NORTH DAKOTA SUPREME COURT REVIEW

The North Dakota Supreme Court Review summarizes important decisions rendered by the North Dakota Supreme Court. The purpose of this Review is to indicate cases of first impression, cases of significantly affected earlier interpretations of North Dakota law, and other potential cases of interest. As a special project, the Associate Editors assisted in writing the Review for the *North Dakota Law Review*. The following topics are included in the Review:

ADMINISTRATIVE LAW—JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS—REVIEW OF PARTICULAR QUESTIONS

NORTH DAKOTA STATE BD. OF MED. EXAMINERS-INVESTIGATIVE PANEL B V. HSU

The North Dakota State Board of Medical Examiners (Board) appealed a district court judgment that reversed a Board decision to revoke Dr. George Hsu's license to practice medicine and a writ of mandamus ordering the Board to establish a reasonable plan of supervision of Dr. Hsu.[1] The

1. N. D. State Bd. of Med. Examiners-Investigative Panel B v. Hsu, 2007 ND 9, ¶ 1, 726 N.W.2d 216, 219.

Supreme Court of North Dakota reversed the district court's judgment that reversed the Board's order revoking Dr. Hsu's license, and the court reversed the writ of mandamus ordered by the district court.[2] However, the court affirmed the district court's judgment to reject Dr. Hsu's due process and equal protection challenges.[3] Additionally, the supreme court reversed the award of attorney's fees to Dr. Hsu.[4]

Dr. Hsu is a board-certified family practitioner, who had been licensed in North Dakota since 1985.[5] He operated rural health clinics in Elgin and Glen Ullin since 1987.[6] In 2003 and 2004, the Board brought several complaints against him.[7] In the September 2003 complaint, an investigative panel of the Board alleged that Dr Hsu "had engaged in a continued pattern of inappropriate care of seven patients in violation of the N.D.C.C. § 43-17-31(21) and had failed to appropriately document medical records for those patients."[8] Following a formal hearing for the 2003 complaint, the administrative law judge (ALJ) recommended a finding that Dr. Hsu "had engaged in a continued pattern of inappropriate care from July 2001 through June 2003 for the seven patients identified in the complaint."[9] The ALJ concluded Dr. Hsu "demonstrated a continued pattern of inappropriate care" towards his patients, and therefore, the ALJ recommended the revocation of Dr. Hsu's medical license unless Dr. Hsu agreed to a plan of monitoring by the Board.[10]

On March 19, 2004, a second investigative panel of the Board issued a complaint against Dr. Hsu that re-alleged the claims in the 2003 complaint, and additionally alleged that Dr. Hsu provided inappropriate care to three other patients between December 2003 and January 2004.[11] At the March 19, 2004, meeting, the Board temporarily suspended Dr. Hsu's license to practice, and then unanimously voted to adopt the ALJ's findings of fact and conclusions of law.[12] Nevertheless, the Board neither revoked Dr. Hsu's license nor adopted the ALJ's recommended sanctions.[13] Instead, the

2. *Id.* ¶ 45, 726 N.W.2d at 235.
3. *Id.*
4. *Id.*
5. *Id.* ¶ 2, 726 N.W.2d at 219.
6. *Id.*
7. *Id.* ¶ 3.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* ¶ 4.
12. *Id.*
13. *Id.*

Board delayed the disposition of the 2003 complaint until after a hearing was held on the March 19, 2004, complaint.[14]

Following the hearing on the March 19, 2004, complaint, the ALJ issued a decision taking official notice of the 2003 disciplinary hearing.[15] "[T]he ALJ recommended finding that Dr. Hsu provided substandard or inappropriate care for one patient . . . [but] did not provide substandard or inappropriate care for the two other patients."[16] Additionally, the ALJ determined that Dr. Hsu failed to properly document the medical care of two patients.[17] After reviewing the ALJ's findings and conclusions, the Board adopted all but one of the ALJ's conclusions.[18] The Board declined to adopt the ALJ's recommendation that Dr. Hsu be monitored, and instead concluded that Dr. Hsu's license should be revoked.[19]

Dr. Hsu appealed the decision to the district court, alleging that the Board's use of an investigator, who was also a Board member, violated due process.[20] Dr. Hsu further alleged that the use of a preponderance of the evidence standard in the Board's disciplinary hearings violated due process and equal protection.[21] The district court found these arguments unpersuasive, but concluded that the Board violated section 28-32-39(3) of the North Dakota Century Code by delaying a decision on the ALJ's recommendations regarding the 2003 complaint.[22] The district court further held that the Board offered an insufficient rationale for departing from the ALJ's recommended disposition.[23] Therefore, the district court adopted the ALJ's recommendation for the disposition of the 2003 complaint and reversed the Board's order to revoke Dr. Hsu's license.[24]

The Board elected not to appeal the decision of the district court.[25] Instead, the Board issued additional rationale explaining why it did not accept the ALJ's recommended disposition.[26] The Board's rationale included: (1) the seriousness of the departure from the standard of care; (2) Dr. Hsu's prior behavior; (3) Dr. Hsu's attitude; and, (4) the Board's belief that the

14. *Id.*
15. *Id.* ¶ 5, 726 N.W.2d at 219-20.
16. *Id.* at 220.
17. *Id.*
18. *Id.* ¶ 6, 726 N.W.2d at 221.
19. *Id.*
20. *Id.* ¶ 7.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* ¶ 8.
26. *Id.*

ALJ's proposed system of monitoring was unworkable.[27] Dr. Hsu petitioned for, and was issued, a writ of mandamus from the district court.[28] Additionally, the district court granted attorney's fees to Dr. Hsu in accordance with section 28-32-50 of the North Dakota Century Code.[29]

On appeal, the Supreme Court of North Dakota first examined the role of the district court in the administrative hearings process.[30] "By definition, the Board is an administrative agency, and its procedures for physician licensure and discipline are governed by the Administrative Agencies Practice Act, N.D.C.C ch. 28-32."[31] Accordingly, a district court must affirm an administrative agency's decision, unless: (1) the order is not in accordance with the law; (2) the order violates the constitutional rights of the appellant; (3) the provisions of the Administrative Agencies Practice Act have not been followed; (4) the appellant was not afforded a fair hearing because of the rules or procedure of the agency; (5) the findings of fact are not supported by a preponderance of the evidence; (6) the conclusions of the agency lack factual support; (7) the findings of fact fail to address the evidence presented by the appellant; or (8) the conclusions of the agency fail to explain the agency's rationale for not adopting the recommendation of the ALJ.[32] However, when the North Dakota Supreme Court evaluates an administrative agency's decision on appeal, the court may not substitute its judgment for that of the particular administrative agency, nor can the court make independent findings.[33] The court must evaluate the administrative agency's factual conclusions under a standard of "whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record."[34]

Applying the standard of review, the court addressed Dr. Hsu's claims that the district court erred in finding that the Board's decision did not violate his due process or equal protection rights.[35] Section 28-32-46(5) of the North Dakota Century Code requires the Board's findings regarding proof for physician disciplinary proceedings to be proved by a preponderance of the evidence standard.[36] Dr. Hsu argued that this standard violates

27. *Id.* at 221-25.
28. *Id.* ¶ 9, 726 N.W.2d at 225.
29. *Id.*
30. *Id.* ¶ 11, 726 N.W. 2d at 226.
31. *Id.*
32. *Id.*
33. *Id.* ¶ 12.
34. *Id.*
35. *Id.* ¶ 13, 726 N.W.2d at 226-27.
36. *Id.* ¶ 14, 726 N.W.2d at 227.

due process because "a revocation proceeding potentially takes away a private property interest, prohibits a doctor from practicing his profession, and subjects a doctor to public embarrassment."[37]

The United States Supreme Court in *Mathews v. Eldridge*[38] established a three-part test for due process challenges.[39] The *Mathews* test requires a balance of:

> (1) the nature of the private interest affected by the governmental action;
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> (2) the countervailing nature of the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail; and
>
> (3) the risk of an erroneous deprivation of the private interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards.[40]

This test has been used by the United States Supreme Court in challenges to standards of proof under due process grounds.[41]

Upon examining other United States Supreme Court holdings and the holdings of similar cases in other jurisdictions, the North Dakota Supreme Court concluded that the framework identified in *Mathews* is satisfied by the preponderance of the evidence standard for medical disciplinary proceedings.[42] First, the court recognized that a physician's interest in a medical license is a property interest, and therefore, is substantial.[43] However, the court concluded that "the State's interest in protecting the health, safety, and welfare of its citizens is superior to a licensee's interest."[44] The court further held the Administrative Agencies Practices Act, chapters 43-17 and 43-17.1 of the North Dakota Century Code, and the legislature's responsibility to protect the public all support its decision that the preponderance of the evidence standard satisfies due process under the *Mathews* test.[45]

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37. *Id.* ¶ 15.
38. 424 U.S. 319 (1976).
39. *Hsu*, ¶ 17, 726 N.W.2d at 227 (citing *Mathews*, 424 U.S. at 332-49).
40. *Id.* (quoting *Mathews*, 424 U.S. at 332).
41. *Id.* ¶ 18, 726 N.W.2d at 227.
42. *Id.* ¶¶ 19- 27, 726 N.W.2d at 228-30.
43. *Id.* ¶ 27, 726 N.W.2d at 230.
44. *Id.*
45. *Id.*

An administrative agency does not violate due process simply because it engages in the three functions of investigation, prosecution, and adjudication at an administrative proceeding.[46] A medical disciplinary proceeding is protected under procedural and statutory safeguards, thus when the Board is made up of trained and experienced professionals whose functions are separated, the risk of error is minimized.[47] As such, the court concluded "the preponderance of evidence standard for medical disciplinary proceedings satisfies due process under the *Mathews* framework."[48]

Dr. Hsu argued that the use of the preponderance of evidence in his case violates the equal protection clauses of the federal and state constitutions because North Dakota imposes a more rigorous standard of clear and convincing evidence concerning attorney disciplinary hearings.[49] The three standards for reviewing equal protection claims: (1) strict scrutiny, when a suspect classification or infringement of a fundamental right is involved; (2) intermediate scrutiny, when an important substantive right is involved; and, (3) rational basis, when no suspect class, fundamental right, or important substantive right is involved.[50] Applying these standards, the court determined Dr. Hsu had not clearly presented a separate equal protection argument under the state constitution.[51] Therefore, his equal protection argument was reviewed under the strict scrutiny and rational-basis standards, but because the court determined that there was no fundamental right at issue or suspect class involved, it evaluated Dr. Hsu's equal protection claims under the rational basis standard.[52]

Under the rational basis standard of review, the court evaluated whether a less stringent burden of proof for discipline of medical licensees versus other professional licensees violated equal protection.[53] The court stated, "[t]he legislature has chosen the preponderance of evidence standard for physician discipline and this Court, governing body for attorneys, has chosen the clear and convincing standard for attorney discipline. The separation of powers between the legislature and this Court forms a rational basis for the different standards."[54] As an illustration, the court explained the effects that an adversarial relationship of attorney-client and a non-

46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* ¶ 28.
50. *Id.* ¶ 29, 726 N.W.2d at 230-31.
51. *Id.* ¶ 30, 726 N.W.2d at 213.
52. *Id.*
53. *Id.* ¶ 31.
54. *Id.*

adversarial relationship of physician-patient have on disciplinary actions.[55] For example, an unhappy client may file a disciplinary complaint against her attorney for losing at trial, but the imposition of a higher standard of proof on attorney disciplinary complaints filters out meritless complaints.[56] The physician, however, is engaged in a non-adversarial relationship with his patient therefore there is no loser resulting from the physician-patient relationship.[57] Consequently, the North Dakota Supreme Court concluded that the use of a preponderance of evidence standard in Dr. Hsu's case did not violate equal protection.[58]

Dr. Hsu next argued that the district court erred in deciding the Board did not violate due process because the Board's investigator, Dr. Lambrecht, had personal and financial conflicts of interest.[59] First, Dr. Hsu alleged that because Dr. Lambrecht's mother was denied a job with the National Guard in 1985 due to complaints brought by Dr. Hsu, Dr. Lambrecht had a personal conflict.[60] Second, Dr. Hsu alleged that Medcenter One had a competing clinic in Elgin, and because Dr. Lambrecht was an employee of Medcenter One in Bismarck, Dr. Lambrecht had a financial conflict.[61] Therefore, Dr. Hsu asserted that his due process rights were violated when an investigator with these conflicts sits on the Board.[62] The North Dakota Supreme Court found Dr. Hsu's assertions unpersuasive even though section 43-17-07.2 of the North Dakota Century Code bars Board members, who have served on the investigative panel, from also serving in an adjudicative capacity during the hearing.[63] Specifically, the court noted that statutory safeguards are present during the administrative agency's investigation and adjudication proceedings to prevent violations of due process.[64] Therefore, the court held that Dr. Lambrecht's participation as an investigator of the complaints did not violate due process, and the district court did err in concluding that Dr. Hsu's due process and equal protection rights were not violated.[65]

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55. *Id*.
56. *Id*.
57. *Id*.
58. *Id*. ¶ 33, 726 N.W.2d at 232.
59. *Id*. ¶ 34.
60. *Id*.
61. *Id*.
62. *Id*.
63. *Id*.; *see* N.D. CENT. CODE § 43-17-07.2 (2005) (providing that a member of the board that acts in that capacity may not participate in adjudication affecting the member's personal, professional or pecuniary interest).
64. *Hsu*, ¶ 36, 726 N.W.2d at 232.
65. *Id*. at 233.

The Board argued that the district court erred in finding that the Board violated section 28-32-39(3) of the North Dakota Century Code by delaying its ruling in the 2003 complaint.[66] Specifically, the Board argued that the district court erred in reversing the Board's order that revoked Dr. Hsu's medical license, and in issuing a writ of mandamus that compelled the Board to adopt the ALJ's recommendations.[67] Under section 28-32-39(3), an ALJ's recommendations become final unless the recommendations are amended or rejected.[68] The court concluded that North Dakota statutes did not prevent the Board from temporarily suspending Dr. Hsu's license to initiate new proceedings to incorporate allegations from the 2003 complaint.[69] Additionally, the court concluded that the Board's action in delaying disposition did not preclude the Board from considering the cumulative effects of Dr. Hsu's conduct in the 2004 complaint.[70] The court held that generally, "the determination of the appropriate sanction to be imposed by the Board is a matter of discretion."[71] According to the court, the Board's conclusions are entitled to "appreciable deference" because the determination of a physician's standard of care and requirements for documentation involve technical matters, and a majority of the Board members are practicing physicians.[72] More importantly, courts may not substitute their judgment for that of the administrative agency, nor may the courts reweigh the evidence.[73] Applying a deferential standard of review, the court determined that the Board's sanctions were legal, and that the Board did not abuse its discretion in revoking Dr. Hsu's license.[74] Therefore, the North Dakota Supreme Court reversed the part of the district court's judgment that reversed the Board's order to revoke Dr. Hsu's license and reversed the order to issue a writ of mandamus, but affirmed the finding that Dr. Hsu's due process and equal protection rights were not violated.[75]

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66. *Id.* ¶ 37.

67. *Id.*

68. *Id.* ¶ 40, 726 N.W.2d at 234; *see* N.D. CENT. CODE § 28-32-39(3) (2005) (providing in part, "[t]he recommended findings of fact and conclusions of law and the recommended order become final unless specifically amended or rejected by the agency head").

69. *Id.*

70. *Id.*

71. *Id.* ¶ 42 (citing Larsen v. Comm'n on Med. Competency, 1998 ND 193, ¶¶ 32, 35, 585 N.W.2d 801, 808-09).

72. *Id.*

73. *Id.* at 235 (citing Huff v. N. D. State Bd. of Med. Examiners-Investigative Panel B, 2004 ND 225, ¶ 8, 690 N.W.2d 221, 226).

74. *Id.* ¶ 44.

75. *Id.* ¶ 45.

ADMINISTRATIVE LAW—STATUTORY CONSTRUCTION AND OPERATION

STATE V. ALTRU HEALTH SYS.

