FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MARCH 19, 2021
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Kyra Joyce Mistic n/k/a Kyra J. Bellew, Plaintiff and Appellant, v. Joshua James Mistic, Defendant and Appellee	)	Richland County District Court No. 2017-DM-00032 Supreme Court No. 20200313

ON APPEAL FROM AMENDED JUDGMENT DATED SEPTEMBER 22, 2020
FROM THE DISTRICT FOR THE
SOUTHEAST JUDICIAL DISTRICT
RICHLAND COUNTY, NORTH DAKOTA
THE HONORABLE BRADLEY CRUFF, PRESIDING

BRIEF OF APPELLANT KYRA JOYCE MISTIC N/K/A KYRA J. BELLEW

William Woodworth
Bar I.D.#: 08707
Woodworth & Holter, PLLP
4007 State St. STE 111
Bismarck, ND 58503
Telephone: (701) 751-0373
Email: williamwoodworth@woodworthholter.com
Attorney for Plaintiff and Appellant

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ARGUMENT.....¶1

[¶1.] Honorable Justices of the Supreme Court, I[1] want to thank you for taking time to review the matter of my appeal. This is correspondence is in regards to Supreme Court Case No. 20200313. Outlined below will cover the aggrievances I wish to be addressed within the court hearing from Motion to Modify Primary Residential Responsibility that occurred on July 3 1st, 2020 and the Memorandum Opinion in the same matter, while referencing transcripts from the Oct 19, 2019 hearing and July 31st, 2020 hearing. I am bringing up the Memorandum Opinion as it is what the Court issued giving insight to its decision over the best interest factors and where the Wahpeton court erred in its overall decision granting primary to the defendant. This is what my arguments is.

[¶2.] First and foremost, I would like to address the issues that happened during the court hearing on July 31st, 2020 and the Amended Judgement that resulted. On July 31, 2020 in the Wahpeton Court there was an evidentiary hearing held in the matter of Motion to Modify Primary Residential Responsibility (PRR) changes brought forth by the Defendant. During this hearing both parties were allotted approx. 75 mins to present our cases to the Honorable Judge Cruff. It was my understanding that this hearing would be based around the best interest factors for the children offered by both homes. Where the court would then take this information and decide accordingly. However, the defendant spent majority of his testimony discussing events and incidents that range anywhere from 4-10 years ago. He spent his testimony describing what life was like when we were married which included: alleged destruction of his property (not the children's property), accusations of verbal and physical abuse from me, fabricated stories of an alleged affair,

[1] The Appellant's Brief was originally submitted for filing to the Court when the Appellant was unrepresented by counsel. Appellant's attorney assisted with the non-substantive corrections to the Brief. Pronouns referring to the Appellant personally have been unaltered.

my supposed deteriorating mental health, and my overall inability to parent via his standards.

[¶3.] Because the nature of this hearing was intended to showcase all that comes with taking care of the children so the court could thoroughly make an informed decision in the children's best interest; I found it to be irrelevant to the case as these were all instances the defendant could have brought forth, if they truly concerned him, at that time of their individual occurrences. It is my belief the defendant used this hearing simply to have an audience and, quite frankly, waste the courts time. His testimony was allowed to go on, barren of insight as to why he should be granted primary residential responsibility. I was instructed by my lawyer that I needed to use some of my own testimony time to rebuttal all of the defendant's allegations.

[¶4.] During my testimony, my lawyer and I tried to get as much information into evidence while also describing to the court home life, consistency, and the deep bonds between the children and myself. It is outlined very clearly within the transcripts as the defendant and myself both admitted to the parenting plan where the children resided in my residence during the academic year and with the defendant during the summer months. This schedule has been in place since 2017, it is what the children have known for years. When the memorandum opinion from the court came out, it did in fact grant the defendant primary residential responsibility. The court failed to uphold the continuity the children were familiar with by this action.

[¶5.] The Amended Judgement of Sept 22, 2020 and within the memorandum opinion it is said that I was not to be granted primary because the court assumed I would simply ask for permission to relocate to South Dakota again. It also excludes facts to this

case which are then used against me. During the Oct 2019 hearing, where the defendant held me in contempt for crossing state lines, I received a court order to return to the state of ND or else the children would be placed with the defendant. This had to be done by June 2020. I abided and returned to the state within the allotted timeline, I ask the supreme court justices to keep in mind at this time I had a stable job (four years) and home (owned) and was then ordered by the Wahpeton district court to remove the children from this stable environment. The court then states that my home was unstable, using this move against me and also took the opportunity to say my job was unstable, again withholding the fact that the court first ordered me to leave, which meant losing the stable home and job for the children.

