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STATE OF NORTH DAKOTA

**IN THE SUPREME COURT**
**STATE OF NORTH DAKOTA**

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| Lyn C. Schroeder, n/k/a<br>Lyn C. Karjalainen, | |
| Appellant, | Supreme Court No. 20130351 |
| v. | Grand Forks Co. No. 18-07-C-00017 |
| Travis L. Schroeder, | |
| Appellee. | |

APPEAL FROM THE ORDER DENYING AN EVIDENTIARY HEARING ON APPELLANT'S REQUEST FOR A CHANGE IN RESIDENTIAL RESPONSIBILITY ENTERED ON SEPTEMBER 6, 2013,
FROM GRAND FORKS COUNTY DISTRICT COURT

NORTHEAST CENTRAL JUDICIAL DISTRICT
HONORABLE PATRICK WEIR, PRESIDING

# BRIEF OF APPELLEE

Sarah W. Gereszek (07017)
Kalash & Pettit
311 South 4th Street, Suite 103
Grand Forks, ND 58201
(701) 780-9276
sgereszek@kalashpettitlaw.com
Attorney for Defendant/Appellee

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## [¶3.] **JURISDICTIONAL STATEMENT**

[¶4.] The district court had jurisdiction under North Dakota Constitution article VI, section 8 and North Dakota Century Code section 27-05-06. The North Dakota Supreme Court has jurisdiction under North Dakota Constitution article VI, sections 2 and 6, and North Dakota Century Code section 28-27-01.

## [¶5.] **STATEMENT OF THE FACTS**

[¶6.] Travis Schroeder ("Travis") and Lyn Schroeder ("Lyn") were married on June 19, 1999. (App. 8). The parties had two minor children born of the marriage, specifically, T.S., born in 2000, and A.S., born in 2002. (App. 8). Travis and Lyn were divorced in Grand Forks County on June 29, 2007. (App. 8). The parties were awarded joint legal and physical custody of the minor children. (App. 10). At the time of the divorce, both Travis and Lyn resided in Grand Forks, North Dakota. (App. 8).

[¶7.] In 2008, Lyn got remarried to Neil Karjalainen. (App. 27). In 2009, Lyn filed a Motion for Change of Custody and requested the Court's permission to move to Sioux Falls, South Dakota, with the minor children. (App. 26). Travis opposed the motion and the request to relocate the minor children. (App. 26). On February 2, 2010, after a two day hearing, District Court Judge Karen Braaten issued a Findings of Fact, Conclusions of Law, and Order for Judgment denying Lyn's motion to move out of state with the minor children, awarding Travis primary residential responsibility and Lyn parenting time. (App. 32). Nothing in the Amended Judgment limited Travis's ability to move with the children once Lyn moved to another state which was more than fifty miles from Travis's residence.

[¶8.] In March of 2012, Lyn informed Travis that her family would be moving again to Omaha, Nebraska, in the summer of 2013 for her husband's occupation. (App. 63-64). Up to that date, the parties had been following the parenting time schedule in the Amended Judgment. Lyn was granted one weekend a month with the parties meeting halfway for exchanges, summer parenting time from one week after school ends to one week before school starts, and alternated holidays between the parties. (App. 43). In anticipation of Lyn's move, Travis tried to communicate with Lyn about revising the parenting time schedule to optimize the minor children's parenting time with Lyn and alleviate additional financial burden the extra transportation would have on the parties. (App. 64-65). Lyn discussed Travis's proposed changes with her husband, but did not discuss any changes with Travis. (App. 65). In May of 2013, Travis decided to move the children to Florida where he had a better support group consisting of family and friends and for an employment opportunity. (App. 60, 65). Travis informed Lyn of his planned move and offered her additional parenting time with the minor children over the summer. Travis offered her an extra week and to give up his uninterrupted two weeks of parenting time with the minor children during the summer. (App. 61).

[¶9.] On May 24, 2013, Lyn's previous attorney, Daylen Ramstad, served Travis with a Demand for Change of Judge, Confidential Information Form, Notice of Motion, Motion to Amend Judgment, Brief in Support of Motion to Amend Judgment and Request for Evidentiary Hearing, and Affidavit of Lyn C. Karjalainen. (App. 60). None of these documents were filed with Grand Forks District Court until July 2, 2013. (App. 4-5, 60). Travis's responsive documents were filed with the Grand Forks District Court on July 3, 2013. (App. 5).