In *State ex rel. Workforce Safety & Insurance v. Altru Health Systems*,[76] Workforce Safety and Insurance (WSI) appealed and Altru Health Systems (Altru) cross-appealed a district court order that denied WSI's motion for contempt, permitted WSI to conduct depositions of Altru physicians, and prohibited WSI from deposing the physicians on events from a videotaped surveillance of the claimant.[77] The Supreme Court of North Dakota affirmed the order, holding that the district court did not abuse its discretion.[78]

During a fraud investigation, WSI asked Altru to allow WSI's special investigation unit to question claimant's treating physician and physician's assistant.[79] Altru denied WSI's request and WSI requested an administrative subpoena on July 30, 2005, to take depositions of the physician and physician's assistant.[80] The physician and physician's assistant refused to be deposed.[81] Therefore, WSI brought an action under section 65-02-11 of the North Dakota Century Code to enforce the administrative subpoenas.[82]

On September 1, 2005, the district court issued an order to enforce the subpoenas.[83] The order provided that WSI was not required to give notice to the claimant before deposing the physician and physician's assistant and that neither the physician nor the physician's assistant was required to review the videotaped surveillance before being deposed.[84] WSI again issued administrative subpoenas on the physician and physician's assistant and scheduled depositions for October 27, 2005.[85] At the depositions, WSI's counsel informed the physician's assistant that she would be shown videotaped surveillance and would be asked questions based on the events shown on the videotape.[86] The physician's assistant, however, refused to watch the videotape; she was deposed without being questioned on the events of the videotape.[87]

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76. 2007 ND 38, 729 N.W.2d 113.
77. *Altru*, ¶ 1, 729 N.W.2d at 114.
78. *Id.* ¶¶ 25, 27, 729 N.W.2d at 120.
79. *Id.* ¶ 2, 729 N.W.2d at 114.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* ¶ 3.
84. *Id.*
85. *Id.* ¶ 4, 729 N.W.2d at 114.
86. *Id.*
87. *Id.*

On November 4, 2005, WSI filed a contempt motion to enforce the September 1, 2005, order.[88] On February 9, 2006, the district court responded with an order that denied both parties' requests for sanctions, but the district court clarified its prior order: (1) neither party was required to review the videotaped surveillance before being deposed; (2) section 65-02-11 of the North Dakota Century Code permits WSI to examine witnesses and subpoena records, but it does not mandate that "the requested deponents become expert witnesses for WSI"; (3) claimant's treating physician and physician's assistant were not required to watch the videotaped surveillance.[89] Consequently, WSI appealed and Altru cross-appealed.[90] WSI argued that under section 65-02-11, *"[t]he organization may make investigation as in its judgment is best calculated to ascertain the substantial rights of all the parties . . . and generally to do anything necessary to facilitate or promote the efficient administration of this title*."[91] Specifically, WSI claimed that the language, "generally to do anything necessary," granted WSI the authority to question the physician and physician's assistant on the events of the videotaped surveillance.[92]

On appeal, the North Dakota Supreme Court had to determine the scope of judicial inquiry and the court's standard of review under section 65-02-11 of the North Dakota Century Code.[93] Because the court had not previously determined the scope of judicial inquiry and the standard of review under 65-02-11, this case was one of first impression.[94] Therefore, the court began its analysis by evaluating precedent governing a district court's power to enforce administrative subpoenas.[95] A district court may enforce an administrative subpoena when: "(1) the subpoena is within the statutory authority of the [administrative] agency; (2) the information sought is reasonably relevant to the inquiry of the administrative proceeding; (3) the subpoena is reasonably specific; and (4) the subpoena is not unduly broad or burdensome."[96]

Because the district court limited the scope of the subpoena, WSI argued that the district court erred.[97] Specifically, WSI argued that the

88. *Id.* ¶ 5.
89. *Id.* at 115.
90. *Id.* ¶ 6.
91. *Id.* ¶ 9, 729 N.W.2d at 116 (quoting N.D. CENT. CODE § 65-02-11 (2003)).
92. *Id.* ¶ 10.
93. *Id.* ¶ 11.
94. *Id.*
95. *Id.*
96. *Id.* (quoting Medical Arts Clinic, P.C. v. Franciscan Initiatives, Inc., 531 N.W.2d 289, 300-01 (N.D. 1995)).
97. *Id.* ¶¶ 12, 14, 729 N.W.2d at 116-17.

broad language of section 65-02-11 permitted WSI to do "anything necessary to facilitate or promote the efficient administration of [Title 65]."[98] The district court determined that WSI's interpretation of section 65-02-11 was beyond the scope of the statute.[99] The supreme court adhered to the district court's interpretation of section 65-02-11 because WSI's interpretation of the "anything necessary" language would lead to unreasonable or absurd consequences.[100] Furthermore, the court stated that section 65-05-30 of the North Dakota Century Code restricts the type of information that WSI may obtain from the claimant's physician.[101] Section 65-05-30 provides that the claimant consents to the use of medical information that is within "*the course of any examination or treatment of the claimant*."[102] Therefore, section 65-05-30 "*does not give a claimant's consent for the claimant's treating physician to provide expert opinion or become an expert witness outside of the examining physician's examination or treatment*."[103]

The court acknowledged that due process concerns are minimized when the parties are in investigative process, as in the present case.[104] Nevertheless, the court stated that WSI sought to obtain new expert opinion by trying to depose the physician and physician's assistant on the events of the videotape.[105] The court determined that due process concerns were implicated because WSI sought new information.[106] Specifically, the court stated that WSI's request for new information interfered with the claimant's existing physician-patient relationship, which extended beyond the scope of section 65-05-30.[107] Therefore, the North Dakota Supreme Court held that the district court did not err in limiting the effect of WSI's subpoena.[108]

98. *Id.* ¶ 14, 729 N.W.2d at 117 (quoting N.D. CENT. CODE § 65-02-11 (2003)).
99. *Id.*
100. *Id.* ¶ 16.
101. *Id.* ¶ 19, 729 N.W.2d at 118.
102. *Id.* (quoting N.D. CENT. CODE § 65-05-30 (2003)).
103. *Id.* ¶ 20.
104. *Id.* ¶ 23, 729 N.W.2d at 119.
105. *Id.* ¶ 24.
106. *Id.* at 119-20.
107. *Id.* at 120.
108. *Id.* ¶ 25.

CIVIL RIGHTS—FEDERAL REMEDIES—LIABILITY OF MUNICIPALITIES AND OTHER GOVERNMENTAL BODIES

STRAND V. CASS COUNTY

In *Strand v. Cass County*,[109] John Strand and Cass County residents appealed from a dismissal of a civil rights claim and abuse of action process for dismissing attorney fees in an action to protect a historic Cass County jail.[110] The Supreme Court of North Dakota affirmed the district court's jury instructions on a civil rights claim.[111] The court reversed the district court's order denying Strand's request for attorney fees, and remanded for reconsideration.[112] Justice Maring concurred.[113]

Cass County approved a one-half cent sales tax increase to finance the construction of a new jail in the late 1990s.[114] As a result, the County decided to tear down the existing jail and sheriff's residence.[115] John Strand and a group of Cass County residents known as "Save the Jail" (hereinafter "Strand") engaged in a series of actions to prevent the demolition, because both buildings were listed on the National Registry of Historic Places.[116] The County awarded bids to demolish the buildings on February 18, 2003, but on February 25, 2003, the Attorney General issued an opinion declaring, "Cass County may not destroy the residence without the State Historical Board's approval."[117]

The State Historical Board consented to the demolition of the jail at its meeting on March 11, 2003, but did not approve the demolition of the sheriff's residence until a subsequent meeting on April 11, 2003.[118] Also on April 11, 2003, the Attorney General issued an opinion interpreting chapter 11-11 of the North Dakota Century Code.[119] In his opinion, the Attorney General stated that chapter 11-11 requires Cass County to submit the project to a vote if it would constitute an "extraordinary expenditure."[120]

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109. 2006 ND 190, 721 N.W.2d 374.
110. *Strand*, ¶¶ 1, 2, 721 N.W.2d at 375.
111. *Id.* ¶ 1.
112. *Id.*
113. *Id.* ¶ 21, 721 N.W.2d at 380 (Maring, J., concurring).
114. *Id.* ¶ 2.
115. *Id.*
116. *Id.*
117. *Id.* ¶ 3, 721 N.W.2d at 375-76.
118. *Id.* at 376.
119. *Id.*
120. *Id.*; "[I]f the project constitutes an extraordinary expenditure, Cass County cannot commence the project prior to submitting the proposed expenditure to a vote. Whether the demolition is a separate project from the proposed construction is a question of fact on which this office cannot opine." N.D. Op. Att'y. Gen. 2003-L-25, at 4.

The County concluded the demolition was a separate project and did not require voter approval.[121]

Strand filed a suit against the County on April 14, 2003, alleging that under chapter 11-11, the County had an obligation to hold a vote before continuing the demolition.[122] The district court issued a restraining order that was later vacated by stipulation of the parties on April 22, 2003, because the buildings were already partially demolished.[123] On May 6, 2003, the contractor submitted a bill to the County.[124] The County filed its answer and counterclaim on May 7, 2003, claiming Strand's "allegations [we]re untrue, made without reasonable cause and not in good faith and [we]re frivolous" under section 28-26-31 of the North Dakota Century Code.[125] The County further claimed Strand's actions, in delaying the demolition, resulted in additional costs in excess of $39,000.[126] Strand was allowed to amend his complaint, so Strand added a request for attorney fees on grounds that the County's claims were frivolous and lacked good faith.[127] Strand further alleged that the County violated his civil rights under the First Amendment, the North Dakota Constitution, and 42 U.S.C. §1983.[128]

At trial, the jury found that the County did not violate Strand's First Amendment rights nor commit an abuse of process by asserting a counterclaim.[129] Additionally, the jury determined that Strand's procurement of a restraining order had not damaged the County.[130] Later, the district court ruled that the County had not violated chapter 11-11 when it failed to present the demolition project to a vote.[131] Furthermore, the district court denied Strand's motion for attorney fees.[132]

Strand appealed to the North Dakota Supreme Court, alleging the district court committed a reversible error by instructing the jury on his civil rights claim.[133] Strand claimed the district court's instruction erroneously "required the jury to find that a violation of his civil rights had to be the

121. *Strand*, ¶ 3, 721 N.W.2d at 375-76.
122. *Id.* ¶ 4.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* ¶ 5.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* ¶ 6.

result of a 'policy or custom' of the County, and the commissioners' approval of the filing of the counterclaim indisputably constituted an official 'policy.'"[134]

The Supreme Court of North Dakota evaluated United States Supreme Court precedent to determine whether local government may be sued under 42 U.S.C. § 1983 for injuries inflicted by its employees or agents.[135] In *Monell v. New York City Department of Social Services*,[136] the United States Supreme Court held that local governments cannot be sued under 42 U.S.C. § 1983 for injuries inflicted "solely" by employees or agents.[137] Adopting this reasoning, the North Dakota Supreme Court concluded that plaintiffs, who attempt to file a claim against a municipality under § 1983, must reference a municipal policy or custom that caused the plaintiff's injury.[138] The court also referenced *Pembaur v. City of Cincinnati*,[139] where the United States Supreme Court held that a local government, or municipality, "may be liable . . . for a single decision by its properly constituted legislative body-whether or not that body had taken similar action in the past . . . because even a single decision by such a body unquestionably constitutes an act of official government policy."[140] Therefore, the North Dakota Supreme Court concluded that the district court did not err in denying Strand's request to remove references to "policy or custom" from the jury instruction because these words were appropriate in defining the elements of a section 1983 violation.[141]

The court next addressed Strand's claim for attorney fees.[142] Strand argued the district court should have granted his request for attorney fees because the County's demand for attorney fees was frivolous and lacked good faith.[143] Strand's motion for attorney fees, presented under Rule 11(b) of the North Dakota Rules of Criminal Procedure and sections 28-26-01 and 28-26-31 of the North Dakota Century Code, had two bases.[144] First, he argued that the County's counterclaim for $39,000 was frivolous and made in bad faith.[145] Second, he argued that the County's claim for attorney fees

134. *Id.* ¶ 8, 718 N.W.2d at 377.
135. *Id.* ¶ 10.
136. 436 U.S. 658 (1978).
137. *Strand*, ¶ 10, 721 N.W.2d at 377 (citing *Monell*, 436 U.S. at 694).
138. *Id.* at 377-78.
139. 475 U.S. 469 (1986).
140. *Strand*, ¶ 10, 721 N.W.2d at 378 (quoting *Pembaur*, 475 U.S. at 480).
141. *Id.* ¶ 11.
142. *Id.* ¶ 15, 721 N.W.2d at 379.
143. *Id.*
144. *Id.* ¶ 16.
145. *Id.*

was frivolous and made in bad faith.[146] At trial, the district court denied the motion for attorney fees, but ruled only on the first basis.[147]

The North Dakota Supreme Court held that under Rule 11 of the North Dakota Rules of Criminal Procedure and sections 28-26-01 and 28-26-31 of the North Dakota Century Code, an award of attorney fees lies within the discretion of the district court.[148] But a district court "abuses its discretion when it fails to address nonfrivolous issues."[149] Therefore, the North Dakota Supreme Court reversed the district court's order and remanded the case so the district court could consider Strand's second basis for requesting attorney fees.[150]

Justice Maring concurred.[151] Justice Maring voiced her concerns about attorneys making misstatements of the law during closing argument.[152] Specifically, she stated that attorneys who make improper statements during closing argument should be admonished because "the legal system depends on public confidence in the courts and the system of justice is negatively impacted by the allowance of improper comments."[153]

COMMERCIAL LAW—BILLS AND NOTES—RIGHTS AND LIABILITIES ON ENDORSEMENT OR TRANSFER

STATE EX REL. V. CENTER MUTUAL INSURANCE CO.

Center Mutual Insurance Company (Center Mutual) appealed a district court judgment finding Center Mutual liable to the North Dakota Housing Finance Agency (NDHFA) for a forged insurance proceeds check.[154] The North Dakota Supreme Court affirmed the district court judgment, concluding that Center Mutual was not discharged on the forged check, and therefore, was liable to NDHFA for the amount of the check.[155]

Brian and Penny Grieme purchased a house in Mandan, North Dakota, financing it with a first-time home buyer loan through Bank Center First.[156]

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146. *Id.*
147. *Id.*
148. *Id.* ¶ 17, 721 N.W.2d at 379-80; *see generally* Dietz v. Kautzman, 2004 ND 119, 681 N.W.2d 437; Peterson v. Zerr, 477 N.W.2d 230 (N.D. 1991).
149. *Strand*, ¶ 17, 721 N.W.2d at 380 (citing Hilgers v. Hilgers, 2004 ND 95, ¶ 25, 679 N.W.2d 447).
150. *Id.*
151. *Id.* ¶ 21 (Maring, J., concurring).
152. *Id.* ¶¶ 21-22.
153. *Id.* ¶ 27-28, 721 N.W.2d at 381.
154. State *ex rel.* v. Central Mutual Ins. Co., 2006 ND 175, ¶ 1, 720 N.W.2d 425, 426.
155. *Id.*
156. *Id.* ¶ 2.

The Griemes executed a mortgage on the house in favor of the Bank.[157] Bank Center First assigned the mortgage to the NDHFA, but continued to act as the participating lender for the NDHFA in financing and servicing the Griemes' mortgage obligation.[158] The Griemes' mortgage obligation was financed through revenue bonds, which were held in trust by Norwest Bank of Minnesota (Norwest Bank).[159]

The mortgage required the Griemes to insure the home, so the Griemes' obtained a dwelling insurance policy from Center Mutual.[160] The insurance documents named the Griemes as the insured and Norwest Bank and NDHFA as the loss payees.[161] The insurance premium billing notices were mailed for payment to Norwest Bank and NDHFA, in care of Bank Center First.[162]

The Griemes' house was damaged by a hailstorm in 2001.[163] A claims adjuster for Center Mutual inspected the property and determined that the house received $4378.00 worth of damage, after adjusting for the $500.00 deductible.[164] On July 13, 2001, Center Mutual issued a check drawn on Bremer Bank, N.A., in the amount of $4378.00 made jointly payable to "Brian D. Grieme & Norwest Bank of MN & ND Housing Finance" to cover the insurable loss.[165] Center Mutual mailed the insurance check to Brian Grieme, at his address in the State of Arizona.[166]

Grieme presented the check for payment to Wells Fargo Bank of Tempe, bearing endorsements in the form of a signature purporting to be that of Brian Grieme, and the handwritten block-printing "Norwest Bank" and "ND Housing Finance."[167] The endorsement purporting to be that of the NDHFA was forged.[168] The check was processed for payment and paid by Bremer Bank from Center Mutual's bank account, and the cancelled insurance check was returned to Center Mutual.[169]

In November 2001, Bank Center First requested a copy of the cancelled insurance check from Center Mutual.[170] Then, Bank Center First informed

157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* ¶ 3.
161. *Id.*
162. *Id.*
163. *Id.* ¶ 4.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* ¶ 5, 720 N.W.2d at 426-427.
168. *Id.* ¶ 6, 720 N.W.2d at 427.
169. *Id.* ¶ 5.
170. *Id.* ¶ 6.

