

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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Supreme Court No. 20210107  
Williams County District Court No. 53-2019-CV-01545

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WADES WELDING, LLC,

*Plaintiff and Appellee,*

v.

TIOGA PROPERTIES, LLC.

*Defendant and Appellant,*

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Appeal from Judgment dated February 17, 2021; from the Order Denying Motions to Continue dated November 24, 2020 and December 7, 2020; and from the Order Granting a Witness to Testify by Reliable Electronic Means dated December 4, 2020.

THE HONORABLE PAUL W. JACOBSON, DISTRICT JUDGE

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**BRIEF OF PLAINTIFF/APPELLEE WADES WELDING, LLC**

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## **STATEMENT OF ISSUES**

[¶1.] Whether the District Court correctly determined that the construction liens claimed by Wades Welding are valid?

[¶2.] Whether the District Court correctly determined that Wades Welding is entitled to foreclosure of its construction lien against the mobile home property?

[¶3.] Whether the District Court correctly determined that Wades Welding is entitled to recovery against Tioga Properties for the value of its contributions to the restaurant property under the equitable doctrine of unjust enrichment?

[¶4.] Whether the District Court properly denied Tioga Properties' claim for attorney fees?

[¶5.] Whether the District Court abused its discretion by denying Tioga Properties' motion to continue the trial date?

[¶6.] Whether the District Court abused its discretion by allowing witnesses for both parties to testify by reliable electronic means?

## **STATEMENT OF THE CASE**

[¶7.] This case involves a dispute between a contractor, Wades Welding LLC, against a property owner, Tioga Properties LLC, over work done by Wades Welding on two properties. Wades Welding performed work in early 2016 on the first property, the "restaurant property," at the request of Susan Gordon. Gordon was a relative of the owner of Tioga Properties, Janice Ellsworth. Gordon later requested that Wades Welding perform work on another Tioga Properties property, the "mobile home property." At the time of the work by Wades Welding, Gordon was leasing the restaurant property and living in the mobile home property.

[¶8.] Gordon was evicted by Tioga Properties several days after the work was completed by Wades Welding. Wades Welding was not paid for the work and eventually recorded separate construction liens against each of the two properties. Wades Welding brought an action seeking foreclosure of its liens as well as contractual and equitable claims for damages.

[¶9.] After a bench trial, the District Court determined that both construction liens were valid because Susan Gordon was an “owner” as the term is defined by N.D.C.C. § 35-27-01(5), that she had contracted with Wades Welding to perform the work, and that the work constituted improvements to both of the properties. Tioga Properties did not dispute the value of the improvements, and there was no dispute that Wades Welding went unpaid.

[¶10.] The District Court determined that Tioga Properties had notice of the work being performed by Wades Welding, had not objected to the work, and either implicitly or directly consented to the work being performed. Additionally, the court determined that Tioga Properties was statutorily deemed to have authorized the work under the provisions of N.D.C.C. § 35-27-07.

[¶11.] With respect to the restaurant property, Wades Welding abandoned its foreclosure claim after Tioga Properties introduced evidence that it had sold the restaurant property to a third-party buyer -- the construction lien notwithstanding -- and that the new buyer had not been named in the foreclosure action. The District Court determined that foreclosure of the lien against the mobile home property was appropriate and entered judgment for foreclosure, along with a dollar judgment in the principal amount of \$19,840.00.

[¶12.] With respect to the restaurant property only, the District Court determined that Wades Welding was entitled to recovery for the value of its improvement under the

equitable doctrine of unjust enrichment, and entered judgment in favor of Wades Welding in the principal amount of \$2,500.00.

### STATEMENT OF FACTS

[¶13.] During the period of time relevant to this action, Tioga Properties, LLC was the owner of two properties in Tioga, North Dakota. App. 103. The two properties have been referred to as the “restaurant property” and the “mobile home property.” App. 40. The sole member of Tioga Properties, LLC is Janice Ellsworth, a resident of Alaska. App. 71, 101.