[¶10.] Pursuant to the Amended Judgment dated February 4, 2010, Lyn was to return the minor children to Travis one week before school was to start. (App. 33). Travis informed Lyn that the minor children would start school on August 19, 2013, in Stuart, Florida. (Supp. App. 79). Therefore, the children should have been returned to Travis no later than August 12, 2013. (Supp. App. 79). Travis and Lyn exchanged emails regarding the parenting time exchange. (Supp. App. 80). In anticipation of the minor children's return to Travis, he purchased two plane tickets in the amount of $621.00 for the children to fly out of Omaha, Nebraska on August 12, 2013, at 1:35 p.m. (Supp. App. 83). However on August 12, 2013, at 2:30 p.m., Lyn informed Travis she would not cooperate with the exchange and would be keeping the boys in Omaha, Nebraska. (Supp. App. 82). In preparation for the minor children to start a new school in Florida, Travis obtained transcript records from the minor children's schools in Grand Forks and learned that on May 29, 2013, Lyn requested the minor children's transcript records be sent to Omaha, Nebraska. (Supp. App. 88-89). On August 16, 2013, Travis filed a Motion for Order to Show Cause for Lyn's contempt in not returning the boys pursuant to the Amended Judgment. (App. 5).

[¶11.] On September 6, 2013, Judge Patrick Weir issued a Memorandum Decision and Order denying Lyn's Motion to Amend the Amended Judgment and for an evidentiary hearing, ordering the immediate return of the minor children to Travis, and directing Lyn to reimburse Travis for the cost of the airline tickets. (App. 76-77). The Order also granted Travis's motion for an order to show cause. (App. 77). Judge Weir's Order directed the scheduling clerk to schedule a hearing to address parenting time since both parties had

moved and to address the order to show cause issues. (App. 76). A hearing was pending for November 25, 2013, in Grand Forks District Court to address the remaining issues. (App. 6). On November 1, 2013, Lyn's attorney filed a Notice of Appeal. (App. 78).

## [¶12.] <u>LAW AND ARGUMENT</u>

[¶13.] **A. The district court did not err as a matter of law in denying an evidentiary hearing on Lyn's motion to modify primary residential responsibility because Lyn did not provide sufficient competent evidence to establish a prima face case warranting an evidentiary hearing.**

[¶14.] It has been more than two years since the last order was entered on February 2, 2010. Therefore, Lyn's motion to modify primary residential responsibility is governed by North Dakota Century Code section 14-09-06.6(1) which states:

> Unless agreed to in writing by the parties, or if included in the parenting plan, no motion for an order to modify primary residential responsibility may be made earlier than two years after the date of entry of an order establishing primary residential responsibility, except in accordance with subsection 3.

"The party seeking modification has the burden of proving a change in residential responsibility is required." <u>Krueger v. Tran</u>, 2012 ND 227, ¶ 12, 822 N.W.2d 44.

[¶15.] Further, after the two year period has elapsed, the court may modify the primary residential responsibility if the court finds:

> a. On the basis of the facts that have arisen since the prior order or which were unknown to the court at the time of the prior order, a material change has occurred in the circumstances of the child or the parties; and
>
> b. The modification is necessary to serve the best interests of the child.

N.D.C.C. § 14-09-06.6(6).

[¶16.] This two step process is required to modify any initial custody determination. The first step is for the court to determine whether a significant or material change of circumstances has occurred since the "prior order." If the court finds there has been a significant change in circumstances since the prior order, the court must then determine if the significant change in circumstances warrants, in the child's best interests, a change in custody. Barstad v. Barstad, 499 N.W.2d 584 (N.D. 1993). The second step the court must take is to review the best interests of the minor child. The statutory factors used by the court to determine "best interests" are outlined in section 14-09-06.2 of the North Dakota Century Code and are as follows:

a. The love, affection, and other emotional ties existing between the parents and child and the ability of each parent to provide the child with nurture, love, affection, and guidance.

b. The ability of each parent to assure that the child receives adequate food, clothing, shelter, medical care, and a safe environment.

c. The child's developmental needs and the ability of each parent to meet those needs, both in the present and in the future.

d. The sufficiency and stability of each parent's home environment, the impact of extended family, the length of time the child has lived in each parent's home, and the desirability of maintaining continuity in the child's home and community.

e. The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child.

f. The moral fitness of the parents, as that fitness impacts the child.

g. The mental and physical health of the parents, as that health impacts the child.

h. The home, school, and community records of the child and the potential effect of any change.

i. If the court finds by clear and convincing evidence that a child is of sufficient maturity to make a sound judgment, the court may give substantial weight to the preference of the mature child. The court shall also give due consideration to other factors that may have affected the child's preference, including whether the child's preference was based on undesirable or improper influences.

j. Evidence of domestic violence.

k. The interaction and interrelationship, or the potential for interaction and interrelationship, of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child's best interests.

l. The making of false allegations not made in good faith by one parent against the other, of harm to a child as defined in section 50-25.1-02.

m. Any other factors considered by the court to be relevant to a particular parental rights and responsibilities dispute.'