Center Mutual that the check had a forged endorsement.[171] While Center Mutual and Bremer Bank were considering whether to issue a substitute insurance check, the Griemes cancelled their insurance policy with Center Mutual and filed bankruptcy in the State of Arizona under chapter 7 of the Bankruptcy Code.[172] Center Mutual and Bremer Bank ultimately refused to pay NDHFA.[173]

NDHFA sued Center Mutual for $4378, alleging that Center Mutual breached the terms of the insurance policy and mortgage and that Center Mutual was liable to NDHFA on the forged check.[174] The district court found that Center Mutual did not breach the insurance contract or mortgage.[175] But the district court determined that Center Mutual should have sought reimbursement for the forged check through the banks that had accepted the forged endorsement.[176] Therefore, the district court held that Center Mutual was liable to NDHFA for the amount of the forged check.[177] Center Mutual appealed, alleging that the district court erred in granting summary judgment awarding $4378 plus interest to NDHFA.[178]

On appeal to the North Dakota Supreme Court, Center Mutual argued that it owed no specific statutory duty to NDHFA to discover the forged endorsement.[179] The issue on appeal was "whether a joint payee whose endorsement was forged on an instrument has an action on the instrument against the drawer."[180] Here, the concern was whether Center Mutual's obligation was discharged when Bremer Bank accepted the forged check and charged it against Center Mutual's account.[181]

The court looked to other jurisdictions regarding a drawer's liability to a non-alternative joint payee whose endorsement was forged on an

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171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* ¶ 7.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* ¶ 10.
180. *Id.*
181. *Id.* ¶ 13, 720 N.W.2d at 428. Section 41-03-10(4) of the North Dakota Century Code [U.C.C. § 3-110] governs the rights of multiple payees on an instrument. N.D. CENT. CODE § 41-03-10(4) (2005). The statute provides:

> If an instrument is payable to two or more persons alternatively, it is payable to any of them and may be negotiated, discharged, or enforced by any or all of them in possession of the instrument. If an instrument is payable to two or more persons not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced only by all of them.

Id.

instrument because this case was of first impression in North Dakota.[182] Other jurisdictions have held that the drawer of a check is not discharged on the instrument and is liable to the joint payee.[183] The court noted that under the Uniform Commercial Code, a forgery does not have the effect of a valid signature, nor does it pass title to the paper or release the obligor on the paper from the obligation to pay the payee.[184]

The North Dakota Supreme Court held that Center Mutual was liable to NDHFA on the instrument because the forged endorsement of NDHFA on the check did not operate as its signature.[185] Therefore, under section 41-03-10(4) of the North Dakota Century Code, the forgery did not discharge Center Mutual as the drawer of the instrument.[186]

Additionally, the court stated that Center Mutual, when notified of the forged endorsement, could have demanded reimbursement from Bremer Bank.[187] Bremer Bank could have sought reimbursement up through the chain of collecting banks until it reached Wells Fargo Bank of Tempe, the depository bank.[188]

Ultimately, the Uniform Commercial Code creates liability for the forged on the party who accepted the check from the forger, or on the forger himself.[189] The Uniform Commercial Code does not require the innocent loss payee, whose endorsement was forged, to directly sue the forger or the depository bank.[190] Therefore, the court held that the district court did not err in determining that Center Mutual was liable on the instrument to NDHFA.[191]

Next, the court evaluated the amount of damages to which NDHFA was entitled.[192] Center Mutual argued that NDHFA was entitled to an amount less than $4378, the amount of the check, because NDHFA repaired the Griemes' house at a lower cost.[193] Central Mutual relied on section 32-

182. *Id.* ¶ 16, 720 N.W.2d at 428-29.
183. *Id.*
184. *Id.* ¶ 17, 720 N.W.2d at 429 (citing 6 RONALD A. ANDERSON, UNIFORM COMMERCIAL CODE § 3-404:34 (3d ed. 1998)).
185. *Id.* ¶ 21, 720 N.W.2d at 431.
186. *Id.*
187. *Id.* ¶ 22, 720 N.W.2d at 431-32; *see* N.D. CENT. CODE § 41-04-32(1) (2005) (permitting a bank to charge an item that is properly payable against its customer).
188. *Id.* ¶ 22, 720 N.W.2d at 431-32.
189. *Id.* at 432.
190. *Id.*
191. *Id.* ¶ 23.
192. *Id.* ¶ 24.
193. *Id.*

03-09.1 of the North Dakota Century Code to advance its argument that NDHFA was entitled to a lesser amount of damages.[194]

However, the court disagreed, finding that section 32-03-09.1 applies to damages for injury to property that resulted from the breach of an obligation not arising from a contract.[195] In this case, Center Mutual's liability to NDHFA, was based upon the instrument itself, and not upon injury to property, so the court found that section 32-03-09.1 did not apply.[196] Therefore, the court held that a negotiable instrument, including a check, is an unconditional promise to pay a fixed amount of money, so the proper measure of damages is the face amount of the check.[197] The North Dakota Supreme Court affirmed the district court's judgment.[198]

COURTS—ISSUANCE OF REMEDIAL WRITS

TRINITY HOSPITALS V. MATTSON

In *Trinity Hospitals v. Mattson*,[199] Trinity Hospitals, a non-profit corporation, sought a writ to vacate a district court order that denied Trinity Hospitals summary judgment, and to dismiss a wrongful death action brought by the personal representative of Eleanor Neiss's estate.[200] The North Dakota Supreme Court held that Trinity Hospitals is immune from suit under the exclusive remedy provisions of workers' compensation law and directed the district court to dismiss the action.[201]

The wrongful death action alleged that Neiss was employed by Trinity Health, a North Dakota non-profit corporation, and that she injured herself at work.[202] Specifically, the complaint alleged that while she was walking in a service tunnel, owned by Trinity Hospitals, which connected Trinity Hospital St. Joseph's with the Health Center Medical Arts building in Minot, Neiss fell and hit her head.[203] As a result of the fall, Neiss suffered serious injuries that led to her death.[204] At the time of Neiss's fall, other

194. *Id*. This statute provides in part, "The measure of damages for injury to property caused by the breach of an obligation not arising from contract . . . is presumed to be the reasonable cost of repairs . . . and the reasonable value of the loss of use pending restoration of the property . . . ." N.D. CENT. CODE § 32-03-09.1 (2005).

195. *Central*, ¶ 25, 720 N.W.2d at 432.

196. *Id*.

197. *Id*.

198. *Id*. ¶ 26.

199. 2006 ND 231, 723 N.W.2d 684.

200. *Trinity*, ¶ 1, 723 N.W.2d at 685.

201. *Id*. ¶¶ 21-22, 723 N.W.2d at 693.

202. *Id*. ¶ 2, 723 N.W.2d at 685-86.

203. *Id*. at 685.

204. *Id*. at 685-66.

Trinity Health employees were stripping and waxing the floor of the service tunnel.[205] Neiss had been assigned to clean the second floor of the Medical Arts building, and used the service tunnel to walk from the cafeteria in Trinity Hospital St. Joseph's to the Medical Arts building.[206] Trinity Hospitals was responsible to maintain the skywalk and service tunnel access, due to an easement that it had with Trinity Health.[207] Therefore, Laura Phillips, the personal representative of Neiss's estate, brought a suit against Trinity Hospitals for negligently maintaining the tunnel and failing to take appropriate safety precautions in preventing injuries to those using the tunnel.[208] Trinity Hospitals moved for summary judgment, asserting: (1) Neiss's surviving spouse had received Workforce Safety and Insurance (WSI) benefits through Trinity Health; and (2) workers' compensation law prevented Phillips from suing Trinity Hospitals because Trinity Health and Trinity Hospitals were the same entity.[209]

Trinity Hospitals presented extensive evidence that it was part of Trinity Health, an integrated healthcare system consisting of four non-profit corporations.[210] Specifically, Trinity Hospitals provided evidence that Trinity Health was governed by a single board of directors and operated by a single administrative team; Trinity Health controlled all operations of the four corporations; and only one entity, "Trinity Health and Affiliates," filed a tax return that included the revenues and expenses for the four corporations.[211] Since Trinity Health paid the WSI premiums for all employees in the healthcare system, WSI determined that Trinity Hospitals and Trinity Health were one entity for the purpose of WSI coverage.[212]

The district court denied Trinity Hospitals' motion for summary judgment, determining that Trinity Hospitals and Trinity Health were not the same entity for purposes of the exclusive remedy provisions under workers' compensation law.[213] Trinity Hospitals petitioned the North Dakota Supreme Court for a supervisory writ to direct the district court to vacate its denial of Trinity Hospitals' summary judgment motion and to dismiss

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205. *Id.* at 686.
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* ¶ 3.
210. *Id.* The four non-profit corporations of Trinity Health are Trinity Hospitals, Trinity Homes, Trinity Kenmare Hospital, and Trinity Health Foundation. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* ¶ 4, 723 N.W.2d at 686-87. The district court determined that Trinity Health and Trinity Hospitals were separate entities upon analyzing Michigan case law under a parent and subsidiary analysis. *Id.*

Phillips' action.[214] Phillips argued that the district court did not err in denying Trinity Hospitals' summary judgment motion because Trinity Hospitals was not immune from suit.[215]

After finding that this case appropriately invoked its supervisory jurisdiction, the North Dakota Supreme Court summarized the workers' compensation exclusive remedy provisions.[216] The court noted that these provisions clearly precluded an injured employee from bringing an action against a "contributing employer."[217] The court found that a "contributing employer" is responsible for securing workers' compensation coverage for the employee, and then is immune from legal liability to the employee.[218] The court concluded that Trinity Health was a "contributing employer" under workers' compensation law.[219]

To evaluate whether Trinity Health and Trinity Hospitals were one entity, the court applied the "control" and the "economic realities" tests.[220] Under the "economic reality" test, the court determined that the use of combined workers' compensation premiums for related corporations was an important factor in categorizing an employee-employer relationship.[221] The court noted that this factor was particularly relevant in North Dakota because workers' compensation law specifically precluded an injured employee from suing a "contributing employer."[222] Therefore, the court found that WSI's determination that "all Trinity corporations fall under one account" was an important factor to determining whether Trinity Hospitals and Trinity Health were one entity.[223] But the court also applied the

214. *Id.* ¶ 5, 723 N.W.2d at 687.

215. *Id.*

216. *Id.* ¶¶ 8, 11, 723 N.W.2d at 687-89. The court noted that supervisory writs are issued only in extraordinary circumstances, where no other remedy exists. *Id.* ¶ 6, 723 N.W.2d at 687. The Court found this case to be appropriate for issuing a supervisory writ because the case involved an important public interest in the workers' compensation immunity provisions. *Id.* ¶ 8, 723 N.W.2d at 687.

217. *Id.* ¶ 12, 723 N.W.2d at 689 (citing Cervantes v. Drayton Foods, L.L.C., 1998 ND 138, ¶ 9, 582 N.W.2d 2, 4).

218. *Id.*

219. *Id.* ¶ 13.

220. *Id.* ¶ 20, 723 N.W.2d at 692.

221. *Id.* ¶ 19, 723 N.W.2d at 691. The court followed Michigan case law, James v. Commercial Carriers, Inc., 583 N.W.2d 913, 916, to evaluate the employer-employee relationship in the parent-subsidiary context of a combined workers' compensation policy by both parent and subsidiary. *Trinity*, ¶ 19, 723 N.W.2d at 691. The *James* court applied the factors of the "economic reality" test to determine whether parent and subsidiary corporations are one entity: (1) control over workers' duties; (2) payment of wages; (3) right to discipline, fire, and hire employees; and (4) the performance of duties to accomplish one end goal. *Trinity,* ¶ 14, 18, 723 N.W.2d at 689, 691 (citing *James*, 583 N.W.2d at 915-19).

222. *Id.* ¶ 19, 723 N.W.2d at 691.

223. *Id.* at 692.

"control" test to determine that Trinity Health and Trinity Hospitals were the same entity.[224] Under the "control" test, Trinity Health maintained control because it was responsible for payroll; provided the only Human Resources Department; provided the only board of directors; and employed the director of plant operations, who was in charge of the repairs, maintenance, and housekeeping for the property of all four corporations.[225]

Therefore, under both the "control" and the "economic reality" tests, the court held that Trinity Hospitals was the same entity as Trinity Health for WSI purposes, and that the exclusive remedy provision applied to Trinity Hospitals as a "contributing employer."[226] The court noted that holding otherwise would allow WSI to collect a premium for all Trinity Health employees but would only provide coverage for those employees that were on Trinity Health's property while performing work for Trinity Health.[227] Consequently, the North Dakota Supreme Court exercised its jurisdiction to issue a supervisory writ to direct the district court to vacate the order that denied Trinity Hospitals' summary judgment motion and to dismiss Phillips' action.[228]

CRIMINAL LAW—INVESTIGATORY STOPS—MOTOR VEHICLE

GABEL V. NORTH DAKOTA DEPARTMENT OF TRANSPORTATION

In *Gabel v. North Dakota Department of Transportation*,[229] the North Dakota Department of Transportation appealed a district court judgment that reversed a hearing officer's decision to suspend Jay Gabel's driver's license for ninety-one days.[230] The North Dakota Supreme Court affirmed the district court's judgment, finding that the police stopped Gabel's vehicle without reasonable and articulable suspicion.[231] Justice Sandstrom wrote a dissenting opinion.[232]

On April 23, 2005, Chad Steele was traveling south of Jamestown when he came upon a vehicle with the license plate "JAYBIRD," driven by Gabel.[233] The vehicle sped up and slowed down, which prevented Steele

224. *Id.* ¶ 20.
225. *Id.*
226. *Id.* ¶¶ 20-21.
227. *Id.* ¶ 21.
228. *Id.* ¶ 22, 723 N.W. 2d at 693.
229. 2006 ND 178, 720 N.W.2d 433.
230. *Gabel*, ¶ 1, 720 N.W.2d at 434.
231. *Id.* ¶ 16, 720 N.W.2d at 438.
232. *Id.* ¶ 18 (Sandstrom, J., dissenting).
233. *Id.* ¶ 2, 720 N.W.2d at 434.

from passing the vehicle.[234] Steele reported the vehicle to the Stutsman County Sheriff's Office and followed the driver while speaking to the dispatcher.[235] The dispatcher reported Steele's information to Officer Kapp, who passed Steele's vehicle and found Gabel's vehicle.[236] Officer Kapp stopped Gabel's vehicle because of the information that she had received from dispatch.[237] Officer Kapp did not notice any suspicious or erratic behavior in Gabel's driving before stopping him.[238] When stopped, Gabel admitted to drinking and subsequently failed field sobriety tests that Officer Kapp administered.[239] Therefore, Officer Kapp arrested Gabel for driving under the influence.[240]

At the administrative hearing, Gabel argued that under *Anderson v. Director, North Dakota Department of Transportation*,[241] the officer "lacked a reasonable and articulable suspicion to justify the traffic stop."[242] The hearing officer distinguished *Anderson* because here Officer Kapp knew the informant, and therefore the hearing officer suspended Gabel's license.[243] On appeal, the district court reversed the prior decision, finding that the arresting officer did not have an independent basis to make the traffic stop.[244] The North Dakota Department of Transportation (DOT) appealed to the North Dakota Supreme Court to determine whether *Anderson* is distinguishable.[245] The court reviewed the decision to suspend the driver's license according to chapters 28 through 32 of the North Dakota Century Code.[246]

