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STATE OF NORTH DAKOTA

IN THE SUPREME COURT FOR THE STATE OF NORTH DAKOTA

In the matter of the Estate of Harriet O. Clemetson, Deceased

Supreme Court No. 20110108

Phillip Sprague

Petitioner and Appellant,

vs.

Kenneth Evanson, Personal Representative,

Respondent and Appellee

APPEAL FROM ORDER DENYING PETITION FOR FORMAL PROBATE OF WILL DATED FEBRUARY 17, 2011, OF THE DISTRICT COURT OF GRAND FORKS COUNTY, STATE OF NORTH DAKOTA, THE HONORABLE DEBBIE KLEVEN, PRESIDING

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BRIEF OF APPELLEE

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I. ISSUES PRESENTED FOR REVIEW.

[¶ 1] **Harriet Clemetson did not execute a valid will. The draft of the purported will does not meet the statutory requirements to be considered valid.**

[¶ 2] **If a will had existed, the district court was correct in applying the common law presumption of *animo revocandi*.**

II. STATEMENT OF THE CASE.

A. Nature of Case and Proceedings Below.

[¶ 3] The Appellee would like to incorporate the statement of the case as issued by the district court in its findings. The district court's account is as follows:

> [¶ 4] Harriet Clemetson died on October 2, 2009, as the result of injuries suffered in a car accident. On October 29, 2009, the decedent's grandson, Kenneth Evanson, applied for appointment as the Personal Representative of her estate and stated in the Application for Informal Appointment of Personal representative in Intestacy that the 'after the exercise of reasonable diligence, the Applicant is unaware of any unrevoked testamentary instrument . . .' The Application lists six grandchildren as the surviving heirs of Harriet Clemetson: Dawn Chaffee, Ross Evanson, Shawn Evanson, Kenneth Evanson, Stephen Evanson, and Laurie Bartlett. Letters of Administration were issued to Kenneth Evanson on October 29, 2009.
>
> The decedent's stepdaughter, Carolyn Sprague, filed a Demand for Notice on November 19, 2009. Phillip Sprague, the decedent's step-grandson, filed a Petition for Formal Probate of Will on January 11, 2010, and asserted that Harriet Clemetson executed an unrevoked Last Will and Testament that that should be probated.
>
> A trial on the matter was held on August 10, 2010. Kenneth Evanson is represented by Attorney Craig M. Richie. Philip Sprague, Kevin Joseph Sprague II, and Jennifer Sprague (Spragues) and represented by Attorney Sara K. Sorenson. The issue to be decided by this Court is whether the unsigned and undated cop of the Last Will and Testament of Harriet O. Clemetson is a valid and unrevoked will that should be probated. If the Court decides the will is valid, the decedent's real estate will be awarded to her grandchildren, and the remainder of her property will be shared equally among her six grandchildren and her three step-grandchildren. If the will is not probated, the Sprague step-grandchildren are not entitled to any part of the decedent's estate, as all of the property will pass to decedent's six grandchildren under the laws of intestate succession.

(App.20-21.)

B. Factual Background.

[¶ 5] The Appellee would like to incorporate the facts of the case as issued by the district court in its findings as they are a true and correct assessment of the facts of the case. The district court's findings are as follows:

> [¶ 6] Harriet Clemetson was married to Earl Clemetson for approximately 45 years. They did not have any children together, but they both had a child from a previous relationship. Harriet Clemetson had a son, Ritchie Evanson, who had six children. Ritchie Evanson died in 2003. Ritchie Evanson had four biological children: Laurie Bartlett, Shawn Evanson, Stephen Evanson, and Kenneth Evanson. He had two adopted children: Dawn Chaffee and Ross Evanson. Earl Clemetson had a daughter, Carolyn Sprague, who is married to Kevin Sprague. They have three children: Phillip Sprague, Kevin Joseph Sprague II, and Jennifer Sprague.
> In 1995, Earl and Harriet Clemetson met with Attorney Dan Letnes for the purpose of preparing wills. Attorney Dan Letnes is deceased. Earl Clemetson died on January 18, 2009, and his estate was probated in accordance with his will dated October 9, 1995. Under the terms of his will, he devised a quarter of land to his daughter, Carolyn Sprague. All of his personal property, vehicles, farm machinery and equipment, crops, and bank and savings account were devised to his wife, Harriet Clemetson. If Harriet Clemetson did not survive him, this property was awarded to Carolyn Sprague. The remainder of his estate was awarded to Carolyn Sprague, subject to a life estate in Harriet Clemetson. Included in this residuary clause was another quarter of land, less the farmstead consisting of approximately 5 acres. The farmstead was devised to Harriet Clemetson to be sold at a price she determined, with the sale proceeds retained by Harriet Clemetson. In the event Carolyn Sprague did not survive him, Earl Clemetson devised his property to Carolyn Sprague's three children. Earl Clemetson's will was signed and witnessed on October 9, 1955. Earl Clemetson did not devise any of his property to Harriet Clemetson's six grandchildren.
> Harriet Clemetson's step-grandchildren (Spragues) have produced a copy of a will draft that they received form the law office of Letnes, Marshal, Swanson & Warcup, Ltd. The draft is n not printed on professional will stationery and it does not include the caption 'Last Will and Testament.' Instead, the draft contains blank spaces before it states 'of Harriet Clemetson.' It further ends with 'this ____ day of October, 1995.' The document is not signed by Harriet Clemetson, is not dated and it is not witnessed.
> Petitioner, the Spragues, contend that Kenneth Evanson or another member of the Evanson family took or fraudulently destroyed Harriet

> Clemetson's original signed will in an effort to disinherit the Spragues. They further argue that the draft copy of Harriet Clemetson's will is evidence of her intent and that the draft copy should be probated to honor her intent. Respondent and Personal Representative, Kenneth Evanson, argues that Harriet Clemetson's estate should be probated through intestacy because there is no duly executed will in existence, so it should be presumed that Harriet Clemetson secretly revoked her will, if a will existed.

(App.21-22.)

[¶ 7] In addition, the Appellee provides the following facts as a supplement to the facts provided by the district court. A letter from Letnes, Marshall, Swanson & Warcup, LTD, dated December 10, 2009, states: "In short, there is nothing contained in Mr. Letnes' file that establishes if or when the Wills were signed or if they were subsequently revoked." (App.2.)

[¶ 8] Before her death, Harriet Clemetson (hereinafter "Harriet") revoked the power of attorney with Carolyn Sprague (hereinafter "Carolyn") as guardian, and took Carolyn off of the remainder interest of the Hartford/Putman investments. (Trial Tr. vol. I, 64-65.) In neither case did she advise Carolyn of these changes. Id. Also, on August 1, 2009, Carolyn purchased Harriet's interest in her life estate through a family distribution agreement. (App.8.) The Spragues were to pay off this life estate, in the amount of $100,000.00 plus 6% simple interest to be paid back by December 31, 2009, but failed to do so in the time allotted. (Tr. I at 94-95.)

> [¶ 9] The $100,000 was not paid back by December 31, 2009, but prior to this trial the money was deposited in the Sprague's attorney's trust account. Under this agreement Harriett Clemetson's home of 45 years was sold and she was expected to move into town.
> Kevin Sprague arranged for an auction sale to dispose of Harriet and Earl Clemetson's property. The auction sale was held in August of 2009 at

> Earl and Harriet Clemetson's farmstead. According to Kenneth Evanson, the auction sale was a very distressing event for his grandmother as she had to watch all of her property being sold. Jeff Clemetson was present with Harriet Clemetson at the auction sale, and he testified that Harriet Clemetson was very distraught even to the point of vomiting several times. She appeared to be having difficulty with "all her and Earl's life basically getting sold out on the front yard."

(App.37.)

III. ARGUMENT.

A. Harriet Clemetson did not execute a valid will. The draft of the purported will does not meet the statutory requirements to be considered valid.

[¶ 10] Harriet Clemetson did not have a valid will in existence at the time of her death. The draft of what may be a proposed will does not meet the statutory requirements of the North Dakota Century Code to be considered valid for probate. Section 30.1-08-02, states:

1. Except as provided in subsection 2 and in sections 30.1-08-06 and 30.1-08-13, a will must be:
    a. In writing.
    b. Signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction.
    c. Either signed:
        1) By at least two individuals, each of whom signed within a reasonable time after witnessing either the signing of the will as described in subdivision b or the testator's acknowledgment of that signature or acknowledgment of the will; or
        2) Acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgments.