[¶17.] "A prima facie case requires only enough evidence to allow the fact finder to infer the fact at issue and rule in the moving party's favor." Sweeney v. Kirby, 2013 ND 9, ¶ 5, 826 N.W.2d 330. "It is a 'bare minimum' and requires only facts which, if proved at an evidentiary hearing, would support a change of primary residential responsibility that could be affirmed if appealed." Id. "In determining whether a prima facie case has been established, the district court must accept the truth of the moving party's allegations and may not weigh conflicting allegations." Schumacker v. Schumacker, 2011 ND 75, ¶ 8, 796 N.W.2d 636. "The opposing party may present evidence challenging the moving party's right to the relief requested, but when the evidence merely creates conflicting issues of fact, the court may not weigh or resolve conflicting allegations." Id. "Unless the opposing party's counter-affidavits conclusively show the moving party's allegations have no credibility or are insufficient to justify modification of primary residential responsibility, an evidentiary hearing must be held to resolve conflicting evidence and determine whether a modification

of primary residential responsibility is warranted." Id. "Allegations alone . . . do not establish a prima facie case, and affidavits must include competent information, which usually requires the affiant to have first-hand knowledge." Thompson v. Thompson, 2012 ND 15, ¶ 6, 809 N.W.2d 331. "Affidavits are not competent if they fail to show a basis for actual personal knowledge, or if they state conclusions without the support of evidentiary fact." Id.

[¶18.] "The purpose of the prima facie case requirements is to avoid holding modification hearings based on mere allegations alone, and it is not intended to allow the moving party an opportunity to investigate unsubstantiated allegations." Kartes v. Kartes, 2013 ND 106, ¶ 12, 831 N.W.2d 731. "The procedure created by N.D.C.C. § 14-09-06.6(4) therefore allows the district court to eliminate unsupported or frivolous cases without imposing upon the court and the parties the burden and expense of an unnecessary evidentiary hearing." Id. "The requirement of establishing a prima facie case at a preliminary stage creates a threshold burden upon the party seeking modification, requiring a showing that there is evidence upon which a court could rule in his favor." Sweeny, 2013 ND 9 at ¶¶ 5-6.

[¶19.] Lyn argues that she has satisfied the "bare minimum" requirements to establish a prima facie case for an evidentiary hearing. (P. Br. p. 7). Lyn claims that her affidavits contain first-hand knowledge that Travis's move will necessitate a change in primary residential responsibility. (P. Br. p. 7-8). The District Court properly concluded that all of Lyn's allegations in her affidavit were conclusory and failed to support evidentiary fact. (App. 76). Lyn alleged the minor children were distraught about moving to Florida prior to returning the children to Travis. (P. Br. p. 8). A move to a new state requires some change

for minor children but given some time for adjustment they adapt to their new home and school quickly. Lyn also claims that Travis does not dispute the credibility of Lyn's allegations. (P. Br. p. 12). This is incorrect. Travis stated that Lyn was telling the minor children they would not see their mother for an entire year which is what caused the minor children to be distressed about Travis's move. (Supp. App. 80). Travis also stated that Lyn's allegations that he will restrict or minimize parenting time is pure conjecture, meritless, and not supported by fact. Lyn's allegations that the move would negatively impact the minor children were insufficient and also based on conjecture, not fact. (App. 61). "Affidavits are not competent if they fail to show a basis for actual personal knowledge, or if they state conclusions without the support of evidentiary facts." Ehli v. Joyce, 2010 ND 199, ¶ 7, 789 N.W.2d 560.