In order to justify an investigatory stop of a moving vehicle, "an officer must have a reasonable and articulable suspicion the motorist has violated or is violating the law."[247] Reasonable and articulable suspicion is evaluated under a totality of the circumstances by applying an objective

234. *Id.*
235. *Id.*
236. *Id.* ¶ 2-3.
237. *Id.* ¶ 3.
238. *Id.*
239. *Id.* ¶ 4.
240. *Id.*
241. 2005 ND 97, 696 N.W.2d 918
242. *Gabel*, ¶ 5, 720 N.W.2d. at 434 (citing *Anderson*, ¶ 21, 696 N.W.2d at 923 (finding that an informant who merely reports the behavior of a "possible reckless driver or drunk driver" is not sufficient to provide a reasonable and articulable suspicion for an officer to stop an individual's vehicle)).
243. *Gabel*, ¶ 5, 720 N.W.2d. at 435.
244. *Id.* ¶ 6.
245. *Id.*
246. *Id.* ¶ 7 (citing *Anderson*, ¶ 6, 696 N.W. at 918).
247. *Id.* ¶ 9 (citing City of Fargo v. Ovind, 1998 ND 69, ¶ 8, 575 N.W.2d 901, 903).

standard.[248] A known informant's tip is one way to provide a sufficient basis to justify a stop.[249] The general rule on tips is that "the lesser the quality or reliability of the tip, the greater the quantity of information required to raise a reasonable suspicion."[250] Officer Kapp knew the informant only through his criminal record, as a "criminal milieu;" therefore, the court stated that the informant's reliability generally would have to be established.[251] The court found that a determination of the informant's reliability was unnecessary here because a tip that Gabel was driving slightly below the posted speed limit was insufficient to support a traffic stop, without additional evidence of otherwise illegal activity or suspicious conduct.[252]

The DOT argued that the tip against Gabel was stronger than in *Anderson*.[253] The DOT believed that the tip provided Officer Kapp with evidence that Gabel committed a traffic violation, rather than the possibility of committing a violation as in *Anderson*.[254] The court disagreed, and stated that the tip showed only a possibility that Gabel committed a violation, which the court found to be the "functional equivalent of the 'possible reckless driver or drunk driver' held to be insufficient" in *Anderson*.[255] Thus, the court affirmed the district court decision, concluding that Officer Kapp lacked a reasonable and articulable suspicion to justify stopping Gabel's vehicle.[256]

Justice Sandstrom wrote a dissenting opinion to assert that Gabel's stop was justified because Officer Kapp's tip was reliable and specific.[257] As an initial matter, Justice Sandstrom believed that the majority misstated the standard of review in administrative appeals.[258] He noted that the court should review an administrative agency's findings based on whether a "reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record."[259]

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248. *Id*. at 436 (citing *Ovind*, ¶ 8, 575 N.W.2d at 903).

249. *Id*. ¶ 11.

250. *Id*. ¶12, 720 N.W.2d at 436-37 (citing State v. Miller, 510 N.W.2d 638, 640-41 (N.D. 1994)).

251. *Id*. at 437.

252. *Id*.

253. *Id*. ¶¶ 10, 13, 720 N.W.2d at 436, 437.

254. *Id*. ¶ 13, 720 N.W.2d at 437.

255. *Id*. ¶ 15, 720 N.W.2d at 438 (quoting Anderson, v. Dir., N.D. Dep't of Transp., ¶ 21, 696 N.W.2d 918, 923) (internal quotations omitted).

256. *Id*. ¶ 16.

257. *Id*. ¶ 18 (Sandstrom, J., dissenting).

258. *Id*. ¶ 19.

259. *Id*. at 439.

Justice Sandstrom disagreed with the majority's differentiation between a "criminal milieu" and a citizen informant.[260] The majority implied that Steele was a member of the criminal milieu; therefore, it stated that Steele's information had to be validated to establish reliability.[261] Justice Sandstrom stated, "[t]he majority has basically categorized all informants with a criminal past into the 'criminal milieu' without consideration of what the criminal past is or how that past is relevant to the case at hand."[262] He argued that corroboration was not required in this case, because the tip came from a known citizen informant that provided sufficient information to give the officer reasonable and articulable suspicion.[263]

Additionally, Justice Sandstrom asserted that *Anderson* is distinguishable.[264] Justice Sandstrom found that in this case, unlike in *Anderson*, the informant provided specific information to dispatch and was available for questioning to establish reliability.[265] Furthermore, Justice Sandstrom stated that an officer need not find every element of a violation to be met before reasonable and articulable suspicion is established.[266] Ultimately, Justice Sandstrom concluded that the informant's tip provided Officer Kapp with sufficient reasonable and articulable suspicion to make the traffic stop.[267] Thus, Justice Sandstrom would have reversed the district court's decision.[268]

CRIMINAL LAW — AUTOMOBILES — ARREST, STOP, AND INQUIRY

STATE V. OLIVER

Kenneth Wayne Oliver appealed a conditional plea of guilty for: (1) possession of a controlled substance with intent to deliver; (2) possession of drug paraphernalia (methamphetamine); (3) driving under suspension; and, (4) fleeing a police officer.[269] The district court denied his motion to suppress evidence that was found on him and in his car.[270] Oliver appealed

260. *Id.* ¶ 22.
261. *Id.*
262. *Id.* ¶ 23, 720 N.W.2d at 440.
263. *Id.*
264. *Id.* ¶ 26, 720 N.W.2d at 441.
265. *Id.* at 441-42.
266. *Id.* at 442.
267. *Id.* ¶ 27.
268. *Id.* ¶ 28.
269. State v. Oliver, 2006 ND 241, ¶ 1, 724 N.W.2d 114, 115.
270. *Id.*

to the North Dakota Supreme Court to reverse the denial of his motion.[271] On appeal, he argued that the evidence was unconstitutionally seized due to a pretextual stop.[272] The North Dakota Supreme Court affirmed the judgment of the district court because the stop of Oliver's vehicle was not unconstitutional.[273]

On July 6, 2005, an undercover narcotics task force detective received information from an informant indicating suspicious activity involving a hand-to-hand exchange at a local car wash/laundromat.[274] The detective surveilled the location and observed Oliver, but she did not see any drug-related activity.[275] However, the detective noticed that Oliver's vehicle lacked license plates and had a temporary registration sticker that she perceived to be faded and illegible.[276] The detective testified that she would have stopped Oliver's vehicle to validate the registration, if she would have been driving a marked police car.[277] She contacted uniformed patrol officers with information about Oliver's vehicle and its direction of travel, and informed the officers that they would have to decide whether to stop Oliver's vehicle.[278]

Officer Donald Beck responded to the detective's call, followed Oliver's vehicle, and noticed that the vehicle lacked license plates.[279] Additionally, Officer Beck observed what he perceived to be a faded thirty day temporary registration sticker on the rear window of Oliver's car.[280] Officer Beck flashed his lights to initiate a stop of Oliver's vehicle because he was unable to read the print of the registration sticker to determine its validity.[281] Instead of stopping his vehicle, Oliver drove into a nearby parking lot.[282] Then, Oliver fled into the store, even though Officer Beck and another officer ordered him to stop.[283] The officers seized Oliver in the store's restroom, where they discovered drug paraphernalia and meth-amphetamine.[284] The police department's K-9 unit performed an exterior sweep of Oliver's vehicle, and because the dog indicated a "hit," the

271. *Id.*
272. *Id.*
273. *Id.* ¶ 11, 724 N.W.2d at 117.
274. *Id.* ¶ 2, 724 N.W.2d at 115.
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.* ¶ 3.
280. *Id.*
281. *Id.* at 116.
282. *Id.*
283. *Id.*
284. *Id.*

officers searched the interior of the vehicle.[285] The officers discovered methamphetamine and a scale inside Oliver's vehicle.[286] Therefore, the officers arrested Oliver for fleeing a peace officer, possession of a controlled substance with intent to deliver, possession of drug paraphernalia (methamphetamine), and driving under suspension.[287]

On appeal, the North Dakota Supreme Court had to determine whether the district court properly denied Oliver's suppression motion.[288] Oliver argued that the district court erred in denying his suppression motion because the officers unconstitutionally stopped his vehicle on pretextual grounds.[289] On the other hand, the state argued that the officers constitutionally stopped Oliver's vehicle on grounds that they had reasonable and articulable suspicion to believe the vehicle's temporary registration was invalid.[290] The state further argued that Officer Beck observed a traffic violation, which permitted a lawful stop of the vehicle, regardless of whether the stop was pretextual or not.[291]

The Fourth Amendment guarantees the right of people to be "secure in their persons, houses, papers and effects, against unreasonable searches and seizures."[292] Even temporary detentions of individuals, if actuated by the police, constitute a seizure.[293] However, "the decision to stop an automobile is reasonable where the police have probable cause to believe a traffic violation has occurred."[294] Further, the court explained that traffic violations, even if pretextual, provide a lawful basis to stop the vehicle for investigative purposes, because the police officer's subjective intentions in making the stop are irrelevant so long as a traffic violation has occurred.[295]

Next, the court examined whether Oliver's faded temporary registration gave Officer Beck the right to stop the vehicle.[296] Officer Beck observed that Oliver's vehicle lacked license plates, which was in possible violation of North Dakota vehicle registration provisions.[297] Section 39-04-17 of the North Dakota Century Code permits a temporary registration

285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.* ¶ 6 (quoting U.S. CONST. amend. IV, and N.D. CONST. art. I, § 8).
293. *Id.* (citing Whren v. United States, 517 U.S. 806, 809-10 (1996)).
294. *Id.*
295. *Id.* (citing State v. Loh, 2000 ND 188, ¶ 10, 618 N.W.2d 477).
296. *Id.* ¶ 7, 724 N.W.2d at 117.
297. *Id.*

sticker to be displayed on a vehicle while a title application is being processed.[298] This temporary registration remains valid for thirty days from the date of application.[299] The court concluded that Officer Beck had a right to stop Oliver's vehicle because the temporary registration was faded and had no visible writing, which was indicative of the registration being older than thirty days.[300]

The court concluded this by relying on *Kennedy v. State*,[301] where officers had followed a car but could not determine the tag's issue date.[302] The officers stopped the vehicle because they thought the tag was no longer valid, and the officers then arrested the driver for drug possession.[303] Like Oliver, this driver argued that displaying a faded tag was not a violation, meaning that the officers did not have a legal basis to stop the vehicle.[304] The Texas court disagreed holding,

> [T]he faded dealers tag gave the officers reasonable suspicion to believe that a violation had occurred, that Appellant was driving an unregistered car. Appellant was not stopped because the faded tag was a violation, but rather, under the circumstances, it was an indication that a violation had been, and was, occurring.[305]

Applying *Kennedy*, the North Dakota Supreme Court found that Oliver's constitutional rights were not violated when the officers stopped his vehicle, and consequently the searches were valid incident to arrest.[306] Therefore, the court held that the district court properly denied Oliver's suppression motion.[307]

298. *Id.* (citing N.D. CENT. CODE § 39-04-17).
299. *Id.*
300. *Id.*
301. 847 S.W.2d 635 (Tex. App. 1993).
302. *Oliver*, ¶ 9, 724 N.W.2d at 117 (citing *Kennedy*, 847 S.W.2d at 635).
303. *Id.* (citing *Kennedy*, 847 S.W.2d at 635).
304. *Id.* (citing *Kennedy*, 847 S.W.2d at 636).
305. *Id.* (quoting Kennedy v. State, 847 S.W.2d 635, 636 (Tex. App. 1993)).
306. *Id.* ¶ 10-11.
307. *Id.*

CRIMINAL LAW—INVESTIGATORY STOP—MOTOR VEHICLES

JOHNSON V. SPRYNCZYNATYK

In *Johnson v. Sprynczynatyk*,[308] Robert Johnson was arrested for driving under the influence of alcohol, and his driving privileges were suspended at an administrative hearing.[309] Johnson appealed the administrative officer's decision to a district court, and the district court reversed the suspension.[310] The North Dakota Department of Transportation (DOT) appealed the district court decision, and requested the reinstatement of the administrative officer's decision.[311] The North Dakota Supreme Court affirmed the district court's decision, and held that the arresting officer lacked a reasonable and articulable suspicion to stop Johnson's vehicle.[312] Justice Sandstrom wrote a dissenting opinion.[313]

At 12:43 a.m. on August 30, 2005, a police officer stopped Johnson's vehicle for driving eight to ten miles per hour in a twenty-five mile per hour zone.[314] The officer testified at the administrative hearing that he followed Johnson for two blocks, and observed no other form of erratic driving, or other suspicious behavior, before stopping the vehicle.[315] Once he approached the car, he detected the odor of alcohol, whereupon he had Johnson perform five field sobriety tests which Johnson failed.[316] Based on the officer's observations and the results of the field sobriety tests, the officer arrested Johnson.[317]

At the administrative hearing, the hearing officer determined that traveling eight to ten miles per hour in a twenty-five miles per hour zone is inordinately slow, constituting a reasonable and articulable basis to stop the vehicle.[318] The hearing officer suspended Mr. Johnson's driver's license for ninety-one days.[319] The district court reversed the hearing officer's decision and reinstated Johnson's driving privileges, reasoning that the

308. 2006 ND 137, 717 N.W.2d 586.
309. *Johnson*, ¶ 1, 717 N.W.2d at 587.
310. *Id.*
311. *Id.*
312. *Id.* ¶ 15, 717 N.W2d at 590.
313. *Id.* ¶ 17 (Sandstrom, J., dissenting).
314. *Id.* ¶ 2, 717 N.W.2d at 587.
315. *Id.*
316. *Id.* ¶ 3, 717 N.W.2d at 587-88.
317. *Id.* at 588.
318. *Id.* ¶ 4.
319. *Id.*

driving conduct observed did not constitute a reasonable and articulable basis in which to stop the vehicle.[320]

On appeal, the North Dakota Supreme Court evaluated whether, under the totality of the circumstances, Johnson's driving constituted reasonable and articulable suspicion.[321] The Fourth Amendment of the United States Constitution grants police the right to temporarily detain an individual for investigative purposes when the officer has a reasonable and articulable suspicion that criminal activity is afoot.[322] The court recognized three common situations in which reasonable and articulable suspicion exist: "(1) when the officer relied on a directive or request for action from another officer; (2) when the officer received tips from other police officers or informants, which were then corroborated by the officer's own observations; and, (3) when the officer directly observed illegal activity."[323] Each situation requires an objective manifestation of potential criminal activity; a mere hunch or curiosity of the police is not enough to establish a reasonable and articulable suspicion.[324] The court noted that in North Dakota, traveling at slower-than-usual speeds is not in itself an indication of driving under the influence of alcohol or of other illegal activity.[325]

The DOT argued that Johnson's vehicle was impeding traffic under section 39-09-09(1) of the North Dakota Century Code due to its slow speed.[326] In rejecting this argument, the court reasoned that nowhere in the arresting officer's testimony did he indicate that Johnson's driving was impeding traffic.[327] In support of its holding that no reasonable and articulable suspicion existed, the court cited several North Dakota decisions in which slow speed, time of night, and other subjective factors did not, standing alone, provide the police with objective manifestations of potential criminal activity justifying a stop.[328] The court stated that there may be a situation where a driver is traveling so slowly that the slow speed, in itself, creates a reasonable and articulable suspicion of potential criminal activity;

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320. *Id.* ¶ 5.

321. *Id.*

322. *Id.* ¶ 7 (citing Terry v. Ohio, 392 U.S. 1, 10 (1968)).

323. *Id.* ¶ 8, 717 N.W.2d at 588-89.

324. *Id.* ¶ 9, 717 N.W.2d at 589.

325. *Id.*

326. *Id.* ¶ 10 (citing N.D. CENT. CODE § 39-09-09(1) (2005)). The statute provides: "No person may drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law." N.D. CENT. CODE § 39-09-09(1) (2005).