2. A will that does not comply with subsection 1 is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting . . . ."

[¶ 11] N.D.C.C. §30.1-08-02. None of the requirements under §30.1.-08-02(1)(b) or (c) are satisfied in the document the Appellants purport to be the Will of Harriet Clemetson.

There is no signature provided by the testator, witness, or notary required by the statute to create a document that could legally be probated.

[¶ 12] "The right to make a will disposing of one's property is statutory and unless a testator complies with the prescribed statutory formalities, the will is invalid." Matter of Estate of Krueger, 529 N.W.2d 151, 153 (N.D. 1995). Further support is found in this Court's decision in In the Matter of the Estate of Joseph T. Voeller, 534 N.W.2d 24 (N.D. 1995). The Court in Voeller denied the petition to probate the codicil because one of the two witnesses (who both asserted they were present) had not signed the codicil. Id. at 25. The court went on to state that "[t]he offered codicil must fail since it was not properly executed and witnessed." Id. at 26.

[¶ 13] This case is similar to Voeller in that there is no proof of a will being in effect at the time, and as an unsigned, unwitnessed document, the purported will cannot be probated. It simply does not comply with the statute. Although it is true that a will may be contested by asserting that witnesses were present during the execution of the will, it is not sufficient to argue that a will is valid because a witness allegedly saw an envelope that may have believed had a will in it. Thus, there is no legal basis whatsoever for asserting such a will is legitimate due to the inescapable fact there is no signature and no witness to the alleged will, rendering it just another piece of paper.

[¶ 14] The Appellant argues since members of the Sprague family supposedly saw indication of a will, one existed. This includes testimony provided by Kevin Sprague (hereinafter "Kevin") that he saw the original Will of Harriet Clemetson in January of 2009 and that it was identical to the draft entered into evidence, except that it supposedly was signed. (Tr. I, 102-03.) Other accounts include Carolyn's testimony that she had

seen an envelope with "Harriet Clemetson" on the outside. This claim was also made by Cathy Knudson and Jeff Clemetson. (App.32.)

[¶ 15] Even though Kevin claims he saw the original Will of Harriet Clemetson, the district court stated in its decision that the credibility of his testimony was suspect. (App. 34.) The district court stated in its analysis:

> [¶ 16] Almost immediately after he was notified of Harriet Clemetson's death, Kevin Sprague became concerned about who was entitled to her estate. Kevin Sprague began pressuring Kenneth Evanson to look for a will before Kevin Sprague left his home in Michigan to travel to North Dakota for the funeral. Kevin Sprague continued to pressure Kenneth Evanson about a will as soon as he arrived in North Dakota. The discussions occurred at Harriet Clemetson's prayer service, after her funeral and again in a telephone conversation after Kevin Sprague had returned to Michigan. During all of these conversations about a will, Kevin Sprague ***never disclosed*** to Kenneth Evanson that he had read the original Will of Harriet Clemetson.

(App. 35.) ***(emphasis added).***

[¶ 17] Based upon his current interest in the Will of Harriet Clemetson, it is strange that he would not tell the personal representative of her estate that he had previously read the will, especially after he knew that it was yet to be found. Further, if Kevin had indeed read the will as he claimed, he would have found the witnesses who had witnessed the will and brought them forth to testify to its credibility. The veracity of his assertion is called into question because if Kevin had actually seen a will, he would certainly have told Kenneth Evanson (hereinafter "Ken") where it was when they were standing in the same room where he allegedly saw the will while Ken was looking for the will. (Tr. vol. II, 63.) It is clear that the district court, after having discerned the sincerity and credibility of the witness, found Kevin's testimony wanting. There is no way that Kevin is credible in his testimony that he even saw a will much less read it. What is

evident is the only individual who claims to have seen a signed, valid will has much to profit, along with members of his immediate family, from its being probated.

