

IN THE SUPREME COURT OF NORTH DAKOTA

George Seccombe; Barbara Treska; Erik Naasset; Helge Naasset; Astri Holst; Irene Markle; and Alice Nasset

Plaintiffs and Appellants,

Slawson Exploration Company, Inc.; and Alameda Energy, Inc.

Plaintiffs-Intervenors and Appellants,

vs.

Bradley C. Rohde and Karen D. Rohde, Trustees of the Bradley C. Rohde Trust dated June 22, 2010; Anita Rohde, Trustee of the Anita Rohde Living Trust UDT October 8, 2009; Dennis Rohde, Trustee of the Dennis Rohde Living Trust UDT October 8, 2009; Gary Rohde; Bradley Rohde; Dennis Rohde; Northern Oil and Gas, Inc.; Ryan Family Mineral Partnership; S. Reger Family Mineral Partnership; Kootenai Resources Corporation; Summerfield C. Baldrige; Montana Oil Properties, Inc.; S. Reger Family, Inc.; Beartooth Ridge Resources, Inc.; Lakeside State Bank; and all persons unknown claiming any estate or interest in, or lien or encumbrance upon the property described in the complaint,

Defendants and Appellees.

Supreme Court Case No.: 20180069

Mountrail County Civil
Case No.: 2012-CV-00104

**BRIEF OF APPELLANTS GEORGE SECCOMBE;
BARBARA TRESKA; ERIK NAESSET; HELGE NAESSET;
ASTRI HOLST; IRENE MARKLE; AND ALICE NASSET**

Appeal from Orders on Motions for Summary Judgment, entered March 26, 2013, and December 11, 2017, and Judgment, entered January 17, 2018, by the District Court for the North Central Judicial District, County of Mountrail, the Hon. Judge Gary H. Lee presiding

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TABLE OF CONTENTS

Paragraph #

TABLE OF AUTHORITIESpage iv

STATEMENT OF THE ISSUES.....1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS6

STANDARD OF REVIEW9

ARGUMENT10

 I. The district court’s order quieting title in the Rhode Defendants
 Was erroneous.....11

 II. The district court erred in granting Lakeside’s motion for
 Summary judgment.....12

 a. The Nasset Heirs’ claim against Lakeside was not barred by
 N.D.C.C. § 30-24-13 (1959) or § 30.1-21-05 (1973)13

 b. Lakeside should be held liable to the Nasset Heirs
 for its misrepresentations or inadequate disclosures.....22

CONCLUSION.....25

TABLE OF AUTHORITIES

Cases	Paragraph #
<i>Adams v. Kennard</i> 122 Or. 84, 253 P. 1048 (1927)	22
<i>Arndt v. Maki</i> 2012 ND 55, 813 N.W.2d 564	9
<i>Baptist Hosp. v. Carter</i> 658 So. 2d 560 (Fla. Dist. Ct. App. 3d Dist. 1995).....	19
<i>Bourgois v. Montana-Dakota Utils. Co.</i> 466 N.W.2d 813 (N.D. 1991)	20
<i>Burnham v. Kelley</i> 299 Mich. 452, 300 N.W. 127 (1941).....	22
<i>Hansen v. First Am. Bank & Trust of Minot</i> 452 N.W.2d 770 (N.D. 1990)	18
<i>Hanson v. Walker</i> 259 P.2d 242 (Kan. 1953).....	21
<i>In re Estate of Conley</i> 2008 ND 148, 753 N.W.2d 384	9
<i>In re McGovern’s Estate</i> 77 Mont. 182, 250 P. 812 (1926).....	22
<i>Matter of Estate of Thomas</i> 532 N.W.2d 676 (N.D. 1995)	21
<i>Phoenix Assurance Co. of Canada v. Runck</i> 366 N.W.2d 788 (N.D. 1985)	24
<i>Rea v. Smith</i> 172 Miss. 238, 159 So. 845 (1935).....	22
<i>Wenco v. EOG Resources, Inc.</i> 2012 ND 219, 822 N.W.2d 701	9

Statutes

N.D.C.C. § 28-01-16(6)24

N.D.C.C. § 30-24-13 (1959).....1, 13, 18 (fn. 2)