[¶14.] On February 1, 2021, Tioga Properties leased the restaurant property to Susan Gordon, who at the time was Janice Ellsworth’s sister-in-law. App. 6-12; 67. Gordon operated a business, Wildcatz Grill, from the restaurant property. App. 67. When Gordon first moved to North Dakota and began operating the restaurant, she lived at a property owned by Northern Energy Services. Northern Energy was owned by Janice Ellsworth’s son, John Ellsworth Jr. App. 68-69. John was also a resident of Alaska, but spent significant time in North Dakota.

[¶15.] Tioga Properties later purchased a mobile home property across the street from the restaurant property and allowed Gordon to live there. App. 69. There was no lease agreement for the mobile home and Susan did not pay rent for the mobile home property. See App. 6-12; App. 81.

[¶16.] Several problems occurred with the two properties in late 2016 and early 2017. The first issue was heating deficiencies affecting both properties during the winter months. The heating had become deficient in the restaurant property to the point that staff and customers needed to wear winter coats inside. Suppl. App. 11-12. Gordon asked Wade Sprenger of

Wades Welding to address both heating issues. Id. Wades Welding purchased additional heating units, gas pipe, insulation, electrical components and other parts, and installed new heating and insulation on both properties. Suppl. App. 12; 22-23; 33-34. Susan Gordon testified that the heating upgrades installed by Wades Welding improved both of the properties. App. 70; Suppl App. 12. She testified that John Ellsworth Jr. was aware of both the need for the work and the fact that Wades undertook the work. Suppl. App. 13.

[¶17.] Later, a significant problem arose with the mobile home property when the sewer line collapsed. App. 71. Gordon was unable to shower, do her dishes, or flush her toilet. Id. She testified that she needed to use a bucket for her restroom. Id. She traveled to the Northern Energy Services property to use their showers. App. 72. Gordon communicated with John Ellsworth Jr. about the need to have the sewer line repaired. App. 72-73.

[¶18.] Several plumbers visited and determined that the sewer connection would need to be replaced. App. 71-72. Gordon ultimately commissioned Wades Welding to undertake the needed work. Id. The work involved clearing the snow from the yard, digging approximately eight feet under the trailer, running a trench from the trailer to the city sewer connection along the street, and then laying a new sewer pipe to grade and connecting it to the city sewer connection. Suppl. App 46. Wades brought in a licensed plumber to inspect and approve the work. Id. After the work was approved, Wades backfilled the excavation and finalized the work. Id.

[¶19.] Tioga Properties has not contested that the work was performed by Wades Welding, nor that the work constituted improvements to the properties. Suppl. App. 28.

[¶20.] Susan Gordon testified that John Ellsworth Jr. would have personally observed Wades Welding completing the needed sewer replacement work that she had brought to

his attention. App. 75-76. She recalled hearing John Ellsworth Jr. speaking to Wade Sprenger about the sewer replacement. Id. In fact, she recalled hearing Ellsworth tell Sprenger to bring his bill for the work to his shop for payment. Id. Sprenger also recalled this conversation, and testified that he spoke to John Ellsworth Jr. on several occasions about the sewer work as it was ongoing. Suppl. App. 30. Neither John Ellsworth or anyone else associated with Tioga Properties objected to the work, told Sprenger to halt the work, or told him that he needed approval directly from Janice Ellsworth. Tr. 48-49.

[¶21.] Susan Gordon testified that she was evicted by Tioga Properties immediately after the sewer work was completed by Wades Welding. App. 74. Janice Ellsworth informed her of the eviction, and John Ellsworth Jr. and his employees actually carried it out. Id. Wades Welding presented its invoices for work on the two properties to John Ellsworth Jr. at his Northern Energy Services office. The bills were never paid. The total amounts billed were \$19,840 relating to the work on the mobile home property and \$2,500 relating to work on the restaurant property.

[¶22.] Wades Welding recorded construction liens against both properties on December 5, 2017. On September 19, 2019, Tioga Properties served a written demand to release or enforce the construction liens. Wades Welding recorded lis pendens and commenced this action, seeking foreclosure of its construction liens and damages under contractual and equitable claims.