[¶20.] Lyn also claims the minor children have formed a relationship with their half-siblings, that Lyn is able to provide a stable and consistent home, she will be staying home with the children, that the schools in Omaha, Nebraska, are better than the schools in Florida, and that the minor children have special education needs that she can address. (P. Br. p. 8). The minor children's relationship with their half-siblings is irrelevant for the analysis of whether the move would negatively impact the minor children to necessitate a change in primary residential responsibility. Lyn's ability to feed, transport, and provide a stable home for the minor children are also irrelevant. Lyn failed to provide any information to show that the minor children's new school is unable to meet the children's educational needs or provide the children with a proper education. Lyn claims the schools in Nebraska are better than the schools in Florida for one reason, graduation rates. (App. 57). There are a multitude of other factors to be considered when ranking the success of a school, such as extracurricular

programs, curriculum, special needs programs, tutoring, etc. Lyn's reliance on graduation rates is another conclusory argument. Lyn's argument that the children have special needs that she can properly address is also conclusory. Lyn has failed to articulate how Travis has not met the children's needs in the past three years that he has had primary residential responsibility. There is no evidence the children have declined under Travis's care. Furthermore, now that the children are surrounded by extended family, they are receiving additional support with homework and educational needs beyond what Travis has provided the past three years. This can only be viewed as a positive. In reviewing the parties' affidavits, the district court did not weigh the parties' conflicting allegations but made the determination that Lyn's allegations, even if true, were conclusory and failed to establish sufficient evidence necessary for a prima facie case. (App. 76).

[¶21.] Lyn argues that Travis's home in Florida is neither stable nor desirable for the minor children. (P. Br. p. 9). Travis moved to Florida and stayed with his parents until he was able to secure his own place to live. (Supp. App. 79). The minor children did not live with Travis while he was staying at his parent's house as they were exercising summer parenting time with Lyn. Since August 17, 2013, Travis has been living in his own residence. (Supp. App. 80). Lyn has never been to Travis's residence and has no knowledge to claim that his home is neither stable nor desirable for the children. Lyn also claims that her situation has continued to improve while Travis's situation has declined. (P. Br. p. 10). Lyn failed to provide any evidence that Travis's situation has declined. Travis has his own place in Florida where he resides with the minor children. The children have a strong support system in Florida as they are surrounded by friends and both Travis's and Lyn's extended family. The children have no relatives in Omaha, Nebraska, besides Lyn's

immediate families. Lyn continually relies on a sentence in the Amended Judgment issued February 4, 2010, by Grand Forks District Court Judge Karen Braaten regarding Travis's stability and indication that he has no plans to leave the Grand Forks area. (P. Br. p. 11). At the time, and for over three years, Travis did continue to reside in the Grand Forks area. However, since Lyn was living in Sioux Falls, South Dakota, there was nothing in the Amended Judgment, or agreed to by the parties, requiring Travis to forgo all possible future opportunities which might include a move from the Grand Forks area. Lyn has failed to provide any evidence to the district court that Travis's move would impact the children negatively.

[¶22.] As previously stated, "the best interest factors must be gauged against the backdrop of the stability of the child's relationship with the custodial parent, because that stability is the primary concern in a change of custody proceeding." Vining v. Renton, 2012 ND 86, ¶ 17, 816 N.W.2d 63. "A child is presumed to be better off with the custodial parent, and close calls should be resolved in favor of continuing custody." Id. Since February 2010, Travis has had primary residential responsibility of the minor children. Until August of 2013, Travis and the minor children resided in Grand Forks. They had established a routine and there were no problems at home or school. Travis moved one time as the primary parent and the move resulted in a greater support system of extended family and friends for the minor children. Lyn has already moved twice, first to Sioux Falls and then to Omaha, Nebraska, with the potential for future moves. (App. 29). Travis has provided the minor children with stability over the past almost four years. While the parties may dispute whether this case is a "close call," even if this Court determines this case to be a "close call," the facts still favor Travis continuing to have primary residential responsibility of the minor children.

[¶23.] It is important to note that Lyn received the minor children for her summer parenting time on May 24, 2013. (App. 56). This is the same day that Lyn signed her motion to modify primary residential responsibility and served the motion documents on Travis. (App. 54, 60). Lyn also requested a copy of the minor children's transcripts be sent to schools in Omaha, Nebraska, on May 28, 2013. (Supp. App. 88-89). Lyn did not have sufficient time with the minor children to discuss the upcoming move to Florida at the end of the summer before she filed her motion to modify primary residential responsibility. Therefore, her allegations the children were "distraught" are not credible. Instead, Lyn learned Travis was moving to Florida, was upset, and filed a motion to modify parenting time solely based on Travis's move, which she felt went against the reason he was awarded primary residential responsibility over her in 2010.