N.D.C.C. § 30.1-21-05 (1973)13, 18, 20

Treatises

34 C.J.S. EXECUTORS AND ADMINISTRATORS § 39522

34 C.J.S. EXECUTORS AND ADMINISTRATORS § 82422

34 C.J.S. EXECUTORS AND ADMINISTRATORS § 82722

STATEMENT OF THE ISSUES

[1] Plaintiffs-Appellants present two issues for the Court's review:

1. Whether the District Court incorrectly decided that title to the Subject Minerals passed to Rohde during the 1962 judicial sale, which involves several questions of law:
 - a. Were the Subject Minerals reserved to the Estate by operation of law?
 - i. Did the Executor's Deed reserve the Subject Minerals to the Estate by reference to the County Court's order authorizing the sale?
 - ii. Was the Executor's sale of the Subject Minerals in excess of its authority and was the County Court's approval of the sale of the Subject Minerals in excess of its jurisdiction?
 - b. Did the District Court err by nullifying the Amended Confirmation Order in this collateral proceeding?
 - c. Did the District Court err when it determined that this quiet title action is barred by the statute of limitations in N.D.C.C. § 30-24-13 (1959)?
2. Whether the District Court erred in granting summary judgment to Lakeside State Bank due to being time barred since Lakeside State Bank's misrepresentations or inadequate disclosures resulted in the action being timely by the Plaintiffs.

STATEMENT OF THE CASE

[2] The Plaintiffs and their predecessors have believed for over fifty years that they were the owners of a one-half mineral interest in Mountrail County, North Dakota, to wit:

Township 151 North, Range 92 West, 5th P.M.

Section 5: SE ¼

Section 8: NE ¼

(“Subject Minerals”). The actions taken by the Plaintiffs based on their believed ownership, such as previously leasing the Subject Minerals, were a result of a 1962 County Court’s order that conveyed the surface estate of the above-described property (“Surface”) from the Estate of Olaf Naasset (“Estate”) to Gilbert Rohde (“Rohde”). Whether or not that 1962 order reserved the Subject Minerals in a judicially supervised probate sale of the Surface is at the heart of the dispute in this case.

[3] The Plaintiffs, George Seccombe, Barbara Treska, Erik Naasset, Helge Naasset, Astri Holst, Irene Markle, and Alice Nasset (collectively “Nasset Heirs”), are the successors of the devisees of Olaf Nasset and initiated this suit in order to determine ownership of the Subject Minerals. Slawson Exploration Company, Inc. (“Slawson”) and Alameda Energy, Inc. (“Alameda”) are leasehold and mineral interest owners, respectively, that resulted from buying leases and minerals from the Nasset Heirs.

[4] The Defendants are parties that claim to have received a mineral interest through Rohde subsequent to the 1962 conveyance of the Surface from the Estate. The Bradley C. Rohde Living Trust dated June 22, 2010, the Anita Rohde Living Trust UDT October 8, 2009, the Dennis Rohde Living Trust UDT October 8, 2009, Gary Rohde, Bradley Rohde, and Dennis Rohde (“Rohde Defendants”) are all successors to Rohde. Northern Oil and Gas, Inc. (“Northern Oil”) and Ryan Family Mineral Partnerships, S. Reger Family Mineral Partnership, Kootenai Resources Corporation, Summerfield C. Baldrige, and Montana Oil Properties, Inc. (“Montana Defendants”) all claim leasehold interests, including overriding royalty interests, in the Subject Minerals through the Rohde Defendants. Lakeside State

Bank (“Lakeside”) was the Executor of the Estate and issued an Executor’s Deed (“Deed”) and Amended Executor’s Deed (“Amended Deed”) upon the County Court’s proper following of the process for the sale of real estate and the authority granted to the County Court by the statutes then in place. The parties now dispute whether the Subject Minerals were effectively reserved in that judicially supervised probate in 1962 when only the Surface was sold to Rohde from the Estate.

[5] The District Court granted summary judgment in favor of the Defendants on the issue of title to the Subject Minerals and this appeal is taken partially therefrom. The remainder of the appeal by the Nasset Heirs is taken from the District Court’s order granting summary judgment in favor of Lakeside in the infancy of the suit.

