

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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| <p>City of Glen Ullin and<br/>Park District of the City of Glen Ullin,</p> <p>Plaintiffs/Appellee,</p> <p>v.</p> <p>Karen Schirado and<br/>Jerome Schirado,<br/>Defendants/Appellants.</p> | <p>Case No.: 30-2019-CV-01009</p> <p>Supreme Court Case No:<br/>20200345</p> <p><b>APPELLANT BRIEF</b></p> |
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Appeal from the Amended Civil Judgment in Morton County District  
Court, South Central Judicial District, Glen Ullin, North Dakota,  
November 24, 2020, the Honorable Thomas J. Schneider presiding

ORAL ARGUMENT REQUESTED

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ISSUE I. In this case is there are issues about the permission given by the City to the Schirados in Exhibit #1 and an unwritten agreement between the City of Glen Ullin (City) and the Defendant/Appellants Karen Schirado and Jerome Schirado (Schirados) that prevents the district court from entering a summary judgment against the Schirados.

ISSUE II. Does the unwritten agreement entered into by the City and Schirados and the partial performance by the Schirados of their terms of the written agreement remove the oral agreement from the Statute of Frauds?

ISSUE III. Did the district judge calculate the City’s attorney fees according to the direction given by the North Dakota Supreme Court?

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**Oral Argument:**

Oral argument has been requested to emphasize and clarify the Appellant’s written arguments on their merits.

**Transcript References:**

The Order to Show Cause hearing for this matter was conducted on August 26, 2019. The transcript of the hearing is referred to as [Tr.] in this Brief.

## STATEMENT OF THE ISSUES

- [¶1] ISSUE I. In this case is there are issues about the permission given by the City to the Schirados in Exhibit #1 and an unwritten agreement between the City of Glen Ullin (City) and the Defendant/Appellants Karen Schirado and Jerome Schirado (Schirados) that prevents the district court from entering a summary judgment against the Schirados.
- ISSUE II. Does the unwritten agreement entered into by the City and Schirados and the partial performance by the Schirados of their terms of the written agreement remove the oral agreement from the Statute of Frauds?
- ISSUE III. Did the district judge calculate the City's attorney fees according to the direction given by the North Dakota Supreme Court on remand?

## NATURE OF THE CASE

[¶2] This case involves real property in the City of Glen Ullin (City) and the Parks District of the City of Glen Ullin (Parks). The Defendants are Karen Schirado and Jerome Schirado (Schirados). The Schirados have, according to City & Parks, been on their real property, erecting fence, and storing their personal property.

[¶3] City and Parks started this action to get the Schirados to stop using their real property and get Schirados' fences and personal property off the City and Parks' real property.

[¶4] City and Parks filed an Order to Show Cause on 08/02/2019.

[¶5] Schirado filed a response to City and Parks' Order to Show Cause on 08/21/2019.

[¶6] A hearing on the Order to Show Cause was held in 08/26/2019.

[¶7] The court issued a Memorandum Opinion and Order on the Order to Show Cause hearing on 09/25/2019.

[¶8] The City and Parks filed a Motion for Summary Judgment on 12/04/2019.

- [¶9] Schirado responded to City and Parks Motion for Summary Judgment on 12/31/2019.
- [¶10] The court filed a Memorandum Order on City and Parks' Motion for Summary Judgment on 01/17/2020.
- [¶11] The Findings of Facts, Order for Judgment, and Judgment were filed on 02/04/2020.
- [¶12] Schirado filed a Notice of Appeal and Order for Transcript on 03/10/2020.
- [¶13] A Notice of Filing the Notice of Appeal was filed on 03/10/2020.
- [¶14] An Amended Notice of Filing the Notice of Appeal was filed on 04/13/2020.
- [¶15] The Appellant Brief was filed on 04/22/2020.
- [¶16] The Appellee Brief was filed on 05/21/2020.
- [¶17] Oral argument took place on 06/29/2020.
- [¶18] The North Dakota Supreme Court opinion was filed on 08/27/2020. This opinion affirmed in part, reversed in part, and remanded the case for further proceedings.
- [¶19] A 3.2 Notice of Motion, Motion for Trial, and Brief in Support of Motion was filed on 10/27/2020.
- [¶20] Amended Summary Judgment was filed on 11/24/2020.
- [¶21] A Notice of Appeal of Summary Judgment was filed with the North Dakota Supreme Court on 12/10/2020.
- [¶22] The Notice of Filing the Notice of Appeal was filed on 12/11/2020.
- [¶23] This matter is now before the North Dakota Supreme Court.

