

**THE SUPREME COURT**

**STATE OF NORTH DAKOTA**

<b>TRACEY DECKER</b>	)	<b>COUNTY OF WILLIAMS</b>
	)	
<b>Appellant,</b>	)	<b>Supreme Court No: 20200014</b>
	)	<b>Case No. 53-2019-CV-01267</b>
<b>vs.</b>	)	<b>OAH File No. 2018-0510</b>
	)	
	)	<b>APPELLANT’S BRIEF TO THE</b>
<b>NORTH DAKOTA WORKFORCE</b>	)	<b>NORTH DAKOTA SUPREME</b>
<b>SAFETY INSURANCE FUND</b>	)	<b>COURT</b>
	)	
<b>Appellee,</b>	)	
	)	
<b>And</b>	)	
	)	
<b>CALFRAC WELL SERVICES CORP.,</b>	)	
	)	
<b>Respondent.</b>	)	

**ORDER ON DISTRICT COURT’S ORDER ON ADMINISTRATIVE APPEAL ENTERED ON DECEMBER 20, 2019, INDEX #66, APPEAL FROM DISTRICT COURT JUDGMENT ENTERED JANUARY 02, 2020, INDEX #72, WITH NOTICE OF ENTRY OF JUDGMENT SERVED JANUARY 22, 2020, INDEX # 77.**

**COUNTY OF WILLIAMS  
NORTHWEST JUDICIAL DISTRICT  
THE HONORABLE BENJAMEN J. JOHNSON**

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**1] STATEMENT OF ISSUE**

2] Does the greater weight of the evidence establish that Tracey Decker's April 17, 2015 work incident is a substantial contributing factor regarding his current lumbar back condition?

**3] STATEMENT OF THE CASE**

4] Appellant Tracey Decker filed a First Report of Injury with Appellee Workforce Safety and Insurance on May 13, 2015, claiming that, on April 17, 2015, he had stepped off a rig mat while carrying a chiksan joint on his shoulder and jarred his low back (APP 31). On June 8, 2015, WSI accepted Mr. Decker's claim for injury as a "displaced lumbar disc" (APP 35).

5] Three years later, on May 15, 2018, WSI issued a Notice of Decision Ending Benefits which told Mr. Decker that no further medical benefits would be paid on his claim after June 5, 2018 (APP 36). The Notice informed Mr. Decker that a medical records reviewer, Dr. Charles Burton, had determined that he had degenerative disc disease which had pre-existed his work injury and that his work injury had caused only a minor and temporary aggravation of that condition (Id.). Mr. Decker asked WSI to reconsider its decision and provided his claims adjuster with the July 14, 2014 and January 15, 2015 Functional Capacity Evaluations which showed his pre-injury ability to perform the very heavy labor required by Calfrac (APP 37; APP 38-48). As Mr. Decker explained it, "Please I just want to get fixed and return back to work." (APP 38). WSI's response was to issue an Order Denying Further Benefits (APP 49-54).

6] Mr. Decker challenged WSI's Order, and the issue of whether his work injury was a substantial contributing factor in his current low back condition was heard on May 28, 2019. At hearing, Mr. Decker relied on the records and opinions of his treating medical providers: Angela Bundy, PA-C; Stormy Jensen, NP; Patricia Grantham, MD; Kenneth Stein, DC; Jackie Johnsrud, DC; Nathan Deis, MD; Diego Allende, DO; Eugene J. Dolan, MD; John H. Patrisko, MD; and Amitabh Goswami, DO as well as WSI IME provider, Michael Bronshvag, MD. WSI relied on the opinion of its records reviewer, Charles Burton, MD. ALJ Lynn Jordheim issued Findings of Fact, Conclusions of Law and Order dated June 12, 2019 affirming WSI's denial of all further benefits (APP 57-68). Mr. Decker petitioned ALJ Jordheim for reconsideration, which was denied on August 2, 2019 (APP 69). Mr. Decker appealed to the District Court. The Honorable Benjamin J. Johnson, Judge of the District Court, affirmed ALJ Jordheim's decision by Opinion and Order dated December 20, 2019 (APP 70-83) and Judgment dated January 2, 2020 (App 84). Mr. Decker now appeals to this Court.