STATEMENT OF THE FACTS

[6] The Nasset Heirs hereby incorporate by reference Slawson and Alameda’s “Statement of Facts” portion of their appellant brief, ¶¶ 8–22.

[7] In addition to incorporating by reference Slawson and Alameda’s factual summary, the Nasset Heirs hereby put forth relevant facts related to Lakeside’s motion for summary judgment and the District Court’s order granting that motion.

[8] Lakeside, acting as executor for the estate, negotiated a sale of the Surface to Gilbert Rohde, and was represented by attorney Quentin R. Schulte throughout the administration of the Estate. (Nasset’s App’x D—F)¹. The original heirs of Olaf Nasset intended to retain a one-half interest in the Subject Minerals. *Id.* The original heirs of Olaf Nasset believed that Lakeside retained a one-half interest in the Subject Minerals for the Estate. *Id.*

¹ To distinguish from Slawson and Alameda’s Appendices, those Appendices will be referred to as “[Slawson’s [Appendix Letter]],” and the Nasset Heirs’ Appendices will be referred to herein as “[Nasset’s [Appendix Letter]].”

Lakeside misrepresented or failed to adequately disclose pertinent information relating to the settlement of the Estate, namely the problems Lakeside created in retaining an interest in the Subject Minerals. *Id.* The original heirs and Nasset Heirs relied on Lakeside's misrepresentations or inadequate disclosures, and believed they owned a one-half interest in the Subject Minerals. *Id.* Upon learning of the problems associated with their interest in the Subject Minerals, the Nasset Heirs timely brought this action against Lakeside. *Id.*

STANDARD OF REVIEW

[9] In determining whether summary judgment was appropriately granted, this Court views “the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record.” *Wenco v. EOG Resources, Inc.*, 2012 ND 219, ¶ 8, 822 N.W.2d 701 (citing *Arndt v. Maki*, 2012 ND 55, ¶ 10, 813 N.W.2d 564). “On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law.” *Id.* The Court reviews questions of law de novo. *In re Estate of Conley*, 2008 ND 148, ¶ 15, 753 N.W.2d 384.

ARGUMENT

[10] There are two issues on appeal: (1) whether the District Court incorrectly decided that title to the Subject Minerals passed to Rohde during the 1962 judicial sale, and (2) whether the District Court erred in granting summary judgment to Lakeside State Bank because the Nasset Heirs' claims were barred even though Lakeside State Bank's misrepresentations or inadequate disclosures resulted in the action being timely by the Plaintiffs.

I. The district court's order quieting title in the Rohde Defendants was erroneous.

[11] For the sake of brevity and in an effort to avoid using the Court's time duplicitously, in relation to the first issue, and the several legal questions associated therewith, the Nasset Heirs hereby join each and every argument made by Plaintiffs-Intervenors and Appellants Slawson Exploration Company, Inc. and Alameda Energy, Inc. (collectively "Slawson") and incorporate the same by reference herein.

II. The district court erred in granting Lakeside's motion for summary judgment.

[12] The district court prematurely granted Lakeside's motion for summary judgment when it was granted prior to any discovery being conducted and prior to a scheduling order. Further, the district court's decision on the breach of fiduciary duty claim against Lakeside should not have been in Lakeside's favor because the Nasset Heirs timely brought their action after discovering misrepresentations and inadequate disclosures on the part of Lakeside.

a. The Nasset Heirs' claim against Lakeside was not barred by N.D.C.C. § 30-24-13 (1959) or § 30.1-21-05 (1973).

[13] The Nasset Heirs' claims against Lakeside were timely brought and Lakeside's motion for summary judgment should not have been granted. Generally, and under the current probate code, the rights of successors and of creditors against a personal representative for breach of fiduciary duty are barred unless commenced six months after the closing statement. N.D.C.C. § 30.1.21-05. However, the statute provides for an exception for a successor or creditor to make claims against a personal representative for "fraud, misrepresentation, or inadequate disclosure related to the settlement of the estate" and no limitation is placed on such claims. *Id.* In the more likely event that the 1959

version of the statute applies, actions for the recovery of property sold by an executor have a limitations period of three years or “within three years from the discovery of the fraud *or other ground upon which the action is based.*” N.D.C.C. § 30-24-13 (1959) (Emphasis added) (*see* Slawson’s N.D.R.App.P. 28(g) Addendum). The limitations period did not start to run until just prior to the commencement of this action and, despite that this action was not for a “recovery” of the Subject Minerals as incorrectly construed by the District Court and as required under the statute, it was brought timely thereafter.