327. *Johnson*, ¶ 12, 717 N.W.2d at 589.

328. *Id.* ¶¶ 12-14, 717 N.W.2d at 589-90 (citing State v. Robertsdahl, 512 N.W.2d 427, 428 (N.D. 1994); Salter v. N.D. Dep't of Transp., 505 N.W.2d 111, 114 (N.D. 1993); State v. Brown, 509 N.W.2d 69, 71 (N.D. 1993); State v. Sarhegyi, 492 N.W.2d 284, 286 (N.D. 1992)).

but the court held that Johnson's driving did not meet this situation.[329] Accordingly, the North Dakota Supreme Court affirmed the district court's decision.[330]

Justice Sandstrom wrote a dissenting opinion.[331] He dissented from the majority's holding for two reasons.[332] First, Justice Sandstrom argued that the majority chose to disregard certain facts critical to the determination of whether a reasonable and articulable suspicion existed.[333] Second, he argued that the facts considered by the majority did, under the totality of the circumstances, constitute a reasonable and articulable suspicion to stop Johnson's vehicle.[334]

Justice Sandstrom argued that the majority ignored facts based on the officer's testimony as to how far he followed Johnson's vehicle.[335] He reasoned that, based on where the officer testified he first saw the vehicle, versus where Johnson's vehicle was actually stopped, the officer observed the vehicle for five blocks, not two, as the majority stated.[336]

Next, Justice Sandstrom disputed the majority's position that it is common for individuals to drive under the speed limit in residential or densely populated areas.[337] He reasoned that the record did not reflect evidence supporting this idea.[338] Conversely, Justice Sandstrom argued that it was unusual to observe a vehicle traveling so slowly at that hour of night.[339] He reiterated that two critical facts—the distance which the officer followed Mr. Johnson's vehicle and the unusualness of the slow speed at that hour—were wrongly ignored by the majority.[340]

Additionally, Justice Sandstrom objected to the holding on grounds that under the totality of the circumstances, the officer did have a reasonable and articulable suspicion to stop the vehicle.[341] He believed that the majority made the mistake of asking whether actual criminal activity is observed.[342] The law requires only a reasonable and articulable suspicion that potential criminal activity is afoot before the officer may conduct an investigatory

329. *Johnson*, ¶ 14, 717 N.W.2d at 590.
330. *Id.* ¶ 15.
331. *Id.* ¶ 17 (Sandstrom, J., dissenting).
332. *Id.*
333. *Id.* ¶ 18.
334. *Id.* ¶ 22, 717 N.W.2d at 591.
335. *Id.* ¶19, 717 N.W.2d at 590-91.
336. *Id.*
337. *Id.* ¶ 20, 717 N.W.2d at 591.
338. *Id.*
339. *Id.*
340. *Id.* ¶ 21.
341. *Id.* ¶ 22.
342. *Id.*

stop.[343] Justice Sandstrom would have reversed the decision of the district court and reinstated the decision of the administrative officer.[344]

CRIMINAL LAW—INVESTIGATORY STOP—MOTOR VEHICLES

STATE V. TORKELSEN

Steven Arthur Torkelsen appealed his conviction of class AA felony murder.[345] The North Dakota Supreme Court found that the initial stop of Torkelsen's vehicle was illegal.[346] Therefore, the court reversed and remanded Torkelsen's conditional plea.[347] Justice Sandstrom wrote a dissenting opinion.[348]

On June 27, 2004, a farmer discovered the body of Rebecca Flaa burning in a ditch east of Cando, North Dakota, in Towner County.[349] Before authorities arrived, Torkelsen approached the farmer to determine if the farmer needed assistance.[350] The farmer knew Torkelsen and told him to leave the area, and Torkelsen complied with the farmer's request.[351] As emergency vehicles approached, Torkelsen did not move to the side of the "narrow gravel road."[352] The farmer informed the authorities of Torkelsen's presence and that Torkelsen had not acknowledged the burning body.[353] Additionally, emergency personnel informed the investigators of Torkelsen's failure to move to the side of the road.[354]

Trooper LaRocque found Torkelsen driving near Wolford, North Dakota.[355] After following Torkelsen for several miles, LaRocque radioed his supervisor and informed him that Torkelsen was not driving erratically or violating any laws, and asked how to proceed.[356] LaRocque was instructed to stop Torkelsen, but only after backup officers were in the area.[357] LaRocque stopped Torkelsen, handcuffed him, and informed

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343. *Id.*
344. *Id.* ¶ 29, 717 N.W.2d at 593.
345. State v. Torkelsen, 2006 ND 152, ¶ 1, 718 N.W.2d 22, 24.
346. *Id.* ¶ 17, 718 N.W.2d at 28.
347. *Id.* ¶ 18.
348. *Id.* ¶ 20 (Sandstrom, J., dissenting).
349. *Id.* ¶¶ 2, 6, 718 N.W.2d at 24, 25.
350. *Id.*
351. *Id.*
352. *Id.*
353. *Id.* ¶ 3.
354. *Id.*
355. *Id.* ¶ 4.
356. *Id.*
357. *Id.*

Torkelsen that he was wanted for questioning in Cando.[358] Torkelsen was transported twenty-eight miles to the Towner County Sheriff's office, where he was given his Miranda rights and questioned.[359] He allegedly consented to the search of his vehicle and trailer that revealed incriminating evidence.[360] Torkelsen was then formally arrested and transported to the Lake Region Correctional Center.[361]

Before trial, Torkelsen moved to dismiss or suppress the evidence discovered during the search, arguing that the evidence found should be excluded because the law enforcement officers lacked a reasonable and articulable suspicion that Torkelsen committed a traffic violation.[362] The district court denied the motion, ruling the initial stop of Torkelsen's vehicle was valid because the articulable suspicion was based on the suspicion that Torkelsen committed a homicide, not on the suspicion that he committed a traffic violation.[363] Torkelsen argued that he was arrested at the time of the initial stop because the officers placed him in handcuffs while he was transported to the Sheriff's office in Cando.[364] The district court ruled that while the actions of the officers may have constituted a seizure for Fourth Amendment purposes, "the seizure was reasonable given the 'safety and security interests involved with [the] serious nature of the crime charged and the fact that [Torkelsen] was seen leaving the place where the body was found.'"[365] Consequently, Torkelsen entered an Alford conditional guilty plea and was sentenced to fifty years in prison, with thirty years suspended.[366]

The North Dakota Supreme Court first discussed the permissible types of law enforcement-citizen encounters.[367] According to the court, there are three types: (1) "arrests which must be supported by probable cause; (2) *Terry* stops, seizures which must be supported by a reasonable and articulable suspicion of criminal activity; and (3) community caretaking encounters, which do not constitute Fourth Amendment seizures."[368] Because the

358. *Id.* ¶ 5, 718 N.W.2d at 25.
359. *Id.*
360. *Id.*
361. *Id.*
362. *Id.* ¶¶ 6-9.
363. *Id.* ¶ 9.
364. *Id.*
365. *Id.*
366. *Id.* ¶ 6; *see* North Carolina v. Alford, 400 U.S. 25, 37-38 (1970) (permitting a defendant to accept a plea whereby he professes innocence as to committing the crime, but states that sufficient evidence exists to finding guilt).
367. *Torkelsen,* ¶ 10, 718 N.W.2d at 26.
368. *Id.* (citing Terry v. Ohio, 392 U.S. 1 (1968) (citations omitted)).

state did not argue, and the lower court did not find, that the first or the third of these permissible types are applicable in this case, the supreme court reasoned that the issue was "whether law enforcement officers had a reasonable and articulable suspicion that Torkelsen had engaged in criminal activity to justify a *Terry* stop."[369]

The North Dakota Supreme Court stated that under *Terry v. Ohio*,[370] where there is no probable cause to make an arrest because an officer lacks a reasonable and articulable suspicion of criminal activity, the officer may detain individuals for investigative purposes in appropriate circumstances.[371] The court explained that an officer possesses reasonable suspicion to stop a vehicle: "(1) when the officer relied on an appropriate directive or request for action from another officer; (2) when the officer received tips from police officers or informants, which were then corroborated by the officer's own observations; or (3) when the officer directly observed illegal activity."[372]

In this case, LaRocque did not observe Torkelsen engaging in any illegal activity and did not corroborate a tip that Torkelsen had been swerving all over the road.[373] Although, when an officer relays an order or request to another, without providing the essential facts and circumstances giving rise to the order, the knowledge of the officer giving the order is imputed to the receiving officer.[374]

The court identified the issue as whether the supervisor's order to pull Torkelsen over "was supported by a reasonable and articulable suspicion that Torkelsen had engaged in criminal activity."[375] The court used an objective standard under the totality of the circumstances to determine whether a reasonable person in the officer's position would be justified in concluding that Torkelsen was engaging in unlawful activity, sufficient to make an investigative stop.[376] Even though Torkelsen was at the scene of the crime before police arrived, his "presence at or near the scene of a crime, without more, does not give rise to a reasonable suspicion of

369. *Id.*; *see Terry*, 392 U.S. at 27 (stating that the Fourth Amendment provides law enforcement officers with the authority to conduct a reasonable search for weapons on an individual when the officer has reason to believe that the individual is armed, and such authority is permitted even when the officer does not have probable cause to arrest the individual).

370. 392 U.S. 1 (1968).

371. *Torkelsen*, ¶ 11, 718 N.W.2d at 26.

372. *Id.*

373. *Id.* ¶ 12

374. *Id.*

375. *Id.*

376. *Id.* ¶ 13.

criminal activity."[377] Accordingly, the court held, Torkelsen's status as a resident of the area where the body was found, his stopping at the scene of the crime to offer assistance, and his failure to yield to emergency vehicles on a "narrow gravel road" were insufficient reasons to justify the investigative stop.[378] The stop of Torkelsen's vehicle was invalid because the officers lacked reasonable and articulable suspicion that he had engaged in criminal activity.[379]

Justice Sandstrom wrote a dissenting opinion.[380] In his dissent, Justice Sandstrom stated the majority misapplied the law "parsing the facts rather than taking them as a whole."[381] Justice Sandstrom examined each suspicious fact and concluded that, examined together, the factors provided the officer with a reasonable suspicion to justify an investigative stop to question Torkelsen about the crime.[382]

CRIMINAL LAW—JUVENILE PROCEEDINGS—DUE PROCESS RIGHTS

INTEREST OF R.W.S.

R.W.S (Richard)[383] appealed a juvenile court order, which determined him to be a delinquent child and placed him with the North Dakota Division of Juvenile Services for a temporary period of time.[384] Richard argued that his due process rights were violated because he was forced to wear handcuffs during his juvenile court hearing.[385] Specifically, he argued that in-court identifications of him while wearing handcuffs were impermissibly suggestive and unreliable; therefore, he was denied a fair hearing.[386] The North Dakota Supreme Court held that Richard's due process rights were not violated, because the in-court identifications did not result in a substantial likelihood of irreparable misidentification.[387] The court determined that

377. *Id.* ¶ 15, 718 N.W. 2d at 27; *see generally* State v. Parker, 834 P.2d 592 (Utah. App. 1992); City of Fargo v. Wonder, 2002 ND 142, 651 N.W.2d 655.
378. *Id.* ¶ 16.
379. *Id.* ¶ 17, 718 N.W.2d at 28.
380. *Id.* ¶ 20 (Sandstrom, J., dissenting).
381. *Id.*
382. *Id.* ¶ 37, 718 N.W.2d at 31.
383. Pseudonym used to protect the identity of the juvenile party.
384. *In re* R.W.S., 2007 ND 37, ¶ 1, 728 N.W.2d 326, 327.
385. *Id.*
386. *Id.*
387. *Id.* ¶ 36, 728 N.W.2d at 336.

the juvenile court erred when it failed to independently decide whether to remove Richard's handcuffs.[388]

On April 18, 2006, Richard attended a juvenile court hearing to determine whether he was a delinquent child.[389] Richard was brought into the courtroom wearing handcuffs, and remained handcuffed throughout the hearing.[390] During the hearing, Richard asked the referee to remove the handcuffs, but the referee responded, "Well, as I've been told by the presiding judge of the district that this is a matter to be determined by the sheriff's office since they're responsible for security. And so I've been told not to interfere with that decision."[391] At the hearing, Robert and Carol Solberg testified to seeing an intruder steal tools from their shed.[392] Additionally, the witnesses testified that their son detained the intruder until the police arrived.[393] The Solbergs identified Richard as the intruder and their attorney stated, "I'd like the record to also reflect that [Richard] is the only Native American male in this courtroom. He's the only person in this courtroom who's currently in handcuffs."[394] The referee determined that Richard was a delinquent child for committing the offenses of burglary, robbery, and disorderly conduct; therefore, the referee placed Richard in the custody of the North Dakota Juvenile Services for a temporary period of time.[395]

Richard requested a review of the referee's decision on grounds that he was denied a fair hearing by being forced to wear handcuffs during the in-court identifications.[396] The juvenile court affirmed the referee's order because Richard had not proved that he was prejudiced during the in-court identifications, and the juvenile court determined that the in-court identifications were supported by the evidence.[397]

On appeal, the North Dakota Supreme Court had to determine whether juveniles or adult defendants are entitled to appear in court free from physical restraints.[398] Since this was a case of first impression, the court evaluated precedent from other jurisdictions, particularly United States

388. *Id.* ¶ 37.
389. *Id.* ¶ 2, 728 N.W.2d at 328.
390. *Id.*
391. *Id.*
392. *Id.* ¶¶ 3-4.
393. *Id.* ¶ 3.
394. *Id.* ¶ 5.
395. *Id.* ¶ 6.
396. *Id.* ¶ 7.
397. *Id.* at 329.
398. *Id.* ¶ 10.

Supreme Court precedent.[399] The North Dakota Supreme Court analyzed *Deck v. Missouri*,[400] which stands for the proposition that "a criminal defendant has a right to remain free of physical restraints that are visible to the jury; that the right has a constitutional dimension; but that the right may be overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum."[401] In *Deck*, the United States Supreme Court determined whether shackling a convicted offender during sentencing violated the offender's constitutional rights.[402] The *Deck* court evaluated the constitutional rights of a defendant during trial to ultimately determine a convicted offender's rights at sentencing: (1) a criminal defendant is presumed innocent until proven guilty and the sight of restraints on the defendant undermines that presumption; (2) a criminal defendant is afforded the right to a meaningful defense and restraints may interfere with the defendant's ability to communicate with defense counsel; and (3) the judicial process must be dignified, which includes respectful treatment of defendants.[403] As a result, the *Deck* court concluded that physical restraints should not be used routinely on convicted offenders because the offender is entitled to a meaningful offense and dignified court proceedings.[404] Nevertheless, the offender's right to be free from physical restraints is not absolute.[405]

Based on the *Deck*'s holdings, the North Dakota Supreme Court determined that juveniles and adult defendants have the same right to be free from physical restraints.[406] The discretion to determine whether the juvenile should be physically restrained lies with the juvenile court.[407] The court determined that a juvenile court should consider the following factors: (1) "the accused's record, temperament, and the desperateness of his situation"; (2) "the security situation at the courtroom and courthouse"; (3) "the accused's physical condition"; and, (4) "whether there was an adequate means of providing security that was less prejudicial."[408]

Applying the factors to the present case, the court determined that Richard's due process rights were violated when he was forcibly restrained

399. *Id.* ¶¶ 11-17, 728 N.W.2d at 329-31.
400. 544 U.S. 622 (2005).
401. *In re* R.W.S., ¶ 11, 728 N.W.2d at 329 (quoting *Deck*, 544 U.S. at 628).
402. *Id.* ¶ 12 (citing *Deck*, 544 U.S. at 624).
403. *Id.* ¶ 13, 728 N.W.2d at 330 (citing *Deck*, 544 U.S. at 630-31).
404. *Id.* ¶ 14 (citing *Deck*, 544 U.S. at 632).
405. *Id.* ¶ 16 (citing *Deck*, 544 U.S. at 633).
406. *Id.* ¶ 15.
407. *Id.* ¶ 17, 728 N.W.2d at 331.
408. *Id.* ¶ 18.