### **STANDARD OF REVIEW**

[¶23.] In an appeal from a bench trial, the trial court's findings of fact are reviewed under the clearly erroneous standard of N.D.R.Civ.P. 52(a) and its conclusions of law are fully reviewable. Fargo Foods, Inc., v. Bernabucci, 1999 ND 120, ¶10, 596 N.W.2d 38. “A

finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after reviewing all the evidence, we are left with a definite and firm conviction a mistake has been made.” Moen v. Thomas, 2001 ND 95, ¶ 19, 627 N.W.2d 146. In a bench trial, the trial court is “the determiner of credibility issues and we do not second-guess the trial court on its credibility determinations.” Id. at ¶ 20. A trial court’s findings are “presumptively correct.” Tweeten v. Miller, 477 N.W.2d 822, 835 (N.D. 1991).

## LAW AND ARGUMENT

### **A. The District Court correctly determined that the construction liens claimed by Wades Welding are valid.**

[¶24.] Construction liens are governed by Chapter 35-27 of the North Dakota Century Code. Under N.D.C.C. § 35-27-02, “[a]ny person that improves real estate, whether under contract with the owner of such real estate or under contract with any agent, trustee, contractor, or subcontractor of the owner, has a lien upon the improvement and upon the land on which the improvement is situated.”

[¶25.] For the purposes of Chapter 35-27, “[o]wner means the legal or equitable owner and also every person for whose immediate use and benefit any building, erection, or improvement is made, having the capacity to contract, including guardians of minors or other persons, and including any agent, trustee, contractor, or subcontractor of such owner.” N.D.C.C. § 35-27-01(5).

[¶26.] The District Court determined that Susan Gordon hired Wades Welding to make improvements to each property, and that Gordon was an “owner” for purposes of the lien statute because she occupied the properties and the improvements were for her immediate use and benefit. These findings are supported by the undisputed evidence of the case.

[¶27.] On appeal, Tioga Properties argues that the lien claim is deficient because Gordon is not the legal or equitable owner of the properties. Tioga Property’s argument fails to address the broader definition of “owner” set forth in the lien statute. By all accounts, Gordon was an immediate beneficiary of the improvements made by Wades Welding, and thus an “owner” as defined by N.D.C.C. § 35-27-01. Tioga Properties’ argument that there must be a contract directly between the legal owner of the property and the contractor is contradicted by the plain language of the statute, and in particular N.D.C.C. § 35-27-01(5) and § 35-27-02.

[¶28.] Tioga Properties also suggests that Susan Gordon lacked capacity to contract with Wades Welding because she was not a member of Tioga Properties, LLC. This argument appears to confuse the requirement of capacity with that of legal authority. All persons except minors and persons of unsound mind have the capacity to contract. N.D.C.C. § 9-02-01. There was no evidence introduced that Gordon lacked capacity.

[¶29.] The argument advanced by Tioga Properties appears to instead be that she did not have authority to contract on behalf of Tioga Properties. For the purposes of the construction liens at issue, this inquiry is not relevant. Wades Welding did not argue that Gordon had authority to bind Tioga Properties, or that she was acting on behalf of Tioga Properties. The argument of Wades Welding, adopted by the Court, was that Gordon herself was an “owner” as defined under N.D.C.C. § 35-27-01, and that her contract with Wades Welding for improvements to the properties established grounds for the lien claim. This position is correct under the plain language of the relevant statutes.

[¶30.] Tioga Properties makes a number of other arguments premised on the lease agreement between Tioga Properties and Gordon. The lease appears to make Gordon

solely responsible for repairs, maintenance, and improvements to the restaurant property. However, Wades Welding was not a party to the lease agreement, not aware of the lease agreement, and thus not bound by any term of the lease agreement insofar as it restricts Wades' ability to record a construction lien consistent with the governing statutes.

[¶31.] Tioga Properties argues further that the constructions liens are invalid because Janice Ellsworth did not have direct knowledge of the work commissioned by Gordon. N.D.C.C. § 35-27-07 provides:

When improvements are made by one person upon the land of another, all persons interested therein otherwise than as bona fide prior encumbrancers or lienors are deemed to have authorized such improvements, insofar as to subject their interests to liens therefor. Any person who has not authorized the same may protect the person's interest from such liens by serving upon the person doing work or otherwise contributing to such improvement within five days after knowledge thereof, written notice that the improvement is not being made at the person's insistence, or by posting like notice, and keeping the same posted, in a conspicuous place on the premises.

N.D.C.C. § 35-27-07 (emphasis added).

