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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Cheryl Reese, Plaintiff and Appellant, vs. Tia Reese-Young, Defendant and Appellee.	**SUPREME COURT NO. 20190202** Civil No. 31-2017-CV-00105

APPEAL OF AMENDED JUDGMENT DATED MAY 31, 2019 AND THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DATED FEBRUARY 27, 2019

NORTH CENTERAL JUDICIAL DISTRICT
HONORABLE DOUGLAS MATTSON PRESIDING

APPELLEE BRIEF

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A. Standard of Review

[¶1] The Court reviews summary judgment de novo on the record. "We review summary judgment de novo on the record." *Halvorson v. Starr*, 2010 ND 133, ¶ 4, 785 N.W.2d 248, 250 (citing *Schmidt v. Gateway Community Fellowship*, 2010 ND 69, ¶ 7, 781 N.W.2d 200). The parties agree there are no genuine issues of material fact involving the interpretation of the Deed. The sole issue is whether the Deed reserving a life estate in Cheryl included the exclusive right for her to receive the royalty and bonus payments from the oil and gas removed from property to Tia's exclusion. Summary judgment is particularly appropriate in contract cases as the interpretation of a contract is a question of law for the Court, not one of fact for the fact finder. "The interpretation of a written contract generally is a question of law for the court, making summary judgment an appropriate method of disposition in contract disputes." *Burk v. State by & through Bd. of Univ. & Sch. Lands*, 2017 ND 25, ¶ 9, 890 N.W.2d 535, 539 (citing *Myaer v. Nodak Mut. Ins. Co.*, 2012 ND 21, ¶ 10, 812 N.W.2d 345).

B. The Court should affirm the District Court's order granting summary judgment because the Deed is clear and unambiguous, and as a matter of law, does not explicitly reserve to Cheryl the income from the production of oil and gas

[¶2] At its core, this is a contract law case. The Court does not need to look beyond the four corners of the Deed. "The primary purpose in construing a deed is to ascertain and effectuate the grantor's intent." *Nichols v. Goughnour*, 2012 ND 178, ¶ 12, 820 N.W.2d 740, 744 (citing *Mueller v. Stangeland,* 340 N.W.2d 450, 452 (N.D.1983)).

Like any other contract, deeds involving mineral interests "are subject to general rules governing contract interpretation, … ." *Nichols* at ¶ 12. When reviewing a contract, the parties' intent must be determined from the writing alone when possible. "The intent must be ascertained from the writing alone, if possible." *Johnson v. Shield*, 2015 ND 200, ¶ 7, 868 N.W.2d 368, 371 (citing N.D.C.C. § 9–07–04). *See also* N.D.C.C. § 9-07-02 (stating, "The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity.") When a deed is clear and unambiguous, the Court cannot resort to extrinsic evidence to rewrite its terms. "When the language of a deed is plain and unambiguous and the parties' intentions can be ascertained from the writing alone, extrinsic evidence is inadmissible to alter, vary, explain, or change the deed." *Gawryluk v. Poynter*, 2002 ND 205, ¶ 9, 654 N.W.2d 400, 403 (citing *Minex Resources, Inc. v. Morland,* 467 N.W.2d 691, 696 (N.D.1991)).

[¶3] Because reservations in property conveyances, like deeds, operate to carve out an interest in the property, the law requires they be clearly expressed. The burden to clearly express a reservation in a deed falls on the grantor. "The general rule is that because a grantor is presumed to have made all the reservations or exceptions he intended to make the reservations must be clearly expressed in the deed." *Royse v. Easter Seal Soc. for Crippled Children & Adults, Inc. of N. Dakota*, 256 N.W.2d 542, 545 (N.D. 1977). In any conveyance, reservations must be explicit, they cannot equivocate or leave room for doubt. "[R]eservations of property in a deed should be set forth with the same prominence as the property granted and should be so explicit as to leave no room for doubt." *N. Shore, Inc. v. Wakefield*, 530 N.W.2d 297, 300 (N.D. 1995) (citing *Royse* at 545).