7] **STATEMENT OF FACTS**

8] Appellant Tracey Decker was working shifts up to eighteen hours long as a rig operator for Calfrac Well Services when he was injured on April 17, 2015 (APP 31). The work at Calfrac was very heavy, often requiring two men to lift equipment, some of which weighed over 300 pounds (APP 85). Mr. Decker had a history of occasional low back pain, which he consistently related to the eighteen kidney stones discovered prior to a lithotomy in September of 2013 (APP 86; APP 88, 89, 90). In fact, while he had a documented history of kidney stones (APP 91; APP 93), Mr. Decker had no documented low back pain after he had a large kidney stone removed in 2013 (APP 94). He underwent functional

capacity evaluations on July 14, 2014 when he first went to work for Calfrac and again on January 15, 2015 when he returned to work for Calfrac following recovery from an appendectomy (APP 38-48). Those evaluations provided objective medical evidence that he was capable of performing the very heavy work Calfrac demanded of its employees (Id.). Mr. Decker was able to perform the work at Calfrac without complaint, accommodation or any sort of medical treatment. Although Calfrac policy required that anything weighing more than sixty pounds must be carried by two men, on April 17, 2015, Mr. Decker's supervisor decided to punish him for choosing to help another employee rather than load pipe as instructed by making him carry six 4-inch Chiksan swivel joints, each weighing over 300 pounds, by himself (APP 85; APP 90; APP 95; APP 97; APP 98) Mr. Decker was carrying the sixth and last Chiksan joint when his left foot broke through an ice-covered hole and both he and the Chaksan fell through to the cold ground below (Id.). Mr. Decker felt sudden, sharp low back pain and was unable to move his left leg. Two other Calfrac employees had to help him to his feet (Id.). At first, Mr. Decker delayed getting medical care for his injury because his supervisors told him not to (APP 87-88). He soon began seen various doctors so that he could relieve his pain, improve his function and return to work. Dr. Patricia A. Grantham diagnosed Mr. Decker with "Chronic back pain, work comp" (APP 99) and "Chronic low back pain with radiculopathy" (APP 102). Mr. Decker went through several different types of conservative care before having low back surgery in February of 2017 and again in May of 2018 (APP 105).

9] Mr. Decker had eighteen capability assessments by various medical providers from August 8, 2015 until April 11, 2018 (APP 106-124). Each of the capability assessments performed after Mr. Decker's injury was based on a physical examination and assessment

and placed restrictions on his return to work, including not letting him lift more than five pounds (APP 112) and alternating sitting, standing and lying down every ten minutes (APP 119-123). Mr. Decker's post-injury capability assessments stand in stark contrast to the two FCE's performed before that injury.

**10]                   LAW AND ARGUMENT**

11]     Mr. Decker has challenged a number of the ALJ's Findings of Fact and Conclusions of Law. The ALJ characterized Mr. Decker's mechanism of injury as a "misstep" (APP 58-F of F 1). In the context of WSI's rationale for terminating Mr. Decker's medical care -- that he suffered a temporary and minor aggravation of pre-existing degenerative disc disease -- the ALJ's finding trivializes his injury. He did not simply "misstep." Having already carried five 300-pound Chiksan joints, Mr. Decker's left foot broke through the ice, and he and the Chiksan fell to the ground below. He was unable to move his left leg and had to be helped to his feet (APP 85-H.T. Pp. 15-16).

12]     The ALJ found that Mr. Decker had a pre-existing degenerative condition which was responsible for his occasional pre-injury low back complaints to medical providers. The ALJ found no objective medical evidence to support Mr. Decker's assertion that any pre-injury pain complaints were associated with kidney stones. The ALJ found that Mr. Decker's low back pain and radiculopathy were the result of his degenerative condition, that his condition had become symptomatic on several occasions prior to his work injury, and that it again became symptomatic after that injury. Finally, the ALJ found that any musculoligamentous injury sustained by Mr. Decker in his work incident was minor and would have resolved by June 30, 2015 (APP 58-65).

