NORTH DAKOTA SUPREME COURT REVIEW

The North Dakota Supreme Court Review briefly summarizes important decisions rendered by the North Dakota Supreme Court. The purpose of the Review is to indicate cases of first impression, cases that have significantly affected earlier interpretations of North Dakota law, and other cases of interest. The North Dakota Supreme Court Review was written by the Board of Associate Editors for the *North Dakota Law Review*. The following topics are included in the Review:

ADMINISTRATIVE LAW–DRIVER'S LICENSE SUSPENSION–STATUTORY INTERPRETATION

LENTZ V. SPRYNCZNATYK

Aaron Lentz appealed a North Dakota Department of Transportation officer's decision to suspend his commercial driver's license for ninety-nine years when the officer considered Lentz's past driving under the influence (DUI) conviction in rendering the suspension.[1] Lentz argued that a statute permitting lifetime suspension of a commercial driver's license should not be used retroactively to consider a previous DUI offense that occurred prior to the statute's enactment.[2] The North Dakota Supreme Court affirmed the judgment of the hearing officer, finding that the officer properly interpreted the statute.[3]

Aaron Lentz acquired his commercial driver's license in 1998.[4] The North Dakota Legislative Assembly enacted a statute, effective August 1, 2003, whereby a commercial driver's license would be suspended for life upon the accumulation of two DUI offenses.[5] Lentz received his first DUI conviction while driving a noncommercial vehicle on September 5, 2000.[6] Lentz's first conviction occurred prior to the statute's enactment, but he received a second DUI conviction on November 17, 2003, which was after the statute's enactment.[7]

On appeal to the North Dakota Supreme Court, Lentz argued that the statute was improperly applied because one of his DUI convictions occurred before the statute's enactment.[8] Since the legal question posed on review regarded the interpretation of a statute, the agency's decision was fully reviewable.[9]

First, the court noted that no North Dakota statute is retroactive "unless it is expressly declared to be so."[10] Here, the statute became effective on August 1, 2003, and provided that "for a second conviction of driving while under the influence or being under the influence of a controlled substance or refusal to be tested while operating a noncommercial motor vehicle, a

1. Lentz v. Sprynczynatyk, 2006 ND 27, ¶ 1, 708 N.W.2d 859, 860.
2. *Id.* ¶ 1, 708 N.W.2d at 860.
3. *Id.*
4. *Id.* ¶ 2
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* ¶ 5, 708 N.W.2d at 861.
9. *Id.* ¶ 4 (citing Bjerklie v. Workforce Safety & Ins., 2005 ND 178, ¶ 9, 704 N.W.2d 818, 821).
10. *Id.* ¶ 6 (citing N.D. CENT. CODE § 1-02-10 (2005)).

commercial driver's license holder must be disqualified from operating a commercial motor vehicle for life."[11] Based on this language, Lentz argued that because his first DUI conviction occurred prior to the enactment of the statute, the court should not consider his previous conviction.[12] Instead, Lentz claimed that his commercial driver's license should only be suspended for one year.[13] Furthermore, Lentz claimed that if his license was suspended for longer than one year, then the legislature's presumption against retroactive statutes would be violated because the subsection did not expressly contain retroactive language.[14]

However, based on two analogous decisions, the North Dakota Supreme Court rejected Lentz's argument and affirmed the holding.[15] The court indicated that "the enactment of a change of consequence in . . . driving privileges d[oes] not amount to a retroactive application of [a] statute."[16]

The court examined an analogous decision, *Rott v. North Dakota Department of Transportation*,[17] where a minor accumulated six points against her driving record for a single traffic violation, which resulted in the suspension of her driver's license.[18] Rott claimed that she was licensed as a class D driver for two years prior to the enactment of the applicable statute, and when she received the traffic violation the statute was applied to her retroactively because the status of her driver's license changed.[19] But the court rejected Rott's argument because a statute could only be labeled as retroactive if it "operate[d] on transactions that have already occurred, or on rights existing before its enactment."[20]

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11. *Id.* ¶ 7 (citing N.D. CENT. CODE § 39-06.2-10(8) (2005)).

12. *Id.* ¶ 8.

13. *Id.* (citing N.D. CENT. CODE § 39-06.2-10(7) (2005)). N.D. CENT. CODE § 39-06.2-10(7) states:

> For a first conviction of driving while under the influence of alcohol or being under the influence of a controlled substance or refusal to be tested while operating a non-commercial motor vehicle, a commercial driver's license holder must be disqualified from operating a commercial motor vehicle for one year.

Id.

14. *Id.* ¶ 9, 708 N.W.2d at 862.

15. *Id.* ¶ 9 (referencing Rott v. N.D. Dep't of Transp., 2000 ND 175, ¶ 10, 617 N.W.2d 475, 477; State v. Haverluk, 432 N.W.2d 871, 874 (N.D. 1988)).

16. *Id.* ¶ 10 (citing *Rott*, ¶ 12, 617 N.W.2d at 478).

17. 2000 ND 175, 617 N.W.2d 475.

18. *Lentz*, 2006 ND 27, ¶ 10, 708 N.W.2d 859, 862 (citing *Rott*, ¶ 2, 617 N.W.2d at 476). The North Dakota Century Code section 39-06-01.1 provides that the accumulation of more than five points against a minor's driving record calls for the suspension of driving privileges. N.D. CENT. CODE § 39-06-01.1 (2005).

19. *Lentz*, ¶ 10, 708 N.W.2d at 862.

20. *Id.* (citing *Rott*, ¶¶ 7, 10, 617 N.W.2d at 477).

The court applied a similar rationale in another analogous decision, *State v. Haverluk*,[21] where it held that an increased penalty based on past convictions was not an application of a retroactive statute.[22] Haverluk had three prior DUI convictions, and a statute provided for an increased penalty for a fourth DUI conviction.[23] On Haverluk's fourth conviction, he argued that because three of his DUI convictions occurred prior to the statute's enactment, the increased penalty could not be applied to him.[24] But the court found that because the triggering behavior occurred after the enactment of the statute, the increased penalty was not a retroactive application.[25]

Applying *Rott* and *Haverluk*, Lentz's arguments failed.[26] In affirming the conviction and suspension of Lentz's commercial driver's license for ninety-nine years, the North Dakota Supreme Court held that even though Lentz's first conviction occurred prior to the statute's enactment, the statute had not been applied retroactively.[27] Furthermore, the court found additional support from neighboring state opinions, which upheld the use of prior drunk driving convictions to increase penalties for subsequent DUI offenses.[28]

ADMINISTRATIVE LAW–INTERSTATE WILDLIFE VIOLATOR COMPACT–STATUTORY INTERPRETATION

GRAY V. NORTH DAKOTA GAME & FISH DEP'T

David B. Gray, a North Dakota resident, was convicted of trespass to hunt in Wyoming on April 16, 2004, in a Wyoming circuit court.[29] Gray had crossed private land with "No Hunting" and "No Trespassing" postings in order to reach public land for hunting purposes.[30] Following appeal to a Wyoming district court, Gray's conviction was upheld and he was banned

21. 432 N.W.2d 871 (N.D. 1988).

22. *Lentz*, ¶ 11, 708 N.W.2d at 862 (citing State v. Haverluk, 432 N.W.2d 871, 873-74 (N.D. 1988)).

23. *Id.* ¶ 11.

24. *Id.* (citing *Haverluk*, 432 N.W.2d at 872-73) (showing that section 39-08-01 of the North Dakota Century Code provides that a "fourth or subsequent DUI conviction in a seven-year period" would enhance the penalty to a class A misdemeanor).

25. *Id.* ¶ 11 (citing Haverluk, 432 N.W.2d at 873).

26. *Id.* ¶ 13, 708 N.W.2d at 863.

27. *Id.* ¶¶ 12-13.

28. *Id.* (citing Sims v. State, 556 S.W.2d 141, 142 (Ark. 1977); State v. Sedillos, 112 P.3d 854, 856 (Kan. 2005); State v. Willis, 332 N.W.2d 180, 185 (Minn. 1983); Alexander v. Commonwealth of Penn., Dep't. of Transp., 880 A.2d 552, 561 (Pa. 2005)).

29. Gray v. N.D. Game & Fish Dep't, 2005 ND 204, ¶ 2, 706 N.W.2d 614, 617.

30. *Id.* ¶ 2, 706 N.W.2d at 617.

from hunting, fishing, and trapping in Wyoming until 2006.[31] Because Wyoming and North Dakota are members of the Interstate Wildlife Violator Compact (hereinafter "Compact"), information regarding Gray's suspended hunting privileges was submitted to the North Dakota Game and Fish Department (hereinafter "Department") on October 12, 2004.[32] Gray was informed via letter that his North Dakota hunting privileges were similarly suspended.[33] Both an Administrative Law Judge (hereinafter "ALJ") and, on further appeal, the District Court of Burleigh County affirmed the Department's action.[34] An appeal to the North Dakota Supreme Court followed thereafter.[35]

The North Dakota Supreme Court reviewed the decision of the ALJ in the same manner as did the district court.[36] The court decided only whether a "reasoning mind reasonably could have decided the agency's findings were proven by the weight of the evidence from the entire record."[37] Similarly, the court did not make independent findings of fact, nor substitute its own judgment for that of the ALJ.[38] Furthermore, the court stated that if the ALJ's findings were supported by a preponderance of the evidence, then the ALJ's order would be upheld.[39] Thus, the court would affirm the order of the ALJ unless any of the following were present:

> 1. The order [wa]s not in accordance with the law.
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> 2. The order [wa]s in violation of the constitutional rights of the appellant.
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> 3. The provisions of this chapter have not been complied with in the proceedings before the agency.
>
> 4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
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> 5. The findings of fact made by the agency [we]re not supported by a preponderance of the evidence.
>
> 6. The conclusions of law and order of the agency [we]re not supported by its findings of fact.

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31. *Id.*
32. *Id.* ¶ 3.
33. *Id.*
34. *Id.*
35. *Id.* ¶ 4, 706 N.W.2d at 618
36. *Id.* ¶ 7 (citing N.D. CENT. CODE § 28-32-49 (2004)).
37. *Id.*
38. *Id.*
39. *Id.*

> 7. The findings of fact made by the agency d[id] not sufficiently address the evidence presented to the agency by the appellant.
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> 8. The conclusions of law and order of the agency d[id] not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.[40]

First, Gray argued that the Department should not have suspended his North Dakota hunting privileges on the basis of the Wyoming trespass to hunt conviction.[41] Under the Compact, the "participating states agree to honor other participating states' wildlife license suspensions" to promote proper wildlife resource management.[42]

> [P]articipating states may recognize the suspension of license privileges of any person by any participating state as though the violation resulting in the suspension had occurred in their state and could have been the basis for suspension of license privileges in their state . . . [and] shall communicate suspension information to other participating states in form and content as contained in the compact manual.[43]

Therefore, after receiving notice of Gray's suspension from Wyoming, the Department had to determine if the violation could have led to a suspension in North Dakota.[44]

In Wyoming, Gray was found guilty of violating a statute that prohibited entering private land, without the owner's permission, to hunt.[45] North Dakota also imposes limits on hunting private land, such that "no person may hunt or pursue game, or enter for those purposes, upon legally posted land belonging to another without first obtaining the permission of the person legally entitled to grant the same."[46] While North Dakota presumes that the hunting of private land is legal when the land is not legally posted, Wyoming requires express permission from the landowner to hunt.[47] Gray contended that because the two statutes differed, his violation in Wyoming could not be recognized in North Dakota.[48]

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40. *Id.* ¶ 6 (quoting N.D. CENT. CODE § 28-32-46 (2004)).
41. *Id.* ¶ 8.
42. *Id.* ¶ 9.
43. *Id.* at 619 (quoting N.D. CENT. CODE § 20.1-16-01, art. 5, §§ 1-2 (2004)).
44. *Id.* ¶ 10, 706 N.W.2d at 619 (citing N.D. CENT. CODE § 20.1-16-03 (2004)).
45. *Id.* ¶ 11 (citing WYO. STAT. ANN. § 23-3-305(b) (2005)).
46. *Id.* ¶ 12, 706 N.W.2d at 620 (quoting N.D. CENT. CODE § 20.1-01-18 (2004)).
47. *Id.* (citing N.D. CENT. CODE § 20.1-01-17 (2004)).
48. *Id.*

The North Dakota Supreme Court concluded that the Department properly interpreted the law by suspending Gray's hunting privileges.[49] The court held that participating statutes need not be identical, as the purpose of the Compact is to "promote compliance with the statutes . . . relating to management of wildlife resources."[50] The court noted that Gray's theory would strip the Compact of any real meaning because wildlife statutes among the participating states are not identical.[51] The court also stated that had Gray's actions taken place in North Dakota, his privileges would have been similarly suspended.[52] Finally, the court disposed of Gray's argument by claiming that the "No Trespassing" and "No Hunting" signs posted on the Wyoming land did not conform to North Dakota's statute. The court held that the use of "technical requirements of North Dakota law as a defense to reciprocal enforcement of the Wyoming conviction in North Dakota" did not clear Gray of his violation.[53]

Next, Gray argued that the Department erred by giving full faith and credit to a Wyoming conviction that was wrongfully obtained.[54] At trial, the Wyoming court allowed an amendment of the criminal citation, and Gray claimed that this amendment defeated his defense.[55] The citation listed an erroneous location as the place of the offense, and he stated as a defense that he was innocent of the criminal citation with respect to that location.[56] But when the citation was amended to list the correct location of the offense, Gray claimed that his defense was defeated.[57] However, the Wyoming district court stated that Gray's brief recognized the citation's error prior to trial, and because of this acknowledgment, he was not prejudiced by the amended citation.[58] Similarly, the North Dakota Supreme Court followed the reasoning of the Wyoming district court and found that there was no evidence of a due process violation or prejudice arising from the amended criminal complaint, and therefore, the court held that it was proper to give full faith and credit to Gray's conviction.[59]

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49. *Id.* ¶ 16, 706 N.W.2d at 621.

50. *Id.* ¶ 13, 706 N.W.2d at 620 (citing N.D. CENT. CODE § 20.1-16-01, art. 1, § 2(a) (2004)).

51. *Id.*

52. *Id.* ¶ 15, 706 N.W.2d at 621.

53. *Id.*

54. *Id.* ¶ 17.