[14] Under either statute discussed above, Lakeside misrepresented or failed to adequately disclose information relating to retention of the one-half interest in the Subject Minerals that was only discovered just prior to the commencement of the action by the Nasset Heirs. (Nasset’s App’x D—F). Lakeside, acting as executor for the estate, first petitioned the County Court for the sale of the Surface and then went through the other legal requirements to proceed with the sale to Gilbert Rohde. (Slawson’s App’x F—O). The heirs of Olaf Nasset intended to retain a one-half interest in the Subject Minerals. (Nasset’s App’x D—F).

[15] Lakeside was aware, or should have been aware, of the intentions of the original heirs to the Estate of Olaf Nasset to retain a one-half interest in the Subject Minerals. This is evidenced by the Petition for Sale of Real Estate, Notice of Hearing Petition for Order of License to Sell Real Estate, Published Notice of Hearing, Order of License to Sell Real Estate, Notice of Private Sale of Real Estate, Published Notice of Sale, and Gilbert Rohde’s Bid. (Slawson’s App’x F—L).

[16] Lakeside signed documentation, including the Executor’s Deed, which failed to even mention the minerals. (Slawson’s App’x O). Lakeside then attempted to correct its

error by obtaining an Amended Confirmation Order and subsequently unilaterally signing an Amended Executor's Deed. (Slawson's App'x P, Q). The heirs of Olaf Nasset's estate were led to believe that Lakeside correctly retained a one-half interest in the Subject Minerals for the Estate of Olaf Nasset, and relied on this information. (Nasset's App'x D—F). As a result of Lakeside's misrepresentation or inadequate disclosure, the heirs of Olaf Nasset's estate were unaware there may be an issue with their ownership of the mineral interest until just prior to bringing this action. *Id.* This action was timely brought by the Nasset Heirs upon learning of the title issues created by Lakeside.

[17] The errors and breaches of fiduciary obligations by Lakeside caused issues relating to the Nasset Heirs' ownership of the one-half interest in the Subject Minerals and, due to the District Court's December 11, 2017, Order quieting title in the Rohde Defendants, has prevented them from leasing or selling the Subject Minerals now or in the future. (Slawson's App'x C). The Nasset Heirs sought a revision of the Executor's Deed and also relief from Lakeside for breach of fiduciary duty. *See* Dkt. ID #1, pp. 9-10. Plaintiffs would not have needed to seek revision of the Executor's Deed had Lakeside not breached its duty. Lakeside's misrepresentations or inadequate disclosures prevented the original heirs of Olaf Nasset from bringing a claim against Lakeside, and claims to correct its mistakes, years ago when they were still alive. (Nasset's App'x D—F).

[18] At the District Court, Lakeside relied on *Hansen v. First Am. Bank & Trust of Minot*, 452 N.W.2d 770 (N.D. 1990) in claiming N.D.C.C. § 30.1-21-05 barred the Nasset Heirs' action against Lakeside. *See* Dkt. ID #10, p. 4. However, this Court did not determine whether § 30.1-21-05 barred the plaintiff's action in *Hansen*, and did not address

the exceptions contained in § 30.1-21-05.² *Id.* The only issue on appeal in *Hansen* was whether the defendant waived its statute of limitations argument by not pleading it as an affirmative defense in the initial answer. *Hansen*, 452 N.W.2d at 771.