## STATEMENT OF FACTS

[¶24] In this case the district judge has again granted the City of Glen Ullin (City) summary judgment. The first time the district judge allowed a hearing before granting summary judgment. This time no hearing was allowed even though the Schirados requested one. The City was awarded summary judgment without even having to make a motion for summary judgment.

[¶25] This case began on May 12<sup>th</sup>, 2003 when Karen Schirado attended the Glen Ullin City Council meeting. During that meeting the City decided it was permissible for the Schirados to graze their horses on the streets and alleys in the following described real property:

3<sup>rd</sup> Street N. between Blocks 5 and 6, City of Glen Ullin;  
4<sup>th</sup> Street N. between Blocks 6 and 7, City of Glen Ullin;  
5<sup>th</sup> Street N. between Blocks 7 and 8, City of Glen Ullin;  
N-S Alleys within Blocks 5, 6, 7, and 8, City of Glen Ullin; and  
E-W Alleys within Blocks 5, 6, 7, and 8, City of Glen Ullin.

[¶26] What the City Counsel decided at the Meeting on May 12, 2003 is set out in Exhibit #1 which was entered into evidence at the hearing on August 26, 2019 and can be found in the Appendix at page 48. The part of Exhibit #1 that applies to this case is the last paragraph in the first column which states: “Karen Schirado was present to inquire if she can graze horses on the Schultz land located on the extreme north side of Glen Ullin. The Council determined that this is permissible.”

[¶27] The explanation of how the Schultz Land referred to in the City minutes (Exhibit #1) Appellant Transcript (docket entry #81, district court case 30-2019-CV-1009) relates to this case is found in transcript page 6, lines 4 – 9:

“Q. Now, the land that the City is talking about, who did you get that from?”

A. We bought it from a pair of Schultz brothers.

Q. And that, looking at Exhibit 1, you read that. It does have your name in there and mentions the Schultz land?

A. Yes, it does.”

[¶28] A further explanation of the land involved in this case is found in the court’s memorandum and order of September 25, 2019 at paragraph [7] said:

“Schirados claim that they are allowed to use the City’s property based on an agreement with the City. Admitted into evidence, Exhibit 1, are the minutes of the Glen Ullin City Counsel for the Regular Meeting of May, 12, 2003. The minutes show that Karen Schirado was present and inquired about grazing horses on the Schultz land located on the extreme north side of Glen Ullin. The Counsel at the meeting determined that the grazing is permissible.”

[¶29] After the minutes in Exhibit #1 the city and the Schirados entered into an unwritten agreement regarding the above-described land. The terms of that unwritten agreement that were testified to at the Order to Show Cause hearing are set out below.

The following is Karen Schirado’s testimony:

Transcript page 7, line 12 - page 8, line 1:

“Q. And as far as when you -- from your affidavit you had some kind of -- reached some kind of an agreement with the City?

A. Yes, I did.

Q. And what was that agreement?

A. After I started cleaning up back there and cleaning the area, I noticed that all the -- where all the streets would be was all garbage. There was cars and tractor parts, combine parts, old shop parts, stoves, refridges, beds, all just buried into the dirt and everywhere. I realized just -- that it wasn't just garbage on the top of the soil.

Q. Did you remove most of that stuff?

A. I spent eight years hiring kids and we hauled garbage out one to two times a week every summer for the eight years, and I paid the City to take back their own garbage.”

Transcript page 8, line 6 to line 16:

“Q. Okay. Hold it. Now, is there any terms that – what did you have to do with the horses?