55. *Id.* ¶ 19.

56. *Id.*

57. *Id.*

58. *See id.* (citing State v. Higgins, 2004 ND 115, ¶ 5, 680 N.W.2d 645, 647) (stating that the trial court has discretion to amend a criminal complaint if the amendment does not prejudice the defendant).

59. *Id.*

Gray then claimed the Compact violated the compact clause of the Unites States Constitution because "no state shall, without the consent of Congress . . . enter into any . . . compact with another state."[60] The Department first claimed that the states had previously been allowed to enter compacts "for . . . mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies."[61] In addition, the Department argued that the United States Supreme Court had already settled the question of when interstate agreements fell within the compact clause:[62]

> When an agreement between states is not directed to the formation of any combination tending to increase the political power in the states, which may encroach upon or interfere with the supremacy of the United States, the agreement does not fall within the scope of the compact clause and will not be invalidated for lack of congressional consent.[63]

Furthermore, the Department noted that the Compact was similar to the Drivers License Compact and Non-Resident Violator Compact, both of which specifically related to the licensing and enforcement of automobile drivers, and as a result, both were found to be outside the scope of the compact clause.[64]

The North Dakota Supreme Court concluded that "[p]rotection of the wildlife of the State is peculiarly within the police power, and the State has great latitude in determining what means are appropriate for its protection."[65] The court found that the Compact's system of information sharing and enforcement of wildlife violations did not intrude on the United States' supremacy, and therefore, the Compact did not require Congressional consent.[66]

Gray then claimed that the Department's suspension of his hunting privileges, based on the Wyoming conviction, violated double jeopardy

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60. *Id.* ¶ 20 (citing U.S. CONST. art. I, § 10).

61. *Id.* ¶ 21, 706 N.W.2d at 621-22 (citing 4 U.S.C. § 112(a) (2005) (providing that congressional consent is granted under such circumstances)).

62. *Id.* at 622.

63. *Id.* (citting Northeast Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 175-76 (1985)).

64. *Id.* (citing Koterba v. Commonwealth of Penn. Dep't of Transp., 736 A.2d 761, 765-66 (Pa. Commw. Ct. 1999) (explaining that the Driver's License Compact is an interstate agreement which does not need "Congressional approval" because its policy does not threaten the supremacy of the United States and no state has acted beyond its granted powers through its association in the Driver's License Compact)).

65. *Id.* ¶ 22 (quoting Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 391 (1978)).

66. *Id.*

principles.[67] Gray argued that North Dakota's suspension of his license was a successive punishment for the same crime.[68] The court stated that the Drivers License Compact, which suspended the driving privileges of violators, had been held as a legitimate civil remedial sanction that did not violate double jeopardy principles.[69] Because the Compact was held in a comparable light to the Drivers License Compact, the court held that the Department's suspension of Gray's hunting privileges was "a legitimate civil remedial measure that serves the goal of protecting wildlife resources as well as the safety of persons and property . . . ."[70] Therefore, the Department's suspension of Gray's hunting privileges did not violate double jeopardy.[71]

Next, Gray argued that his procedural due process rights had been violated by the Department because he was not provided with notice and hearing before suspension.[72] The court's analysis balanced Gray's right for procedural fairness against the government's competing interests.[73] In past decisions, the court has held that pre-suspension hearings were not necessary to meet due process requirements where a driver's license suspension was a private concern because the protection of public interest outweighed the need for a pre-suspension hearing.[74] The court noted an Ohio Supreme Court case, *City of Maumee v. Gabriel*,[75] which held that an individual does not have a substantial private interest to possess a driver's license because the state has an interest to provide a safe environment for the public, and once the state removes drivers who fail to meet the state's laws and regulations, due process requirements are satisfied.[76]

Analogizing these previous holdings in the context of the Compact, the North Dakota Supreme Court held that the State's interest in enforcing and complying with wildlife hunting laws outweighed Gray's hunting privileges.[77] Furthermore, the court concluded that Gray's due process rights

67. *Id.* ¶ 23.
68. *Id.* ¶ 24, 706 N.W.2d at 623 (citing U.S. CONST. amend. V).
69. *Id.* ¶ 25 (citing Marshall v. Dep't of Transp., 48 P.3d 666, 671 (Idaho Ct. App. 2002)).
70. *Id.* ¶ 26.
71. *Id.*
72. *Id.* ¶ 27, 706 N.W.2d at 624.
73. *Id.* ¶ 28 (citing Wahl v. Morton County Soc. Servs., 1998 ND 48, ¶ 6, 574 N.W.2d 859, 862).
74. *Id.* ¶ 29 (citing State v. Harm, 200 N.W.2d 387, 388 (N.D. 1972).
75. 518 N.E.2d 558 (Ohio 1988).
76. *Gray*, ¶ 29, 706 N.W.2d at 624 (citing *City of Maumee*, 518 N.E.2d at 562 (Ohio 1988)).
77. *Id.* ¶ 30.

were not violated when the trial court suspended his hunting privileges without first providing him pre-suspension notice and hearing.[78]

Next, Gray asserted that his equal protection rights had been violated by the changes that the North Dakota Legislative Assembly made to the language of the Compact.[79] Gray argued that North Dakota gave the Department the discretion to punish violators with suspensions when it changed the language in the Compact from "shall" to "may."[80] Therefore, the court analyzed Gray's equal protection challenge as a selective prosecution challenge.[81] But the court quickly noted that selective enforcement or prosecution, without improper motives, does not violate equal protection.[82] Because Gray failed to establish that "other similarly situated individuals have not had their hunting privileges suspended," the court concluded that his equal protection rights were not violated by either the Department's action or by the changes that the legislature made with respect to the Compact's wording.[83]

Finally, Gray argued that the Compact was an unconstitutional ex post facto law.[84] The court explained that an ex post facto law is "one that makes an action done before the passing of the law, and which was innocent when done, criminal."[85] Looking to the facts of the case, the North Dakota Legislative Assembly enacted the Compact in 2001, and Gray was convicted in Wyoming in 2004.[86] Consequently, the court dismissed Gray's ex post facto argument because North Dakota's law wasn't passed after his conviction, and the court found all other contentions without merit.[87] Therefore, the North Dakota Supreme Court affirmed the judgment of the ALJ.[88]

In a special concurrence, Chief Justice VandeWalle noted his uneasiness with North Dakota's version of the Compact.[89] Chief Justice

78. *Id.* (citing N.D. CENT. CODE § 20.1-16-05(1) (2004) (stating that a prompt post-suspension hearing will be provided upon request of the violator)).

79. *Id.* ¶ 31, 706 N.W.2d at 624-25.

80. *Id.*

81. *Id.* ¶ 32, 706 N.W.2d at 625.

82. *Id.* (citing Gale v. N.D. Bd. of Podiatric Med., 1997 ND 83, ¶ 32, 562 N.W.2d 878, 886).

83. *Id.* ¶ 32-33 (citing State v. Mathisen, 356 N.W.2d 129, 133 (N.D. 1984) (holding that a defendant claiming selective prosecution must establish other similarly situated individuals have not been prosecuted and the prosecution of the defendant is based upon constitutionally impermissible considerations)).

84. *Id.* ¶ 34.

85. *Id.* ¶ 35 (citing State v. Burr, 1999 ND 143, ¶ 10, 598 N.W.2d 147, 152).

86. *Id.*

87. *Id.* ¶ 35-36.

88. *Id.* ¶ 36.

89. *Id.* ¶ 38.

VandeWalle cautioned that the legislature's grant of discretion to the Department may have been well intended, but it left open the possibility for a later defendant to successfully argue that an improper selective prosecution or an inappropriate delegation of legislative power has occurred.[90]

ADMINISTRATIVE LAW–INTOXILYZER TEST & ASSISTANCE OF COUNSEL–STATUTORY INTERPRETATION

ERIKSMOEN V. N.D. DEP'T OF TRANSP.

In *Eriksmoen v. North Dakota Department of Transportation*,[91] Kjerstin Eriksmoen appealed from a district court judgment affirming a three-year revocation of her driver's license for refusing to submit to an intoxilyzer test.[92] Eriksmoen argued that she had been denied an "adequate opportunity to consult with her attorney" prior to refusing the intoxilyzer test.[93] Under North Dakota law, a person arrested for driving under the influence has a "limited statutory right . . . to consult with counsel before deciding whether to submit to a chemical test."[94]

Highway Patrol Officer Troy Hischer noticed Eriksmoen's car when the vehicle was in the right-turn-only lane with its right turn signal on, but turned left onto 32nd Avenue.[95] After stopping the car, Hischer walked to the car, smelled the odor of alcohol on Eriksmoen's breath, and noticed a case of beer in the car's back seat.[96] Eriksmoen admitted to drinking earlier at a wedding reception, so Hischer administered a field sobriety test on her.[97] Upon failing the field sobriety test, Eriksmoen was read the implied consent advisory and asked to take the onsite screening test (SD-2 test) by giving a breath sample.[98] She refused to provide a breath sample before speaking with her attorney.[99] So Eriksmoen was arrested for driving-under-the-influence (DUI) and escorted to the Grand Forks Police Department.[100] Upon arriving at the Grand Forks Police Department, Eriksmoen was

90. *Id.*
91. 2005 ND 206, 706 N.W.2d 610.
92. *Eriksmoen*, ¶ 1, 706 N.W.2d at 611.
93. *Id.*
94. *Id.* ¶ 8, 706 N.W.2d at 612 (citing N.D. CENT. CODE § 29-05-20 (2005)).
95. *Id.* ¶ 2, 706 N.W.2d at 611.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*

allowed to make a cellular phone call to her attorney's son, and thereafter submitted a breath sample for the SD-2 test, failing this test as well.[101]

While in the intoxilyzer room at the Grand Forks Police Department, Eriksmoen was again read the implied consent advisory and asked to take an intoxilyzer test.[102] Before answering, she requested another phone call to her attorney, but this proved unnecessary because her attorney had already arrived at the police station.[103]

Eriksmoen's attorney, Henry Howe, requested a private room to meet with his client.[104] However, Hischer was required to maintain supervision of Eriksmoen, and because no observational room was available at the time, Hischer offered to stand at the end of the intoxilyzer room and remain out of earshot.[105] But Howe refused to consult with his client under such circumstances, as Hischer was standing a mere twenty-one feet away and did not prevent other officers from walking through the room.[106] Howe left the station without advising Eriksmoen on whether to submit to the intoxilyzer test, so she refused to take the test.[107]

A hearing officer found that Eriksmoen had not been deprived of her statutory right to consult counsel.[108] A district judge affirmed.[109]

On appeal to the North Dakota Supreme Court, Eriksmoen's main argument was that she was denied a reasonable opportunity to meet with her attorney in a meaningful way.[110] In reviewing Eriksmoen's claim, the North Dakota Supreme Court explained that deference must be given to the Department's finding when evaluating a driver's license suspension.[111] The court had to determine "only whether a reasoning mind could have concluded the Department's findings were supported by the weight of the evidence from the entire record."[112] Therefore, the court would not reverse the agency's findings unless:

1. The order is not in accordance with the law.

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101. *Id.*
102. *Id.* ¶ 3, 706 N.W.2d at 611.
103. *Id.*
104. *Id.* ¶ 4.
105. *Id.*
106. *Id.* ¶¶ 4-5.
107. *Id.* ¶ 5.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* ¶¶ 6-7, 706 N.W.2d at 612.
112. *Id.* ¶ 7 (citing Lee v. N.D. Dep't of Transp., 2004 ND 7, ¶ 9, 673 N.W.2d 245, 248).

> 2. The order is in violation of the constitutional rights of the appellant.
>
> 3. The provisions of this chapter have not been complied with in the proceedings before the agency.
>
> 4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
>
> 5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
>
> 6. The conclusions of law and order of the agency are not supported by its findings of fact.
>
> 7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
>
> 8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.[113]

The North Dakota Supreme Court recognized that an accused has only a "limited statutory right to consult with counsel before deciding whether to submit to a chemical test."[114] To determine whether Eriksmoen's right to consult with counsel had been violated, the court relied on a balancing test.[115] "[F]ailure to allow the arrested person a reasonable opportunity to contact an attorney prevents the revocation of her license for refusal to take the test."[116] The court explained that the reasonableness of the opportunity to meet with an attorney must be viewed objectively under the totality of the circumstances.[117]

Relying on *Bickler v. North Dakota State Highway Commissioner*,[118] Eriksmoen argued that she had a right to consult with her attorney in a private room.[119] Eriksmoen asserted that a private room was necessary for attorney-client consultation so that she could speak with her attorney freely

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113. *Id.* ¶ 6 (citing N.D. CENT. CODE § 28-32-46).

114. *Id.* ¶ 8.

115. *Id.* ¶ 9 ("The arrestee's right to consult privately with counsel must be balanced against society's strong interest in obtaining important evidence." (quoting Wetzel v. N.D. Dep't of Transp., 2001 ND 35, ¶ 12, 622 N.W.2d 180, 183)).

116. *Id.* ¶ 9.

117. *Id.*

118. 423 N.W.2d 146 (N.D. 1988).