[¶4] This makes sense. By the very nature of a reservation, if it is uncertain, it fails as a matter of law because something that is uncertain cannot be explicit. As the Court explained in *N. Shore, Inc.*, "In order to promote certainty from the four corners of a deed and from the record title, our rules for construing deeds thus express a preference for clear and explicit reservations or exceptions in a deed." *Id*. at 300. Cheryl does not argue that the Deed clearly and explicitly created a reservation in her favor for the oil and gas proceeds from the property. Instead, Cheryl urges this Court to adopt a legal doctrine that is not law in North Dakota in order to manufacture the needed reservation in her favor that is absent from the clear and unambiguous terms of the Deed.

[¶5] The Court would open a can of worms, and call into question countless recorded deeds, by adopting Cheryl's position that the open mines doctrine now applies in North Dakota to trump the actual language in the Deed, which the parties agree is clear and unambiguous. If the parties had intended for Cheryl to receive the proceeds from the oil and gas during her lifetime, rather than relying on the open mines doctrine – a doctrine that has never been adopted in North Dakota, and even accepting Cheryl's argument, was not in place when the Deed was executed in 2008 – North Dakota law required the parties to clearly and unambiguously make that reservation in the Deed. They did not.

[¶6] An example of such explicit language creating a reservation in the life tenant of the oil and gas royalties during their lifetime is found in another deed creating a life estate, which Cheryl cited in her discovery responses and deposition testimony, the "Quit Claim Deed – Minerals" from Fred Whitney to his children recorded at document no. 367272 ("Whitney Deed"). In the Whitney Deed, Fred created a life estate in

himself and explicitly reserved the royalties in the property, stating in the reservation clause: "PROVIDED, however, Grantor reserves unto himself for and during his life, *the exclusive possession, use, and enjoyment of the royalties, rents and profits of the property interest described herein*." Doc. ID #60 (emphasis added).[1] Cheryl claims in her discovery responses that the Whitney Deed is what Dennis wanted to do. *See* Doc. ID #61 at Response 6(c). Cheryl testified that Dennis was trying to "set up things" like the Whitneys. Doc. ID #62, *Cheryl Depo*. at 16-17:13-1; 17-18:5-1. That is not, however, what Dennis did in the Deed. There is no clear and explicit reservation in the Deed reserving the royalties to Cheryl like the language in the Whitney Deed.

[¶7] It is undisputed that the Deed does not specify how the oil and gas royalties from the property would be split between Cheryl and Tia. Because the parties have not agreed otherwise, and the Deed fails to specify how the royalties should be split, any bonus, royalty and all income derived from actual production of oil and gas is corpus that must be retained for the remainderman, Tia, with Cheryl entitled only to the interest income generated by the corpus. The District Court was correct in holding that Tia is entitled to the bonus, royalty, and income derived from the production of oil and gas from the property, held in trust as corpus, by Cheryl.

C. The open mines doctrine is not law in North Dakota, and would turn well-established North Dakota law on its head

[¶8] Cheryl admits that the open mines doctrine is not law in North Dakota. This Court should decline her invitation to make new law and adopt a doctrine that is not

[1] The Whitney Deed was not included in Cheryl's appendix, and under N.D.R.App.P. 10(a) and 28(f), Tia cites to its docket number in Odyssey.

law in North Dakota. "It is the duty of the court to interpret, not to make, laws." *State ex rel. Langer v. Crawford*, 36 N.D. 385, 162 N.W. 710, 720 (1917). Even if the Court feels an outcome is inequitable, the Court is not a policymaking body, and the language in the Deed controls. "Both the district court and Doyle make good arguments; however, the function of the courts is to interpret law, not to make law." *Doyle ex rel. Doyle v. Sprynczynatyk*, 2001 ND 8, ¶ 16, 621 N.W.2d 253 (citing *Fetzer v. Minot Park Dist.*, 138 N.W.2d 601, 604 (N.D. 1965) (stating, "holding we cannot legislate, regardless of how much we might desire to do so or how worthy an argument; if the rule is wrong, the legislature has ample power to change it, but [the] duty of the judiciary is to enforce the law as it exists.")) The Court should not legislate and make new policy here by adopting the open mines doctrine.