[¶ 18] It is clear that even though claims have been made by Carolyn Sprague, Cathy Knudson, and Jeff Clemetson that an envelope possibly containing a will was seen amongst Harriet's possession, it could have contained any number of documents of hers, or the will of another. The envelope could have also contained an unsigned will or a will that had been modified by Harriet. Unlike the testimony of Kevin, the trial court in its decision did not find the testimony of Ken suspect. At trial, Ken testified that he did not find a will for Harriet Clemetson in her file cabinet at her home. (App.33.) While no will was discovered for Harriet, wills for both Earl and Lena Clemetson were found within the file cabinet. Id. It is not unlikely that the envelope of these old wills could have been mistaken for Harriet's will. Regardless, no one knows what the envelopes contained if there were any envelopes at all, and it is mere conjecture to say this was the Will of Harriet Clemetson. The district court stated in its findings:

> [¶ 19] Kenneth Evanson's testimony is more credible than the testimony of Kevin Sprague. During the approximate ten months after Earl Clemetson died, Kenneth Evanson never pried into his grandmother's affairs as he deemed it none of his business. Kevin Sprague, on the other hand, admitted that he was very concerned about the size of Harriet Clementon's estate and who would benefit from her estate. The Spragues presented no credible evidence that discredits the reliability of Kenneth Evanson's testimony.

(App.40.) Again, the district court went on to state in relation to the witnesses and their credibility:

> [¶ 20] After a review of the evidence and consideration of the credibility of the witnesses, this Court finds that a Will of Harriet Clemetson ***did not*** exist at the time of her death. The only person who actually saw the original Will of Harriet Clemetson was Kevin Sprague, her step-son-in-law. The will was seen ***approximately ten months before the death of Harriet Clemetson***. The only

> evidence that was presented to establish that a will existed at the time of death was the testimony of Kevin Sprague, Cathy Knudson, and Jeff Clemetson, who testified they saw an envelope that said 'Will of Harriet Clemetson,' ***The credibility of these witnesses, however, is suspect***."

(App.34) **(*Emphasis added*).**

[¶ 21] As stated by the December 10, 2009, letter from Letnes, Marshall, Swanson & Warcup, Ltd., "In short, there is nothing contained in Mr. Letnes' file that establishes if or when the Wills were signed or if there subsequently revoked." (App.2.) There is no proof that the draft presented by the Appellants was ever signed, and the only individual claiming to have seen a signed original of the will stands to gain the most if it were to be probated.

[¶ 22] Further evidence creates a contradiction that was noted by the district court. In the notes of Attorney Dan Letnes, both Earl and Harriet Clemetson had visited his office in 1995 to draft their wills. While the notes show that both Harriet and Earl's wills were dated October 5, 1995, Earl's will was actually signed and witnessed on October 9, four days later. (App.25.) Adding further to the mystery is a letter sent by Mr. Letnes to both Earl and Harriet Clemetson stating "[s]everal month have elapsed since your Last Will & Testament was prepared and signed. Perhaps you might wish to review your present will; and make some changes." (App.1.) By stating that "several months" have gone by would indicate that a different will was prepared sometime in the summer of 1998. This is three years after the Will of Earl Clemetson and the draft for Harriet Clemetson was dated. The use of "your" could mean that either Mr. or Mrs. Clemetson, or both for that matter, had changed their will. Because of this, it is near impossible to conclude, beyond a preponderance of the evidence, that the draft presented by the

Spragues could be considered to be a valid Will of Harriet Clemetson. Even though individuals claimed to see an envelope containing Harriet Clemetson's will, it is uncertain if the envelope contained a document from 1995, 1998, or any will at all.

[¶ 23] An attempt to probate an unsigned document is contrary to the fundamental basis of all probate and inheritance law. The Appellant is mistaken in their facts that a will had been in existence at the time of her death. The district court found that "the Spragues did not prove by a preponderance of the evidence that a Will of Harriet Clemetson existed at the time of her death." (App.35.) If the court were to probate this unsigned, unwitnessed, piece of paper, imagine the chaos that would ensue. All of N.D.C.C. § 30.1-08-02 would be called into question, and the statute would become virtually worthless. In order for justice to be served in this case and cases to follow, the court must recognize that this document certainly does not meet the standards of a will, nor was it in line with the final wishes of Harriet Clemetson.