A. I have to keep them in. I have to --

Q. And have the horses gotten out since you've done this?

- A. No. Not unless somebody had opened a gate, no.
- Q. And as far as there was something about letting people down to get minnows. Could you explain that to us, please?
- A. I had to keep it opened enough for people to set their minnow traps and stuff. And I do, I let people back there to get their minnows. I could have brought it -- one or two of the people in now that have minnow traps back there.”

Transcript page 9, line 6 to page 10, line 1:

- “Q. At this time do you think you have reason to be on the land?
- A. Yes, I do.
- Q. And what is that reason?
- A. My agreement with the City when I cleaned those streets was that the streets came with it unless they put new streets in. So my understanding is, I spent eight years cleaning up all that garage and did all the work so that breaking up those streets wouldn't break up my land to take out my well.
- Q. Now, the City, as I understand, is concerned about when this lease that you have with them would end. And do you have any understanding as to when it would end?
- A. Well, the first time I went to check on the land before we bought it, I made sure that I would still be grandfathered in for a pasture, because that's what I was buying it for. Because without water, sewer, electricity, streets or gas, I would be raising mosquitoes if I couldn't have my horses.
- Q. And when is that going to end, I mean?
- A. I suppose -- well, they told me it would end if I sold it or if it went out of my family, is what they told me, is my understanding for it.”

[¶30] The testimony below regarding the unwritten agreement was given by Betty Delabarre, former Mayor and Counselman for the City of Glen Ullin, Transcript page 19, lines 6 – line 12:

- “Q. And did she -- was that part of any arrangement with the City for her to remove the garbage?
- A. The agreement was made with her that she keep the horses in, fence the horses in and keep them there, clean up the garbage, keep the grass low so that there would be no extra rodents or anything running around. But yeah, that was part of the agreement.”

Transcript page 19, lines 20 – 23:

- “Q. And as far as the agreement that you know of, that you recall between Mrs. Schirado, Mr. Schirado and the City, do you think she's done anything to violate that agreement?
- A. Not that I know of, sir.”



[¶31] Two affidavits of Karen Schirado are found in the appendix. The first affidavit is found in the appendix pages 44 – 45 and the second affidavit is found in the appendix at pages 72 - 74.

[¶32] The August 15, 2019 affidavit of Karen Schirado in the appendix at page 44 - 45 at paragraph [3] states:

“That agreement was as follows:

- A. All of the above described land could be used by she and her husband as pasture land.
- B. That there was a lot of garbage on the above land and if she cleaned it up she and her husband could use the platted streets and alleys as part of their pasture land.
- C. That she has cleaned up the garbage.”

[¶33] The December 31, 2019 affidavit of Karen Schirado in the Appendix page 72 - 74 states at [4] through [20]:

“[4] That in 2005 Affiant met with the following members of the Glen Ullin City Counsel; Betty Delabarre, Randy Martivich, Thomas Schirado, and Marie Schaff to discuss whether or not Affiant could make an agreement with the City of Glen Ullin which would allow Affiant to use the platted streets and alley in the above description along with her adjoining real property to graze her horses in exchange for Affiant cleaning up the garbage that had been deposited on Plaintiff’s real property when that real property was used as a garbage dump.

[5] Affiant and the City of Glen Ullin reached an agreement that the Affiant could graze her horses on Plaintiff’s land if she cleaned up and removed the garbage that had been left on Plaintiff’s real property when it was used as dump grounds.

[6] This agreement was never reduced to writing but Affiant put in about seven (7) years cleaning up Plaintiff’s real property.

[7] That in order to clean up Plaintiff’s property Affiant had to use her equipment, such as her truck and tractor, to assist her in cleaning up Plaintiff’s real property.

[8] That Affiant had to also hire others to help her clean up Plaintiff’s real property.

[9] That the following are some of the laborers she hired over the next seven (7) years: Matt Gartner, Jordan Joshua, Dion, Stephan Hoar, Natalia Fode, Michael Fode Jr., Wesley Fode, Michael Rathjen, and Jean Fode.

[10] That these individuals were paid according to the loads they hauled and she provided meals for them during the days they worked. Other individuals she hired were in 2005 and 2006 for one day each year. A log cutter named James Coggins. In the last year to haul 5 vehicles she hired Vance Herman and Bruce Hintz.