119. *Eriksmoen*, ¶ 10, 706 N.W.2d at 612-13 (citing Bickler v. N.D. State Highway Comm'r, 423 N.W.2d 146, 148 (N.D. 1988)).

and openly to prevent police from being within earshot.[120] However, the court noted that *Bickler* did not require a private room for attorney-client discussions.[121] Instead, *Bickler* stood for the proposition that "when an arrested person asks to consult with counsel before electing to take a chemical test he must be given the opportunity to do so out of police hearing, and law enforcement must establish that such opportunity was provided."[122] Therefore, *Bickler* required that police be out of earshot of the client-attorney discussion, not that a private room be provided.[123]

Even though *Bickler* was factually similar, it did not support Eriksmoen's argument.[124] The court found that Eriksmoen was provided a room that, although not private, was reasonable and adequate for consultation with her attorney to discuss the legal situation prior to refusing the intoxilyzer test.[125] In addition, the court noted that a specific room length was not a proper gauge for whether Eriksmoen had a reasonable opportunity to consult with her attorney.[126] The court found that even if police officers had overheard her conversation with Howe, such testimony by the officers would have been inadmissible.[127] Therefore, Eriksmoen's attorney could have consulted with her regarding whether she should submit to the intoxilyzer test without such information being used against her.[128] Based on a preponderance of the evidence, the North Dakota Supreme Court affirmed the agency's holding that Eriksmoen had a reasonable opportunity to consult with her attorney.[129]

CIVIL PROCEDURE—AMENDMENT OF PLEADINGS BY CONSENT

RUUD V. FRANDSON

Dan Frandson appealed a declaratory judgment of the District Court of Ward County.[130] The district court held that Frandson did not farm the cropland that he inherited under his mother's will, which contained a clause

120. *Id.* ¶ 12, 706 N.W.2d at 613.
121. *Id.* ¶ 11.
122. *Id.* (citing *Bickler*, 423 N.W.2d at 148).
123. *Id.*
124. *Id.* ¶ 12.
125. *Id.*
126. *Id.* ¶ 13.
127. *Id.* ¶ 14.
128. *Id.*
129. *Id.*
130. Ruud v. Frandson, 2005 ND 174, ¶ 1, 704 N.W.2d 852, 854.

that provided an option for his sister, Karen Ruud, to purchase the land.[131] The North Dakota Supreme Court affirmed.[132]

Alice Frandson died testate in 1987, leaving in her will certain parcels of property to her son, Dan Frandson, with the following condition:

> In the event that Dan chooses not to farm any or all of the cropland during a twenty (20) year period following my death, then my daughters, together or separately, shall have the option to purchase any portion of that cropland at a price of $80.00 per acre through 1991, and at one-third of its appraised value if purchased after 1991, with all of the proceeds to go to my beloved son, Dan.[133]

Upon his mother's death, Frandson lived and worked on the cropland until 1991.[134] In January 1991, Frandson left the farm and moved to Idaho, where he remained until returning to North Dakota in February of 1993.[135] When Frandson was away, he entered into a one-year crop share agreement with a third party for the years of 1991 and 1992.[136] Upon Frandson's return, he physically farmed the land until June of 1998.[137] In 1998, Frandson and his wife attempted to secure an operating loan to update the farm machinery.[138] When the loan was denied, Frandson entered into a crop-share agreement with his nephew, Jeffery Ruud, for the 1998 crop year.[139] This lease was to run through the conclusion of the twenty-year clause in Alice Frandson's will.[140] The parties then entered into the lease, and Frandson sold much of the farm equipment to Jeffery Ruud.[141] Frandson moved back to Idaho.[142]

On September 25, 2002, Karen Ruud hired an attorney to exercise her option to purchase the cropland based on the clause in the will.[143] Frandson refused to recognize Karen Ruud's efforts as a valid exercise of her option, and Karen Ruud commenced an action.[144] The trial court found that the

131. *Id.*
132. *Id.*
133. *Id.* ¶ 2.
134. *Id.* ¶ 3.
135. *Id.*
136. *Id.*
137. *Id.* ¶ 4.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* ¶ 5.
144. *Id.*

mother's intent was for Frandson to physically farm the land, and the court ordered Frandson to sell the cropland to Karen Ruud.[145]

On appeal to the North Dakota Supreme Court, Frandson argued that the trial court was clearly erroneous in its findings.[146] In addition, Frandson argued that even though he did not raise the issue of waiver and estoppel in the pleadings, or amend the pleadings, these claims were impliedly tried through the introduction of evidence at trial.[147]

Applying the "clearly erroneous" standard of review, the North Dakota Supreme Court noted that the mother intended Frandson to physically farm the land.[148] Therefore, the court held that the trial court's findings were not clearly erroneous.[149]

Next, Frandson argued that Karen Ruud waived her rights through implied consent.[150] Specifically, Frandson argued that Karen Ruud failed to notify him that he was not complying with the condition placed upon his ownership in the will.[151] Because Karen Ruud failed to notify Frandson, he claimed that she waived her rights through implied consent.[152] However, the North Dakota Supreme Court found that the issues of waiver and implied consent were not properly pled at trial.[153]

For an effective appeal on a proper issue, the issue must have been raised at trial.[154] If an issue is not pled, pleadings can be amended to conform to the evidence raised at trial.[155] Under Rule 15(b) of the North Dakota Rules of Civil Procedure, "a pleading may be impliedly amended by the introduction of evidence which varies the theory of the case and which is not objected to on the grounds it is not within the issues in the pleadings."[156] But amendment by implication may only occur when the evidence that is introduced is not relevant to any issue in the case.[157] When the

145. *Id.*

146. Brief of Petitioner-Appellant, Ruud v. Frandson, 2005 ND 174, 704 N.W.2d 852 (No. 20050049).

147. *Frandson*, ¶ 10, 704 N.W.2d at 855.

148. *Id.* ¶¶ 8-9, 704 N.W.2d at 855.

149. *Id.* ¶ 9.

150. *Id.* ¶¶ 10-11, 704 N.W.2d at 855-56.

151. *Id.* ¶ 12, 704 N.W.2d at 856.

152. *Id.*

153. *Id.* ¶ 13, 704 N.W.2d at 857.

154. *Id.* ¶ 10, 704 N.W.2d at 855. (citing Kautzman v. Kautzman, 2003 ND 140, ¶ 10, 668 N.W.2d 59, 64).

155. *Id.* (citing Tormaschy v. Tormaschy, 1997 ND 2, ¶ 17, 559 N.W.2d 813, 817).

156. *Id.* (quoting Lochthowe v. C.F. Peterson Estate, 2005 ND 40, ¶ 8, 692 N.W.2d 120, 123).

157. *Id.* ¶ 10, 704 N.W.2d at 856.

evidence is relevant to an issue raised in the pleadings, then the pleadings may not be impliedly amended.[158] Furthermore, the court has stated:

> When the evidence that is claimed to show that an issue was tried by consent is relevant to an issue already in the case, as well as to the one that is the subject matter of the amendment, and there was no indication at trial that the party who introduced the evidence was seeking to raise a new issue, the pleadings will not be deemed amended under the first portion of Rule 15(b). The reasoning behind this view is sound since if evidence is introduced to support basic issues that already have been pleaded, the opposing party may not be conscious of its relevance to issues not raised by the pleadings unless that fact is specifically brought to his attention.[159]

Frandson did not raise the issues of waiver and estoppel in the pleadings, nor in an amendment to the pleadings.[160] Additionally, Frandson did not present any evidence during trial that would warn Karen Ruud that he intended to include waiver and estoppel, and instead he waited until his post-trial brief was filed to raise those issues.[161] However, Frandson argued that his attorney's questioning, regarding Karen Ruud's failure to notify Frandson that he was violating the will's stipulations, and Ruud's involvement in the lease negotiations between Frandson and Jeffrey Ruud were enough to bring waiver and estoppel arguments into the pleadings by implication.[162]

Disagreeing with Frandson's arguments, the North Dakota Supreme Court stated that Karen Ruud did not impliedly consent to a trial involving waiver and estoppel.[163] The court found that although the lawyer's questions relating to notice were relevant in determining if Frandson was complying with the will's stipulations, such questions were not enough to put Karen Ruud on notice that he was expanding his claims to include waiver and estoppel.[164] Additionally, the questions relating to the lease agreements were relevant only as to whether Frandson was farming the land in compliance with the will provision.[165] But these questions did not notify Karen Ruud or the trial court that Frandson was expanding his theory to

158. *Id.*
159. *Id.* (quoting Mann v. Zabolotny, 2000 ND 160, ¶ 12, 615 N.W.2d 526, 529-30).
160. *Id.* ¶ 11.
161. *Id.*
162. *Id.* ¶¶ 12-13, 704 N.W.2d at 856-57.
163. *Id.* ¶13, 704 N.W.2d at 857.
164. *Id.* ¶ 12.
165. *Id.* ¶ 13.

include estoppel.[166] Therefore, the North Dakota Supreme Court found that the lack of notification to Karen Ruud or the trial court regarding the expansion of Frandson's case, to include theories of waiver and estoppel, did not allow for an amendment of the pleadings by consent.[167]

CIVIL PROCEDURE—DEFAULT JUDGMENT—DISCRETION OF THE COURT

SCHWAN V. FOLDEN

Following a trial on the merits, the district court entered a motion for default judgment against Paul Folden.[168] Folden appealed the default judgment entered against him.[169] The North Dakota Supreme Court reversed and remanded for a judgment to be entered on the merits, rather than on judgment.[170]

In North Dakota, the district court's decision to grant a default judgment will be affirmed unless an abuse of discretion has occurred.[171] A court abuses its discretion when it "acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law."[172] In determining whether the request for default judgment was proper, Rule 55(a) of the North Dakota Rules of Civil Procedure provides:

> If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise appear and the fact is made to appear by affidavit or otherwise, the court may direct the clerk to enter an appropriate judgment by default in favor of the plaintiff and against the defendant.[173]

However, in countering Rule 55(a), the court noted that "if a plaintiff does not move for default judgment after the default has accrued or within a reasonable time after the default has accrued, and the answer is subsequently filed, then the plaintiff waives its right to default judgment for a defendant's failure to appear."[174] The court continued by explaining that an

166. *Id.*
167. *Id.*
168. Schwan v. Folden, 2006 ND 28, ¶ 1, 708 N.W.2d 863, 864.
169. *Id.*
170. *Id.*
171. *Id.* ¶ 6, 708 N.W.2d at 865 (citing Citibank (South Dakota) N.A. v. Reikowski, 2005 ND 133, ¶ 6, 699 N.W.2d 851, 853).
172. *Id.*
173. *Id.* ¶ 7 (quoting N.D.R.CIV.P. 55(a) (2005)).
174. *Id.* (citing United Accounts, Inc. v. Lantz, 145 N.W.2d 488, 491 (N.D. 1966)).

entry of default judgment is a privilege the plaintiff may choose to apply.[175] The court took special notice of other jurisdictions holding that waiver of a default judgment will occur if the plaintiff proceeds to a trial on the merits without fully exercising its default judgment privileges.[176]

In reversing the grant of Plaintiff Schwan's motion for default judgment, the court reaffirmed its strong preference for cases to be decided on their merits.[177] The court stated, "It is illogical to proceed with trial, hear evidence from each party, and expend judicial resources, only to decide the case with a default judgment."[178] Here, counsel for Schwan initially raised a motion for default judgment but proceeded to trial.[179] Because Schwan proceeded with trial, he presented evidence to the district court so that a decision could be made on the merits of the case.[180] Consequently, the court noted that Schwan extinguished his motion for a default judgment by proceeding to trial.[181] Therefore, the court held that because Schwan could no longer invoke his privilege for default judgment, the district court abused its discretion in failing to decide the case on its merits.[182]

Before closing its opinion, the court stated that generally costs would be taxed to the appellee due to the reversal.[183] However, because Folden's counsel included items that were not in the record before the district court, it violated Rule 32 of the North Dakota Rules of Appellate Procedure.[184] Therefore, the North Dakota Supreme Court denied payment of all costs by the appellee, Schwan.[185]

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175. *Id.* (citing 49 C.J.S. Judgments § 203 (1955) (explaining that the default judgment option may be waived by the plaintiff's proceeding with the action, unless the plaintiff was ignorant of the default at the time).

176. *Id.* ¶ 8 (citing Ewing v. Johnston, 334 S.E.2d 703, 707 (Ga. Ct. App. 1985) (stating that "[f]acts which have been held to constitute waiver include . . . going to trial on the merits, or announcing ready for trial and introducing evidence on the merits."); Johnson v. Gib's W. Kitchen, Inc., 338 N.W.2d 872, 873 (Iowa 1983) (holding that "the court did not abuse its discretion in overruling plaintiff's motion for a default judgment made during trial at the close of plaintiff's case"); Kuykendall v. Circle, Inc., 539 So. 2d 1252, 1254 (La. Ct. App. 1989) (finding that "Kuykendall, having proceeded to trial on the merits without confirming his preliminary default, waived his right to a default judgment")).

177. *Id.* ¶ 9 (citing Filler v. Bragg, 1997 ND 24, ¶ 14, 559 N.W.2d 225, 229).

178. *Id.*

179. *Id.* ¶ 10.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* ¶ 12 (citing N.D.R.APP.P. 39(a)(3) (2005)).

184. *Id.*

185. *Id.* ¶¶ 12-13 (citing N.D.R.APP.P. 13 (2005)). Rule 13 of the North Dakota Rules of Appellate Procedure states that "the supreme court may take appropriate action against any person failing to perform an act required by rule or court order." N.D.R.APP.P. 13 (2005)

CRIMINAL LAW
STATE V. BERTRAM

In *State v. Bertram*,[186] Randy Bertram appealed from a district court jury verdict finding him guilty of violating a disorderly conduct restraining order, criminal trespass, and contact by bodily fluids. The North Dakota Supreme Court affirmed.[187]

On January 16, 2004, a divorce decree between Joan and Randy Bertram awarded Joan the parties' residence.[188] On January 29, 2004, Joan obtained a temporary disorderly conduct restraining order against Randy.[189] On February 8, 2004, Randy entered Joan's residence through a window and spoke with her in violation of the restraining order.[190] In defense, Randy stated that he was attempting to retrieve his construction business's tax records, which were located in the residence.[191]

Randy was charged with a variety of offenses related to his actions of entering the home and violating the restraining order.[192] While Randy was in custody, a correctional officer attempted to administer medication to Randy, and Randy responded by spitting on the officer.[193] Because the officer was acting within the scope of his employment in administering medication to Randy, Randy was charged with contact by bodily fluids under section 12.1-17-11(1)(b)(3) of the North Dakota Century Code.[194] In September 2004 and October 2004, Randy was convicted by a jury of violating a restraining order and contact by bodily fluids.[195]

On appeal to the North Dakota Supreme Court, Randy argued that the district court erred when it denied his motion for judgment of acquittal based on lack of evidence.[196] Randy argued that the State failed to prove beyond a reasonable doubt that he was neither licensed nor privileged to

186. 2006 ND 10, 708 N.W.2d 913.
187. *Bertram*, ¶ 1, 708 N.W.2d at 917.
188. *Id.* ¶ 2.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* ¶ 3 (explaining that the actual criminal violations were: (1) violating the disorderly conduct restraining order under North Dakota Century Code section 12.1-31.2-01; (2) for allegedly entering Joan's home and speaking to her and with criminal trespass under North Dakota Century Code section 12.1-22-03(1) for allegedly entering her home, knowing he was not licensed or privileged to be in the home).
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* ¶ 4, 708 N.W.2d at 917-18.