[¶6.] Even prior to our initial judgement of our divorce in 2017 I have primarily taken care of the children's medical, academic, mental, and physical well-being. The defendant has been a traveling physical therapist since we separated. We spent a year separated at which time I had the children and he rarely exercised parenting time. It was not until 2018 when the defendant suddenly pushed to exercise his parenting time, which I did not deny.

[¶7.] In the opening statement, the defendant's lawyer highlights "rigorous" routines and schedules and the importance of maintaining that because it was what the children knew for the last 2.5 months (defendant was exercising his summer parenting time) and that it would be disruptive to allow the children to return to me for the school year, which was a schedule, a routine, they have known for the last four years. However, the defense completely fails at acknowledging this fact. The defense was willing to break the continuity that was already in place for a substantial amount of time. Somehow, the last

2.5 months took precedence over years of routine. I want to note here this was the kids third summer with the defendant, yet he was fine with the rigorous routine being changed over the past two summers with no issues returning the children to me for the start of each academic year. App. 59–61.

[¶8.] Stability and structure are sound in both households, yet the structure and stability I have offered the children for the last four years was completely disregarded. The defense has many assumptions littered throughout their opening statement to include: my mental health state, YY "witnessing" an alleged suicide attempt (that was later contradicted by the defendant himself during testimony, App. 66–67, the children's choice to refer to my fiancé as "dad", and also flat out guessing about the apparent shift work I hypothetically would have been doing (it was 5 not a job that was shift work or rotating shifts) as the defense would have you believe.

[¶9.] There are also allegations towards me about interfering with the defendants parenting time, specifically standing him up or showing up late to exchanges. These are untrue and appeared to also be unimportant as the defendant and his lawyer never mention it once during questioning or testimony. This affirms it was mentioned purely to hurt the court's ability to see I did not render him helpless or incapable of co-parenting as the defendant states multiple times "there was nothing I could do". When questioned by my lawyer, the defendant admitted to the fact that I always met him halfway or more than halfway for exchanges, that I did this all the time. This means I did not withhold parenting time from him or stand him up. The defendant testified in the Oct 2019 hearing to this fact. When questioned, "How did that prevent you from being the dad you always were when you were travelling all over Minnesota and she is meeting you halfway?", the defendant's

response was, "Lack of communication and everything they are doing to me as we're going through this process." App. 39. This response does not prove that I was standing the defendant up nor that I was withholding the children from him. In fact, the defendant is unable to provide a coherent answer or proof of these allegations surrounding my apparent hindrance of his parenting ability. During the hearing, the defendant was asked by my lawyer, "Isn't it true that during all of these moves wherever you moved to Kyra met you halfway with the children?". App. 69. The defendant's response was "Most of the time. Yes.". *Id.* This would appear at first glance that I sometimes did not exchange the children. However, the defense asks the defendant to describe Exhibit 23 which the defendant states, "This is her texting me at her time and then I just tell her to just come to my house, because that was in Pelican." App. 68. When the defendant states this in his testimony it corroborates to me delivering the children to his residence, which was not written in the original judgement. This shows that I often would drop the children off at his residence and this is what he is referring to when he states, "most of the time". Further proof I have respected the defendant's and the children's relationship by driving all the way to his residence so he could exercise his parenting time. I have extended invites over the last four years to the defendant for various events which he chose not to attend on his own accord. App. 72.

[¶10.] The defense states his job is permanent. That it is close to his home (63 miles from his residence) and that he is happy where he was at, yet he has attained a new job located in Bemidji, MN since October 2020, a two-hour commute from his residence. He does not notify me of this material change until November 2020. Then, in Dec 2020 tells me he will likely relocate the kids to Bemidji, MN. This is contradicting the very

argument the defense spent a considerable amount of time on. The defendant testified the home in Pelican Rapids had room for growth and made it a point to ensure the court was aware he maintained that residence for the last four years. He testified it was a home the kids knew well and were familiar with, yet now he is willing to not only remove that familiarity he is willing to do so at the cost of their security and stability while also exposing the children to longer travel times for exchanges, straining the deep relationship the children have with me. The defendant has already purchased a home, began the moving process all while ignoring my objections as this distance will greatly impact my parenting time and ability to parent. It is especially upsetting as the children liked their Wahpeton school, were forced to go to an entirely new school after starting in Wahpeton. Now, they like seem to like Pelican Rapids school and are being forced to relocate again. The defendant is greatly hindering their abilities to know security or establish long lasting connections.