[¶32.] Tioga Properties is deemed by law to have authorized the improvements undertaken by Wades Welding, and there was no evidence presented that Janice Ellsworth or anyone else with an interest in the properties objected to the work or undertook any action to protect Tioga Properties' interests against the liens at issue. The District Court also noted that Janice's son, John Ellsworth Jr., observed the work as it was completed, and that John acted as manager of the property on behalf of Tioga Properties with respect to most relevant property management functions. App. 41, 44. John had keys to the properties, he collected rent for the restaurant property, he oversaw repairs to the restaurant property after the eviction, and he commissioned the removal of the trailer from the trailer property after it was damaged. Id. Tioga Properties has not argued that protections afforded to lessors

against liens set out by N.D.C.C. § 35-27-07 apply, but even if those provisions were now considered, they afford no protection because the District Court properly determined that there was “ample evidence presented that Tioga Properties, LLC had at least constructive notice of the work performed by Wades Welding...”, and no objection to the work was raised. App. 47. Moreover, the mobile home property was not subject to any lease agreement between Tioga Properties and Susan Gordon.

[¶33.] Wades Welding also established that the necessary procedural steps to claim the constructions liens were carried out. Wades Welding had served notice of its intent to claim construction liens against the properties (Trial Exhibits 23-24 [Dkt. 55-56]) and the construction liens were appropriately recorded (Trial Exhibits 27-27 [Dkt. 58-59]). There was no dispute that the work completed by Wades Welding constituted improvements to the property, nor any dispute regarding the value of the improvements.

**B. The District Court correctly determined that Wades Welding is entitled to foreclosure of its construction lien against the mobile home property.**

[¶34.] Wades Welding conceded after trial that it was not entitled to foreclosure of its construction lien against the restaurant property. Suppl. App. 68. Despite the construction lien recorded against the restaurant property, and unbeknownst to Wades Welding, Tioga Properties had sold the restaurant property to a third-party just prior to serving its demand to release the construction lien. Id. Wades Welding was unaware of the sale and did not include the purchasers in the lien foreclosure action. However, as the District Court correctly noted, the voluntary dismissal of the foreclosure claim by Wades Welding does not disturb the underlying basis for the lien itself.

[¶35.] As to the foreclosure action against the mobile home property, the District Court properly determined that Wades Welding had complied with all requirements for

foreclosure and established that foreclosure of the lien was appropriate. Tioga Properties had served a written demand to release the construction lien. In response, Wades Welding recorded notice of lis pendens and commenced an enforcement action within thirty days. Tioga Properties, LLC appeared and defended the action. The action was thus appropriately commenced.

[¶36.] To the extent Tioga Properties may argue that pre-enforcement notice was not provided under NDCC § 35-27-24, Wades Welding notes that the action was commenced by demand of Tioga Properties, LLC under NDCC § 35-27-25, which does not require pre-enforcement notice be served. Tioga Properties LLC did not raise any objections to the manner of commencement in its answer, thus waiving any argument of deficiency under NDCC § 35-27-24. Regardless, a purported failure to give notice of intention to enforce a lien is not fatal where a party appears and defends, as Tioga Properties did in this case. Atlas Lumber Co. v. Canadian-American Mtg. & Trust Co., 36 N.D. 39, 161 N.W. 604 (1917). The action was appropriately commenced, and Wades Welding complied with all requirements at law for claiming its construction liens.

[¶37.] During trial, evidence was presented that Wades Welding had served notice of its intent to claim construction liens against the properties (Exhibits 23-24 [Dkt. 55-56]); that the construction liens were appropriately recorded (Exhibits 27-27 [Dkt. 58-59]); and that Wades Welding that the liens were both valid. There was no dispute as to the value of the improvements made by Wades Welding to the properties. There was no dispute that Wades Welding went unpaid for their services. Accordingly, the District Court did not err in determining that Wades Welding is entitled to foreclosure of its lien claim against the mobile home property, nor in its confirmation of the value of the lien.