enter the home.[197] But the evidence showed that Randy was provided with the default divorce decree, which awarded Joan the parties' home.[198] In addition, Joan informed Randy that he was not allowed to enter the home unless she approved, so she changed the locks.[199]

The court applied the standard set out in *State v. Noorlun*,[200] to determine whether Randy's conviction was based on sufficient evidence.[201] In *Noorlun*, the court stated,

> In an appeal challenging the sufficiency of the evidence, we look only to the evidence and reasonable inferences most favorable to the verdict to ascertain if there is substantial evidence to warrant the conviction. A conviction rests upon insufficient evidence only when, after reviewing the evidence in the light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor, no rational fact finder could find the defendant guilty beyond a reasonable doubt.[202]

Based on the trial court's findings and the standard of review set out in *Noorlun*, the court found that "the evidence and reasonable inferences from the evidence, viewed in the light most favorable to the verdict, are such that a rational fact finder could find Randy knew he was not licensed or privileged to enter Joan's house."[203] Therefore, the conviction for criminal trespass was affirmed.[204]

Randy's second argument on appeal was that he was prosecuted simultaneously for the same offense when charged with criminal trespass and violation of the disorderly conduct restraining order.[205] Randy claimed that such simultaneous prosecutions were in violation of his state and federal double jeopardy protections.[206] In order to determine whether criminal trespass and violation of the disorderly conduct restraining order were the same offenses, the court applied the "same elements" test.[207] The "same elements" test requires the court to determine "whether each offense

197. *Id.* ¶ 8, 708 N.W.2d at 918.
198. *Id.* ¶ 9.
199. *Id.* ¶ 9, 708 N.W.2d at 918-19.
200. 2005 ND 189, 705 N.W.2d 819.
201. *Bertram*, ¶ 5, 708 N.W.2d at 918.
202. *Id.* (quoting State v. Noorlun, 2005 ND 189, ¶ 20, 705 N.W.2d 819, 826-27).
203. *Id.* ¶ 11, 708 N.W.2d at 919.
204. *Id.* ¶ 12.
205. *Id.* ¶ 13.
206. *Id.*
207. *Id.* ¶ 14.

contain[ed] an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment and successive prosecution."[208] Here, the criminal trespass charge required proof that Randy entered or remained in a dwelling knowing he was not licensed or privileged to be in that dwelling, and the disorderly conduct restraining order charge required an additional element of proof that Randy knew of the restraining order.[209] Upon applying the "same elements" test, the court found that the two offenses contained different elements, and therefore, Randy's double jeopardy protections were not violated.[210]

Randy's third argument on appeal was that the trial court failed to instruct the jury that "willful" culpability was required to prove a violation of the disorderly conduct restraining order.[211] The court stated that in order for Randy to succeed on this argument, the district court's jury instruction must have been in obvious error in "clear deviation from an applicable legal rule under current law."[212] But Randy did not object to this issue at trial.[213] Furthermore, the jury instructions included the essential elements of the offense based on section 12.1-31.2-01(8) of the North Dakota Century Code.[214] Therefore, the court rejected Randy's argument and concluded that the district court's jury instruction on the violation of the disorderly conduct restraining order was not in error.[215]

Randy also argued that reversal is required because the state failed to allege all of the essential elements of contact by bodily fluids in the amended documents.[216] In the amended documents, the state failed to include the words, "unless the employee does an act within the scope of employment which requires or causes the contact."[217] Consequently, the court has held that an information must be a written statement that contains the essential elements of the offense.[218] Furthermore, the North Dakota Supreme Court relied on *State v. Franfurth*,[219] which stated that "elements of an offense" means: "(1) the forbidden conduct, (2) the attendant circumstances specified in the definition and grading of the offense, (3) the

208. *Id.* (quoting City of Fargo v. Hector, 534 N.W.2d 821, 823 (N.D. 1995)).
209. *Id.* ¶ 15, 708 N.W.2d at 920.
210. *Id.*
211. *Id.* ¶ 16.
212. *Id.* ¶ 17 (quoting State v. Olander, 1998 ND 50, ¶ 14, 575 N.W.2d 658, 663).
213. *Id.* ¶¶ 16-17.
214. *Id.* ¶¶ 17-20.
215. *Id.* ¶ 20.
216. *Id.* ¶ 21, 708 N.W.2d at 921.
217. *Id.* (citing N.D. CENT. CODE § 12.1-17-11(1)(b) (2005)).
218. *Id.* ¶ 23 (citing State v. Frankfurth, 2005 ND 167, ¶ 7, 704 N.W.2d 564, 566.
219. 2005 ND 167, 704 N.W.2d 564.

required culpability, (4) any required result, and (5) the nonexistence of a defense as to which there is evidence sufficient to give rise to a reasonable doubt on the issue."[220]

Additionally, the court stated that technical defects would be dismissed if the defendant had sufficient notice to prepare his defense.[221] Here, the applicable statute allowed for liability of bodily fluids when the victim (officer) of the contact of bodily fluids was "acting *in* the scope of employment," but if the victim (officer) was acting "*within* the scope of employment," then the victim (officer) was precluded recovery.[222] Therefore, Randy contended that if his bodily fluids came into contact with the correctional officer, then it was a result of the officer acting *in* the course of his employment.[223] But the court found that Deputy Anderson, the victim, was administering medication when Randy spit on him.[224] Thus, the court stated that the omission of the language "in" or "within" was not a technical defect, and therefore, Randy's defense was negated.[225]

The court refused to expand *Frankfurth* beyond the factual circumstances of that case.[226] While in *Frankfurth*, the defendant claimed that the information failed to allege his "knowledge" of the crime and he did not raise this defense until post-trial, Randy did not wait until post-trial to raise his defense as to the wording in the charging document, and instead raised it during the trial.[227] Therefore, instead of applying *Frankfurth*, the court applied the "harmless error" analysis.[228] Because there was a lack of evidence to support Randy's assertion that he relied on the charging document to his detriment, the court determined that the defect in the charging document was harmless.[229]

Randy's appeal included arguments of reversible errors because of prosecutorial misstatements, a failure of the district court to inform counsel in writing of a jury instruction, and ineffective assistance of counsel.[230] The court quickly dismissed these arguments on grounds that Randy's

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220. *Bertram*, ¶ 23, 708 N.W.2d at 922 (citing *Frankfurth*, ¶ 6, 704 N.W.2d at 566).

221. *Id.*

222. *Id.* ¶ 27, 708 N.W.2d at 923 (citing N.D. CENT. CODE § 12.1-17-11(1)(a)-(b) (2005)) (emphasis added).

223. *Id.* ¶ 28.

224. *Id.*

225. *Id.*

226. *Id.* ¶ 29.

227. *Id.* ¶¶ 29-30.

228. *Id.* ¶¶ 30-31, 708 N.W.2d at 923-24 (providing the relevant text of rule 52(a) of the N.D.R.CRIM.P., "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded").

229. *Id.* ¶ 32, 708 N.W.2d at 924.

230. *Id.* ¶¶ 33-41, 708 N.W.2d at 924-26

substantial rights were not affected, and therefore, his claims were unsubstantiated.[231]

In conclusion, the North Dakota Supreme Court denied all of Randy's arguments on appeal and affirmed the trial court's decision.[232]

CRIMINAL LAW—PLEAS

STATE V. FEIST

In *State v. Feist*,[233] Douglas Feist appealed from a criminal judgment that was entered after he pled guilty to possession of a pipe bomb.[234] The North Dakota Supreme Court reversed the conviction because: (1) the district court failed to comply with Rule 11(c) of the North Dakota Rules of Civil Procedure; and (2) the record demonstrated a lack of understanding over what type of plea agreement existed.[235]

Andrew Greff and Feist decided to make a bomb and detonate it south of Bismarck.[236] When the bomb failed to detonate, Feist convinced Greff to leave the bomb at the site.[237] Greff took Feist home and then went back to the site.[238] Greff ignited the bomb, and the explosion severed his arm, which was later amputated.[239] Feist was arrested when the receipts for the materials of the pipe bomb connected him to its construction.[240]

On August 18, 2004, Feist pled guilty to the charge of possession of a pipe bomb.[241] When the district court judge asked him for his plea, the court failed to ask if a plea agreement existed.[242] At a March 22, 2005, sentencing hearing, Feist contended that he had entered a plea agreement with the State's Attorney, who was unable to attend court that day.[243] On March 30, 2005, after dealing with an unrelated matter regarding another offense by Feist, the court inquired as to the existence of a plea agreement.[244] After some discussion, the State's Attorney requested a sentence

231. *Id.* ¶¶ 41-43, 708 N.W.2d at 926.
232. *Id.* ¶ 43.
233. 2006 ND 21, 708 N.W.2d 870.
234. *Feist*, ¶ 1, 708 N.W.2d at 872 (explaining that this is an illegal act under North Dakota Century Code section 62.1-05-01).
235. *Id.*
236. *Id.* ¶ 2.
237. *Id.*
238. *Id.*
239. *Id.* ¶ 3.
240. *Id.* ¶ 4.
241. *Id.* ¶ 5.
242. *Id.* ¶ 6.
243. *Id.* ¶ 7, 708 N.W.2d at 872-73.
244. *Id.* ¶ 9, 708 N.W.2d at 873.

of two years, with all but six months suspended.[245] The district court rejected the plea agreement, and Feist requested a jury trial.[246]

On April 13, 2005, a written order was issued stating the circumstances and the confusion regarding the plea agreement.[247] The written order stated that the parties originally denied the existence of a plea agreement on the issue of Feist's possession of a pipe bomb and later agreed that an agreement did exist.[248]

On May 2, 2005, the State's Attorney denied any existence of a plea agreement, while Feist requested a withdrawal of his guilty plea.[249] The judge denied Feist's motion and sentenced him to five years, while his co-defendant, the one who actually ignited the bomb, was sentenced to six months.[250]

On appeal to the North Dakota Supreme Court, Feist argued that the district court must withdraw his guilty plea due to the existence of his binding plea agreement with the State's Attorney.[251] However, the State argued that no binding plea existed, and instead, the State asserted that the parties agreed to a non-binding sentencing recommendation.[252] Furthermore, the State argued that if a plea agreement had existed, it would have been stated when Feist first admitted guilt.[253]

Under *State v. Thompson*,[254] if the parties agree to a non-binding recommendation, the State's obligation is fulfilled when it presents that recommendation to the court.[255] Furthermore, *Thompson* stood for the proposition that the court may impose a harsher sentence than recommended by the State without allowing the defendant to withdraw a guilty plea.[256] Therefore, when a court is presented with a binding plea agreement, the court can accept the agreement, reject the agreement, or defer its decision until receiving a pre-sentence report.[257]

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245. *Id.* ¶ 10, 708 N.W.2d at 873-74.
246. *Id.*
247. *Id.* ¶ 11, 708 N.W.2d at 874
248. *Id.*
249. *Id.* ¶ 12.
250. *Id.* ¶ 13.
251. *Id.* ¶ 14.
252. *Id.* ¶ 15, 708 N.W.2d at 874-75.
253. *Id.*
254. 504 N.W.2d 315 (N.D. 1993).
255. *Feist*, ¶ 16, 708 N.W.2d at 875 (citing State v. Thompson, 504 N.W.2d 315, 319 (N.D. 1993)).
256. *Id.* (citing *Thompson*, 504 N.W.2d at 319).
257. *Id.* (citing N.D.R.CRIM.P. 11(d)(2) (2002).

Here, the record was unclear as to whether a plea agreement existed on Feist's charge of possession of a pipe bomb.[258] The confusion was illustrated by: (1) contradictory statements made by the State's Attorney; and (2) the district court judge instructing the parties that he rejected the plea agreement.[259] The North Dakota Supreme Court stated that when plea agreements are ambiguous, a trial court should clarify the problem on the record.[260] In this case, the trial court did not attempt to determine the true nature of the agreement on the record, so the supreme court had to determine whether the withdrawal of the guilty plea was necessary to prevent injustice.[261]

A court must allow a defendant to withdraw a guilty plea at any time if the defendant can prove that the withdrawal is necessary to prevent manifest injustice.[262] The determination of whether a manifest injustice has occurred is left to the district court to decide and will be reversed only on appeal in abuse of discretion.[263] Historically, the court has stated that Rule 32(d) of the North Dakota Rule of Criminal Procedure should be "liberally construed in favor of the defendant and that leave to withdraw a guilty plea before sentencing should be freely granted."[264] Abuses of discretion occur when a court acts in an arbitrary, unreasonable, or capricious manner or misinterprets or misapplies the law.[265] Additionally, Rule 11(c) of the North Dakota Rules of Criminal Procedure requires that a court advise a defendant of certain rights before accepting a guilty plea.[266]

Here, the district court failed to clear up confusion as to whether a plea agreement existed on Feist's charge of possession of a pipe bomb.[267] Because the court failed to inquire into the parties' discussions as to whether a plea agreement existed, it failed to comply with Rule 11(c).[268] As a result, the record was ambiguous as to whether a binding plea agreement existed, so the North Dakota Supreme Court reversed and remanded the case to allow Feist to withdraw his guilty plea.[269]

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258. *Id.* ¶ 17.
259. *Id.*
260. *Id.* ¶ 18 (citing Peltier v. State, 2003 ND 27, ¶ 12 n.1, 657 N.W.2d 238, 242).
261. *Id.* ¶ 19, 708 N.W.2d at 875-76.
262. *Id.* ¶ 20, 708 N.W.2d at 876 (citing N.D.R.CRIM.P. 32(d)(1) (2002)).
263. *Id.* ¶ 22 (citing State v. Sisson, 1997 ND 158, ¶15, 567 N.W.2d 839, 843).
264. *Id.* ¶ 21 (quoting State v. Millner, 409 N.W.2d 642, 644 (N.D. 1987)).
265. *Id.* (citing State v. Farrell, 2000 ND 26, ¶ 8, 606 N.W.2d 524, 528).
266. *Id.* ¶ 24, 708 N.W.2d at 876-77 (citing N.D.R.CRIM.P. 11(c) which provides that a court is required to determine if a defendant's guilty plea is fully understood by the defendant).
267. *Id.* ¶ 25, 708 N.W.2d at 877.
268. *Id.*
269. *Id.* ¶ 28.