[¶9] There is nothing in North Dakota law, including case law and the statutes controlling the relationship between life tenants and remaindermen, *see* N.D.C.C. §§ 47-02-33 and 47-04-22, indicating a policy or intent by our Legislature to follow or adopt the open mines doctrine. *Cf. Estate of Albritton v. U.S.*, 2001 WL 1843696, *2 (M.D. La. Dec. 10, 2001) (citing Article 552 of the Louisiana Civil Code, which established the open mines doctrine in Louisiana). What's more, because the Legislature has addressed the duties and relationship between life tenants and remaindermen, which are at issue here, common law cannot be considered. *See* N.D.C.C. § 1-01-06 (stating, "In this state there is no common law in any case where the law is declared by the code.") *See also State v. Coutts*, 364 N.W.2d 88, 92 (N.D. 1985) (stating, "Where a statute controls, we do not consider the common law.") (citing N.D.C.C. § 1–01–06, *State v. Woodworth*, 234 N.W.2d 243, 247 (N.D.1975); and *In re*

Estate of Jensen, 162 N.W.2d 861, 878 (N.D.1968)). The open mines doctrine must be rejected because it's common law that contradicts the statutes governing the relationship between life tenants and remaindermen.

[¶10] The place for Cheryl's argument advocating for adopting the open mines doctrine at the expense of statute and well-settled case law involving the interpretation of deeds and other conveyances, is the Legislature, not the courts. Adopting the open mines doctrine contravenes the law applied by the Court respecting the doctrine of waste. This bedrock rule of North Dakota property law controlling the relationship between life tenants and remaindermen is that the life tenant cannot do anything that decreases the value of the property subject of the life estate to the remainderman's detriment. Allowing Cheryl to receive the oil and gas royalties from the property to Tia's detriment runs afoul of this rule as the property's value substantially decreases when the oil and gas interests are removed.

[¶11] In *Farm Mortg. Loan Co. v. Pettet*, the Court noted that the concept of waste applied to situations where parties have an interest in the same property. "We are convinced from an examination of our statutes and a consideration of their history, that the Legislature has used and understood the term 'waste' in its common-law and historical meaning of 'spoil, or destruction in houses, gardens, trees and other corporeal hereditaments,' of 'some definite physical injury,' ... ." *Farm Mortg. Loan Co.*, 200 N.W. 497, 500 (N.D. 1924) (citing 2 Black Com. 281). *See also Vogel v. Marathon Oil Co.*, 2016 ND 104, ¶ 31, 879 N.W.2d 471 ("Under the common law doctrine of waste, this Court has said that 'waste may be defined as an unreasonable or improper

use, abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession, which results in substantial injury.'")

[¶12] Cheryl, as the life tenant, has a duty to preserve the property's value for the benefit of Tia, the remainderman. This is a statutory duty. "The owner of a life estate may use the land in the same manner as the owner of a fee simple, *except that the owner of a life estate must do no act to the injury of the inheritance*." N.D.C.C. § 47-02-33 (emphasis added). Any act by Cheryl that decreases the property's value – such as removing the property's most valuable asset, the oil and gas, and enriching herself by the same – is prohibited. The open mines doctrine runs roughshod over statute and case law in this area, turning both on their heads. "It is the ultimate rule that the life tenant or the tenant for years is not privileged to take oil and gas, nor has he the power to create such privilege in others by way of lease of the land for oil and gas purposes." *Eide v. Tveter*, 143 F.Supp. 665, 671 (D.N.D. 1956) (citing Summers, Oil and Gas, Vol. 2, Sec. 223). If Cheryl, as the life tenant, cannot take the oil and gas from the property under North Dakota law, likewise, she cannot receive the proceeds from someone else removing the oil and gas to the detriment of the remainderman, Tia.