B. If a will had existed, the district court was correct in applying the common law presumption of *animo revocandi*.

[¶ 24] In the event that a will did exist for Harriet Clemetson, the district court was correct in applying the presumption of *animo revocandi.* The Appellant misapplies the holding in In re Estate of Conley, 2008 ND 148, 753 N.W.2d 384. In Conley, the court formally adopted the common law presumption that a missing will is revoked. Id. at ¶ 27. Once a will is deemed missing or lost, it is presumed to be revoked under the common law. Id. at ¶ 20.

[¶ 25] In its decision, the district court stated: "Kenneth Evanson testified that after a thorough search of Harriet Clemetson's belongings, no will has been found. Thus,

under common law, the lost or missing will is presumed to have been secretly destroyed by Harriet Clemetson." (App.27.) Ken acted in good faith and looked for Harriet Clemetson's will. Because a valid will was not found by Ken, or anyone else for that matter, the common law presumption was justly applied.

[¶ 26] The Appellant in their brief claims that there is a burden on Ken to prove that Harriet Clemetson did not have a will or that she had destroyed hers. There is no burden on a personal representative of an estate to conjure up a will for the deceased. Rather, "[a]personal representative is a fiduciary who shall observe the standards of care applicable to trustees." N.D.C.C. § 30.1-18-03. The Century Code goes on further to state that a personal representative "is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this title, and as expeditiously and efficiently as is consistent with the best interests of the estate." Id. As a personal representative, Kenneth Evanson is a fiduciary who is under a duty to see that the estate of Harriet Clemetson is distributed properly according to guidelines set forth in the Century Code, not to find a will or to prove its absence.

[¶ 27] The true burden of proof is on the petitioner who wishes to probate the missing will. The court in Conley stated that " N.D.R.Evid. 301(a) requires the party seeking to probate the missing will to demonstrate, by a preponderance of the evidence that the testator did not destroy or revoke the missing will *animo revocandi*." 2008 ND 148, ¶ 28, 753 N.W.2d 384. The true burden lies with the Appellant to prove that the will was not revoked by a preponderance of the evidence. The Spragues are wishing to probate the paper/draft, not the personal representative of the estate, thus it is their duty to prove the will valid not Ken, personal representative for the estate.

[¶ 28] The idea that Harriet would change her will after the death of her husband is not farfetched. It would only be natural that Harriet would change her will and provide for her side of the family like Earl provided for his. In her testimony Carolyn stated, "She treated everyone the same. That was the way Harriet did things." (Tr. I, 83.) Fairness was important to Harriet. The evidence indicates that Harriet had changed her power of attorney and took Carolyn off the remainder interest of the Hartford/Putnam investments before her unexpected death. (App.16-19.) These changes were made unbeknownst to Carolyn, who testified that she didn't know about these changes until after Harriet's death (Tr. I, 79.) If Harriet did not tell the Spragues that she was changing her power of attorney and beneficiaries, it would not be hard to believe that she could have made changes to her will without their knowledge as well. As stated in Conley, the presumption of *animo revocandi* is intended to protect the testator's right to change their will "and recognizes 'that wills are almost always destroyed secretly.'" 2008 ND 148, ¶ 21, 753 N.W.2d 384.

[¶ 29] It was only natural that Harriet would have changed her will if one existed at the time of her death as much had changed from 1995 to 2009. The two main beneficiaries of this purported will draft Earl Clemetson and her son, Ritchie Evanson, were deceased by 2009. They were the two whom Harriet wanted to have her estate. With their death it was only logical that she would change her will like she had done with her power of attorney and the Hartford/Putnam investment.

[¶ 30] It is also very likely that Harriet would have felt that the Spragues had received their fair share as they had received much of the property under Earl's estate, and had bought out her life estate. She also had been very distressed over the sale of her

property, basically seeing her life with Earl being sold on their front lawn. It is not unlikely that Harriet was "put off" by the continuing push from the Spragues for more and more of the property. These hard feelings are evidenced by her being upset when one of the Sprague grandchildren had wanted Earl's pickup as shown in the testimony of both Carolyn and Kevin Sprague. This was also reflected in the conclusions of law set forth by the trial court, which found:

> [¶ 31] The testimony establishes that hard feelings developed between Harriet Clemetson and the Sprague family shortly after Earl Clemetson's death As Carolyn and Kevin Sprague' three children were getting ready to fly home after Earl Clemetson's funeral, Phillip Sprague asked Harriet Clemetson what was going to happen to his grandfather's pickup as Phillip Sprague desired to have the vehicle. When this question was asked of her, Harriet Clemetson became very upset. As testified to by Kevin Sprague, it was 'kind of the straw that broke the camel's back for her.' It was never discussed again, and it was eventually sold at the August auction sale.