in the juvenile hearing, but such violations were harmless error.[409] The referee did not produce evidence that Richard posed an immediate and serious risk of danger, disruptive behavior, or flight, therefore, Richard should not have been forcibly restrained.[410] The court determined that such violations of Richard's rights were harmless beyond a reasonable doubt because the evidence in the record overwhelmingly supported the finding that Richard was guilty of the charges brought against him.[411]

Next, Richard argued that he was denied a fair hearing because the in-court identifications took place while he was physically restrained.[412] The court analyzed precedent from other jurisdictions, as well as its own precedent, to define an accused's constitutional rights during in-court identifications.[413] In *State v. Norrid*,[414] the North Dakota Supreme Court stated that due process of the accused is violated if, under a totality of the circumstances, the methods of the identification were so unnecessarily suggestive as to create a substantial likelihood of irreparable mistaken identification.[415] When such a violation occurs, the identification testimony must be suppressed.[416] In order to determine whether there is a substantial likelihood of irreparable mistaken identification, a court must apply five factors: (1) "[t]he opportunity of the witness to view the criminal at the time of the crime"; (2) "the witness' degree of attention"; (3) "the accuracy of his prior description of the criminal"; (4) "the level of certainty demonstrated at the confrontation"; and (5) "the time between the crime and the confrontation."[417]

Applying the *Norrid* rule and the five reliability factors, the court determined that the in-court identifications of Richard were suggestive.[418] Because Richard was the only Native American in the courtroom and the only individual in handcuffs, the in-court identifications were suggestive.[419] The court found that under the *Norrid* rule and the five reliability factors, the in-court identifications did not create a substantial likelihood of

409. *Id.* ¶ 19.
410. *Id.*
411. *Id.* ¶ 20, 728 N.W.2d at 331-32.
412. *Id.* ¶ 21, 728 N.W.2d at 332.
413. *Id.* ¶¶ 24-32, 728 N.W.2d at 332-35.
414. 2000 ND 112, 611 N.W.2d 866.
415. *In re* R.W.S., ¶¶ 26, 33, 728 N.W.2d at 333, 335 (citing *Norrid*, ¶ 8, 611 N.W.2d at 866).
416. *Id.* ¶ 26, 728 N.W.2d at 333.
417. *Id.* (quoting Neil v. Biggers, 409 U.S. 188, 199-200 (1972)); *see also id.* ¶ 33, 728 N.W.2d at 335 (stating that the five *Biggers* factors should be used in determining the reliability of the identification).
418. *Id.* ¶ 34, 728 N.W.2d at 336.
419. *Id.*

irreparable identification because the Solbergs had a clear view of Richard as the intruder and Richard was personally detained by the Solbergs' son until the police arrived at the scene.[420] Therefore, the North Dakota Supreme Court determined that the juvenile court violated Richard's due process rights by failing to make an independent determination of whether Richard should be detained.[421] Furthermore, the court determined that the in-court identifications of Richard were not substantially likely to lead to irreparable misidentification, so the juvenile court properly admitted the in-court identifications of Richard.[422]

CRIMINAL LAW—SENTENCING AND PUNISHMENT

STATE V. BUCHHOLZ

Paul Buchholz appealed his conviction of two counts of possession of a firearm by a felon.[423] The North Dakota Supreme Court affirmed the conviction.[424]

Buchholz was sentenced to sixty days in jail suspended and one year of unsupervised probation, after being convicting of a class C felony for issuing a check with insufficient funds.[425] In November 2003, during a search of Buchholz's home under a valid search warrant, law enforcement officers found an SKS rifle and shotgun under a bed.[426] Buchholz was charged with violating section 62.1-02-01(2) of the North Dakota Century Code.[427] At a preliminary hearing, the district court determined that there was a lack of probable cause to find that Buchholz violated section 62.1-02-01(2) because his class C felony conviction of issuing a check with insufficient funds felony was immediately reduced to a misdemeanor at the moment he was sentenced to a term less than one year.[428]

Following the appeal, Buchholz was charged with two additional counts of felony possession of a firearm by a felon, based on weapons officers seized as a result of a search of a residence and motor home.[429]

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420. *Id.* ¶ 35.
421. *Id.* ¶ 37.
422. *Id.*
423. State v. Buchholz, 2006 ND 227, ¶ 1, 723 N.W.2d 534, 536.
424. *Id.*
425. *Id.* ¶ 2.
426. *Id.* ¶ 3.
427. *Id.*; *see* N.D. CENT. CODE § 62.1-02-01(2) (2005) (stating that persons convicted of felonies are prohibited from possessing or owning a firearm).
428. *Buchholz*, ¶ 3, 723 N.W.2d 536-37.
429. *Id.* ¶ 5, 723 N.W.2d at 537.

The state filed two motions *in limine* to exclude any testimony or evidence that Buchholz relied on a mistake of law in owning or possessing firearms.[430] The district court granted the motions *in limine*, thereby disallowing Buchholz from presenting any testimony or evidence relating to a mistake of law defense.[431] The jury found Buchholz guilty of the initial count of possession and one count of possession from the search of the residence, but found him not guilty for the weapon that was seized from the motor home.[432]

Buchholz claimed the district court abused its discretion by granting the State's motions *in limine* excluding evidence of his mistake of law defense.[433] Buchholz argued that in his prior appeal the court instructed the district court to permit him to present evidence of a mistake of law defense during trial.[434] Furthermore, Buchholz asserted that the court's instruction is the "law of the case," and therefore, the district court was required to follow the instruction on remand.[435] According to the "law of the case" doctrine, "if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal question thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain the same."[436] However, the court stated that the issue in Buchholz's prior appeal was not whether he could assert a mistake of law defense, but whether an affirmative defense could be properly asserted at a preliminary hearing.[437] The court held that an affirmative defense could not be asserted in a preliminary

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430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.* ¶ 6. The appropriate standard of review for a district court's decision on a motion *in limine* is abuse of discretion. *Id.* ¶ 7. "A court has broad discretion in deciding whether evidence is relevant, and this Court does not reverse a district court's decision to admit or exclude evidence on the basis of relevance unless the district court abused its discretion by acting in an arbitrary, unreasonable, or unconscionable manner." *Id.* (quoting State v. Bjerklie, 2006 ND 173, ¶ 4, 719 N.W.2d 359, 361).

434. *Id.* ¶ 9; *but see* State v. Buchholz, 2005 ND 30, ¶ 8, 692 N.W.2d 105, 107 (finding that Buchholz could not rely on a mistake of law defense at a preliminary hearing, and instead had to prove an affirmative defense at trial). In the prior appeal, the court reversed and remanded a district court order releasing Buchholz. *Id.* ¶ 12, 692 N.W.2d at 108. The court concluded that any person convicted of a felony whose conviction is immediately reduced to a misdemeanor, because the sentence is for less than one year, is still initially convicted of a felony. *Id.* ¶ 8, 692 N.W.2d at 107. But Buchholz claimed the district court's discharge order should be upheld because he did not believe he was committing a crime, and was therefore was mistaken about the law. *Id.* ¶ 10.

435. *Buchholz*, ¶ 10, 723 N.W.2d at 538.

436. *Id.* (quoting Peoples State Bank of Truman, Inc. v. Molstad Excavating, Inc., 2006 ND 183, ¶ 10, 721 N.W.2d 43, 46 (citations omitted)).

437. *Id.* ¶ 11.

hearing because the purpose of a preliminary hearing is not to determine guilt or innocence.[438] "[T]herefore, the place for such an assertion [i]s at trial."[439]

Next, the court examined Buchholz's mistake of law defense.[440] The court held that the defense is rarely available, and generally precluded, when the offense lacks a culpability requirement such as the case of a strict liability offense.[441] The court held that an affirmative defense should not apply because the offense of a felon in possession of a firearm is a strict liability offense.[442]

After admitting that ignorance of the law is not an excuse, Buchholz argued that the district court imposed an illegal sentence for the felony that was the basis for his possession of firearms charge and that is a mistake of law.[443] The court explained that a sentence is illegal "if it is contrary to statute, fails to comply with a promise of a plea bargain, or is inconsistent with the oral pronouncement of the sentence."[444] Buchholz contended that contrary to section 62.1-02-01(2) of the North Dakota Century Code, his sentence only required that he not possess firearms for one year and the sentence was illegal because the statute imposed a mandatory restriction of at least five years.[445]

The court found Buchholz's argument unpersuasive.[446] If the district court judge had informed Buchholz that section 62.1-02-01(2) did not apply because his felony conviction was reduced to a misdemeanor, then Buchholz may have been correct.[447] The district court, however, had not addressed whether section 62.1-02-01(2) applied to Buchholz.[448] Instead, the district court only addressed the conditions of Buchholz's parole in accordance with section 12.1-32-07(3) of the North Dakota Century Code.[449] The court concluded the district court's sentence was not illegal

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438. *Id.*

439. *Id.*

440. *Id.* ¶ 12.

441. *Id.* (citing State v. Eldred, 1997 ND 112, ¶¶ 29-31, 564 N.W.2d 283, 290-91).

442. *Id.*

443. *Id.* ¶ 13.

444. *Id.* (citing State v. Raulston, 2005 ND 212, ¶ 7, 707 N.W.2d 464, 467).

445. *Id.*; *see* N.D. CENT. CODE § 62.1-02-01(2) (2005) (stating that a person convicted of a nonviolent felony is prohibited from owning or possessing a firearm for five years after conviction or release from incarceration or probation, whichever is latest).

446. *Buchholz*, ¶ 15, 723 N.W.2d at 539-40.

447. *Id.* at 539.

448. *Id.*

449. *Id.* ("The court shall provide as an explicit condition of every probation that the defendant may not possess a firearm. . . ." (quoting N.D. CENT. CODE § 12.1-32-07(3) (2005)).

and the district court did not abuse its discretion in excluding evidence concerning Buchholz's mistake of law defense.[450]

Finally, Buchholz argued that because the State failed to present any evidence that the firearms were capable of being fired, there was insufficient evidence to sustain his conviction of being a felon in possession of a firearm.[451] But the sheriff's deputy testified that he believed the guns were capable of being firing and Buchholz did not present any evidence or testimony to rebut the testimony.[452] Therefore, the North Dakota Supreme Court held that the district court did not abuse its discretion by excluding evidence of a mistake of law defense, and found that there was sufficient evidence to support the conviction.[453]

CRIMINAL LAW—SENTENCING AND PUNISHMENT

STATE V. SALVESON

In *State v. Salveson*,[454] Salveson appealed a district court judgment sentencing her to two consecutive one-year sentences following her guilty plea to the charges of driving under the influence and reckless driving.[455] The North Dakota Supreme Court held that because the crimes of driving under the influence and aggravated reckless driving arose from substantially different criminal objectives, the district court did not abuse its discretion in sentencing Salveson to two consecutive one-year sentences for committing two class A misdemeanors.[456] Justice Maring dissented.[457]

Sharol Salveson was charged with the class A misdemeanors of driving under the influence and aggravated reckless driving on April 4, 2005.[458] She was also charged with driving under suspension, a class B misdemeanor.[459] She had previously been convicted of driving under the influence in 2001 and 2004.[460] After the district court rejected a plea agreement that would have limited Salveson's jail time to six to nine months, she pled guilty to the charges of aggravated reckless driving and

450. *Id.* ¶ 17, 723 N.W.2d at 540.
451. *Id.* ¶ 19.
452. *Id.* ¶ 22.
453. *Id.* ¶ 24, 723 N.W.2d at 541.
454. 2006 ND 169, 719 N.W.2d 747.
455. *Salveson*, ¶ 1, 719 N.W.2d at 747.
456. *Id.* ¶ 10, 719 N.W.2d at 749.
457. *Id.* ¶ 12, 719 N.W.2d at 750 (Maring, J., dissenting).
458. *Id.* ¶ 2, 719 N.W.2d at 747.
459. *Id.*
460. *Id.*, 719 N.W.2d at 747-48.

driving under the influence.[461] The district court sentenced her to twelve months of incarceration for aggravated reckless driving, and another twelve months for driving under the influence.[462] These sentences were to run consecutively, which meant that Salveson would be incarcerated for two years.[463]

Salveson appealed to the North Dakota Supreme Court, arguing that the two-year sentence was illegal.[464] The court first noted that North Dakota statute authorizes consecutive sentences only if each misdemeanor was committed "involve[s] a substantially different criminal objective," but the term "criminal objective" was ambiguous.[465] The court reviewed a three-part test established in *State v. Ulmer*[466] to aid in interpreting the term "criminal objective."[467] In *Ulmer*, the court stated that multiple class A misdemeanors involve substantially different criminal objectives if they do not fall within one of three categories:

> (1) one offense is an included offense of the other; (2) one offense consists of a conspiracy, attempt, solicitation, or other form of preparation to commit, or facilitation of, the other; or (3) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.[468]

The North Dakota Supreme Court concluded that *Ulmer*'s three-category test applied and was controlling.[469] The court applied *Ulmer*'s three-part test to conclude that the crimes of aggravated reckless driving and driving under the influence involved different criminal objectives, and "do not relate to each other under any of the three categories announced in *Ulmer*."[470] As such, the court held that the district court did not abuse its discretion, and therefore upheld the consecutive two-year sentence for committing two class A misdemeanors.[471]

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461. *Id.* ¶ 3, 719 N.W.2d at 748. The State dismissed the charge of driving with a suspended license. *Id.*
462. *Id.*
463. *Id.*
464. *Id.*
465. *Id.* ¶¶ 5, 6 (citing N.D. CENT. CODE § 12.1-32-11(3)(2005)).
466. 1999 ND 245, 603 N.W.2d 865.
467. *Salveson*, ¶ 6, 719 N.W.2d at 748-49.
468. *Id.* (quoting *Ulmer*, ¶ 10, 603 N.W.2d at 868).
469. *Id.* ¶ 10, 719 N.W.2d at 749.
470. *Id.* ¶ 8.
471. *Id.* ¶ 9.

Justice Maring wrote a dissenting opinion.[472] In her eight-page dissent, Justice Maring criticized the court for being "too invested in its own opinion in *State v. Ulmer*" to recognize that the result in *Ulmer* was contrary to legislative history, arguing instead that consecutive sentencing in the instant case was exactly what the legislature sought to avoid.[473] Justice Maring noted that section 12.1-32-11(3) of the North Dakota Century Code governs a trial court's ability to impose consecutive sentences for multiple misdemeanors in a single case.[474] She stated that the North Dakota Supreme Court, in prior case law, had equated "criminal objective" with "criminal intent."[475] Therefore, according to Justice Maring, the application of section 12.1-32-11(3) should be nothing more than the Court examining whether the criminal intent with respect to one crime was substantially similar with the criminal intent of the other crime.[476] Justice Maring argued that the majority has altered the definition of "criminal objective" to comply with *Ulmer*.[477]

Justice Maring disagreed with the majority that Salveson had two distinct criminal objectives in committing a "singular act [driving with a blood-alcohol concentration of 0.26] that is the indispensable element for proving both crimes."[478] Justice Maring argued that no facts were presented to establish that Salveson recklessly drove, aside from driving with a 0.26 blood-alcohol concentration.[479] Additionally, Justice Maring noted that the majority agreed that Salveson's crimes did not relate to each other under any of the three categories announced in *Ulmer*.[480] She argued that both crimes arose from the same act (Salveson driving while intoxicated), which is the type of situation that the drafters of section 12.1-32-11(3) sought to limit consecutive sentencing.[481] Therefore, Justice Maring argued that the *Ulmer* test should not be the sole test when determining whether multiple class A misdemeanors invoked substantially different criminal objectives.[482] Additionally, Justice Maring looked to state and federal legislative history to demonstrate that the drafters of section 12.1-32-11(3) would have rejected the three-category test enacted in

472. *Id.* ¶ 12, 719 N.W.2d at 750.
473. *Id.*
474. *Id.* ¶ 13.
475. *Id.* ¶ 14.
476. *Id.*
477. *Id.*
478. *Id.* ¶ 15, 719 N.W.2d at 751.
479. *Id.*
480. *Id.* ¶ 18, 719 N.W.2d at 753.
481. *Id.*
482. *Id.* ¶ 26, 719 N.W.2d at 757.