[¶13] The holding in *Ruggles v. Sabe*, and its application of the North Dakota statutes controlling the relationship between a life tenant and remainderman, is on point. *See Ruggles*, 2003 ND 159, ¶¶ 3 – 6, 670 N.W.2d 356 (discussing the application of N.D.C.C. §§ 47-02-33 and 47-04-22 to the relationship between, and duties owed by, the life tenant to the remainderman). In *Ruggles*, the Court held the life tenant, Sabe, committed waste when he removed an asset from the property, an airplane hangar, which decreased the property's value. *Id.* at ¶¶ 5-6. Like the life tenant removing the

hangar in *Ruggles*, Cheryl would be decreasing the property's value to Tia's detriment if she's allowed to keep the royalties from the property's oil and gas interests.

[¶14] In *Wilkinson v. Bd. of Univ. & Sch. Lands,* the Court recognized that mineral interests in the oil-producing Bakken formation have value. *Wilkinson*, 2017 ND 213, ¶ 24, 903 N.W.2d 51. The Montana Supreme Court explained that selling oil and gas interests from property permanently decreases the property's value. In *State ex rel. v. Dickgraber v. Sheridan*, using the same rationale as *Ruggles*, the Court relied on the bedrock law controlling the life tenant and remainderman relationship. "A tenant for life … cannot do anything which has the effect of permanently diminishing the value of the future estate. Cases on this point are too numerous to cite." *Dickgraber*, 254 P.2d 390, 402 (Mont. 1953) (citations omitted). *Cf.* N.D.C.C. § 47-02-33.

[¶15] When minerals are removed from property, the value of the real estate is destroyed. "We have already seen that mineral in place is land; that when it is taken therefrom and changed into personal property, real estate has to that extent been destroyed." *Id.* (quoting *McLaren Gold Mines Co. v. Morton*, 224 P.2d 975, 981 (Mont. 1950)). In *McLaren Gold Mines Co.*, the Court concluded that royalty payments must be treated as principal owed to the remainderman, not the life tenant. "Such rents or royalties are principal, and not income, and must be so treated in the ascertainment of the respective interests of life tenants and remaindermen." *McLaren* at 981. *See also Allred v. Biegel*, 219 S.W.2d 665, 667 (Mo. Ct. App. 1949) (stating, "Things, part of the land, wrongfully severed by a life tenant, become personality but belong to the owner of the next vested estate of inheritance, not the life tenant.") These cases

comport with *Ruggles*, and the legal principle that the life tenant has a duty not to commit waste or engage in acts decreasing the property's value.

[¶16] When you remove a valuable asset from property subject to a life estate, whether it's an airplane hangar or oil and gas interests, you diminish the property's value for the remainderman. That is, in part, why North Dakota law requires reservations in property conveyances, particularly ones creating a life estate, be clearly and explicitly stated. "Reservations of property in a deed should be set forth with the same prominence as the property granted and should be so explicit as to leave no room for doubt." *N. Shore* at 300. The Deed does not explicitly state that Cheryl is entitled to the royalties during her lifetime.

[¶17] The importance of clearly and explicitly stating reservations in a deed creating a life tenancy as related to the statutory duties a life tenant owes the remainderman also finds support in the North Dakota Mineral Title Standards. Unless the remainderman and tenant clearly express the allocation of royalties and rents in the granting document, the royalties and bonus are treated as corpus belonging to the remainderman.

> However, the instrument creating a life estate defines the respective rights of the parties and may confer to the life tenant additional powers, such as an express right to develop minerals or a general grant of authority to commit waste or consume the corpus of the estate. Scholarly authorities refer to these general grants as life tenancies "without impeachment for waste."

NDMTS 7-03.1 (NDMTS 12/89, as amended in 2017). The Deed did not create or confer a life tenancy to Cheryl without impeachment for waste. Nowhere in the Deed does that language appear. Lacking this language, the NDMTS recognizes the life tenant cannot commit waste and consume the corpus created in the remainderman's favor.

[¶18] The treatise, *The Law of Trusts and Trustees*, echoes the reasoning of the respective courts in *Ruggles*, *Dickgraber*, and *Allred*, and the NDMTS.

> If a trustee owning wasting property credits to the income account of the trust the entire receipts from the property, the income beneficiary will receive large benefits, but the remainderman will find a great shrinkage or an entire dissipation of the value of the trust property when it is to be turned over to him.