[11] That Affiant had to have loads of garbage hauled from Plaintiff's real property to the new Glen Ullin dump and the cost of each load was determined by the size of the load.

[12] That Affiant spent approximately \$18,000.00 on all of the above.

[13] That Affiant also worked about 7 months each year from 2005 to 2012 getting the loads ready to haul to the new dump in Glen Ullin.

[14] That Affiant worked about ten (10) hours per day and six (6) days per week for seven (7) years in the cleaning up of Plaintiff's real property.

[15] That \$10.00 per hour for ten (10) hours per day amounts for \$100.00 per day.

[16] That figuring twenty-six (26) work days per month times \$100 comes to \$2,600.00 per month and \$18,200.00 per year.

[17] That seven (7) years times \$18,200.00 comes to \$127,400.00.

[18] That in the years 2005 and 2006 Affiant attended school and only worked 40 hours per week during the months of June and July in those years.

[19] That figuring forty (40) hours times 10 is only \$400 per week and is \$200.00 per month less than what she normally would earn.

[20] That because of summer school in those years \$800.00 should be deducted from \$127,400 and Affiant's total wages should be \$126,600.00.

[¶]34] The affidavit of Betty Delabarre in [5] through [8], at Appendix Page 46 - 47 states.

“[5] That the Schirados wanted to use that platted land as a horse pasture.

[6] That the City Counsel when she was on it had no objection to the Schirados using the land for a horse pasture and made the following agreement with the Schirados regarding that land:

- A. The Schirados could use the land as a horse pasture and keep their horses on said land.
- B. That while the Schirados horses were on the land they had to keep it fenced so their horses wouldn't get out.
- C. That while the Schirados were on the platted land they had to keep all the platted land clean and remove the garbage that had been dumped there.
- D. That the Schirados had to allow the public to go on the land to catch minnows from the creek.

[7] That the city counsel made a motion and it passed regarding A., B., C., and D. above.

[8] That to her knowledge the Schirados have done all that was required in the above agreement with the City of Glen Ullin to allow them to use the platted land as a horse pasture and that there is no reason the Schirados should not be allowed to use the land as a horse pasture.”

[¶35] The other issue in this case deals with attorney fees awarded to the City.

According to City of Glen Ullin v. Schirado, 2020 ND 185, 20200075 only the Park Board has a prior judgment. Because the city doesn't have a prior judgment the City is entitled to no attorney fees for contempt.

#### STANDARD OF REVIEW

[¶36] The Standard of Review to determine whether summary judgment was appropriately granted is set out in Klein v. Sletto, 889 N.W.2d 918 (N.D. 2017):

“[¶7] In Hamilton v. Woll, 2012 ND 238, ¶ 9, 823 N.W.2d 754 (quoting Wenco v. EOG Res., Inc., 2012 ND 219, ¶ 8, 822 N.W.2d 701), we explained the well-established standard for reviewing summary judgments:

Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. We have explained:

If the moving party meets its initial burden of showing the absence of a genuine issue of material fact, the party opposing the motion may not rest on mere allegations or denials in the pleadings, but must present competent admissible evidence by affidavit or other comparable means to show the existence of a genuine issue of material fact. Rule 56[, N.D.R.Civ.P.,] requires the entry of summary judgment against a party who fails to establish the existence of a material factual dispute as to an essential element of the claim and on which the party will bear the burden of proof at trial. When no pertinent evidence on an essential element is presented to the trial court in resistance to the motion for summary judgment, it is presumed that no such evidence exists. This Court has repeatedly cautioned that mere speculation is not enough to defeat a motion for summary judgment, and a scintilla of evidence is not sufficient to support a claim. *Riemers v. Hill*, 2016 ND 137, ¶ 21, 881 N.W.2d 624 (quoting *Barbie v. Minko Constr., Inc.*, 2009 ND 99, ¶ 6, 766 N.W.2d 458).

In determining whether summary judgment was appropriately granted, we must view 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. 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. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record. *Hamilton*, at ¶ 9 (quoting *Wenco*, at ¶ 8).”