FAMILY LAW—CHILD CUSTODY—DISCRETION OF THE COURT

L.C.V. v. D.E.G.

In *L.C.V. v. D.E.G.*,[270] L.C.V. (hereinafter "Lisa") appealed from a district court judgment, which found that D.E.G. (hereinafter "Doug") was the biological father of their child ("Ann") and granted custody and child support to Doug.[271] Lisa argued that the court's grant of custody was arbitrary and clearly erroneous.[272] In addition, Lisa asserted that she should have been awarded attorney fees and retroactive child support for the period during which she was the primary caregiver of Ann.[273]

On June 18, 2003, Lisa filed a paternity action against Doug for child support because they were not married.[274] After admitting to being Ann's father, Doug requested that the court grant him custody and child support from Lisa.[275] The court awarded Doug primary physical custody of Ann and child support, but permitted liberal visitations for Lisa.[276] Lisa requested retroactive child support for the time when she was Ann's primary caretaker, but the court declined her request.[277] No attorneys' fees were granted for either party.[278]

On appeal, the North Dakota Supreme Court assessed the grant of custody under a limited scope of review, attempting only to determine if the district court acted in the best interests and welfare of the child.[279] The supreme court evaluated the district court's findings on a clearly erroneous standard.[280] If the district court's rationale is supported by sufficient specificity, then its award of custody has to be upheld.[281]

First, Lisa claimed that the district court had acted arbitrarily by granting physical custody to Doug.[282] Previously, the parties had agreed to the appointment of a custody investigator, who submitted a final report

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270. 2005 ND 180, 705 N.W.2d 257.
271. *L.C.V.*, ¶ 1, 705 N.W.2d at 259.
272. *Id.*
273. *Id.*
274. *Id.* ¶ 2.
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.* ¶ 3, 705 N.W.2d at 259 (citing *In re* Griffey, 2002 ND 160, ¶ 5, 652 N.W.2d 351, 353). The North Dakota Century Code provides a list of factors the court must consider in awarding custody. N.D. CENT. CODE § 14-09-06.2(1) (2004)).
280. *Id.*
281. *Id.* (citing Schmidt v. Schmidt, 2003 ND 55, ¶ 6, 660 N.W.2d 196, 199).
282. *Id.* ¶ 4, 705 N.W.2d at 259-60.

stating the parties should share custody on a schedule that would leave Lisa as the primary physical custodian.[283] The district court did not follow the suggestion of the investigator, but did consider the report when making its decision.[284] The supreme court determined that the district court's decision to grant custody to Doug was not arbitrary because the investigator's report had been considered when making the decision.[285]

Next, Lisa claimed that two findings of fact made by the district court were clearly erroneous.[286] Lisa first contested the district court's finding that her testimony, regarding the amount of time that Doug spent with Ann, was not credible based on the investigator's report.[287] Likewise, Lisa contended the district court's finding that Doug provided a more stable and satisfactory environment for Ann was clearly erroneous.[288] But the district court made specific findings that Lisa had carried on various impermanent romantic relationships, while Doug separated Ann from his outside relationships.[289] In addition, Doug separately testified that Ann was having difficulty leaving him after their visits.[290] Based on this information and the investigator's report, the North Dakota Supreme Court determined that the district court remained within its discretion and did not make clearly erroneous findings of fact.[291]

The supreme court then reviewed the district court's considerations for awarding Doug physical custody of Ann.[292] The district court made the following findings:

> [T]hat both parents have strong emotional ties to Ann but Doug is best able to provide love and affection to Ann, because Lisa has demonstrated stronger ties to her two older children from a prior relationship and a lesser regard . . . for her relationship with Ann . . . Doug has the capacity and disposition to best provide guidance and education for Ann . . . [B]oth parents have the ability to provide for Ann's material needs, but Doug can provide a more stable positive home environment for her . . . [B]oth parents are fit

283. *Id.*

284. *Id.* ¶ 4, 705 N.W.2d at 260.

285. *Id.* (citing Hogan v. Hogan, 2003 ND 105, ¶ 10, 665 N.W.2d 672, 676 (explaining that the court "cannot delegate to . . . an independent investigator its authority to award custody to the parent who will promote the best interests and welfare of the child")).

286. *Id.* ¶ 5.

287. *Id.*

288. *Id.* (citing N.D. CENT. CODE § 14-09-06.2(1)(d) (2004)).

289. *Id.*

290. *Id.* ¶ 6, 705 N.W.2d at 261.

291. *Id.*

292. *Id.* ¶ 8, 705 N.W.2d at 262 (citing N.D. CENT. CODE § 14-09-06.2(1) (2004)).

> to provide for Ann's care, but Doug is overall the better choice to have primary physical custody of Ann.[293]

Because the district court made the proper statutory considerations, supported by the evidence, the supreme court would not substitute its own judgment for the district court's findings.[294] The supreme court held the "district court's decision to award primary physical custody to Doug, with liberal visitation privileges for Lisa, is supported by the record evidence and is not clearly erroneous."[295]

Next, Lisa claimed the district court's failure to award her retroactive child support as Ann's primary caretaker was reversible error.[296] Lisa argued that the district court did not make any findings regarding her request for retroactive child support.[297] The supreme court determined that the district court failed to make the necessary findings regarding child support guidelines established by the Department of Human Services.[298] The supreme court thus remanded the issue of retroactive child support for additional findings of fact and redetermination.[299]

Finally, Lisa claimed that the district court's failure to award her attorney fees was reversible error.[300] The supreme court disagreed with this argument, finding that without either an agreement between the parties or a statutory basis, attorney fees were improper.[301] Thus, the supreme court held that since there was no agreement in place, no statute to rely on, and no argument that Doug made frivolous claims, Lisa's claim for attorney fees failed.[302]

The North Dakota Supreme Court granted Lisa's appeal for reconsideration of retroactive child support and affirmed all other findings of the district court.[303]

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293. *Id.*

294. *Id.* ¶ 9 (citing Gonzalez v. Gonzalez, 2005 ND 131, ¶ 12, 700 N.W.2d 711, 717).

295. *Id.*

296. *Id.* ¶ 10.

297. *Id.* ¶ 11.

298. *Id.* ¶¶ 10, 11, 705 N.W.2d at 262-63 (citing T.E.J. v. T.S., 2004 ND 120, ¶ 4, 681 N.W.2d 444, 446).

299. *Id.* ¶ 11, 705 N.W.2d at 263 (citing Lukenbill v. Fettig, 2001 ND 47, ¶ 9, 623 N.W.2d 7, 10 (stating that "where the court does not clearly set forth how its child support decision is in compliance with the child support guidelines, or why it has decided to deviate therefrom, it is appropriate to remand for additional findings and a redetermination of the issue")).

300. *Id.* ¶ 12.

301. *Id.* ¶ 14 (citing *Lukenbill*, ¶ 14, 623 N.W.2d at 11).

302. *Id.* ¶ 14, 705 N.W.2d at 264 (citing *Lukenbill*, ¶ 15, 623 N.W.2d at 11).

303. *Id.* ¶ 15.

FAMILY LAW–CHILD SUPPORT GUIDELINES–STATUTORY INTERPRETATION
SIMON V. SIMON

In *Simon v. Simon*,[304] the Foster County Social Service Board, on behalf of the State of North Dakota, appealed the district court's interpretation of offset provisions "of the split custody and equal custody regulations of the child support guidelines."[305] The North Dakota Supreme Court affirmed the district court's interpretation, "concluding [that] the offset provisions apply to all split custody and equal custody cases, including those where one parent assigns the right to receive child support to the State."[306]

Because the parents shared equal and split custody of their children, at issue was the district court's interpretation of sections 75-02-04.1-03 and 75-02-04.1-08.2 of the North Dakota Administrative Code.[307] Particularly, the North Dakota Supreme Court had to determine whether to offset child support where one parent had assigned the right to receive support to the State.[308] The State argued that the offset provisions of those sections were not applicable when one parent had assigned the right to receive child support to the State.[309] Because the language of the sections was ambiguous, the State argued that deference should be given to the Child Support Guidelines Drafting Committee's (hereinafter "the Committee") interpretation.[310] Pursuant to section 75-02-04.1-03 of the North Dakota Administrative Code, once a district court has ordered split custody, each parent's child support obligation is determined, and the parent with the greater child support obligation should pay the difference between the obligations to the lesser obligated parent as offset.[311] The court noted that section 75-02-04.1-03 did not include an exception where the State had been assigned the right to receive support.[312]

To determine the validity of the State's arguments, the supreme court reviewed the Committee's recommendations prior to the 2003 amendment of section 75-02-04.1-03 of the North Dakota Administrative Code.[313] At that time, the Committee had considered an exception to the offset provision where one parent's right to receive child support was assigned to a

304. 2006 ND 29, 709 N.W.2d 4.
305. *Simon*, ¶ 1, 709 N.W.2d at 6.
306. *Id.*
307. *Id.* ¶¶ 6, 9.
308. *Id.*
309. *Id.* ¶ 9.
310. *Id.* ¶ 19.
311. *Id.* ¶ 13 (citing N.D. ADMIN. CODE § 75-02-04.1-03 (2005)).
312. *Id.* ¶ 13.
313. *Id.* ¶¶ 15-16.

"governmental entity."[314] However, these recommendations were never implemented because the Committee anticipated difficulties "when the offset is not applied, including the fluctuating monthly amounts of child support the parents would pay, how parents would receive notice of the change in the monthly payment, and the consequences when one parent could not pay his or her obligation."[315] But because the Committee had not rejected language that permitted a party to assign the right to receive support, the offset provision in section 75-02-04.1-03 encompassed assignments.[316]

Therefore, the State's argument, based on the North Dakota Supreme Court's interpretation of section 75-02-04.1-03 of the North Dakota Administrative Code failed. Despite an assignment of rights to the State, there is no provision in the statute or its legislative history for deference to be paid to the Committee's reasonable interpretation of the statute, which would require the offset provision to be set aside.[317] The court affirmed the district court's interpretation of section 75-02-04.1-03.[318]

To determine the child support obligation of each parent where the parents hold equal custody, the court evaluated section 75-02-04.1-08.2 of the North Dakota Administrative Code.[319] The statute provides:

> A child support obligation must be determined as described in this section in all cases in which a court orders each parent to have equal physical custody of their child or children. Equal physical custody means each parent has physical custody of the child, or if there are multiple children, all of the children, exactly fifty percent of the time. A child support obligation for each parent must be calculated under this chapter assuming the other parent is the custodial parent of the child or children subject to the equal physical custody order. The lesser obligation is then subtracted from the greater. The difference is the child support amount owed by the parent with the greater obligation. Each parent is an obligee

314. *Id.* ¶ 16 (citing Minutes of the Department of Human Services Child Support Guidelines Drafting Advisory Committee 15 (May 29, 2002)).

315. *Id.* ¶ 16 (citing Minutes of the Department of Human Services Child Support Guidelines Drafting Advisory Committee 3-4 (June 6, 2002)).

316. *Id.* ¶ 17 (citing Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993)).

317. *Id.* ¶¶ 19-20, 709 N.W.2d at 10 (citing State *ex rel.* Clayburgh v. American West Cmty. Promotions, Inc., 2002 ND 98, ¶¶ 7-9, 645 N.W.2d 196, 200-02) (stating that "[a]n administrative agency's interpretation of a statute is entitled to deference if the statute is complex and technical in nature, or if the statute is reenacted after a contemporaneous and continuous construction of the statute by the administrative agency"). The court explained that because neither of these conditions existed in *Simon v. Simon*, less weight need be given to the agency. *Id.*

318. *Id.* ¶ 20.

319. *Id.* ¶ 21.

> to the extent of the other parent's calculated obligation. Each parent is an obligor to the extent of that parent's calculated obligation.[320]

When interpreting section 75-02-04.1-08.2 of the Administrative Code, the North Dakota Supreme Court relied on the Committee's guidance.[321] The court rejected the State's argument that an offset exception should be triggered when the State is assigned the right to receive child support payments, specifically noting that section 75-02-04.1-08.2 had been drafted with section 75-02-04.1-03 in mind.[322] Because the offset provision in section 75-02-04.1-08.2 was based on the same provision in 75-02-04.1-03, with the goal of having consistent application, the court held that no exception existed for the State to set aside offset where it was assigned the rights to receive child support payments.[323]

The North Dakota Supreme Court affirmed the district court's interpretation of the North Dakota Administrative Code.[324]

FAMILY LAW—EQUITABLE-OFFSET REMEDY

HEWSON V. HEWSON

In *Hewson v. Hewson*,[325] Leon Hewson appealed from the trial court's amended judgment, which ordered that he pay Joselyn Privratsky (formerly "Joselyn Hewson") $17,852 to correct an unequal asset distribution resulting from the parties' divorce.[326] The North Dakota Supreme Court reversed and remanded, based upon the trial court's failure to make specific findings as to the determination of the $17,852 figure and if the amount of credit for child support that Privratsky may have owed Hewson was included in that figure.[327]

The Hewsons divorced in July of 1991.[328] Under the terms of their divorce decree, Hewson received custody of their children.[329] Both parties entered into a property settlement agreement that was incorporated into the

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320. *Id.* ¶ 21 (quoting N.D. ADMIN. CODE § 75-02-04.1-08.2 (2005)).
321. *Id.* ¶ 22.
322. *Id.* ¶ 22 (citing Minutes of the Department of Human Services Child Support Guidelines Drafting Advisory Committee 6 (June 11, 2002)).
323. *Id.* ¶ 22.
324. *Id.* ¶ 23, 709 N.W.2d at 11.
325. 2006 ND 16, 708 N.W.2d 889.
326. *Hewson*, ¶ 1, 708 N.W.2d at 891.
327. *Id.*
328. *Id.* ¶ 2.
329. *Id.*

divorce judgment.[330] The property settlement stated that Hewson would retain the majority of the marital assets as an offset to receiving child support from Privratsky because Privratsky could not afford to pay more than $10 per child in monthly child support.[331] Therefore, by accepting the settlement agreement, Hewson was not able to receive child support from Privratsky.[332] The divorce judgment stated that the agreement was a contract that could not be modified by either the parties or the court, and Hewson agreed to indemnify Privratsky and hold her harmless for any future child support claims.[333]

In 1995, Hewson commenced an action through Southwest Area Child Support Enforcement Unit (hereinafter "SACSEU"), whereby Privratsky agreed to pay a monthly amount of $126 per child in child support, which was incorporated into an amended judgment.[334] In 2003, Hewson requested another review of Privratsky's child support obligation.[335] The SACSEU moved to increase her obligation, to which Privratsky argued that she had given up all marital property in lieu of child support.[336] Upon holding a hearing on February 3, 2004, the trial court ordered that the amount of forfeited property be calculated and deducted from the amount of child support owed since 1991, the year that the parties divorced.[337]

In May 2004, the trial court ordered that custody of the children be transferred to Privratsky.[338] In addition, the court ordered Hewson to pay $1,146 in monthly child support and terminated Privratsky's support obligation.[339]

In January 2005, the trial court found that Privratsky had paid a total of $12,852 in child support to Hewson since their divorce.[340] The court stated:

> I have a strong feeling that after land valuation, credits and debits, due consideration for what everyone should and could have paid and done, that the bottom of the tape would show that Leon owes Joselyn around $18,000.
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> . . . .