[¶11.] The defendant contradicts himself many times in his testimony pertaining to keeping the children in a home they have known for years and in the same breath will talk about how he believes it is good for them to go to new places. However, it is only okay for him to do so. If I do it I am a bad, unstable parent that has a deteriorating situation.

[¶12.] Another matter is the defense stating that I hindered his ability to coparent. This is a fallacy. I have maintained open communication regarding the children and their activities or breaks at school. He has been notified in timely manners of dance recitals, Christmas and spring concerts, appointments made, and the like. The defendant chose to not attend any of these events. He also chose jobs that were not close to our children. The amount of locations he has worked took a toll on the travelling time for exchanges as they

were often further away from my residence. This was not addressed in the PRR hearing and did not seem relevant to the case for some reason.

[¶13.] Throughout this hearing there were certain liberties given to the defendant that I did not get. There is an instance where he is allowed to give a lay opinion on my mental state, App. 62, and when my lawyer does the same thing the court states, " .. .it is different because she is trying to anticipate what his mind set is or what his state of mind is." App. 70. This was not different. During his lay opinion (which still had nothing to do with the best interest of our children) he was anticipating my mind set or state of mind regarding my own mental health from 2012-2014. The court did recognize that if the defendant truly had concerns about my mental health it should have been brought up at the time it occurred rather than waiting until this specific hearing. It is my belief the defense brough this up only to blur the courts vision of my mental state, purposely going out of their way to make me look bad, because I am, in fact, a great mother to my children. There was nothing and is nothing I have ever done to endanger my children's well-being. This is why the defense chose to waste time with fictional accounts of events that happened many years ago and did not pertain to the best interest of the children.

[¶14.] The defendant is unable to maintain a chronological sequence of events as his stories continuously change in details or is unable to answer questions concisely. *See* App. 42-43. The defendant does not sound confident in his recollections which raises questions of truthfulness. He first states we are taking a shower, then states we are somehow in a tub together, then states I am conversing with a friend about our intimate life at the same time, which upsets him so he leaves (the tub presumably). In this same instance he claims I kept "bugging" him, that he was unable to get away from me, and yet he

explains that he continues to play a video game in the exact same room (how does this depict him trying to get away?). The defendant in this instance admits to antagonizing me by saying "something mean" to include details that lead to me "punching him in the head for thi1iy seconds straight". I find it very unbelievable that someone would sit and allow another person to hit them for thirty seconds straight, especially someone of the defendant's size. The defendant does, however, admit to punching me in the stomach. When asked by his lawyer if it was meant to hurt me or out of self-defense, he does not say it was for defensive purposes. He only says he did not have the intent to cause me physical harm. App. 63–64.

[¶15.] There is an undocumented assault by admission from the defendant in the July 31st hearing where he states plainly that he put me in a sleeper hold while discussing the damage done to a guitar that he claims I did. App. 65. This is proof of historical abuse from the defendant on me by his own admission. He states he has never physically assaulted me, then proceeds to recall an incident where he felt he had to get physical with me, while my back was turned (proof I was not aggressive towards him). The original question was, "Did you have any kind of physical violence towards her?". I want to note that immediately after this response, his lawyer breezes right past the fact he admitted to physical violence towards me that was not documented. App. 65.

[¶16.] I could go on about the inconsistencies in this hearing, but I want to bring to light a few things. When I filed to Modify PRR, the court denied it. The reasoning behind this was "it took five months for plaintiff to file". I find this to be unjust. The defendant took four months to file Motion for Contempt against me in 2019, in which the court

granted it to him regardless of the time passed. When my motion to modify was denied the defendant then motioned to modify. It was granted by the court then for the defendant.