13] Although the ALJ recognized that PA-C Angela Bundy's May 21, 2013 notes documented a history of treatment for kidney stones, he concluded that nothing connected Mr. Decker's anecdotal history of kidney stones with his occasional pre-injury complaints of low back pain (APP 65-F of F 28). The ALJ failed to note that Drs. Patricia Grantham, Eugene J. Dolan, John H. Patrisko, Diego Allende and Amitabh Goswami also recorded a history of kidney stones and/or treatment for kidney stones (APP 93; APP 125-129; APP 132; APP 99; APP 135-138; APP; APP 102; APP 141-143). The ALJ failed to note that Mr. Decker saw each of the aforementioned doctors for evaluation and treatment of the unrelenting low back pain and radiculopathy he had experienced every day since his work injury. That was the stated reason for each of those visits. In every case, the doctors Mr. Decker saw for his post-injury, work-related low back pain asked for either his surgical history (kidney stone removal) or his medical history (kidney stones). None of Mr. Decker's medical records document a history of degenerative disc disease. Mr. Decker's medical records do, however, document his history of kidney stones and subsequent surgical removal. He provided that information in the context of his medical treatment, not as a foil to WSI's attribution of his disabling injury to a pre-existing degenerative disc disease. WSI did not issue its Notice of Decision until May 15, 2018, raising for the first time its theory that Mr. Decker's occasional pre-injury low back pain now disqualified him from further benefits for the displaced lumbar disc it had accepted three years earlier (APP 36). Furthermore, the ALJ's attribution of Mr. Decker's pre-injury low back complaints to degenerative disc disease rather than the kidney stones Mr. Decker claimed fails to explain the absence of any records of low back pain after Mr. Decker's lithotomy in September of 2013. The ALJ's analysis fails to explain how Tracey Decker could have performed the

very heavy work demanded of him, day in and day out if a pre-existing degenerative condition had caused his pre-injury low back pain.

14] The ALJ found that Mr. Decker's pre-injury low back complaints were attributable to degenerative disc disease (APP 65-F of F 28). The record shows that Mr. Decker sought treatment on December 30, 2009, complaining of right hip, right ankle and back pain after trying to push a heavy box across the floor with his right foot (APP 146). Mr. Decker gave a history of kidney stones at that time, six years before his work injury (Id.). Mr. Decker was diagnosed with acute low back pain with radiation to the right leg and probable herniated disc (APP 48). Of note, none of the MRIs, X-rays, or CT scans obtained after Mr. Decker's work injury confirmed the probable herniated disc diagnosed in 2009. No treating doctor attributed Mr. Decker's pre-injury complaints or condition to any degenerative process. Mr. Decker testified that he experienced no further low back pain after he had a large kidney stone removed in 2013 until he suffered his work injury in 2015 (APP 94-H.T. p. 35). There is absolutely no evidence in the record to contradict Mr. Decker's testimony and the many medical records, both before and after his work injury, which confirm both a history of kidney stones and resulting surgical treatment. When Mr. Decker consulted Stormy Jensen, NP on May 5, 2015, he complained of low back pain radiating into his left leg (APP 150). He reported that he had experienced similar pain two years earlier, when he last treated for kidney stones (Id.). Ms. Jensen noted, "Right ureteroscopy with laser litho and stone removal and stent placement on 9/5/2013" (APP 151). Ms. Jensen diagnosed left sided sciatica (APP 152). The evidence shows that the low back pain Mr. Decker experienced before his work injury was related to an acute injury in 2009 and, before September of 2013, to kidney stones and that those symptoms resolved

after his 2013 kidney stone removal. The ALJ provided no explanation for the absence of low back complaints after Mr. Decker's lithotomy in September of 2013.

15] While there is no denying the degeneration noted on the May 28, 2015 MRI (APP 153), even WSI's records reviewer, Dr. Charles Burton, agreed that degenerative disc disease is usually asymptomatic and is thought to be the product of three factors: genetics, environmental factors (such as carrying 300-pound Chiksan swivel joints over frozen ground) and personal habits (APP 154-155-H.T. Pp. 49- 50). This Court has noted that the fact that an employee may have physical conditions or personal habits which make him more prone to injury does not constitute a sufficient reason for denying a claim. Manske v. Workforce Safety and Insurance, 2008 ND 79; 748 N.W.2d 394. That is precisely the situation in which Mr. Decker finds himself. Neither Dr. Burton nor WSI nor the ALJ have offered any explanation for Mr. Decker's ability to perform heavy labor before his work injury compared to his consistently documented functional limitations after that work injury. Such an explanation would necessarily require causation, something Dr. Burton, WSI and the ALJ are not prepared to admit.