[19] In *Baptist Hosp. v. Carter*, 658 So. 2d 560 (Fla. Dist. Ct. App. 3d Dist. 1995), on the other hand, a Florida appellate court interpreted a statute that required claims against the decedent’s estate, the personal representative, and the beneficiaries to be brought within two years after the death of a person. The court found a triable issue as to the estate’s estoppel to claim the limitations defense where the decedent’s survivor misled a hospital into believing that the decedent left no estate from which to collect outstanding bills. *Baptist Hosp.*, 658 So. 2d at 562-63. The court determined “that fraud or misrepresentation which misleads a claimant into a justified failure to assert his rights bars reliance on a statute of limitations.” *Id.* at 563 (emphasis added). Similarly, a triable issue exists as to whether Lakeside misrepresented or failed to adequately disclose pertinent information relating to the settlement of the Estate of Olaf Nasset—namely the problems Lakeside created by failing to adequately disclose its own errors to the original heirs of the Estate. (Nasset’s App’x D—F). Based on the affidavits submitted by the Nasset Heirs and exhibits attached thereto, it is clear that Lakeside either misrepresented to the original heirs, or failed to disclose to them, information that would have put them on notice of any potential title problems related to the Subject Minerals. *Id.*

[20] Neither “misrepresentation” nor “inadequate disclosure” are defined in N.D.C.C. § 30.1-21-05. A misrepresentation need not be intentionally false to create liability in North

² As the District Court noted, the analysis under N.D.C.C. § 30-24-13 (1959) and § 30.1-21-05 are the same regarding misrepresentation or inadequate disclosures. (Nasset’s App’x C at p. 9).

Dakota. *Bourgeois v. Montana-Dakota Utils. Co.*, 466 N.W.2d 813 (N.D. 1991) (holding that summary judgment was improper on plaintiff’s claim of negligent misrepresentation because question of fact existed whether the defendant used reasonable care in forming and communicating the project without disclosing a material fact). There is also no requirement that the defendant had to know the information was false in making a misrepresentation. *Id.* at 818. Here, though, the negligent misrepresentation was caused by a question of fact as to whether the errors made were communicated at all to the original heirs of the Estate, as is apparent by several of the exhibits filed with the Nasset Heirs’ original response to Lakeside’s motion for summary judgment. (Nasset’s App’x D—F).

[21] Lakeside’s action of signing the Executor’s Deed without any mention of a reservation of the Subject Minerals, while knowing the heirs intended to retain a one-half interest, was a breach of its fiduciary duty. Lakeside then attempted to correct its mistake by unilaterally signing an Amended Executor’s Deed and misrepresenting to the heirs of the estate that they correctly retained a one-half interest in the Subject Minerals. (Slawson’s App’x Q). The original heirs, and later the Nasset Heirs, relied on Lakeside’s representations and actions. (Nasset’s App’x D—F). Lakeside possessed the expertise in administering estates and dealing with land transactions—certainly more expertise than the heirs of Olaf Nasset. *Id.* Lakeside should have known that unilaterally attempting to correct a deed may cause problems. *Hanson v. Walker*, 259 P.2d 242, 245 (Kan. 1953). Instead, it acted unreasonably in administrating the estate or improperly relied on the ill advice of legal counsel. *Matter of Estate of Thomas*, 532 N.W.2d 676, 686 (N.D. 1995) (holding that a “personal representative may not avoid liability for breach of his fiduciary duty to the heirs of the estate by asserting a blanket defense of reliance upon counsel” and

a personal representative's fiduciary obligations related to the sale of estate property "are personal, and cannot be delegated to his attorney"). Lakeside then misrepresented or failed to adequately disclose that there may be problems with the ownership of the Subject Minerals due to their own mistakes. (Nasset's App'x D—F). Therefore, summary judgment in favor of Lakeside was inappropriate because the Nasset Heirs' claims were brought in a timely manner.

b. Lakeside should be held liable to the Nasset Heirs for its misrepresentations or inadequate disclosures.

[22] Should this Court affirm the district court's ruling on the title issues in this case, Lakeside is liable to the Nasset Heirs for their losses due to its misrepresentation or inadequate disclosure of the errors that were made. "An executor or administrator is liable for the loss resulting from an unauthorized sale of real estate." 34 C.J.S. EXECUTORS AND ADMINISTRATORS § 395 (*citing Burnham v. Kelley*, 299 Mich. 452, 300 N.W. 127 (1941)). Further, "where a sale of property results in a loss to the estate because of a breach of trust by the personal representative, the liability of the representative for the loss is not discharged by the mere fact that the sale was reported to the court and approved." *Id.* at § 824 (*citing Rea v. Smith*, 172 Miss. 238, 159 So. 845 (1935); *Adams v. Kennard*, 122 Or. 84, 253 P. 1048 (1927)). And, "devisees are not estopped from questioning an executor's power of sale if they permitted the sale to proceed because the executor was entitled to sell the real estate under a court order." *Id.* (*citing In re McGovern's Estate*, 77 Mont. 182, 250 P. 812 (1926)). Lastly, "[t]he personal representative is chargeable with a loss that results from a failure in any substantial respect to follow the requirements of the law as to the manner of making the sale or for failure to exercise ordinary skill, prudence, and caution, or breach of fiduciary duty to an heir, in making the sale." *Id.* at § 827 (citations omitted).