[¶17.] Next, I will address the issues surrounding the Memorandum Opinion. The court admitted and accepted our parenting time schedule. It also states multiple inconsistencies with the facts that were presented. There is mention of my multiple relocations, job changes, relationships. None of which is also mentioned for the defendant. It is unjust to uphold one party to a certain standard while allowing the other essentially the freedom to do as they please. I worked for the same company for four years, the location of my job moved as I was promoted. This was left out. The defendant had a new job almost every thirteen weeks, at most 26 weeks if the company renewed another 13 week contract with the defendant. I moved three times, yes, however, I explained clearly the reasoning behind each (including the court ordered move) and how it was always motivated by improving the children's quality of life. I fail to see the relevance of the listing my two relationships as the defendant also had relationships prior to his marriage in 2019. I am unaware of how many there were as I did not see it as my business this is something the defendant would randomly share with me while we were still on good terms. I also want to include it is not stated in the best interest factors the number of relationships each parent may or may not have over the course of time.

[¶18.] The court states the defendant "now resides full time in his pelican rapids home", insinuating prior to this point in time he was not residing there full time. This establishes my stated facts about multiple moves the defendant made over the past four years making exchange locations ever changing, which was not taken into account at all, yet my moves were.

[¶19.] The court cites that it has concerns for the children's supervision and emotional well-being while in my home. App. 28. This is specifically revolving around two instances of tragedies with pets. The first being with a 6-month-old puppy, Kairi. There was never any evidence presented regarding this. For the sake of clarity, the kids were not present. This was not my dog. It was Jenkins' dog that resided with him at his brother's residence. The children asked what happened to her because Jenkins only brought his other dog. He had an urn for Kairi the children saw and then asked how she was ashes, which I explained the cremation process. This was not emotionally difficult on the children as they were not emotionally connected to Kairi, they were simply curious. They were not heart broken, nor did they witness the incident. Jenkins and I did not even know what happened ourselves until we took her to the vet, it was revealed via x-ray there was a pellet present in Kairi' s abdomen. All of this was disclosed to the defendant and he intentionally left these facts out.

[¶20.] The tragedy with the kittens was exactly that, a tragedy. The children's mental health did not suffer from this incident. I held them when they mourned their kittens, we buried them in the yard and visited them often. The children were still their happy selves. I find it hard to believe that a pet's accidental death automatically means the parent in question is guilty of being unable to ensure their children's emotional well-being. It was something that was extremely unexpected and we got the children through it as a family. I am unsure why the court did not take into account that over the last four years these are the only two instances the defendant mentioned anything that pertains to the children's emotional well-being. These instances are years a part. This is not grounds to question my ability to care for their emotional well-being.

[¶21.] The court describes the defendant's abilities to provide life experiences, books, education programs, and various activities, yet does not even mention that I also did the exact same thing whenever the children were in my home. App. 14.

[¶22.] The court only talks about the defendant's ability to provide online learning needs. App. 5–6. When the pandemic hit, the children were online schooling for the entirety of the tail end of the school year. I had no problems providing this to the children as they also had a great internet connection, computers, tablets, offered in my home and the like to ensure they completed schoolwork. This was void of acknowledging that I had not only the ability to cater to online learning needs, but also, that I had already proven I was capable in the months prior to summer.

[¶23.] The court presumes that I would have been working shift work. App. 30. I had a job offer that was a schedule of Monday-Friday, normal hours and did not change to a swing or grave shift. In this same section, the court claims it is unaware if Jenkins is still a member of the family, yet earlier uses my relationship with him against me. I want to note that Jenkins has been physically present in the courtroom for each hearing. If he were not a member of the family, why would he take the time to be there? The court also states it does not know if "we" means Jenkins was included as well. However, in real world circumstances no one would take the time to elaborate and name each individual that relocated. The defendant was able to conclude that Jenkins also moved to Wahpeton, yet the court did not.

[¶24.] The court refers to AA returning to the Wahpeton Public Schools as an emotionally distressing situation. App. 30–31. I emphasized that AA attended the Zimmerman elementary school, not the Wahpeton elementary school. It was at

Zimmerman he had a rough time. The court fails to acknowledge AA' s growth over the past three years. AA has made significant strides and as the primary caregiver of AA over this period of time, strongly believe through being present over the past three years he was ready to attend a Wahpeton school again. It was something I had talked to AA about prior to us leaving Sisseton school (which he did not want to leave, but understood we had to). AA seemed confident he would do great at the Wahpeton school and upon attending the first couple of weeks there found out he already knew a high number of students, which made him extra happy to already have familiar faces in the classroom.