(App.36.) Again, the district court stated:

> [¶ 32] Based upon the testimony of the witnesses, the Court concludes that Harriet Clemetson felt pressured by Kevin Sprague's attempt to take over the management of the farm and the financial affairs that she and her husband had managed together for 45 years. Her frustration was demonstrated by her reaction to Phillip Sprague when he asked for Earl Clemetson's pickup and by her reaction during the auction sale. Simply put, Kevin and Caroline Sprague appeared to be pressuring Harriet Clemetson into making life-changing decisions that she was not ready to make so soon after her husband's death.

(App.38.) "There is another legitimate reason why Harriet Clemetson no longer desired to distribute her estate under the terms of her 1995 Will. As testified to by all of the witnesses, the Evanson and Sprague families were never close."(App.38.)

[¶ 33] For a party to probate a missing will, they must establish, by a preponderance of the evidence, that "a will existed at the at the time of the testator's death, that the will was fraudulently destroyed in the lifetime of the testator, or by other evidence demonstrating the testator did not intend to revoke the missing will." Conley,

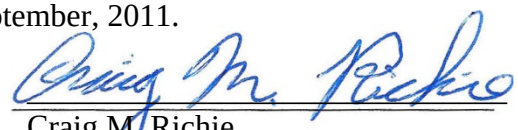
2008 ND 148, ¶ 29, 753 N.W.2d 384. According to the findings of the district court, "the Spragues did not prove by a preponderance of the evidence that a Will of Harriet Clemetson existed at the time of her death." (App.35.) While offering a creative legal argument, the Appellant twists the meaning of the common law to suit their purpose, not to apply the law to the facts at hand. Further they did not prove that the piece of paper/draft of a will from 1995 was the will that was in existence at the time of her death. "The fact that a conformed copy of the missing will is in the office of the attorney who drafted it does not alter the rational for the presumption." Conley, 2008 ND 148, ¶ 21, 753 N.W.2d 384.

IV. CONCLUSION.

[¶ 34] North Dakota Statute is exceedingly clear that the elements laid out in 30.1-08-02 must be met. The language in the statue is concise and unambiguous. The requirements set forth in it are not met by the petitioning party. More specifically, the will is not signed by the testator, lacks two witnesses that both saw the execution of the will and signed within a reasonable time of the execution (which was never executed), and the will was not acknowledged by the testator before a notary public or other individual authorized by law to take acknowledgement. In this case, it seems as if the necessary steps in probating a will have not been followed. To begin with, first there must be a valid, executed will. In this instance, the alleged will in question is invalid due to the fact that there is no signature by the testator. Even if it is asserted that the will is somehow valid, the next step in the process is to probate the non-revoked will. However, it is asserted by the opposition that this will is lost or destroyed which by common law in

North Dakota renders the will revoked. Therefore, it is impossible for this alleged will to be probated since it must be unrevoked and by asserting that the will is lost, it is also presumed to be revoked. Furthermore, if there was a will it was revoked by a 1998 will or even other wills may have been executed later. For the court to go down that path would be too speculative and against the North Dakota Statutes, case law, and the express language of the governing statute. The circumstances of this case set out that the elements needed for a valid will as per the governing statute in North Dakota are not met, and therefore, there is no valid will to probate.

Respectfully submitted this 14th day of September, 2011.



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Supreme Court No. 20110108

Philip Sprague,

Petitioner and Appellant,

v.

CERTIFICATE OF SERVICE

Kenneth Evanson, Personal Representative,

Respondent and Appellee.

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

I hereby certify that on September 14, 2011, I caused to be electronically filed the Appellee's Brief and Corrected Appellee's Brief and Appendix of Appellee by fax with the Clerk of the North Dakota Supreme Court and served the Brief electronically and Appendix personally as follows:

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Dated: September 14, 2011.

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