**C. The District Court correctly determined that Wades Welding is entitled to recovery against Tioga Properties for the value of its contributions to the restaurant property under the equitable doctrine of unjust enrichment.**

[¶38.] Unjust enrichment “serves as a basis for requiring restitution of benefits conferred in the absence of an express or implied in fact facts. Ritter, Laber and Assocs., Inc. v. Koch Oil, Inc., 2004 ND 117, ¶26, 680 N.W.2d 634. “An essential element of recovery under unjust enrichment is the receipt of a benefit by the defendant from the plaintiff that would be inequitable to retain without paying for its value. Id. To recover under a theory of unjust enrichment, the plaintiff must prove: (1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and the impoverishment, (4) the absence of a justification for the enrichment and the impoverishment, and (5) the absence of a remedy provided by law. Id.

[¶39.] The District Court determined that the elements of unjust enrichment are present relating to the work performed by Wades Welding on the restaurant property. Tioga Properties LLC was enriched when Wades Welding performed work benefiting the property and increasing its value, while Wades Welding was impoverished by performing work and supplying parts and materials and providing labor without being compensated. The enrichment of Tioga Properties and the corresponding impoverishment of Wades Welding are directly connected.

[¶40.] The Court correctly held that there was no justification for Tioga Properties to retain the benefit of Wades Welding’s services without cost to them. The unique factual circumstances of the case were appropriately considered. Wades Welding would ordinarily have the remedy of lien foreclosure available for its work on the restaurant property.

However, Wades was unable to proceed on the foreclosure claim because Tioga Properties – in conscious disregard of the construction lien claimed and recorded by Wades Welding – sold the property just before issuing its demand to enforce the lien.

[¶41.] The Court also considered Tioga Property’s conduct in evicting Susan Gordon within mere days of the work being completed. The benefits of Wade’s work were thus conferred substantially on Tioga Properties, and not Susan Gordon. The Court also determined that Tioga Properties was deemed to have authorized the improvements under N.D.C.C. § 35-27-07, and considered the substantial evidence that John Ellsworth Jr. was aware of the improvements, and that John Jr. served as the local manager of Tioga Properties. The Court also considered Ellsworth’s assurances to Wades Welding that he would arrange payment for their work.

[¶42.] Ultimately, Tioga Properties enjoyed the benefits of Wades Welding’s work but failed to pay the fair cost of those benefits conferred upon it. Tioga Properties had no fair expectation that Wades Welding’s work was gratuitous. The District Court did not err in its finding that equitably Tioga Properties must pay for the fair value of the benefits conferred upon it.

**D. The District Court correctly denied Tioga Properties’ claim for an award of costs and attorney fees.**

[¶43.] N.D.C.C. § 35-27-24.1 provides that any owner who successfully contests the validity or accuracy of a construction lien by action in district court must be awarded the costs and reasonable attorney fees incurred by the owner. Tioga Properties argues that the District Court should have awarded its costs and attorney fees because Wades Welding voluntarily abandoned its foreclosure claim against the restaurant property.

[¶44.] There is a clear distinction between the “validity or accuracy of a construction lien” and an action for foreclosure of the lien. Wades acknowledged a procedural defect in its foreclosure action against the restaurant property and voluntarily abandoned its foreclosure claim. However, the District Court correctly determined that the underlying construction lien was valid and accurate. By its plain language, N.D.C.C. § 35-27-24.1 does not provide for the award of costs or attorney fees to a party when that parties fails to successfully contest either the validity or accuracy of the lien. In fact, the District Court determined that Wades Welding was entitled to recovery on an equitable basis for the value of its contributions to the restaurant property.

[¶45.] The District Court did not abuse its discretion in denying Tioga Properties claim for costs or attorney fees.

**E. The District Court did not abuse its discretion by denying Tioga Properties’ motion to continue the trial date.**

[¶46.] The district court’s decision whether to grant a continuance will not be set aside on appeal absent an abuse of discretion. State v. Kunkel, 452 N.W.2d 337, 339 (N.D. 1990). “In reviewing a court’s decision on a motion for continuance, ‘we must look to the particular facts and circumstances of each case as there is no mechanical test for determining whether or not a trial court abused its discretion.’” Id. The party asserting the district court abused its discretion in denying a motion to continue must establish prejudice. Flattum-Riemers v. Peters-Riemers, 2001 ND 121, ¶15, 630 N.W.2d 71.