[¶25.] The court mentions that it would like it to be true that AA did not experience bullying in the Sisseton school, however, says after that the court is inclined to believe it is not true. I am baffled the court would make such an assumption. App. 31. I took an oath before testifying to tell the whole truth and nothing but the truth. Yet, the court felt as though I was lying about my own son's situation where I was present for 100% of that academic year. Who would know better than I if he were being bullied or not?

[¶26.] When addressing Factor d, the district court in this particular section emphasizes the defendants home as beneficial to AA' s borderline autism needs being that his residence is rural and that the children have forged friendships with neighboring children. App. 31. This fact falls apart as the defendant as already began moving the children to Bemidji, MN. Those forged friendships will no longer be relevant due to his actions. There is no longer, in the court's words, a "home base" for the children offered via the defendant.

[¶27.] The court states blatantly "the court finds that it is desirable to maintain continuity in the children's home and community in Pelican Rapids." App. 22. What about

the continuity they have had while in my care? There are many forged friendships and family ties that were completely disregarded and not even mentioned by the court that my children have maintained over years.

[¶28.] The court assumes a lot without grounds or proper evidence. App. 32–33. The court erred when it states that I moved because I simply "did not like the town" I was in. I voiced clearly the reasonings behind each move, and as stated earlier it was always to improve the children's quality of life. I am not some selfish, self-fulfilling mother that would impose such changes without discussion with the children. I included the children in such topics as it would affect them. I did not come out of the blue saying "Oh, we're moving, pack your things." I talked with the children. It is unjust for the court to make such assumptions, the court guessed as to what my actions may be if I were granted primary. There is no possible way the court would know if I had intentions to re-request permission to relocate to the Sisseton home, the court cannot offer a lay opinion as it cannot anticipate what my mind set or state of mind is. I would like to note here that the court seems adamant about not wanting "to change the children's residence or school yet another time" and this is exactly what the court did. First, by removing the children from the Wahpeton school where they had already started. Now, the defendant is doing it by forcing them to relocate when it was not necessary. If he truly were happy with his job and believed his residence had room for growth to accommodate the children why would he have taken a job so far from his residence and purchased a new, unfamiliar home that leads to a new school "yet another time"?

[¶29.] The court recognizes that AA is borderline autistic yet made it so he was tom from his routine. The court was aware that routines, in particular, are important to those

with autism/special needs. AA is used to being with me for the school year, this apparently was no longer important to the court as it granted the defendant primary, which greatly impacted and significantly reduced my time with AA and my other two children. Though it has been hard on all of us, AA has suffered the most as the court deemed it necessary to change his entire routine that he has known for years.

[¶30.] The court believes the children will remain in the same home and attend the same school for more than one year if the defendant has primary responsibility. App. 36. The court stated this factor favored the defendant. The defendant is relocating and has already closed on a home in Bemidji, MN where he intends to move the children from the familiar home and enroll them in a new school in the next academic year. There is no way the court could have known about his intentions to move less than six months after the Amended Judgement came out. I will note that I have no intentions of moving as I have many ties to Wahpeton. This is a school the children are familiar with and was the reason I returned specifically to Wahpeton. I was only ordered to return to the state from the Oct 2019 hearing, I could have easily picked any town to reside in and the court order would have been honored. However, I did not take the opportunity to move someplace new. I returned to a town with family ties and educational opportunities, all while ensuring familiarity for the children. Even attaining the same apartment complex we had when we lived in Wahpeton prior. It is all very familiar to the children.

[¶31.] In this particular section the court recounts vaguely the domestic violence that occurred within the marriage between the defendant and I. App. 37–38. The court's recall of this is incorrect. I mentioned earlier in this answer brief but will restate it again. First, the court claims that I alleged the defendant hit me repeatedly on the back of my

head. I have never made such a claim, I am unsure where the court got this specific information from as I have never testified to the defendant hitting me repeatedly on the back of my head. Secondly, the court states" ... Josh's rendition is that Kyra attacked him by repeatedly punching Josh in the head and that he jabbed Kyra in a defensive manner after she attacked him". The defendant never states he struck me in self-defense. Even when directly questioned if it was defensive. Defendant failed to state so.