[23] Under the above authorities, it is clear that Lakeside, as executor of the Estate, is liable for the losses suffered by the Nasset Heirs if the title decisions by the District Court are upheld. The sale of the minerals was unauthorized despite the sale being reported to the court and receiving approval. (Slawson's App'x F—K, M, N). As successors of the devisees of Olaf Nasset, the Nasset Heirs should not be estopped from questioning the sale since it was done under court order. (Slawson's App'x F, I; Nasset's App'x D—F). And, Lakeside's substantial failure to exercise the ordinary skill, prudence, and caution as executor, and its breach of fiduciary duty to the heirs in making the sale, result in it being liable to the Nasset Heirs. (Slawson's App'x C, D, F—R).

[24] North Dakota law permits the statute of limitations to be tolled in cases of fraud and misrepresentation. An action is timely if it is commenced within six years after the person entitled to bring suit discovers the claim. N.D.C.C. § 28-01-16(6). "There is no limitation upon the time for discovery of the cause of action." *Phoenix Assurance Co. of Canada v. Runck*, 366 N.W.2d 788, 791 (N.D. 1985). The North Dakota Supreme Court has "held that where there is doubt as to which of two limitations statutes is applicable, the longer term applies." *Id.* The Nasset Heirs brought their claims within the timeframe allowed based on when they discovered Lakeside's misrepresentations or inadequate disclosures.

CONCLUSION

[25] For the foregoing reasons, the District Court incorrectly determined in its March 26, 2013, Order that Lakeside was entitled to summary judgment because the statute of limitations had expired and because the Nasset Heirs had not presented evidence of misrepresentation or inadequate disclosures by Lakeside. This is especially true in the event this Court affirms the district court's ruling on the title issues in this case. The Nasset

Heirs respectfully ask this Court to reverse the District Court's December 11, 2017, Order and Judgment entered January 17, 2018, regarding title to the Subject Minerals. The Nasset Heirs also respectfully ask this Court to reverse the District Court's March 26, 2013, Order and hold that there are questions of fact to be resolved on trial.

Dated this 12th day of April, 2018.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This Brief contains 3,278 words, excluding the parts of the brief exempted by N.D.R.App.P. 32(a)(8)(A). I certify that this Brief complies with the typeface requirements of N.D.R.App.P. 32 and the type style requirements of that rule because it has been prepared in a proportionally spaced typeface using a Microsoft Word, Times New Roman, 12-point font.

By: /s/ Benjamin W. Keup
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AFFIDAVIT OF SERVICE

Annette Kirschenheiter, being first duly sworn, deposes and says that on the 12th day of April, 2018, she forwarded a copy of the forgoing:

1. Brief of Appellants George Seccombe; Barbara Treska; Erik Naasset; Helge Naasset; Astri Holst; Irene Markle; and Alice Nasset; and
2. Appendix to Brief of George Seccombe; Barbara Treska; Erik Naasset; Helge Naasset; Astri Holst; Irene Markle; and Alice Nasset

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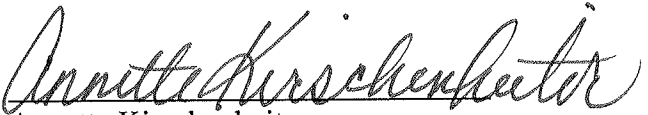
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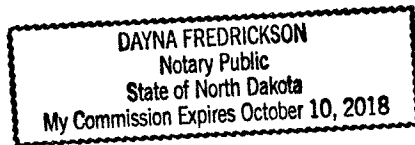
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Dated this 12th day of April, 2018.


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Subscribed and sworn to before me this 12th day of April, 2018.




Notary Public