[¶47.] Tioga Properties fails to establish that the district court abused its discretion. North Dakota Supreme Court Administrative Order 25 did not suspend bench trials, and afforded district courts “discretion” to continue bench trials and hearings. Tioga Properties’ motion for continuance argued only that its member, Janice Ellsworth, felt “uncomfortable”

traveling to North Dakota during the COVID-19 pandemic. The district court appropriately weighed Ms. Ellsworth's non-specific concerns about traveling against the prejudice that would be suffered by Wades Welding in delaying trial until conclusion of the pandemic. The district court's decision denying the motion to continue was within its discretion and supported by the particular facts and circumstances of the case.

[¶48.] Moreover, Tioga Properties fails to establish any prejudice suffered due to the denial of their motion. Mr. Ellsworth testified by telephone at trial. Tioga Properties argues that the court would have observed her more fully in person and better assessed her purported propensity for truthfulness, but fails to identify any particular testimony from Ellsworth that was disregarded by the court or would have been given different weight if she were present. Ms. Ellsworth's son, John Ellsworth Jr. also testified by telephone. No prejudice was suffered due to the district court's order denying the motion to continue.

**F. The District Court did not abuse its discretion by allowing witnesses for both parties to testify by reliable electronic means.**

[¶49.] Tioga Properties argues that the District Court abused its discretion by allowing Susan Gordon to testify by telephone. N.D.R.Admin. 25 provides that courts may conduct civil hearings or other proceedings, or take testimony, by reliable electronic means. Tioga Properties argues that a formal Rule 3.2 motion is necessary before a district court may allow a witness to appear telephonically, and that Wades Welding filed only a "Request for Witness to Testify by Reliable Electronic Means." Notably, Tioga Properties filed no requests or motions at all, and did not obtain permission of the court, before its only two witnesses, Janice Ellsworth and John Ellsworth Jr. testified by telephone.

[¶50.] There is no specification within N.D.R.Admin. 25 that a formal Rule 3.2 motion be filed before the district court can grant a request to allow a witness to testify remotely.

Wades Welding filed its request in advance and the request was granted. Tioga Properties objected to Susan Gordon's testimony at trial and presented its arguments why her testimony should not be allowed. The district court heard the arguments and overruled the objection. There was no prejudice suffered by the lack of a formal Rule 3.2 motion in advance of trial. Tioga Properties enjoyed the same benefits of telephonic testimony as did Wades Welding, in the absence of any motion or request being filed at all. The argument that the district court abused its discretion by allowing both sides to present witnesses by reliable electronic means is devoid of merit.

### CONCLUSION

[¶51.] For the reasons stated above, Wades Welding LLC respectfully requests that the District Court's judgment be AFFIRMED in all things.

DATED this 2nd day of July, 2021.

MCGEE, HANKLA & BACKES, P.C.

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**CERTIFICATE OF COMPLIANCE**

[¶52.] The undersigned attorney for the Appellee certifies that the attached brief complies with the page limitation stated in North Dakota Rule of Appellate Procedure 32(1)(8)(A). The page count of the filed electronic document is 17 pages, exclusive of this Certificate of Compliance.

*/s/ Erich M. Grant*  
\_\_\_\_\_  
Erich M. Grant

**CERTIFICATE OF SERVICE**

[¶53.] I hereby certify that, on July 2, 2021, I served the foregoing document on the following by electronic mail transmission, through the filing portal, and that notice of the filing and the documents will be sent to the following:

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*/s/ Erich M. Grant*  
\_\_\_\_\_  
Erich M. Grant

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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Supreme Court No. 20210107  
Williams County District Court No. 53-2019-CV-01545

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THE HONORABLE PAUL W. JACOBSON, DISTRICT JUDGE

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**CERTIFICATE OF ELECTRONIC SERVICE**

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**CERTIFICATE OF ELECTRONIC  
SERVICE**

I hereby certify that on July 7, 2021, the following documents:

- 1) **Brief of Plaintiff/Appellee Wades Welding, LLC (corrected)**
- 2) **Supplemental Appendix of Appellee Wades Welding, LLC (corrected)**

were filed and served with the Supreme Court Clerk of Court through ECF and that ECF will send a Notice of Electronic Filing (NEF) to the following:

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Dated: July 7, 2021

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