16] Dr. Burton testified that Mr. Decker's May 28, 2015 MRI findings would have been the same before his April 17, 2015 work injury (APP 156-H.T. pp. 44-45). In other words, according to Dr. Burton, Mr. Decker's MRI shows degeneration but does not show the source of his pain and disability. It does not show the source of the numbness and tingling noted by Dr. Jackie Johnsrud or the reason for a positive finding on a straight leg raise test (APP 107). Dr. Patricia Grantham opined that Mr. Decker's post-injury chronic low back pain was work related (APP 99). Dr. Kenneth Stein opined that Mr. Decker's work injury explained his condition and resulting need for medical care. Dr. Stein did not believe Mr.

Decker's low back condition to be associated with any pre-existing degenerative condition (APP 157). Dr. Diego Allende opined that Mr. Decker's hypertension was a direct result of chronic pain from his work injury as well as weight gain due to injury-related inactivity (APP 161). Dr. Allende explained to WSI on July 20, 2016 that Mr. Decker's work injury left him only able to sit for 30 minutes, stand for ten minutes, and lie down frequently (APP 163).

17] The ALJ failed to note that Mr. Decker successfully completed two functional capacity evaluations for Calfrac, demonstrating his ability to do the heavy work demanded, the second of which occurred only a few months before his work injury (APP 38). The ALJ failed to note that Mr. Decker was able to perform the heavy work Calfrac demanded of him until he was forced to carry six Chiksan joints as punishment and in violation of Calfrac policies (APP 85-H.T. Pp. 15-17). There is no record of low back pain between Mr. Decker's kidney stone removal in 2013 and his 2015 work injury. There is no record of low back treatment, no record of lost work and no record of work restrictions during the entirety of Mr. Decker's employment with Calfrac before his work injury. There is no evidence of any kind to contradict Mr. Decker's testimony that his occasional pre-injury complaints were related to kidney stones and that those complaints resolved with his kidney stone surgery.

18] The ALJ failed to note Dr. Amitabh Goswami's December 12, 2016 findings: "On examination of paravertebral muscles, hypertonicity, spasm, tenderness and tight muscle band is noted on the left side. Ankle jerk is ¼ on the left side. Patellar jerk is ¼ on the left side. Straight leg raising test is positive, left. FABER test is positive, left" (APP 165). In other words, Mr. Decker had objective signs of nerve impingement over eighteen months

after his work injury. None of Mr. Decker's pre-injury medical records show the signs recorded by Dr. Goswami. Perhaps Dr. H. Tookoian's MRI finding on December 16, 2015 that Mr. Decker had disc protrusions and resulting effacement of the thecal sac at both the L4-5 and L5-S1 vertebral levels explains the signs noted by Dr. Goswami (APP 172). Perhaps Dr. Nathan Deis's finding of a "mass effect" on the S1 nerve root explains Dr. Goswami's findings (APP 173). Finally, maybe the compressed L5 nerve root Dr. Anthony Roccisano found during surgery on February 15, 2018 explains the objective signs noted by Dr. Goswami (APP 174). Even Dr. Michael M. Bronshvag, the board-certified neurologist who conducted an IME at WSI's behest, opined that Mr. Decker's work injury had aggravated his pre-existing condition (APP 176). For his part, psychologist Greg Hirokawa determined that Mr. Decker's symptoms were not psychological in origin (APP 201).

19] Dr. Deis noted Mr. Decker's conservative course of care as well as his progressing symptoms in recommending a two-level fusion on January 31, 2017 (APP 205) Dr. Burton, WSI's records reviewer, for his part, disagreed with WSI's initial acceptance of a displaced intervertebral disc and disagreed with Drs. Stein and Roccisano as well as WSI about the medical necessity of surgery (APP 154-H.T. pp. 46-47). While Dr. Burton may have believed that Mr. Decker suffered a minor sprain/strain which resolved in a matter of weeks, there is no evidence to support that theory. Mr. Decker displayed signs and symptoms of L5 nerve compression which required two surgeries. There is no evidence to support WSI's theory that Mr. Decker had a pre-existing degenerative condition which was not affected by his work injury and that his only work injury consisted of a minor, short-term sprain/strain. Mr. Decker's signs and symptoms of nerve impingement, including

positive straight leg raising, never resolved in the nearly three years that elapsed between his work injury and his first surgery. His symptoms improved enough following his second surgery that Mr. Decker was able to resume his career of heavy labor (APP 87-H.T. pp. 18-19).