Ulmer as the sole test.[483] Upon rejecting *Ulmer* as the sole test, Justice Maring determined that the objectives for reckless driving and driving while intoxicated are one and the same and as such, she would have reversed and remanded for resentencing.[484]

CRIMINAL LAW—TRIAL—RIGHT OF ACCUSED TO CONFRONT WITNESS

CITY OF FARGO V. KOMAD

In *City of Fargo v. Komad*,[485] Eldin Komad appealed a district court conviction for theft on the grounds that his constitutional and statutory rights to be present at trial were violated.[486] The North Dakota Supreme Court held that Komad's constitutional right under the Sixth Amendment to the United States Constitution was not violated.[487] The court found that Komad's statutory rights under Rule 43 of the North Dakota Rules of Criminal Procedure had been violated, and the violation was not harmless.[488] Justice Maring wrote a concurring opinion to express concerns with defendant rights under Rule 43.[489] Justice Sandstrom wrote a dissenting opinion.[490]

Komad was originally charged with theft by the City of Fargo and was convicted in the Fargo Municipal Court.[491] Komad appealed that conviction to the Cass County District Court, which set a December 12, 2005, trial date.[492] Komad was not present for the trial, but his counsel petitioned the court for a continuance; Komad was stranded in Chicago due to bad weather and could not arrive in Fargo until later that day.[493]

The City of Fargo opposed the continuance, arguing that Komad's excuse was false, and requested the district court to issue a bench warrant.[494] The district court judge denied the continuance and stated the trial would proceed or the appeal would be dismissed.[495] Believing he had no

483. *Id.* ¶¶ 21-27, 719 N.W.2d at 753-57.
484. *Id.* ¶¶ 16, 32, 719 N.W.2d at 751, 758.
485. 2006 ND 177, 720 N.W.2d 619.
486. *Komad*, ¶ 1, 720 N.W.2d at 620.
487. *Id.* ¶ 7, 720 N.W.2d at 622.
488. *Id.* ¶ 16, 720 N.W.2d at 624.
489. *Id.* ¶ 19 (Maring, J., concurring).
490. *Id.* ¶ 22 (Sandstrom, J., dissenting).
491. *Id.* ¶ 1, 720 N.W.2d at 620.
492. *Id.* ¶¶ 1-2, 720 N.W.2d at 620-21.
493. *Id.* ¶¶ 2-3, 720 N.W.2d at 621.
494. *Id.* ¶ 3.
495. *Id.*

choice, Komad's attorney proceeded with trial despite his client's absence, and Komad was convicted of the theft charge.[496]

First, the North Dakota Supreme Court evaluated statutory law governing municipal court appeals.[497] Municipal court convictions can be appealed to a district court, but the district court does not review the record and decision of the municipal court.[498] Instead, the district holds an entirely new trial and independently determines whether the defendant has violated the ordinance, because municipal courts are not courts of record.[499]

Next, the court considered Komad's Sixth Amendment right to be present at the district court trial.[500] Both the United States Constitution and the North Dakota Constitution guarantee a criminal defendant the right to be present during trial.[501] But the district court was not exercising original jurisdiction because it heard Komad's case on appeal.[502] Therefore, the North Dakota Supreme Court held that Komad had no constitutional right to be present for a "trial anew" in a district court on appeal from his conviction in municipal court.[503]

The Court considered Komad's rights under the North Dakota Rules of Criminal Procedure because Komad was not guaranteed a constitutional right to be present for a trial anew in a district court.[504] Rule 43(a) of the North Dakota Rules of Criminal Procedure, made applicable to the appeal by section 40-18-19 of the North Dakota Century Code, requires a defendant to be present at the initial appearance, the arraignment, the plea, every stage of trial, and sentencing.[505] Under Rule 43(a), a court can continue with proceedings without a defendant when the defendant is voluntarily absent or is removed from the court due to disruptive conduct.[506]

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496. *Id.*

497. *Id.* ¶ 4.

498. *Id.*

499. *Id.* (citing City of Grand Forks v. Lamb, 2005 ND 103, ¶ 7, 697 N.W.2d 362, 364; Bismarck v. Uhden, 513 N.W.2d 373, 380 (N.D. 1994)).

500. *Id.* ¶ 5.

501. *Id.* ¶¶ 5-6.

502. *Id.* ¶ 7, 720 N.W.2d at 622.

503. *Id.*

504. *Id.* ¶ 8.

505. *Id.* Section 40-18-19 of the North Dakota Century Code provides in part:

> An appeal may be taken to the district court from a judgment of conviction or order deferring imposition of sentence in a municipal court in accordance with the North Dakota Rules of Criminal Procedure. An appeal is perfected by notice of appeal. A perfected appeal to the district court transfers the action to such district court for trial anew. On all appeals from a determination in a municipal court, the district court shall take judicial notice of all of the ordinances of the city.

N.D. CENT. CODE § 40-18-19 (2006).

506. *Komad*, ¶ 8, 720 N.W.2d at 622 (citing N.D. R. CRIM. P. 43(c)).

Additionally, the defendant's presence is not required when charged with a misdemeanor offense and gives written consent for his absence, or when the proceeding only involves a question of law, sentence correction, or reduction.[507] But, the court found that Komad had not waived his right to be present.[508] Even though the City argued that Komad's excuse for his absence was false, the court dismissed this argument because the City provided no evidence to support its assertion.[509]

As a result, the North Dakota Supreme Court held that Komad was tried in violation of Rule 43 of the North Dakota Rules of Criminal Procedure.[510] Additionally the court explained that district judge did not have discretion to dismiss Komad's appeal, but only had discretion to either grant a continuance or issue a bench warrant, or do both.[511] According to the court, a dismissal of Komad's appeal would have been a violation of the defendant's procedural rights, so the district judge's decision was not harmless error.[512]

Justice Maring specially concurred with the majority.[513] In her concurrence, Justice Maring argued that Rules 37 and 43 of the North Dakota Rules of Criminal Procedure should be amended so that a district court may summarily affirm the municipal court's judgment in particular instances.[514] Particularly, Justice Maring believed that summary affirmance by the district court should be permitted when the defendant has abandoned his appeal from the municipal court by failing to appear at the district court trial.[515] Otherwise, she argued that the district court would be required to

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507. *Id.* (citing N.D. R. CRIM. P. 43(b)).

508. *Komad*, ¶ 13, 720 N.W.2d at 623. Rule 43(c) of the North Dakota Rules of Criminal Procedure provides:

> The further progress of the trial, including the return of the verdict and the imposition of sentence, may not be prevented and the defendant waives the right to be present if the defendant, initially present at trial or having pleaded guilty: (1) is voluntarily absent after the trial has begun (whether or not the defendant has been informed by the court of the obligation to remain during the trial); (2) is voluntarily absent at the imposition of sentence; or (3) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct that justifies the defendant's exclusion from the courtroom.

N.D. R. CRIM. P. 43(c).

509. *Id.* ¶ 15, 720 N.W.2d at 624.

510. *Id.* ¶ 16.

511. *Id.*

512. *Id.*

513. *Id.* ¶ 19 (Maring, J., concurring).

514. *Id.*

515. *Id.*

expend resources wastefully when a defendant already had the benefit of a trial, at the municipal court.[516]

Justice Sandstrom wrote a dissenting opinion.[517] In his dissent, Justice Sandstrom stated that Komad wrongfully believed that the district court proceeding was the original trial, rather than an appeal.[518] Because Komad was present during the municipal trial, Justice Sandstrom argued that the district court proceeding was an appeal for which the constitutional right to be present did not apply.[519] Furthermore, Justice Sandstrom argued that even though Rule 43 provides the defendant with a "trial anew," the district court proceeding did not change from an appeal into an original trial.[520] He explained that the evidence is only "heard anew" because the evidence is not recorded or transcribed in the municipal court.[521]

Additionally, Sandstrom argued that the history of section 40-18-19 and Rule 43 do not support Komad's position.[522] He pointed out that in the years of 1968 and 1969, when the new Rules of Criminal Procedure were being developed, the Joint Committee of the Judicial Council and State Bar Association discussed the need for rules to govern the procedure in making an appeal.[523] The Committee determined that Rule 37 would govern appeals to district court.[524] The minutes of the July 10, 1969, meeting also reflected that the committee considered the provision providing for summary affirmance of the appeal in district court.[525] The Committee made it clear that section 33-12-41 of the North Dakota Century Code would not be abrogated by the adoption of the Rules, and even though this section is not longer part of the Century Code, it is still included as part of the Explanatory Note for Rule 37.[526] Thus, Justice Sandstrom concluded that because the district court could have proceeded with Komad's trial or summarily affirmed the municipal court verdict, it did not err by doing the former, and the criminal judgment of the district court should have been affirmed.[527]

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516. *Id.* ¶ 20.
517. *Id.* ¶ 22 (Sandstrom, J., dissenting).
518. *Id.* ¶ 29, 720 N.W.2d at 625.
519. *Id.* ¶ 31, 720 N.W.2d at 626.
520. *Id.* ¶ 35, 720 N.W.2d at 628.
521. *Id.*
522. *Id.* ¶ 36.
523. *Id.* ¶ 38, 720 N.W.2d at 628-629.
524. *Id.* ¶ 39, 720 N.W.2d at 629.
525. *Id.* ¶ 40.
526. *Id.* ¶¶ 40-41.
527. *Id.* ¶ 42, 720 N.W.2d at 630.

CRIMINAL LAW—REVIEW—SCOPE OF REVIEW

STATE V. HANSON

In *State v. Hansen*,[528] the State of North Dakota appealed a district court ruling that a requirement of random drug testing as part of bail conditions was unconstitutional.[529] In dismissing the appeal, the North Dakota Supreme Court held that no actual controversy existed, and therefore the appeal was moot.[530] However, the court vacated the district court's order under its supervisory jurisdiction, on the ground that the district court failed to follow established procedures and orderly process when considering the constitutional issues.[531]

Brent Hansen was charged with four drug-related offenses, including felonies, and at his initial appearance the state requested bail.[532] In response to a question from the district court, the state indicated that it had no information regarding whether imposition of random drug testing was necessary to ensure Hansen's appearance.[533] On its own initiative, the district court asked Hansen's counsel whether he wished to challenge the imposition of random drug testing as part of the bail conditions, on the ground that section 19-03.1-46 of the North Dakota Century Code was unconstitutional.[534] Thereafter, Hansen's counsel challenged the constitutionality of the statute.[535]

The district court determined that it would not include random drug testing as a condition of bail.[536] In a lengthy written opinion, the district court stated that section 19-03.1-46 was unconstitutional under both the separation-of-powers doctrine and state and federal prohibitions on

528. 2006 ND 139, 717 N.W.2d 541.
529. *Hansen*, ¶ 1, 717 N.W.2d at 542.
530. *Id.*
531. *Id.*, ¶ 12, 717 N.W.2d at 545.
532. *Id.* ¶¶ 2, 3, 717 N.W.2d at 542.
533. *Id.* ¶ 3.
534. *Id.* (citing N.D. CENT. CODE § 19-03.1-46 (2005)). The statute provides, in part:

> A court shall impose as a condition of release or bail that an individual who has been arrested upon a felony violation of this chapter or chapter 19-03.4 not use a controlled substance without a valid prescription from a licensed medical practitioner and that the individual submit to a medical examination or other reasonable random testing for the purpose of determining the person's use of a controlled substance.

N.D. CENT. CODE § 19-03.1-46 (2005).
535. *Hansen*, ¶ 3, 717 N.W.2d at 542-43.
536. *Id.* ¶ 4, 717 N.W.2d at 543.

unreasonable search and seizure.[537] The State appealed the order to the North Dakota Supreme Court.[538]

On appeal, the state argued that the appeal was not moot, even though Hansen had already pled guilty and was no longer subject to bail.[539] The state argued that the trial court erred in declaring section 19-03.1-46 unconstitutional because Hansen did not properly raise the issue, nor did he provide notice to the attorney general of the constitutional challenge.[540] Additionally, the state argued that the statute did not violate either the separation-of-powers doctrine or the prohibitions against unreasonable search and seizure.[541] Hansen agreed that the appeal was not moot, but persisted in his argument that the statute was unconstitutional.[542]

In dismissing the appeal, the North Dakota Supreme Court held that the appeal was moot and no actual controversy existed because Hansen had already pled guilty to some of the charges and been sentenced.[543] The court stated that it could not issue advisory opinion on an issue that is moot, even if the issue may arise in the future.[544] Nevertheless, the court will not dismiss a moot issue if the issue involves a question of great public interest and the power and authority of public officials.[545] However, the court determined that no question of great public interest or question of the power and authority of public officials was implicated in the case.[546] Therefore, the court determined that the appeal was moot.[547]

Concerned by the district court's opinion, the court vacated the district court order that declared section 19-03.1-46 of the North Dakota Century Code unconstitutional.[548] The court criticized the district court's handling of the case because the district court raised the constitutional question on its own initiative, and without notice to the attorney general; therefore, the district ignored established procedures for considering constitutional questions.[549] Additionally, the court was particularly concerned with a district court judge having the final say over the constitutionality of a

537. *Id.*
538. *Id.*
539. *Id.* ¶ 5.
540. *Id.*
541. *Id.*
542. *Id.*
543. *Id.* ¶¶ 6, 10, 717 N.W.2d at 543-44.
544. *Id.* ¶ 8, 717 N.W.2d at 544.
545. *Id.* ¶ 9.
546. *Id.* ¶ 10-11, 717 N.W.2d at 544-45.
547. *Id.* ¶ 11, 717 N.W.2d at 545.
548. *Id.* ¶ 12.
549. *Id.* ¶ 11, 717 N.W.2d at 544-45.

statute.[550] Therefore, pursuant to its supervisory jurisdiction, the North Dakota Supreme Court vacated the district court's order.[551]

CRIMINAL LAW—SEARCHES AND SEIZURES—MOTOR VEHICLES

STATE V. DOOHEN

In *State v. Doohen*,[552] the state appealed the district court's order which suppressed evidence found in Tyler Doohen's vehicle after a Highway Patrol Trooper stopped the vehicle.[553] The North Dakota Supreme Court held that the district court erred in finding that the Trooper lacked probable cause to search Doohen's vehicle.[554] Justice Kapsner wrote a dissenting opinion.[555]

On February 28, 2005, Highway Patrol Trooper Roger Clemens received a report of a vehicle driving erratically on the interstate.[556] Clemens located and stopped the vehicle.[557] Clemens suspected that Doohen was driving under the influence, but upon stopping Doohen, Clemens detected no indications of alcohol consumption.[558] Instead, Clemens observed butane lighters and syringes protruding from a tote bag on Doohen's passenger seat.[559] After placing Doohen in his patrol car, Clemens asked Doohen about the items.[560] Doohen claimed that the syringes were used to spray water for purposes of glass blowing.[561] After Doohen refused a search of his vehicle, Clemens placed Doohen in the backseat of the patrol car, and summoned a sergeant to assist with searching the vehicle.[562] The officers requested a canine unit because of the items found in the tote bag.[563] During the search of the vehicle, Clemens noticed a metal tray with residue that was later identified as methamphetamine.[564]

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550. *Id.* ¶ 12, 717 N.W.2d at 545 (citing State v. Hanson, 558 N.W.2d 611, 612 (1996)).
551. *Id.* ¶ 13.
552. 2006 ND 239, 724 N.W.2d 158.
553. *Doohen*, ¶ 1, 724 N.W.2d at 159.
554. *Id.* ¶ 16, 724 N.W.2d at 162.
555. *Id.* ¶ 18 (Kapsner, J., dissenting).
556. *Id.* ¶ 2, 724 N.W.2d at 159.
557. *Id.*
558. *Id.* ¶ 3.
559. *Id.*
560. *Id.* at 159-60.
561. *Id.* at 160.
562. *Id.*
563. *Id.*
564. *Id.* ¶ 5.