Bogert, The Law of Trusts and Trustees, *Proceeds of wasting property*, § 827. *See also Magruder v. Magruder*, 525 S.W.2d 400, 407 (Mo. Ct. App. 1975) (stating, "The law is clear that in a limited sense, the life tenant [] holds the corpus of the life estate in trust for the remaindermen with the fiduciary obligation not to commit waste thereto and preserve the property for ultimate transmission to the remaindermen, … .") This same principle is cited in Lowe's Oil and Gas nutshell.

> Absent such an agreement, however, the common law of most states classifies royalty and bonus payments as part of the corpus of the estate, with the life tenant entitled only to the interest earned on the payments and the remainderman entitled to take the principal when he inherits the estate.

John S. Lowe, *Oil and Gas in a Nutshell* 107 – 08 (4th Ed. 2003). This finds support in numerous cases. *See e.g.*, *Vaughn v. Boerckel*, 20 So.3d 443, 445 (Fla. Dist. Ct. App. 2009) (stating, "A life tenant who commits an unreasonable act which results in damage to the corpus of the property or the remaindermen may be liable for damages"), *cf. Ruggles* at ¶ 3, *supra*, (stating, "Accordingly, [the remainderman] has a legal remedy against [the life tenant] for any decrease in value of her interest sustained as a result of the building's removal.") *See also Hammons v. Hammons*, 327 S.W.3d 444, 451 (Ky. 2010) (stating, "A life tenant has sometimes been referred to as a trustee, quasi-trustee, or fiduciary in relation to the remainderman, but only in the sense that, like trustees, life tenants have a duty not to injure or dispose of the corpus of the estate to the

detriment of the remainderman.") Cheryl has a statutory duty to preserve the property's value for Tia's benefit by not profitting from the property's most valuable asset.

[¶19] If this Court adopts the open mines doctrine as law in North Dakota, it would run afoul of the statutory duties life tenants owe remaindermen to preserve the value of the property and protect it from waste absent a clear and express reservation in the granting document to the contrary. There are no reservations in Cheryl's favor clearly and explicitly stated in the Deed. Because the parties have not otherwise agreed, and the Deed fails to specify how the income is to be shared, any bonus, royalty and all income derived from production is corpus and must be retained for the remainderman, Tia. Cheryl is entitled only to the interest income generated by the corpus.

D. If the Court adopts the open mines doctrine, it should only apply prospectively, and to deeds executed *after* the Court's decision

[¶20] Cheryl concedes the open mines doctrine has never been law in North Dakota. "The North Dakota Supreme Court has not yet recognized the common law open mines exception to the doctrine of waste, … ." Appellant's Br. at ¶ 26. If North Dakota law does not yet recognize the open mines doctrine, it cannot be used retroactively to rewrite a clear and unambiguous Deed that was drafted in 2008. "Generally, we apply the law in effect when the cause of action arose." *Wilkinson* at ¶ 17 (citing *White v. Altru Health Sys.*, 2008 ND 48, ¶ 10, 746 N.W.2d 173). Thus, even if the Court adopts the open mines doctrine as new North Dakota law, it does not apply retroactively to 2008 when the Deed at issue was executed. Tia is still entitled to the oil and gas royalties as the remainderman because the open mines doctrine was not the law when the Deed was executed, or when the parties' claims arose. *See* e.g., *White* at ¶ 11

(stating, "Unless amendments to N.D.C.C. § 28-01-46 are retroactive, the district court should have used the date White's cause of action accrued in its analysis rather than the commencement date of the action.")

[¶21] If this Court does adopts the open mines doctrine, it should do so only for deeds executed prospectively after the date of its decision in this case. This allows parties notice of what the law is, and that the open mine doctrine applies when conveying interests in property. It also avoids the quagmire of calling into question deeds and other conveyances executed in the past, and applying the open mines doctrine retroactively.