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330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.* ¶ 3.
335. *Id.*
336. *Id.*
337. *Id.* ¶ 3, 708 N.W.2d at 892.
338. *Id.* ¶ 4.
339. *Id.*
340. *Id.* ¶ 5.

> So from the disproportionate property division, Leon still owes Joselyn $17,852 which, by great co-incidence [sic], comes very close to the amount that Joselyn paid directly in child support plus about $5,000 in attorney's fees.[341]

On April 26, 2005, the trial court ordered Hewson to pay Privratsky $17,852 to correct the unequal asset distribution that resulted from the divorce.[342]

On appeal to the North Dakota Supreme Court, Hewson raised two issues, whether: (1) the trial court erred when it applied the equitable-offset remedy to offset the amount of marital property that Privratsky gave up against her child support obligation; and (2) the trial court erred in its finding that the amount of the equitable offset was $17,852.[343] Hewson argued that the trial court erred by failing to state how it arrived at the $17,852 figure.[344] But Privratsky disagreed and stated that there was sufficient evidence to support the trial court's order.[345]

First, the North Dakota Supreme Court noted that the trial court could only modify the parties' child support obligation, and not their property settlement, in an amended judgment.[346] The supreme court has maintained a longstanding principle that "a trial court 'does not have continuing jurisdiction to modify a property distribution in a divorce judgment, but has continuing jurisdiction to modify child support.'"[347]

Next, the court evaluated whether the trial court erred when it applied the equitable-offset remedy to Privratsky's marital property for her child support obligation.[348] Using a de novo standard of review, the court reviewed the divorce decree, specifically the child support obligations.[349] Notably, the court stated that a child support agreement should be accepted by a trial court only if the agreement represented the best interests of the child.[350]

In *Rueckert v. Rueckert*,[351] the North Dakota Supreme Court determined that a clause in a divorce decree that limited the court's power to

341. *Id.*
342. *Id.*
343. *Id.* ¶ 6.
344. *Id.*
345. *Id.*
346. *Id.* ¶ 7.
347. *Id.*
348. *Id.* ¶ 11.
349. *Id.* ¶ 8.
350. *Id.* ¶ 9 (citing Rueckert v. Rueckert, 499 N.W.2d 863, 868 (N.D. 1993)).
351. 499 N.W.2d 863 (N.D. 1993).

modify child support agreements was void as against public policy.[352] Additionally, the court found that when a parent foregoes property rights in marital assets in order to waive paying future child support, that parent could offset the value of the assets from the amount of the child support obligation.[353] The court noted that this remedy was not intended to supercede a child's right to receive support from both parents, but rather was intended to grant parents credit for property settlements.[354] Furthermore, the court noted that the result of offsetting child support with marital property was that it placed responsibility for the support of their children on both parents.[355] In addition, the court stated in *Rueckert* that the forfeiture of property would only be a prepayment of child support when equity demanded it and the child's right to support was not superseded.[356]

Here, the North Dakota Supreme Court found that the trial court's use of the equitable-offset remedy was appropriate.[357] The court found that the equitable-offset remedy would not adversely affect the support to the parties' children because Hewson's custody rights had been terminated and transferred to Privratsky and one of the children was no longer a minor.[358]

Next, the North Dakota Supreme Court evaluated whether the trial court erred when finding that the amount of equitable-offset was $17,852.[359] Relying on *Dufner v. Dufner*,[360] "[a]s a matter of law, a trial court must clearly set forth how it arrived at the amount of income and level of support."[361] Here, the trial court determined the $17,852 offset figure on merely a "strong feeling," rather than making a specific finding on the record.[362] Therefore, the determination by the trial court fell below the standard set forth in *Dufner*.[363] Since the trial court made no clear determination as to its calculation of the $17,852 offset figure, the supreme court could not determine whether Privratsky owed child support to Hewson or whether she was entitled to future credit for paying too much in child support.[364]

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352. *Rueckert*, 499 N.W.2d at 868.
353. *Id.* at 870-71.
354. *Hewson*, ¶ 11, 708 N.W.2d at 893.
355. *Id.*
356. *Id.*
357. *Id.* ¶ 12.
358. *Id.* ¶¶ 12-13.
359. *Id.* ¶ 14, 708 N.W.2d at 894.
360. 2002 N.D. 47, 640 N.W.2d 694.
361. *Hewson*, ¶ 14, 708 N.W.2d at 894 (quoting *Dufner*, ¶ 22, 640 N.W.2d at 701).
362. *Id.*
363. *Id.*
364. *Id.*

The North Dakota Supreme Court ordered the trial court to use the framework set forth in *Rueckert* to make specific findings of fact as to the values and offset amounts that Privratsky should be credited from the time of entry in the original divorce decree to the first order establishing child support in July of 1995.[365] In order to do this, the trial court must evaluate Privratsky's gross income and the guidelines during that time frame.[366] Then, the trial court was ordered to calculate the amount of child support Privratsky owed from July 20, 1995, the date of the amended judgment, to July 2, 2003, the day before the SACSEU made a motion to increase support.[367] Because a court cannot retroactively modify unpaid child support, the trial court must reinstate the $126 in monthly child support per child that was ordered on July 20, 1995.[368] Then, the trial court must calculate the amount of child support owed under guidelines effective July 2, 2003, through April 20, 2004 (the day before custody of the children changed hands from one parent to the other).[369] Once the total amount of child support due is determined, the court must subtract the amount Privratsky has paid from the total owed.[370] Finally, the total amount unpaid must be offset by the value of the property Privratsky relinquished in the divorce decree.[371] Upon this calculation, if there was credit in favor of Privratsky, then this credited amount would be owed to Hewson if custody changed hands to Hewson.[372]

In conclusion, the North Dakota Supreme Court reversed and remanded for further proceedings. [373]

FAMILY LAW—TERMINATION OF PARENTAL RIGHTS—STATUTORY INTERPRETATION

IN RE *IN THE INTEREST OF M.B. AND N.B. V. I.B.*

I.B., father of M.B. and N.B., appealed the juvenile court's orders, which ended his rights as a parent and denied his motion for continued

365. *Id.* ¶15.

366. *Id.*

367. *Id.* (citing Geinert v. Geinert, 2002 ND 135, ¶ 10, 649 N.W.2d 237, 241 ("[A] modification of child support generally should be made effective from the date of the motion to modify, absent good reason to set some other date. The trial court retains discretion to set some later effective date, but its reasons for doing so should be apparent or explained.")).

368. *Id.*; *see* Rueckert v. Rueckert, 499 N.W.2d 863, 870 n.4 (N.D. 1993) (stating that a court may not retroactively modify unpaid child support).

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.* ¶ 16.

373. *Id.* ¶ 17.

visitation.[374] The trial court determined that I.B. was aware of the proceedings he faced and the evidence supported terminating I.B.'s parental rights.[375] The North Dakota Supreme Court affirmed the trial court's findings.[376]

I.B. and K.S. had two children prior to marrying in 2000, and four years later they divorced.[377] Each child had been diagnosed with attention deficit hyperactivity disorder and oppositional defiant disorder.[378] Because the parents had exposed the children to domestic violence in the home, sexual activity, and pornographic and horror films, the juvenile court found the children were deprived and placed them in the custody of social services in April 2002.[379] The children remained in the custody of social services only intermittently, though, because the juvenile court allowed the children to reunify with their parents in the summer of 2002.[380] In July 2004, social worker Marlene Sorum petitioned the court to terminate the parental rights of I.B. and K.S.[381] The children's mother, K.S., consented to having her parental rights terminated; however, the children's father, I.B., "appeared to defend against the petition," arguing that he wished to provide for M.B. and N.B.[382] Although the children's guardian ad litem proposed a reunification with the father, a judicial referee found the kids deprived after a three-day trial and ordered the termination of I.B.'s parental rights.[383] Sorum prepared the findings of fact, conclusions of law, and order, which were all adopted in full.[384]

Following I.B.'s request for judicial review of his terminated parental and visitation rights, the district judge affirmed.[385] The North Dakota Century Code requires that a petition to terminate parental rights set out plainly:

> [t]he facts which bring the child within the jurisdiction of the court, with a statement that it is in the best interest of the child and the public that the proceeding be brought and, if delinquency or

374. *In re* Interest of M.B. and N.B. v. I.B., 2006 ND 19, ¶ 1, 709 N.W.2d 11, 14.
375. *Id.*
376. *Id.*
377. *Id.* ¶ 2.
378. *Id.*
379. *Id.*
380. *Id.*
381. *Id.* ¶ 3.
382. *Id.*
383. *Id.* ¶¶ 3-4.
384. *Id.* ¶ 4.
385. *Id.*

> unruly conduct is alleged, that the child is in need of treatment or rehabilitation.[386]

In addition, the petition must make the parent aware of the specific circumstances supporting the proposed termination.[387] Furthermore, the petition must include specific facts that will be used to terminate the parental rights so that any opposing parent has notice of the claims and is given an opportunity to "meaningfully prepare a defense against the petition."[388]

Sorum's petition included sufficient factual basis for the requested termination of parental rights.[389] The factual basis included numerous domestic violence disputes, a history of abusive behavior, I.B.'s own concerns regarding his ability to financially support the children, and the failure of either parent to continue treatment for the children's disorders, as well as their own.[390] Based on the factual findings made by the trial court, the North Dakota Supreme Court determined that I.B.'s due process rights were not violated because he was made aware of the evidence that Sorum relied on, and I.B. did not appear to be prejudiced at trial or unable to defend against the charges.[391]

Next, I.B. argued that the referee improperly delegated judicial authority to Sorum by assigning her the preparation of proposed findings of fact and conclusions of law and then adopting those findings in whole.[392] In North Dakota, a trial court may delegate the duty of preparing findings of fact and conclusions of law to one or both parties.[393] Rule 52(a) of the North Dakota Rules of Civil Procedure provides:

> The findings of a master or juvenile referee, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court.[394]

While a court's adoption of one party's proposed findings of fact is discouraged, once the court signs those findings, they become the court's

386. *Id.* ¶ 6, 709 N.W.2d at 15 (quoting N.D. CENT. CODE § 27-20-21(1) (2005)).
387. *Id.* ¶ 7 (citing Thompson v. King, 393 N.W.2d 733, 738 (N.D. 1986)).
388. *Id.* (citing *In re* Interest of T.M.M., 267 N.W.2d 807, 813 (N.D. 1978)).
389. *Id.* ¶ 8.
390. *Id.*
391. *Id.*
392. *Id.* ¶ 9, 709 N.W.2d at 16.
393. *Id.* ¶10 (citing N.D.R.CT. 7.1(b)(1)).
394. *Id.* (quoting N.D.R.CIV.P. 52(a)).

findings and will not be thrown out unless clearly erroneous.[395] Even where the trial court announces its decision via letter and asks the triumphant party to prepare the findings, the decision will not be reversed.[396]

Here, the judicial referee's decision was communicated by letter and requested that Sorum prepare the findings of fact.[397] The findings were adopted in whole by the referee and signed.[398] The supreme court held that the findings were not clearly erroneous, and therefore, affirmed the trial court's ruling.[399]

In North Dakota, the standard of review for rendering whether a parent's rights should have been terminated is "clearly erroneous."[400] The North Dakota Century Code requires, where parental rights are at stake, that the petitioner prove by clear and convincing evidence: "(1) 'the child is a deprived child,' (2) 'that conditions and causes of deprivation are likely to continue or will not be remedied,' and (3) 'that by reason thereof the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm.'"[401] In North Dakota, a court's termination of parental rights will be upheld unless the decision is clearly erroneous, meaning that "no evidence exists to support the finding, or if, on the entire record, [the court is] left with a definite and firm conviction a mistake ha[d] been made."[402] North Dakota Century Code defines a deprived child as:

> [one] without proper parental care or control, subsistence, education as required by law, or other care or control necessary for the child's physical, mental, or emotional health, or morals, and the deprivation is not due primarily to the lack of financial means of the child's parents, guardian, or other custodian.[403]

The North Dakota Supreme Court has defined proper parental care as the "minimum standards of care which the community will tolerate."[404]

Based on the record, the supreme court found that sufficient evidence existed to hold that the children were deprived.[405] The evidence included

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395. *Id.* ¶ 11 (citing Foster v. Foster, 2004 ND 226, ¶ 10, 690 N.W.2d 197; N.D.R.CIV.P. 52(a)).

396. *Id.* ¶ 11 (citing *Foster*, ¶¶ 7, 10, 690 N.W.2d 197).

397. *Id.* ¶ 12.

398. *Id.*

399. *Id.* ¶ 15, 709 N.W.2d at 17-18.

400. *Id.* ¶ 13 (citing N.D.R.CIV.P. 52(a)).

401. *Id.* (citing N.D. CENT. CODE § 27-20-44(1)(b) (2005); *In re* Interest of M.M.S., 449 N.W.2d 574, 577 (N.D. 1989)).

402. *Id.* (citing *Adoption of S.R F.*, 2004 ND 150, ¶ 8, 683 N.W.2d 913, 916)).

403. *Id.* ¶ 14 (quoting N.D. CENT. CODE § 27-20-02(8)(a) (2005)).

404. *Id.* (citing *Interest of D.Q.*, 2002 ND 188, ¶ 12, 653 N.W.2d 713, 719).