20] The ALJ found that Mr. Decker's post-work injury condition was a combination of a minor sprain/strain and the natural progression of his pre-existing degenerative disc disease (APP 65-F of F 30). Again, the ALJ's description trivializes Mr. Decker's injury. WSI accepted Mr. Decker's injury as a displaced lumbar disc, not a sprain/strain (APP 35). That decision is final. The ALJ failed to explain how a simple sprain/strain could elicit a positive response on a straight leg test and cause symptoms of numbness and tingling (APP 107). The ALJ failed to note that Mr. Decker was pain free before his work injury and in severe, chronic pain afterwards. Before his work injury, Mr. Decker had no restrictions on his ability to perform heavy work. Afterwards, eighteen separate functional assessments over three years established objective medical evidence of work restrictions based on physical examinations and workability (APP 107-125; APP 207). Mr. Decker's post-injury symptoms did not resolve or change until after surgery relieved the pressure on his S1 nerve. Coincidentally, his restrictions were not revised, and he was not able to return to work until the pressure on his S1 nerve was relieved. There is no evidence of any soft tissue sprain/strain resolving and no explanation for Mr. Decker's post-injury chronic low back pain other than the nerve impingement relieved by surgery.

21] The ALJ's analysis of the medical evidence under the provisions of N.D.C.C. Section 65-05-08.3 is flawed. The ALJ apparently believed that WSI's IME doctor, Michael Bronshvag, was the outlier. The ALJ failed to note WSI's initial decision

accepting a displaced disc condition and the finality of that decision. The ALJ failed to note the findings and opinions of Drs. Grantham, Stein, Allende, Goswami et al. all of which supported Mr. Decker's claim for a displaced disc. In fact, it was WSI's medical records reviewer, Dr. Burton, who was the outlier. Dr. Burton disagreed with WSI's initial acceptance of Mr. Decker's disc condition and disagreed with Drs. Deis and Roccisano that, conservative treatment having failed to relieve Mr. Decker's chronic low back pain and radiculopathy, surgery was reasonably medically necessary. Unlike all of Mr. Decker's treating doctors and unlike Dr. Bronsvhag, Dr. Burton never saw Mr. Decker. His opinion was based entirely on a records review. None of the treating doctors were limited to reviewing records. When Dr. Allende restricted Mr. Decker to alternate sitting, standing and lying down it was based on a physical examination (APP 163). Similarly, Dr. Roccisano's diagnosis of a compressed L5 nerve root was based on his observation during surgery (APP 174). A proper statutory analysis of medical opinion supports Mr. Decker's continued entitlement to benefits for his displaced disc.

22] The ALJ's legal analysis is also flawed. The ALJ cited N.D.C.C. Section 65-05-04 as authority for ignoring WSI's initial acceptance of Mr. Decker's displaced disc (APP 67-C of L 7). While that section grants WSI continuing jurisdiction, WSI made no claim in either its Notice of Decision terminating further benefits (APP 36) or in its Order Denying Further Benefits (APP 49-54) that its initial acceptance was incorrect. Furthermore, WSI's continuing jurisdiction is not unfettered. Without new facts, WSI's acceptance is final. See: Lass v. N.D. Workmens Compensation Bureau, 415 N.W.2d 796 (N.D. 1987); Cridland v. N.D. Workers Comp. Bureau, 1997 ND 223, 571 N.W.2d 351. In the instant case, WSI did not get the results it wanted from Dr. Bronsvag, so the agency enlisted Dr. Burton to

perform a records review. There are no new facts. Dr. Burton simply reviewed the records of the treating doctors and came to a different conclusion, that Mr. Decker's post-injury low back condition was unrelated to that injury, that his symptoms resolved soon after that injury and that his surgeries were unnecessary. The ALJ has no authority to use Dr. Burton's disagreement with the treating doctors and WSI's own decision-makers to invoke WSI's continuing jurisdiction. Furthermore, continuing jurisdiction is not justified in the absence of new facts.