### ARGUMENT

ISSUE I. In this case is there are issues about the permission given by the City to the Schirados in Exhibit #1 and an unwritten agreement between the City of Glen Ullin (City) and the Defendant/Appellants Karen Schirado and Jerome Schirado (Schirados) that prevents the district court from entering a summary judgment against the Schirados.

ISSUE II. Does the unwritten agreement entered into by the City and Schirados and the partial performance by the Schirados of their terms of the written agreement remove the oral agreement from the Statute of Frauds?

[¶37] According to the above standard of review summary judgment can not be granted in any case when there “genuine issues of material fact or inferences that can be reasonably drawn from undisputed facts”.

[¶38] In this case there are genuine issues of material facts and/or inferences that can be reasonably drawn from undisputed material facts. These issues are:

1. Is Exhibit #1 the memorandum or the note required by N.D.C.C. §9-06-04?
2. Have the Schirados because of the time and money they spent partially performed the unwritten agreement?
3. Was the work the Schirados did cleaning up the garbage from the city streets and alleys an improvement and was that improvement valuable, substantial, and permanent?
4. Did the Schirados after the unwritten agreement was entered into take possession of the city streets and alleys?

[¶39] As to issue one N.D.C.C. §09-06-04 applies:

“09-06-04. Contracts invalid unless in writing – Statute of frauds. The following contracts are invalid, unless the sale or some note or memorandum thereof is in writing and subscribed by the party to be charged, or by the party’s agent...”.

[¶40] The Schirados claim Exhibit #1 is the note and/or memorandum referred to in N.D.C.C. §09-06-04.

[¶41] Why the second, third, and fourth issues apply to this case are discussed in

Williston Co-op. Credit Union v. Fossum, 459 N.W.2d 548, (N.D. 1990):

“The general rule is that contracts for the sale of real property and transfers of real property interests must be made by an instrument in writing. Section 9-06-04, N.D.C.C.; Section 47-10-01, N.D.C.C. However, part performance of an oral contract which is consistent only with the existence of the alleged contract removes it from the statute of frauds. *Poyzer v. Amenia Seed & Grain Co.*, 409 N.W.2d 107 (N.D.1987). While partial payment of the purchase price alone is not justification for enforcing an oral contract to convey land, partial payment together with other acts such as possession or the making of valuable improvements may be sufficient to take a contract out of the statute of frauds. See *Parceluk v. Knudtson*, 139 N.W.2d 864 (N.D.1966). When improvements to the property are relied upon as part performance of an oral contract for purposes of removing it from the statute of frauds, the improvements

made on the land must be valuable, substantial, and permanent. *Vasichek v. Thorsen*, 271 N.W.2d 555 (N.D.1978). Thus, part payment of the purchase price and substantial improvements to the property may remove an oral contract from the statute of frauds and create an enforceable contract constituting an enforceable equitable property interest.”

[¶42] An issue in this case is set out in *City of Glen Ullin v. Schirado*, 2020 ND 185, 20200075 and is found at [¶7]: “Moreover, the Schirados have raised an issue concerning an oral agreement with the Glen Ullin City Council that was not resolved in the prior lawsuit”.

ISSUE III. Did the district judge calculate the City’s attorney fees according to the direction given by the North Dakota Supreme Court on remand?

[¶43] According to *City of Glen Ullin v. Schirado*, 2020 ND 185, 20200075:

“[¶8] We also vacate the award of attorney's fees and costs. The City and the Park District requested attorney's fees in the amount of \$3, 000 for the Schirados' violation of the 2013 judgment. The district court found the Schirados in contempt for violating the 2013 judgment, and it awarded attorney's fees and costs in the amount of \$11, 106.85. Violation of the 2013 judgment is a valid reason for a finding of contempt, and we therefore affirm the court's finding. See *Arnold v. Trident Res., LLC*, 2020 ND 104, ¶ 10, 942 N.W.2d 465. However, the court did not specify which portion of the award is a sanction for the contempt, nor did it articulate which portion of the award was attributable to each plaintiff. We therefore vacate the award of attorney's fees and costs with instructions for the district court to explain its rationale for the award, including which amount is a sanction for the contempt, and which portion is allocated to each plaintiff. See *id.* at ¶ 22 (remanding sanction award for district court to explain its rationale when the record was insufficient to review the appropriateness of the amount awarded).”