[¶22] North Dakota courts "have used prospective application of decisions to avoid injustice 'in dealing with questions having widespread ramifications for persons not parties to the action.'" *Vetter v. N. Dakota Workers Comp. Bureau*, 554 N.W.2d 451, 454 (N.D. 1996) (quoting *Kitto v. Minot Park District*, 224 N.W.2d 795, 804 (N.D.1974)). In determining whether the Court should apply a new rule of state law retroactively or prospectively, the factors set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) apply. *See Vetter* at 454. Those factors are: (1) the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants relied, or by deciding an issue of first impression; (2) the Court weighs the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation; and (3) the Court weighs the inequity imposed by retroactive application, for where a decision could produce substantial inequitable results if applied retroactively, there is ample basis for avoiding

the "injustice or hardship" by a holding of nonretroactivity. *Id.* (quoting *Chevron*, 404 U.S. at 106-07) (internal quotations omitted).

[¶23] The *Chevron* factors support *prospective* application of the open mines doctrine. First, if the Court adopts the doctrine it is "overruling clear past precedent on which litigants may have relied" and "deciding an issue of first impression whose resolution was not clearly foreshadowed." Because it establishes a new principle of law in conflict with the statutes dealing with the life tenant and remainderman relationship, case law on the principle of waste, and North Dakota's Mineral Title Standards, the open mines doctrine should only be applied prospectively.

[¶24] Second, the purpose of the open mines doctrine, according to Cheryl, "is that a life tenant, who is given the beneficial enjoyment of land, is entitled to enjoy the land in the same manner as it was enjoyed before the creation of the life estate." Appellant's Br. at ¶ 34. Retrospective application of the open mines doctrine does little to further this purpose. That is, the purpose of the open mines doctrine has always been accomplishable in North Dakota. All that a grantor needed to do was explicitly state in the deed that the life tenant was entitled to all bonuses, royalties, and income derived from actual production on the land. Indeed, mineral reservations have successfully included such language for decades, including the Whitney Deed referenced by Cheryl.

[¶25] And, finally, while the purpose of the open mines doctrine is easily accomplished by other means, applying it retroactively has a largely inequitable result. Namely, overturning the principles of law that control the use of certain language respecting reservations, and the legal principle of waste with respect to a life tenant and remainderman, which have been in place for decades. Applying the open mines

doctrine retroactively would result in inequitable results for remaindermen that were intended to receive the corpus from production, but, by retroactive application of the open mines doctrine, will now lose a substantial amount of the royalties that were intended for, or already paid to, them. Applying the doctrine prospectively allows life tenants and remaindermen to make any adjustments to the conveyances controlling their relationship going forward. This hardship is amplified by the likelihood that numerous grantors are long since deceased, and to determine if their intent was in line with North Dakota's long-standing interpretation of mineral reservations, or in line with the open mines doctrine, invites litigation.

[¶26] The retroactive application of the doctrine in North Dakota changes the principle every mineral reservation drafter has relied on for decades. While changing that principle going forward is one thing, to hold that principle is no longer valid as applied to drafters who relied on it decades ago works to create a massive amount of injustice and unfairness. It has been a principle of law that when a mineral reservation is made, unless expressly stated otherwise, the life tenant is to retain any bonus, royalty, and all income derived from actual production in trust for the remainderman. Retroactive application of the open mines doctrine throws that out the window, and is unfair to every mineral reservation drafter, and remainderman, in North Dakota. The *Chevron* factors support prospective application of the open mines doctrine if the Court adopt it as law.

CONCLUSION

[¶27] Considering the foregoing, Tia respectfully requests that the Court reject Cheryl's argument regarding the open mines doctrine, and affirm the District Court's

Order and Amended Judgment holding that under the clear and unambiguous language in the Deed, she is entitled to the bonus, royalties, and income derived from the oil and gas produced from the property, to be held as corpus for her benefit.

Respectfully submitted this 23rd day of August, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 20 pages.

Dated this 23rd day of August, 2019.

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IN THE SUPREME COURT
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Cheryl Reese, Plaintiff and Appellant, vs. Tia Reese-Young, Defendant and Appellee.	**SUPREME COURT NO. 20190202** Civil No. 31-2017-CV-00105 **AFFIDAVIT OF SERVICE**

I hereby certify that on August 23, 2019, I served the following documents:

1. Brief of Defendant/Appellee

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Dated this 23rd day of August, 2019.

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