[¶32.] There is much that is incorrect and unjust within the two court hearings, memorandum opinion, and amended judgement. I have clearly outlined most of my biggest concerns pertaining to these huge changes the children have been subjected to. Perhaps, had the July 31st, 2020 hearing been allotted more time we could have covered all of the evidence that both parties had prepared and wanted to submit. Due to time constraints, there was much that did not have opportunity to be received into evidence. I only learned after the fact, from my lawyer, that anything that was not received in the hearing would not be reviewed by the court. One would conclude that the Wahpeton court could have made a more informed decision in the best interest of the children had all the prepared evidence been received in the July 31st, 2020 hearing.

[¶33.] The requested relief I am looking for is the children to be returned to the regular schedule that has been upheld for years and is already familiar to them. The goal of this appeal is not aimed towards awarding me primary residential responsibility, although, if I am awarded this by the supreme court or district court I would not object to it. I would like things to return to how they were. Meaning returning to equal residential responsibility as this would be most ideal for the children. I understand the importance of maintaining relationships of both parties and respect their relationship with the defendant.

I also believe joint residential responsibility would be in the defendant's best interest as this would mean we could do offset child support again as the child support calculations in the state are mostly theoretical and unfair. I am already aware of the amount of child support the defendant would have to pay and that it would be through the roof. This would not be beneficial given the situation.

[¶34.] I am looking to have a mediation clause added to the Amended Judgement as the legal disputes are cumbersome. Having mediation as a first choice could potentially alleviate issues prior to progressing to any court level.

[¶35.] Being a self-represented appellant in this matter I am unaware of the exact authorities of which I am to rely on having no law degree or background in such materials. This is difficult to admit, however, I am asking the justices of the supreme court and all those involved in the appeal process, their knowledge of the law and educational backgrounds to assist in recognizing what wrongs have been overlooked or committed; resulting in this drastic change of routine inflicted on my family. I cannot pinpoint exactly what authorities are at play here, but I am certain there is injustice.

[¶36.] I am seeking the relief of the children being returned to my home during the academic school year, to successfully co-parent with the defendant where the children have the freedom to experience healthy relationships with both parties. This is all I truly desire. I do not wish for the courts to have to be involved anymore should this matter be dissolved in the best interest of our children.

[signature on next page]

Dated: March 31, 2021.

/S/ William D. Woodworth

William Woodworth
Bar I.D.#: 08707
Woodworth & Holter, PLLP
4007 State St. STE 111
Bismarck, ND 58503
Telephone: (701) 751-0373
williamwoodworth@woodworthholter.com
Attorney for Plaintiff and Appellant

CERTIFICATE OF COMPLIANCE

[¶37.] I, William D. Woodworth, as the attorney for the Appellant and the author of this brief, hereby certify that this brief is in compliance with N.D.R.App.P. 32(a)(8)(A). This brief is 19 pages long, excluding any addendum.

Dated: March 31, 2021.

/S/ William D. Woodworth

William Woodworth
Bar I.D.#: 08707
Woodworth & Holter, PLLP
4007 State St. STE 111
Bismarck, ND 58503
Telephone: (701) 751-0373
williamwoodworth@woodworthholter.com
Attorney for Plaintiff and Appellant

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Krya Joyce Mistic n/k/a Kyra J. Bellew, Plaintiff and Appellant, v. Joshua James Mistic, Defendant and Appellee	)	Richland County District Court No. 2017-DM-00032 Supreme Court No. 20200313 **CERTIFICATE OF SERVICE**

I, William D. Woodworth, certify on March 31, 2021, I served the following documents by Electronic service under N.D.R.App.P. 25(c)(1)(D).

1. Notice of Appearance
2. Appellant's Brief
3. Appellant's Appendix

On:

Amy M. Clark
amyclark@smithstrege.com

Dated: March 31, 2021.

/S/ William D. Woodworth

William Woodworth
Bar I.D.#: 08707
Woodworth & Holter, PLLP
4007 State St. STE 111
Bismarck, ND 58503
Telephone: (701) 751-0373
williamwoodworth@woodworthholter.com
Attorney for Plaintiff and Appellant