[¶24.] Lyn also claims that Travis stated he intends to deny Lyn's monthly visitation. (P. Br. p. 9). This is an inaccurate summarization of the conversation between the parties about parenting time. In fact, Travis tried to discuss revising the parenting time schedule due to the new distance between them, however, Lyn was unwilling to discuss the schedule. (App. 64-65). However, the allegation that Travis will deny parenting time is very different than actual frustration and denial of parenting time and does not provide a basis for granting an evidentiary hearing. In Sweeney v. Kirby, the Court determined one party's affidavit showed the basis for personal knowledge and was supported by telephone records and was "enough to demonstrate Sweeney's denial and interference with Kirby's parenting time." 2013 ND 9 at ¶ 7. Lyn failed to provide any evidence in her motion to modify primary residential responsibility to show that Travis has intentionally frustrated or denied her parenting time. Lyn's brief states that Travis has indicated he will deny her visitation. (P.

Br. p. 9). Lyn's Affidavit in Further Support of her Motion to Amend Judgment and in Response to Motion for Order to Show Cause states that Travis has expressed in correspondence that he plans to limit visitation if the children are ordered to return to him in Florida. (App. 69-70). Significantly, Lyn failed to provide this correspondence or any information to the court showing Travis has intentionally frustrated or denied parenting time. Lyn argues that Travis's "simple denial does not establish that Lyn's allegations lack credibility." (P. Br. p. 9). Travis is unable to provide evidence of communication that never took place, however, if Lyn has information to show the court that Travis will interfere with or prevent parenting time, she has the burden to produce that information. Conversely, the record shows Travis has given Lyn more time with the minor children than what is outlined in the Amended Judgment schedule. (App. 61). Travis offered to let Lyn start her summer parenting time one week early and he waived his two weeks of uninterrupted summer parenting time with the minor children so that Lyn could spend more time with them. (App. 61).

[¶25.] Importantly, the record shows that Lyn is the only party to violate the Amended Judgment "without legitimate justification" and frustrate parenting time by not returning the children as ordered in the Amended Judgment. (App. 76). Travis's move to Florida is the only change that has occurred since the Amended Judgment was entered in February 2010. As the parent with primary residential responsibility, a move alone does not constitute a material change in circumstances. The North Dakota Supreme Court stated in Dunn v. Dunn, that "it is clear that our case law does not support the proposition that relocation alone is sufficient to establish a change in circumstances." 2009 ND 193, ¶ 18, 775 N.W.2d 486 (Maring, J., concurring). The North Dakota Supreme Court also stated in Frey v. Frey, that

"a move by a parent with primary residential responsibility either out-of-state or in-state, *accompanied by other circumstances*, may be viewed as a material change of circumstances." 2013 ND 100, ¶ 8, 831 N.W.2d 753 (citing State v. Neustel, 2010 ND 216, ¶ 8, 790 N.W.2d 476)(emphasis added). Involvement with a new partner, improvements in the noncustodial parent's situation, or a move to live with a new significant other may be a material change. See Neustel, 2010 ND 216 at ¶ 9; Glass v. Glass, 2011 ND 145, ¶ 13, 800 N.W.2d 691; Gietzen v. Gietzen, 1998 ND 70, ¶ 10, 575 N.W.2d 924.

[¶26.] Judge Weir determined that both parties' moves constituted a material change in circumstance. (App. 76). Travis disagrees with the district court's determination that a material change has occurred. Travis was awarded primary residential responsibility of the minor children in February 2010. Lyn moved to Sioux Falls in 2010, which is beyond the prescribed distance from the minor children's residence that would require Travis to seek the court's permission to move out of state from Grand Forks, North Dakota. See N.D.C.C. § 14-09-07. Lyn's additional move is relevant in regard to the schedule but hardly provides support of her motion to change primary residential responsibility. Lyn's move to Omaha, Nebraska, should not be considered in the analysis of whether a material change has taken place justifying a transfer in primary residential responsibility to her. Rather, it provides evidence of further instability by Lyn. When Travis, the primary parent, moved with the minor children to Florida in May of 2013, he was able to do so without the court or Lyn's permission. Travis's move, alone, does not constitute a material change of circumstance as it is not accompanied by any other circumstances. Lyn has failed to present sufficient evidence that the move has or will have a negative impact on the minor children necessitating a change in primary residential responsibility. The children have been residing primarily

with Travis primarily for the past four years. There is no evidence that the relationship with Travis and the minor children is not stable or that a change in status quo is required. See Vining v. Renton, 2012 ND 86. Additionally, the minor children are presumed to be better off with the custodial parent, Travis. Id. Therefore, Travis respectfully submits that the Grand Forks District Court's determination that Travis's move constituted a material change is incorrect.