405. *Id.* ¶ 15.

the lower court's findings that: (1) the children were deprived; (2) the family's home was "unkempt"; (3) the parents exhibited violent behavior toward one another; and (4) the children suffered abuse and the threat of abuse at the hands of I.B.[406] In addition, the lower court noted other instances in which I.B. did not meet the minimum standard of care in parenting his children.[407]

But in North Dakota, parental rights will not be terminated unless prognostic evidence is provided showing that deprivation is "likely to continue or will not be remedied."[408] Prognostic evidence includes the lack of cooperation displayed by the parents, the parents' background, and the reports and opinions of professionals involved.[409]

Based on the conclusions of a social worker, a parent aide, two therapists, and M.B. and N.B.'s mother, the supreme court held that sufficient evidence existed to find that continued deprivation would occur if the children were returned to I.B.[410] Despite I.B.'s alleged desire to be reunited with the boys, his prior avoidance of interaction with the boys, the boys' fear of I.B., and I.B.'s lack of understanding regarding the effort required to provide for the children were held to be substantial grounds to find that continued deprivation would occur.[411]

Finally, the North Dakota Century Code requires the petitioner to prove that the "child is suffering or will probably suffer serious physical, mental, moral, or emotional harm" if not removed from the care of the parent.[412] Based on prognostic testimony, the supreme court found that I.B.'s parental rights should be terminated.[413] The evidence included the boys' past exposure to mental and physical abuse, sexual abuse, and violent and pornographic films.[414]

In I.B.'s final argument regarding the termination of his parental rights, he claimed that reasonable efforts had not been made by Cass County

406. *Id.*

407. *Id.*

408. *Id.* ¶ 16, 709 N.W.2d at 18 (citing N.D. CENT. CODE § 27-20-44(1)(b)(1) (2005)).

409. *Id.* (citing *Interest of T.K.*, 2001 ND 127, ¶ 14, 630 N.W.2d 38, 44; *Interest of A.S.*, 1998 ND 181, ¶ 19, 584 N.W.2d 853, 856-57; *Interest of D.Q.*, 2002 ND 188, ¶ 21, 653 N.W.2d 713, 721),

410. *Id.* ¶ 17, 709 N.W.2d at 18-19.

411. *Id.* The court further noted that since the boys had entered foster care their behavior had improved and that a proper caregiver-child relationship had been established with the foster parents. *Id.*

412. *Id.* ¶ 18, 709 N.W.2d at 19 (citing N.D. CENT. CODE § 27-20-44(1)(b)(1) (2005)).

413. *Id.* ¶ 19.

414. *Id.*

Social Services to return the boys to his care.[415] The North Dakota Century Code has stated that "reasonable efforts" means:

> [t]he exercise of due diligence, by the agency granted authority over the child . . . to use appropriate and available services to meet the needs of the child and the child's family in order to prevent removal of the child from the child's family or, after removal, to use appropriate and available services to eliminate the need for removal and to reunite the child and the child's family. In determining reasonable efforts to be made with respect to a child under this section, and in making reasonable efforts, *the child's health and safety must be the paramount concern*.[416]

The supreme court concluded, based on sufficient testimony received by the referee, that "reasonable efforts" were attempted.[417] I.B. did not take part in the boys' counseling. Among other evidence, I.B. did not improve the boys' living space and was continually at odds with his desire to have parental control over M.B. and N.B.[418]

Finally, I.B. contested the denial of visitation rights.[419] Based on the court's previous holding that sufficient evidence was produced to terminate I.B.'s parental rights, the court deemed the issue of his right to visitation as moot.[420]

The North Dakota Supreme Court affirmed the order of the juvenile court.[421]

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415. *Id.* ¶ 20.

416. *Id.* (quoting N.D. CENT. CODE § 27-20-32.2(1) (2005)) (emphasis added). The North Dakota Century Code further provides that reasonable efforts must be made to preserve and reunify families prior to the placement of the child in foster care, to prevent or eliminate the need for removing the child from the child's home and to make it possible for a child to return safely to the child's home. If the court or the child's custodian determined that continuation of reasonable efforts is inconsistent with the permanency plan for the child, reasonable efforts must be made to place the child in a timely manner in accordance with the permanency plan and to complete whatever steps are necessary to finalize the permanent placement of the child. N.D. CENT. CODE § 27-20-32.2.

417. *In re M B.*, ¶ 21, 709 N.W.2d at 19.

418. *Id.* I.B. took little interest in parenting, as was evident from his behavior in not maintaining his home, in rarely being home, and in sleeping all day when he was at home. *Id.*

419. *Id.* ¶ 22, 709 N.W.2d at 20.

420. *Id.* (citing *In re* Interest of L.B.B., 2005 ND 220, ¶ 9, 707 N.W.2d 469, 472; Wanner v. N.D. Workers Comp. Bureau, 2002 ND 201, ¶ 31, 654 N.W.2d 760, 773)

421. *Id.* ¶¶ 22-23.

MEDICAL MALPRACTICE

DAVIS V. KILLU

In *Davis v. Killu*,[422] Anthony Davis appealed from a judgment entered on a jury verdict dismissing a medical malpractice claim against Dr. Keith Killu, Dr. Philip Hershberger, and other healthcare providers.[423] The North Dakota Supreme Court affirmed the trial court's decision.[424]

In May 2000, Davis was experiencing pain in his right ankle, so his urologist referred him to Dr. Killu, an internal medicine physician, who diagnosed Davis with cellulites and possible osteomyelitis.[425] Upon diagnosis, Davis was admitted to the hospital for an antibiotic IV.[426] Despite the intravenous drip, Davis's condition did not improve, and Dr. Killu consulted an orthopedic surgeon, Dr. Hershberger.[427] Dr. Hershberger determined that treatment of Davis's left ankle required incision and drainage, debridement, and exploration of the bone.[428] In addition, Dr. Hershberger initiated a six-week course of intravenous antibiotics when Davis was released from the hospital on June 30, 2000.[429]

On July 11, 2000, Davis returned to Dr. Killu who was convinced that his condition had improved and continued administering antibiotics for another six weeks.[430] Dr. Killu recommended that Davis should follow up with the orthopedic clinic.[431] On July 28, 2000, Davis saw Dr. Ravindra Joshi, another orthopedic surgeon, who determined that a blister on Davis's foot tested positive for blastomycosis, a fungal infection of the bone that does not respond to antibiotics.[432] Because the fungal infection could not be treated, Davis's leg was amputated in August 2000.[433]

In February 2002, Davis commenced a malpractice action against Dr. Killu and Dr. Hershberger, alleging that they were negligent in failing to timely diagnose and treat the infection in his ankle.[434] Davis specifically claimed that he lost his leg because of the doctors' alleged negligence.[435] In

422. 2006 ND 32, 710 N.W.2d 118.
423. *Davis*, ¶ 1, 710 N.W.2d at 119.
424. *Id.* at 120.
425. *Id.* ¶ 2.
426. *Id.*
427. *Id.*
428. *Id.*
429. *Id.*
430. *Id.* ¶ 3.
431. *Id.*
432. *Id.*
433. *Id.*
434. *Id.* ¶ 4.
435. *Id.*

August 2004, a jury found that neither of the doctors were negligent in the care and treatment of Davis.[436]

On appeal to the North Dakota Supreme Court, Davis argued that the trial court's evidentiary rulings constituted reversible error.[437] Specifically, Davis argued that the trial court erred in refusing to allow his medical expert to testify, admitting evidence that he had been fired from his employment, and excluding evidence of Dr. Hershberger's licensing status.[438] The North Dakota Supreme Court has stated that trial courts are given broad discretion to rule on evidentiary matters, and a trial court's rulings will not be overturned unless an abuse of discretion has occurred.[439] Rule 61 of the North Dakota Rules of Civil Procedure provides that no judgment shall be overturned unless refusal to admit or exclude evidence "appears to the court inconsistent with substantial justice."[440]

First, Davis argued that the trial court erred when it refused to allow the testimony of a medical expert, Dr. Henry Masur, regarding opinions contained in Davis's original Mayo Clinic medical records.[441] The trial court redacted physicians' opinions from the records for the purpose of trial, and Davis argued that Dr. Masur should have been allowed to testify with respect to those opinions.[442] In redacting the physicians' opinions from Davis's medical records, the trial court relied on the ruling in *Patterson v. Hutchens*,[443] which did not admit the opinion of a physician, who was neither a witness at trial nor was available for cross-examination.[444] Here, no Mayo Clinic physicians testified at trial.[445] Therefore, based on the reasoning in *Patterson*, the parties agreed to redact the physicians' opinions in Davis's Mayo Clinic medical records before admitting those records into evidence, and accordingly the trial court ordered the redaction of the physicians' opinions.[446] Then, Dr. Hershberger brought a motion in limine to exclude Dr. Masur from testifying as to his medical opinions that had

436. *Id.*

437. *Id.* ¶¶ 5, 7, 14, 17, 710 N.W.2d at 120-24.

438. *Id.*

439. *Id.* ¶ 6 (citing Forster v. W. Dakota Veterinary Clinic, 2004 ND 207, ¶ 40, 689 N.W.2d 366).

440. *Id.* (citing N.D.R.CIV.P. 61) (stating "[n]o error in either the admission or the exclusion of evidence. . . is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice").

441. Id. ¶ 7.

442. *Id.*

443. 529 N.W.2d 561 (N.D. 1995).

444. *Davis*, ¶ 8, 710 N.W.2d at 121 (citing *Patterson*, 529 N.W.2d at 564-65).

445. *Id.*

446. *Id.*

been redacted from the records.[447] Although Davis made no offer of proof to the specific testimony, he contended that the trial court's ruling was "plain error," in violation of Rule 703 of the North Dakota Federal Rules of Evidence, which provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.[448]

Davis asserted that Dr. Masur should have been allowed to testify as to the redacted opinions in the medical records because the opinions constituted facts or data reasonably relied upon by Dr. Masur to form his expert opinion.[449]

Historically, the North Dakota Supreme Court has stated that expert witnesses "should be permitted to describe otherwise inadmissible hearsay relied upon in order to give the basis for the opinion"[450] Yet, the court has recognized that it would be an injustice if expert witnesses were allowed "free reign" as a mouthpiece for inadmissible hearsay.[451] In order to balance this contradiction, courts have weighed the probative value of the hearsay with the danger of unfair prejudice, pursuant to Rule 703 of the Federal Rules of Evidence.[452] In Davis's case, the unaltered portions of the record were not present on appeal, and the record showed that Davis made no offer of proof.[453] The court found that because these critical elements were absent, it was unable to determine whether the evidence that would have been presented was an attempt to allow the jury to hear inadmissible hearsay or would assist Dr. Masur in relaying his expert opinion.[454] Therefore, the court could not state whether or not the trial court abused its discretion in excluding the evidence.[455]

Next, Davis argued that the trial court erred in admitting testimony as to his termination of employment from Tioga High School.[456] Davis

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447. *Id.*
448. *Id.* ¶ 9 (citing N.D.R.EV. 703).
449. *Id.*
450. *Id.* ¶ 10 (quoting State v. Messner, 1998 ND 151, ¶ 26, 583 N.W.2d 109, 114).
451. *Id.* at 122.
452. *Id.* ¶ 11 (citing United States v. Dukagjini, 326 F.3d 45, 51-52 (2d Cir. 2003)).
453. *Id.* ¶ 13, 710 N.W.2d at 123.
454. *Id.*
455. *Id.* (citing Forster v. W. Dakota Veterinary Clinic, 2004 ND 207, ¶ 43, 689 N.W.2d 366, 382).
456. *Id.* ¶¶ 14-15.

claimed that testimony as to his termination of employment was irrelevant and inadmissible.[457] On direct examination, Davis discussed his employment background, and on cross-examination he was asked if he was terminated from his teaching position at Tioga High School.[458] Davis's counsel objected, and the trial court ruled that the reasons for his termination must be excluded as prejudicial, but the termination testimony itself was admissible to complete the picture of his employment background.[459]

The North Dakota Supreme Court agreed that the questioning regarding the termination of Davis's employment was irrelevant.[460] But the court would not overturn the trial court's admittance of the testimony because such testimony did not affect Davis's substantial rights.[461] As evidence that Davis's substantial rights were not affected, the court stated that the testimony had no bearing on the weight of the jury's finding that Dr. Killu and Dr. Hershberger were not negligent in treating Davis.[462] Therefore, admission of testimony regarding Davis's termination from employment was harmless error.[463]

Next, Davis argued that the trial court erred in prohibiting evidence regarding Dr. Hershberger's licensing status.[464] While being deposed, Dr. Hershberger suggested that he was not licensed to practice at UniMed Medical Center in Minot, but rather was only licensed to practice at the affiliated clinic, Medical Arts Clinic.[465] Before trial, Dr. Hershberger raised a motion in limine to exclude the testimony as to his licensing status.[466] At the in limine hearing, Hershberger's counsel stated that Hershberger was licensed to practice in North Dakota, and that UniMed Medical Center is affiliated with Medical Arts Clinic in which Hershberger was licensed to practice.[467] On the fourth day of trial, a question arose regarding the resolution of this evidence.[468] When the issue was raised, the record showed that Davis's counsel failed to object, which prevented Davis from preserving an objection on the record for appeal.[469] Therefore, Davis's

457. *Id.* ¶ 15.
458. *Id.*
459. *Id.*
460. *Id.* ¶ 16.
461. *Id.* (citing *In re* K.S., 2002 ND 164, ¶ 11, 652 N.W.2d 341, 346).
462. *Id.* at 123-24.
463. *Id.* at 124.
464. *Id.* ¶ 17, 710 N.W.2d at 124.
465. *Id.* at ¶ 18.
466. *Id.*
467. *Id.*
468. *Id.* ¶ 19.
469. *Id.* ¶ 20 (citing May v. Sprynczynatyk, 2005 ND 76, ¶ 25, 695 N.W.2d 196, 203).

failure to object at trial resulted in a waiver of later claiming error on the issue.[470] In addition, the court stated that the evidence as to licensing may have been relevant in a negligence suit against the clinic and medical center, but it had no bearing on the negligence of Dr. Hershberger.[471]

In conclusion, the North Dakota Supreme Court affirmed all three evidentiary issues.[472]