**23] CONCLUSION**

24] Tracey Decker was strong and able-bodied before he hurt his low back at work. The records prove it. He had a history of kidney stones and kidney stone removal. The records prove it. He developed chronic, unrelenting low back pain and radiculopathy after his injury, creating functional limitations and restrictions which had never existed before. The records prove it. Mr. Decker's treating doctors found evidence of both effacement of the thecal sac and nerve impingement in his low back. The records prove it. Mr. Decker's symptoms following his work injury did not change or improve until he underwent surgery to relieve the pressure on his nerve. The records prove it.

25] There is no evidence to support the ALJ's belief that Mr. Decker's occasional low back pain from 2009 to 2013 were related to degenerative disc disease. The greater weight of the evidence demonstrates that Mr. Decker's pre-injury complaints were due either to acute trauma or kidney stones, as Mr. Decker testified. There is no evidence to support Dr. Burton's theory that Mr. Decker suffered a minor sprain/strain and recovered in a matter of weeks. Rather, the evidence shows that Mr. Decker's signs and symptoms were related

to the displaced disc accepted by WSI and that those signs and symptoms persisted until surgery.

26] The ALJ's minimization of Mr. Decker's injury as a "misstep" or a minor sprain/strain evidences a fundamental misunderstanding of a life-changing event. Mr. Decker has gone from doctor to doctor trying to get well and get back to work. Unfortunately, falling through the ice while carrying 300-pound equipment exacts a price. Mr. Decker has been paying that price and will continue to pay it for the rest of his life. This was not some minor or trivial event. Apparently, the ALJ believed that Mr. Decker's chronic low back pain and radiculopathy immediately after his work injury and continuing thereafter is simply coincidence and has no causal connection to his activities on the date of injury. There is no factual support for the coincidence theory. The MRIs and other records reviewed by Dr. Burton do not explain the difference in Mr. Decker's level of function after his work injury. The greater weight of the evidence confirms Mr. Decker's continued entitlement to benefits, including medical treatment. The ALJ's findings are not supported by the greater weight of the medical evidence and his legal conclusions are without legal authority.

27] Dated this 24th day of February, 2020.

28] **LITTLE LAW OFFICE**

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**ATTORNEY FOR APPELLANT**

29]                    **CERTIFICATE OF COMPLIANCE**

30]        The undersigned, as attorney for the Appellant, Tracey Decker, in the above captioned matter, and as the author of the above brief, hereby certifies, in compliance with Rule 32(e) and Rule 32(a)(8) of the North Dakota Rules of Appellate Procedure, that the total number of pages of the above brief does not exceed 38.

31]        Dated this 24th day of February, 2020.

32]                    **LITTLE LAW OFFICE**

33]                    */s/ Stephen D. Little*  
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**THE SUPREME COURT  
STATE OF NORTH DAKOTA**

<b>TRACEY DECKER</b>	)	<b>COUNTY OF WILLIAMS</b>
	)	
<b>Appellant,</b>	)	<b>Supreme Court No: 20200014</b>
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<b>vs.</b>	)	<b>OAH File No. 2018-0510</b>
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<b>CALFRAC WELL SERVICES CORP.,</b>	)	
	)	
<b>Respondent.</b>	)	

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32] I, Stephen D. Little, hereby certify that on this 24<sup>th</sup> day of February, 2020, a true and correct copy of the Appellant’s Appendix to the North Dakota Supreme Court and Certificate of Service and were served via email to the following:

**Supreme Court of North Dakota  
Office of The Clerk  
[supclerkofcourt@ndcourts.gov](mailto:supclerkofcourt@ndcourts.gov)**

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33] Dated this 24<sup>th</sup> day of February, 2020.

34] **LITTLE LAW OFFICE**

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Via – US MAIL**

33] Dated this 24<sup>th</sup> day of February, 2020.

34] **LITTLE LAW OFFICE**

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34] I, Stephen D. Little, hereby certify that on this 2nd day of March, 2020, a true and corrected copy of the Appellant's Brief to the North Dakota Supreme Court and Certificate of Service and were served via email to the following:

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