[¶27.] **B. If the Court determines that a material change of circumstance has occurred, an analysis of the best interest factors of the child does not support a change in primary residential responsibility.**

[¶28.] Should this Court determine that Travis's move did constitute a material change, the Court must next determine if modification is in the best interest of the minor children. N.D.C.C. § 14-09-06.6(6). In a proceeding to modify primary residential responsibility, the district court must analyze the best interest factors in light of two considerations not required in an original primary residential responsibility decision:

> First, the best interests of the child factors must be gauged against the backdrop of the stability of the child's relationship with the custodial parent, because the stability is the primary concern in a change of custody proceeding. Second, after balancing the child's best interests and stability with the custodial parent, the trial court must conclude that a change in the status quo is required. A child is presumed to be better off with the custodial parent, and close calls should be resolved in favor of continuing custody. A change should only be made when the reasons for transferring custody substantially outweigh the child's stability with the custodial parent.

Vining, 2012 ND 86 at ¶ 17 (citing Myers v. Myers, 1999 ND 194, ¶ 10, 601 N.W.2d 264)(citations, quotations, and emphasis omitted).

[¶29.] As previously discussed, it is Lyn's burden to show that modification of primary residential responsibility is in the best interest of the minor children. Lyn has failed to provide any evidence to show that the move to Florida would negatively impact the children to the degree that it would necessitate a change in primary residential responsibility. Travis has had primary residential responsibility of the minor children since February 4, 2010. (App. 41). In the past four years, Travis has provided a stable and nurturing environment for the minor children and no issues regarding his ability to be the primary parent have been raised. Even though Travis moved to Florida, Lyn also moved to a new state as well. Lyn has failed to show how Travis's move to Florida negatively impacts the children whereas her move has or will not negatively impact the children. As stated, the minor children have been residing primarily with Travis for the past four years and absent any problems with this arrangement, the law presumes the children are better off continuing to reside with the parent who has primary residential responsibility, Travis. Lyn has failed to show that a change in the "status quo" is required. Therefore, the district court properly concluded that Lyn's affidavits in support of her motion to modify primary residential responsibility were conclusory and failed to evidence that a change in primary residential responsibility is in the minor children's best interest.

## [¶30.] **CONCLUSION**

[¶31.] For the foregoing reasons, the Appellee respectfully requests the Court AFFIRM the Grand Forks District Court's September 6, 2013, Memorandum, Decision and Order.

Dated this 10th day of January, 2014.

/s/ Sarah Gereszek
Sarah W. Gereszek/ID#7017
Kalash & Pettit
311 South 4th Street, Suite 103
Grand Forks, ND 58201
(701) 780-9276
sgereszek@kalashpettitlaw.com
Attorney for Defendant/Appellee

## [¶32.] **VI. CERTIFICATE OF SERVICE**

[¶33.] I hereby certify that on the 14th day of January, 2014, a copy of the foregoing Appellee's Brief was electronically served on Tracy Lyson at the following email address:

Tracy Lyson
tjl@kennellylaw.com

[¶34.] I hereby certify that on the 14th day of January, 2014, a copy of the foregoing Appellee's Brief was electronically filed with the Supreme Court at the following email address:

Clerk of Supreme Court
supclerkofcourt@ndcourts.gov

/s/ Sarah Gereszek

Sarah Gereszek/ID#07017
Kalash & Pettit
311 South 4th Street, Suite 103
Grand Forks, ND 58201
(701) 780-9276
sgereszek@kalashpettitlaw.com
Attorney for Defendant/Appellee

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STATE OF NORTH DAKOTA

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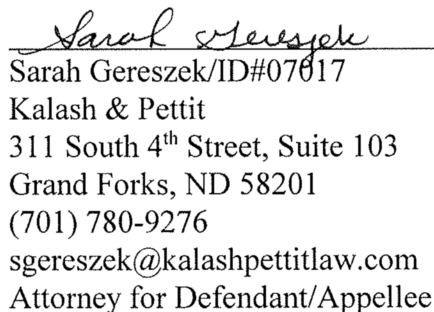

Sarah Gereszek/ID#07017
Kalash & Pettit
311 South 4th Street, Suite 103
Grand Forks, ND 58201
(701) 780-9276
sgereszek@kalashpettitlaw.com
Attorney for Defendant/Appellee