 6017
Fargo, ND 58108-6017
Phone: 701.232.8957
rmclean@serklandlaw.com
pzuger@serklandlaw.com
ATTORNEYS FOR APPELLEES DANIEL GAUSTAD AND PEARSON, CHRISTENSEN & CLAPP, PLLP