MENTAL HEALTH—INVOLUNTARY COMMITMENT

IN RE *INTEREST OF M.M.*

M.M. appealed two orders issued by the District Court of Stutsman County.[473] The first order mandated the hospitalization of M.M. at the North Dakota State Hospital for a period not to exceed forty-five days, and the second order mandated involuntary treatment with medication.[474] M.M. argued that he was not mentally ill, he did not require medical treatment, and involuntary hospitalization and treatment were not the least restrictive alternatives to his medical care.[475]

M.M. was a fifty-five year old male, who was admitted to Trinity Hospital in Minot, North Dakota, because of a complaint that he was unable to urinate.[476] M.M. refused surgery when learning that kidney stones were the cause of his urinary retention.[477] While being treated, hospital staff noticed M.M. displayed grandiose delusions.[478] Upon witnessing these behaviors, a psychiatric consultant filed a Petition for Involuntary Commitment based on statements that were termed to be psychotic and delusional.[479] M.M. was then sent to the state hospital, where he was treated without surgery.[480]

Upon entering the state hospital, M.M. told Dr. Pryatel that he was a grey ghost involved with military intelligence and a stunt man.[481] At trial, Dr. Pryatel stated his belief that M.M. was a homeless hitchhiker, who

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470. *Id.*
471. *Id.*
472. *Id.* ¶ 21.
473. *In re* M.M., 2005 ND 219, ¶ 1, 707 N.W.2d 78, 79.
474. *Id.*
475. *Id.* ¶¶ 7-8, 707 N.W.2d at 80.
476. *Id.* ¶ 2, 707 N.W.2d at 79.
477. *Id.*
478. *Id.* ¶ 3. M.M.'s delusions included statements where he claimed to be able to speak many languages, be related to famous people including the President of the United States, and exist as a color. *Id.*
479. *Id.*
480. *Id.* ¶¶ 3-4.
481. *Id.* ¶ 5.

panhandled for money.[482] During his hospitalization, M.M. was capable of feeding himself and sustained sufficient personal hygiene.[483] Dr. Pryatel also testified that M.M.'s kidney condition presented serious risks if untreated.[484] Dr. Pryatel testified that surgery, in combination with medicine, was M.M.'s only treatment option.[485] Furthermore, Dr. Pryatel had serious doubts regarding M.M.'s ability to function in society or manage his medical condition.[486]

M.M. argued that he was not in need of medication or surgery to maintain his physical or mental health.[487] M.M. asserted that his physical condition was not life threatening and claimed that he was not mentally ill because he had not been diagnosed with any mental illness in the past, nor had he experienced episodes of inflicting injury upon himself or others.[488] M.M. testified that the statements made at Trinity Hospital were a result of him being in intense pain.[489] Unlike the previous statements that he made at Trinity Hospital, at trial M.M. stated that he was not related to any presidents, but he did state that he had performed stunts and that he was fluent in both Russian and Chinese.[490] Based on this evidence, the trial court found that M.M. was in need of involuntary hospitalization.[491]

In North Dakota, a trial court has the power to order an involuntary commitment of an individual under certain circumstances.[492] Involuntary commitment is appropriate when the petitioner proves by clear and convincing evidence that the individual was mentally ill, and if not treated would pose a serious risk to himself, others, or property.[493] The supreme court reviewed the trial court's findings under a "clearly erroneous" standard of review.[494] The supreme court determined that M.M.'s behavior at Trinity Hospital, combined with Dr. Pryatel's opinion that M.M. was mentally ill, was enough to support the trial court's finding of his mental illness.[495]

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482. *Id.* ¶ 6.
483. *Id.*
484. *Id.*
485. *Id.*
486. *Id.*
487. *Id.* ¶ 7, 707 N.W.2d at 80.
488. *Id.*
489. *Id.*
490. *Id.*
491. *Id.* ¶ 8.
492. *Id.* ¶ 9.
493. *Id.* ¶ 9 (citing *In re* Interest of D.Z., 2002 ND 132, ¶6, 649 N.W.2d 231, 234).
494. *Id.*
495. *Id.* ¶ 10, 707 N.W.2d at 80-81.

M.M. argued that he did not require treatment because he was not a physical threat to himself, others, or property.[496] But "[w]hen one or more reasonable inferences can be drawn from credible evidence, this Court must accept the inferences drawn by the trial court."[497] Here, expert testimony was provided to demonstrate that without medical attention M.M.'s condition would result in renal failure, which would cause M.M. to be a danger to himself.[498]

M.M. also argued that the trial court erred in ordering involuntary commitment rather than ordering some less restrictive treatment.[499] M.M. relied on North Dakota law, which provided that "[w]hen an individual is found to be a person requiring treatment he has the right to the least restrictive conditions necessary to achieve the purposes of the treatment."[500] A two-part inquiry is required to determine the least restrictive environment: "(1) whether a treatment program other than hospitalization is adequate to meet the individual's treatment needs; and (2) whether an alternative treatment program is sufficient to prevent harm or injuries which the individual may inflict upon himself or others."[501] Furthermore, the North Dakota Supreme Court requires a trial court to show by clear and convincing evidence that alternative treatment was not adequate, or that hospitalization was the least restrictive alternative.[502]

During trial, the court heard testimony from Dr. Pryatel that hospitalization and medication were the only effective treatment for M.M.'s psychiatric condition.[503] Because M.M. was a homeless transient, no outpatient or rehabilitation arrangements could be made, leaving involuntary commitment as the only option.[504] Taking into consideration the testimony of Dr. Pryatel and M.M.'s needs, the trial court found that involuntary hospitalization did not violate his rights, and therefore, was the least restrictive medical treatment.[505]

M.M's final argument on appeal was that the trial court erred in permitting involuntary treatment using medication.[506] Dr. Pryatel requested authorization to treat M.M. with a variety of different medications, as

496. *Id.* ¶ 11.
497. *Id.* (quoting *In re Interest of D.Z.*, ¶ 9, 649 N.W.2d at 235).
498. *Id.*
499. *Id.* ¶12.
500. *Id.* (quoting *In re Interest of D.Z.*, ¶ 10, 649 N.W.2d at 235).
501. *Id.* (quoting *In re Interest of D.Z.*, ¶ 10, 649 N.W.2d at 235).
502. *Id.*
503. *Id.* ¶ 13, 707 N.W.2d at 81.
504. *Id.*
505. *Id.* at 82.
506. *Id.* ¶ 14.

necessary, to treat M.M.'s condition.[507] Dr. Pryatel was of the opinion that M.M.'s mental health would improve substantially from the administration of the medication.[508] But in order for a trial court to authorize the involuntary administration of medication, the treating psychiatrist and another licensed physician must certify the medication order, and the court must find by clear and convincing evidence, the following factors under section 25-03.1-18.1 of the North Dakota Century Code:

> "1.a. Upon notice and hearing, a treating psychiatrist may request authorization from the court to treat a person under a mental health treatment order with prescribed medication. The request may be considered by the court in an involuntary treatment hearing. As a part of the request, the treating psychiatrist and another licensed physician or psychiatrist not involved in the current diagnosis or treatment of the patient shall certify:
>
> (1) That the proposed prescribed medication is clinically appropriate and necessary to effectively treat the patient and that the patient is a person requiring treatment;
>
> (2) That the patient was offered that treatment and refused it or that the patient lacks the capacity to make or communicate a responsible decision about the treatment;
>
> (3) That prescribed medication is the least restrictive form of intervention necessary to meet the treatment needs of the patient; and
>
> (4) That the benefits of the treatment outweigh the known risks to the patient."[509]

The trial court found that all of the factors listed in section 25-03.1-18.1 were proven by clear and convincing evidence. Using Dr. Pryatel's testimony, the supreme court found that the trial court's finding was not clearly erroneous.[510] The North Dakota Supreme Court affirmed the trial court's finding that M.M. was a mentally ill individual requiring involuntary hospitalization and treatment.[511]

Justice Kapsner wrote a dissenting opinion.[512] In her dissent, Justice Kapsner argued that M.M.'s refusal to submit to surgery was not sufficient

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507. *Id.*
508. *Id.*
509. *Id.* ¶ 15 (quoting N.D. CENT. CODE § 25-03.1-18.1 (2005)).
510. *Id.* ¶ 16.
511. *Id.* ¶ 17.
512. *Id.* ¶¶ 22-24, 707 N.W.2d at 83-84 (Kapsner, J., dissenting).

evidence to diagnosis him as being mentally ill.[513] Additionally, Justice Kapsner questioned the trial court's finding that M.M. was mentally ill, citing the fact that M.M. was competent to testify and was maintaining daily living activities even though he was not medicated.[514]

PERSONAL INJURY LAW—NEGLIGENCE—SUMMARY JUDGMENT

PEREZ V. NICHOLS

In *Perez v. Nichols*,[515] the district court granted summary judgment in favor of defendant Ronnie Nichols, stating that no reasonable jury could find Nichols negligent of injuries sustained by the passenger in his vehicle at the time of the accident.[516] On appeal to the North Dakota Supreme Court, Sheila Perez, the passenger and plaintiff, argued that questions of fact still existed regarding "whether Nichols kept a proper lookout while entering an intersection and whether Nichols was negligent for not having his van equipped with seat belts."[517] The North Dakota Supreme Court affirmed the district court's grant of summary judgment.[518]

In *Green v. Mid Dakota Clinic*,[519] the North Dakota Supreme Court defined summary judgment as:

> a procedural device under N.D.R.Civ.P. 56 for prompt and expeditious disposition of a controversy without a trial if either party is entitled to judgment as a matter of law, and if no dispute exists as to either the material facts or the inferences to be drawn from undisputed facts, or if resolving disputed facts would not alter the result.[520]

Additionally, "the party moving for summary judgement must show that there are no genuine issues of material fact and that the case is appropriate for judgment as a matter of law."[521] The court also noted that all favorable inferences will be drawn in favor of the opposing party, and the

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513. *Id.* ¶ 20-21, 707 N.W.2d at 83 (Kapsner, J., dissenting) (citing Cruzan v. Director Mo. Dep't of Health, 497 U.S. 261, 278 (1990)) (explaining that competent individuals have a constitutional right to refuse unwanted medical treatment, while an incompetent person is not able to make an informed and voluntary decision in exercising this constitutional right to refuse treatment).

514. *Id.* ¶¶ 22-24, 707 N.W.2d at 83-84 (Kapsner, J., dissenting).

515. 2006 ND 20, 708 N.W.2d 884.

516. *Perez*, ¶ 1, 708 N.W.2d at 886.

517. *Id.* ¶ 1.

518. *Id.*

519. 2004 ND 12, 673 N.W.2d 257.

520. *Perez*, ¶ 5, 708 N.W.2d at 887 (quoting *Green*, ¶ 5, 673 N.W.2d at 260).

521. *Id.* (quoting *Green*, ¶ 5, 673 N.W.2d at 259-60).

evidence will be construed most favorably to the opposing party.[522] As speculation will not defeat a motion for summary judgment, the court requires the opposing party to provide "competent admissible evidence by affidavit or other comparable means" that will show the court what evidence raises an issue of material fact.[523]

The North Dakota Supreme Court has held that a claim of negligence requires the plaintiff to prove that the defendant owed a duty to the plaintiff, the defendant breached his duty, and the defendant proximately caused the plaintiff's injury.[524] As here, "[t]he driver of an automobile has a duty to keep a proper lookout, and failure to discharge that duty is negligence."[525] If the evidence presented could result in only one reasonable conclusion by a reasonable fact-finder, only a question of law exists and summary judgment may be appropriate.[526]

First, Perez argued that Nichols failed to keep a proper lookout.[527] Perez stated that Nichols failed to survey the intersection before entering it, and if he had properly surveyed the intersection, then Nichols would have observed the oncoming car.[528]

Upon examining the facts in the light most favorable to Perez, the court found that Nichols did not breach his duty to keep a proper lookout.[529] The court noted that Nichols had proceeded into the intersection on a green light, following two other vehicles.[530] Additionally, the court found that Perez contradicted herself because she was unable to identify how Nichols could have avoided the accident and she did not believe that Nichols caused the accident.[531] Furthermore, the court found important Nichols' testimony, in which he testified that he properly surveyed the intersection before entering it.[532] The court held that these facts, even in the most favorable light for Perez, could not sustain a claim that Nichols had "breached his duty to keep a proper lookout or that Nichols proximately caused Perez's injuries."[533]

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522. *Id.* (citing Hurt v. Freeland, 1999 ND 12, ¶ 7, 589 N.W.2d 551, 554).

523. *Id.* (citing *Hurt*, ¶ 8, 589 N.W.2d at 554; Ellingson v. Knudson, 498 N.W.2d 814, 818 (N.D. 1993)).

524. *Id.* ¶ 6 (citing *Hurt*, ¶ 11, 589 N.W.2d at 555 (quoting Diegel v. City of West Fargo, 546 N.W.2d 367, 370 (N.D. 1996))).

525. *Id.* (citing Kelmis v. Cardinal Petrol. Co., 156 N.W.2d 710, 715 (N.D. 1968)).

526. *Id.* ¶ 7 (citing Fast v. State, 2004 ND 111, ¶ 7, 680 N.W.2d 265, 268).

527. *Id.* ¶ 8.

528. *Id.*

529. *Id.* ¶ 9.

530. *Id.*

531. *Id.*

532. *Id.*

533. *Id.*

Next, Perez argued that Nichols had a duty to equip his van with safety belts.[534] Nichols and Perez both testified that safety belts were available in the van, but Perez had chosen a bench seat that was not equipped with safety belts.[535] The court easily rejected Perez's argument because Nichols' van did contain seats with safety belts, and Nichols did not instruct Perez where to sit.[536] Because Perez raised no issues of material fact, the North Dakota Supreme Court affirmed the grant of summary judgment.[537]

In a special concurrence, Justice Maring remarked that the court is without proper evidence to determine whether Nichols had an opportunity to see the oncoming car that failed to yield the right-of-way and *avoid the collision* regardless of his right of way.[538] "It is the lack of that evidence that justifies the summary judgment."[539]

534. *Id.* ¶ 10.
535. *Id.* ¶ 11.
536. *Id.* ¶ 12.
537. *Id.* ¶¶ 12-13.
538. *Id.* ¶ 15 (emphasis added).
539. *Id.* (Maring, J., concurring).