[¶44] In the first summary judgment the Plaintiffs were awarded attorney fees of \$11,106.85. This award included fees for contempt for both Plaintiffs, the Glen Ullin Park Board and the City of Glen Ullin.

[¶45] The amended summary judgment states Plaintiffs shall be awarded statutory costs of \$10.00 disbursements of \$176.85 and ½ of their attorney fees of \$10,920.00 = \$5,460.00 for a total sum of \$5,646.85.

[¶46] Attorney fees for the Plaintiff Park District of the City of Glen Ullin should include attorney fees for contempt because of a 2013 judgment in favor of the Park District. The City of Glen Ullin has no prior judgment that the Schirados can be in contempt of. Therefore, the City of Glen Ullin is not entitled to attorney fees for contempt.

[¶47] The above figures in the amended summary judgment don't contain a break down or explanation of the award of Plaintiff City of Glen Ullin's attorney fees. Without a break down and/or summary it appears the City of Glen Ullin attorney fees include contempt.

[¶48] Both judgments include attorney fees for contempt for the City. The second judgment as written doesn't comply with what the North Dakota Supreme Court ordered on remand and awards The City of Glen Ullin attorney fees for contempt.

[¶49] If this case is remanded for a trial no attorney fees should be awarded until after the trial.

#### CONCLUSION

[¶50] In this case there is no explanation for the Schirados cleaning up the City's Streets and alleys other than the had an unwritten agreement with the City of Glen Ullin.

[¶51] Summary judgment shouldn't have been granted because there are four genuine issues of material fact or inferences that can be reasonably drawn from undisputed facts that must be resolved. These issues are:

1. Is Exhibit #1 the memorandum or the note required by N.D.C.C. §9-06-04?
2. Have the Schirados because of the time and money they spent partially performed the unwritten agreement?

3. Was the work the Schirados did cleaning up the garbage from the city streets and alleys an improvement and was that improvement valuable, substantial, and permanent?
4. Did the Schirados after the unwritten agreement was entered into take possession of the city streets and alleys?

[¶52] For the above and forgoing reasons this case should be remanded for a trial on the four issues listed above and to correct the award to the City of attorney fees for contempt.

[¶53] If this case is remanded for a new trial no attorney fees should be awarded until after the trial.

Dated this 6<sup>th</sup> day of January 2021.

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| <p>City of Glen Ullin and<br/>Park District of the City of Glen Ullin,</p> <p>Plaintiffs/Appellee,</p> <p>v.</p> <p>Karen Schirado and<br/>Jerome Schirado,<br/>Defendants/Appellants.</p> | <p>Case No.: 30-2019-CV-01009</p> <p>Supreme Court Case No:<br/>20200345</p> <p><b>CERTIFICATE OF<br/>COMPLIANCE</b></p> |
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[¶1] This Appellant’s Brief and Appendix complies with the pages limit of 38 for the Brief and 100 pages for the Appendix set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, as the Brief consists of 16 pages and Appendix consists of 134 pages. Payment in the amount of .50 per page in excess of 100 has been made to the North Dakota Supreme Court.

Dated this 6<sup>th</sup> day of January, 2021.

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[¶1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Appendix  
Appellant's Brief

By email at the below address upon:

John Mahoney  
Attorney for the Plaintiffs  
[service@mahoney-legal.com](mailto:service@mahoney-legal.com)

North Dakota Supreme Court  
[supclerkofcourt@ndcourts.gov](mailto:supclerkofcourt@ndcourts.gov)

and by placing a true and correct copy of said items in a sealed envelope with USPS mail to:

Karen and Jerome Schirado  
411 S. 2<sup>nd</sup> Street  
Glen Ullin, ND 58631

Dated this 6<sup>th</sup> day of January, 2021.

/S/ Cassy Larson  
Cassy Larson  
Legal Assistant to Benjamin C. Pulkrabek  
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