The search also revealed a machete concealed in a sleeping bag.[565] Doohen was subsequently charged with carrying a concealed weapon and possession of drug paraphernalia.[566] He moved to suppress the items found in his vehicle, arguing that Clemens did not have probable cause to conduct the search.[567] The district court granted his motion and the State appealed to the North Dakota Supreme Court.[568]

On appeal, the North Dakota Supreme Court examined whether Clemens had probable cause to search Doohen's vehicle.[569] To affirm the district court's order to suppress evidence, the court must find sufficient competent evidence that is capable of supporting the district court's findings and the decision of the district court must not be contrary to the manifest weight of evidence.[570] The established rule for an officer's search of a vehicle is that "[u]nder the automobile exception, law enforcement may search for illegal contraband without a warrant when probable cause exists."[571] The court stated that probable cause should be determined under a totality of the circumstances governing the search of the vehicle.[572] But an officer is permitted to "draw inferences based on his own experience in deciding whether probable cause exists."[573] Probable cause does not require the officer to be certain that the found items were evidence of a crime; rather, probable cause exists when a "reasonably cautious man" would believe that such items are evidence of a crime.[574]

Applying this standard, the court stated that even though Clemens was not certain as to the use of Doohen's hypodermic needles, the presence of the needles, combined with the presence of the butane lighters, would have lead a reasonably cautious individual to believe that the syringes may have been drug paraphernalia.[575] Additionally, the court stated that Doohen's statements about glass blowing and spraying water with needles "were layers which contributed to the totality of the circumstances that resulted in probable cause."[576] The court concluded that the presence of the syringes, lighters, and statements together established probable cause to search

565. *Id.*
566. *Id.* ¶ 6.
567. *Id.*
568. *Id.*
569. *Id.* ¶ 8.
570. *Id.*
571. *Id.* ¶ 10 (citing State v. Haibeck, 2004 ND 163, ¶ 10, 685 N.W.2d 512, 517).
572. *Id.* at 161.
573. *Id.* ¶ 11 (quoting Ornelas v. United States, 517 U.S. 690, 700 (1996)).
574. *Id.* ¶ 12.
575. *Id.*
576. *Id.* ¶ 14.

Doohen's vehicle, and because the officer had probable cause to search the vehicle, the items were admissible under the automobile exception to the warrant requirement.[577] Therefore, the North Dakota Supreme Court determined that the district court erred in suppressing the evidence found in Doohen's vehicle, and reversed and remanded for further proceedings.[578]

Justice Kapsner dissented.[579] Justice Kapsner reiterated that the automobile exception to the warrant requirement is the standard of review for an officer to search an automobile.[580] However, she disagreed with the majority's view that the district court's decision was against the manifest weight of the evidence.[581] She stated that instead of having probable cause to search Doohen's automobile, the officers "merely had information that may have warranted further investigation."[582] She concluded that because Clemens had observed only "innocuous items" in Doohen's vehicle, he had only a "very thin layer to support his probable cause determination," and taken together, the items did not amount to probable cause.[583] Justice Kapsner concluded that because the district court's decision was not against the manifest weight of the evidence, the suppression order should be affirmed.[584]

CRIMINAL LAW—SEARCH AND SEIZURE—WAIVER AND CONSENT

STATE V. ODOM

In *State v. Odom*,[585] the State of North Dakota appealed the district court's order to suppress evidence discovered in a locked safe during a consent search of Charles Odom's hotel room.[586] The North Dakota Supreme Court reversed the district court's order, and held that the district court misapplied the appropriate law regarding whether consent to search a room extends to consent to search containers within that room.[587]

577. *Id.* ¶ 15, 724 N.W.2d at 162.
578. *Id.* ¶ 16.
579. *Id.* ¶ 18 (Kapsner, J., dissenting).
580. *Id.* ¶ 19.
581. *Id.* ¶ 23, 724 N.W.2d at 163.
582. *Id.* ¶ 27, 724 N.W.2d at 164.
583. *Id.* ¶ 29.
584. *Id.* ¶ 30, 724 N.W.2d at 165.
585. 2006 ND 209, 722 N.W.2d 370.
586. *Odom*, ¶ 1, 722 N.W.2d at 371.
587. *Id.* ¶¶ 16-18, 722 N.W.2d at 374.

In December 2005, Odom was staying at the Days Inn in Bismarck, North Dakota.[588] Odom was arrested at the hotel due to an outstanding arrest warrant for a drug paraphernalia charge.[589] After placing Odom under arrest and informing him of his *Miranda* rights, the arresting officer questioned Odom about the presence of narcotics in the room.[590] Initially, Odom denied the presence of narcotics, but upon further questioning he admitted that narcotics were present in the room.[591] The officer asked Odom how he had arrived in Bismarck, and Odom replied that he had taken a bus and had been picked up by an acquaintance.[592] The officer was familiar with the acquaintance as a crack cocaine dealer.[593] Then, the officer asked Odom for consent to search the room, to which Odom replied, "[Y]ou are going to find it anyway. Go ahead."[594] Based on the arrest and Odom's consent, the officer conducted a search of the room, where he discovered a paper with the name and phone number of the acquaintance, as well as a locked safe.[595] Odom denied having the key to the safe, so the officer obtained the master key from hotel staff.[596] Inside the safe, the officer discovered a digital scale with cocaine residue, a roll of cash totaling just under $1000, and a "big chunk of crack cocaine."[597]

Odom was charged with felony narcotic possession and distribution charges.[598] He moved to suppress the contents of the safe as illegally procured evidence.[599] The district court granted his motion to suppress, reasoning that although Odom consented to a search of his hotel room, he retained an expectation of privacy in the safe because he did not give specific consent its search.[600] The State appealed the district court's order, arguing that Odom's consent to search the room included the locked safe.[601]

On appeal to the North Dakota Supreme Court, the issue was whether the officer's search of the safe was a reasonable search and seizure of evidence.[602] At the outset, the court noted that any warrantless search must

588. *Id.* ¶ 2, 722 N.W.2d at 371.
589. *Id.*
590. *Id.* ¶ 3, 722 N.W.2d at 371-72.
591. *Id.* at 372.
592. *Id.*
593. *Id.*
594. *Id.*
595. *Id.* ¶¶ 4, 5.
596. *Id.* ¶ 5.
597. *Id.*
598. *Id.* ¶ 6.
599. *Id.*
600. *Id.*
601. *Id.* ¶¶ 6-7.
602. *Id.* ¶ 9.

be supported by a well-recognized exception to the warrant requirement, such as consent.[603] Whether an individual consented is determined by "considering what an objectively reasonable person would have understood the consent to include."[604] The court found that Odom voluntarily consented to the officer's search of the hotel room.[605] Furthermore, the court determined that Odom's consent was without limitations, so a reasonable officer would have believed that Odom's consent extended to a search of the hotel room and the safe.[606] An individual need not consent to the search of every container in a room so long as consent was given to search the room.[607] The court noted that drawing an opposite conclusion—requiring law enforcement to acquire consent to search each container in a room—would place an unreasonable burden on law enforcement.[608] Additionally, the court stated that consent to search does not extend to consent to inflict damage to the place(s) to be searched, but held that the district court erred in making this a material issue in the case, given that the officer did not destroy the safe to open it, but rather opened it with keys.[609]

Finally, the court noted that to be "reasonable" the scope of a search must be limited to its expressed object.[610] This inquiry is based upon what each party knew at the time the consent to search was given.[611] The court held that Odom knew the object of the search was narcotics because the questions asked of him by the arresting officer all pertained to narcotics.[612]

Therefore, the court determined that the search was reasonable because the scope of the search was limited to its expressed object.[613] The North Dakota Supreme Court reversed the district court's order to suppress the evidence procured during the search of Odom's hotel room safe, and remanded the case for further proceedings.[614]

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603. *Id.*
604. *Id.* ¶ 10, 722 N.W.2d at 373. (quoting United States v. Urbina, 431 F.3d 305, 310 (8th Cir. 2005)).
605. *Id.* ¶ 11.
606. *Id.*
607. *Id.* (citing Florida v. Jimeno, 500 U.S. 248, 251 (1991)).
608. *Id.*
609. *Id.* ¶ 16, 722 N.W.2d at 374.
610. *Id.* ¶ 12, 722 N.W.2d at 373.
611. *Id.*
612. *Id.* ¶ 13.
613. *Id.*
614. *Id.* ¶¶ 17, 18, 722 N.W.2d at 374.

FAMILY LAW—CHILD CUSTODY

GIETZEN V. GABEL

In *Gietzen v. Gabel*,[615] Christopher Gietzen appealed a district court judgment that awarded Jessica Gabel sole custody of their minor child.[616] The district court granted Gietzen visitation and ordered him to pay child support.[617] The North Dakota Supreme Court reversed the district court's custody determination and remanded the case for findings of domestic violence under the appropriate legal standard.[618] Justice Maring wrote a dissenting opinion.[619] Chief Justice VandeWalle specially concurred with the majority on remanding the case for findings of fact and concurred with the dissent as to the domestic violence standard for custody determinations.[620]

In 1996, Gietzen and Gabel had a son together.[621] The two parties had a tumultuous relationship and were never married.[622] Gabel later married another man, but the parties continued to have contact until January 2002 for the sake of their child.[623]

Gabel claimed that Gietzen regularly physically abused her throughout their relationship.[624] In December 2001, Gietzen choked Gabel until she passed out, but Gietzen claimed that his actions were in response to Gabel coming after him with a knife.[625] In January 2002, Gabel reported to the police that Gietzen was threatening her with a pocketknife, while Gietzen claimed that he was just cleaning his fingernails with the knife; no charges were filed.[626] Later that month, while Gabel gave Gietzen a haircut, an argument arose and Gabel stabbed Gietzen in the hand, chest, and face with scissors.[627] Gabel was charged with attempted murder, but pled guilty to assault.[628] The child was then taken into custody by Cass County Social

615. 2006 ND 153, 718 N.W.2d 552.
616. *Gietzen*, ¶ 1, 718 N.W.2d at 553.
617. *Id.*
618. *Id.* ¶ 19, 718 N.W.2d at 559.
619. *Id.* ¶ 23 (Maring, J., dissenting).
620. *Id.* ¶ 35-36, 718 N.W.2d at 562 (VandeWalle, J., concurring).
621. *Id.* ¶ 2, 718 N.W.2d at 553.
622. *Id.*
623. *Id.*
624. *Id.* ¶ 3.
625. *Id.* at 554.
626. *Id.*
627. *Id.*
628. *Id.*

Services.[629] Eventually, the child was returned to Gietzen, but Gabel was granted visitation.[630]

After Gietzen moved with the child to Halliday, he sued Gabel to establish paternity, obtain custody, set visitation, and establish child support.[631] Gietzen was granted temporary custody.[632] During the trial, both parties claimed to be victims of domestic violence.[633] Ultimately, the district court awarded physical custody to Gabel, granted visitation to Gietzen, and ordered Gietzen to pay child support.[634] Gabel appealed claiming that the district court misapplied the law on domestic violence and "erred in measuring the amount of domestic violence committed by both parties."[635]

Section 14-09-06.1 of the North Dakota Century Code requires custody of a child to be awarded to the person who promotes the best interests of the child, and the factors to determine the best interests are provided in section 14-09-06.2(1)(a-m).[636] Within the best interest factors, a "rebuttable presumption against awarding custody of a child to a perpetrator of domestic violence" is found in section 14-09-06.2(1)(j).[637] If there is credible evidence of domestic violence, that evidence is the predominate factor in custody decisions.[638] Whether the statutory presumption is applicable is a finding of fact that cannot be reversed unless clearly erroneous.[639]

In analyzing Gietzen's argument that both parties committed domestic violence, the North Dakota Supreme Court examined the evolution of domestic violence as a factor in child custody determinations.[640] The North Dakota Legislature failed to address situations in which both parents committed domestic violence, thus the court in *Krank v. Krank*,[641] construed the 1993 amendments to assess these situations.[642] Summarizing *Krank*, the court noted that when both parents have committed domestic violence, a district court must measure the amount and extent that each parent inflicts

629. *Id.* ¶ 4.
630. *Id.*
631. *Id.*
632. *Id.*
633. *Id.*
634. *Id.*
635. *Id.* ¶ 5.
636. *Id.* ¶ 7.
637. *Id.* ¶ 8.
638. *Id.* ¶ 9, 718 N.W.2d at 555.
639. *Id.* (citing Gonzalez v. Gonzalez, 2005 ND 131, ¶ 6, 700 N.W.2d 711, 715).
640. *Id.* ¶ 10.
641. 529 N.W.2d 844 (N.D. 1995).
642. *Gietzen*, ¶ 12, 718 N.W.2d at 556 (citing Krank v. Krank, 529 N.W.2d 844, 850 (N.D. 1995)).

domestic violence.[643] If one parent inflicts domestic violence to a significantly greater amount, the presumption is applied against him or her, but if the amounts are proportional, the presumption ceases to exist.[644] However, in 1997, the domestic violence statute was amended again to create a rebuttable presumption against an offender of domestic violence and the offender "may not be awarded sole or joint custody of the child."[645] The amended statute permits the presumption to be overcome only by clear and convincing evidence.[646] Furthermore, the amended statute authorizes a district court to award custody to a suitable third party if necessary.[647]

Here, the district court applied the *Krank* proportionality test and determined that the "parties' circumstances indicate the domestic violence is unlikely to occur in the future and this factor favors neither party."[648] The court found that the district court's findings lacked the specificity required for a situation in which both parties committed domestic violence.[649] The court stated that where a reciprocal abuse is alleged, the district court must focus its "findings more carefully and specifically on the degree of violent behavior by each parent."[650] Additionally, the 1997 amendment must be used when reciprocal abuse triggers the presumption.[651] The district court must then determine "whether the presumption has been overcome in favor of a parent by evidence that is clear and convincing, or whether other suitable custodial arrangements with a third person should be made."[652]

Moreover, Gabel argued that if her domestic violence was greater than Gietzen's, she was still entitled to custody because of his continued drug use.[653] However, this claim was not supported by the district court's findings.[654] Alternatively, Gietzen argued that the district court's findings of fact were not supported by evidence.[655] The court was unable to conclude that the district court's findings were clearly erroneous.[656] Ultimately, the North Dakota Supreme Court reversed the district court's

643. *Id.* (citing *Krank*, 529 N.W.2d at 850).
644. *Id.* (citing *Krank*, 529 N.W.2d at 850).
645. *Id.* ¶ 13.
646. *Id.* (citing N.D. CENT. CODE § 14-09-06.2(1)(j) (2005)).
647. *Id.* at 557.
648. *Id.* ¶ 16, 718 N.W.2d at 558.
649. *Id.* ¶ 17.
650. *Id.* (quoting Reeves v. Chepulis, 1999 ND 63, ¶ 14 n.1, 591 N.W.2d 791, 795).
651. *Id.*
652. *Id.* (citing N.D. CENT. CODE § 14-09-06.2(1)(j) (2005)).
653. *Id.* ¶ 18, 718 N.W.2d at 559.
654. *Id.*
655. *Id.* ¶ 20.
656. *Id.*

decision on custody and remanded the case for determination of domestic violence under appropriate law.[657]

Justice Maring wrote a dissenting opinion.[658] She believed the district court had properly set forth and applied the correct standard for assessing domestic violence in child custody decisions.[659] In her dissent, Justice Maring suggested that the long-settled *Krank* standard should be used in dealing with situations in which both parents have committed domestic violence.[660] Justice Maring argued that the majority "would have the presumption against custody arise against both parents whenever evidence is present of domestic violence sufficient to trigger the presumption."[661] The majority's interpretation would require that a third person be awarded custody of the child unless a parent could overcome the presumption by clear and convincing evidence.[662]

Moreover, Justice Maring determined that neither the 1997 amendments to section 14-09-06.2(1)(j), nor the legislative history of the statute, indicated a departure from the standard produced in *Krank*.[663] In fact, Justice Maring pointed out that the North Dakota Supreme Court has followed the *Krank* standard in many cases since the enactment of the 1997 amendments.[664] Thus, Justice Maring agreed with the district court in its application of the *Krank* standard.[665]

Chief Justice VandeWalle concurred with both the majority and the dissent.[666] Chief Justice VandeWalle concurred with the majority to remand the case for specific findings.[667] However, Chief Justice VandeWalle concurred with the dissent as to the domestic violence standard.[668]

657. *Id.* ¶¶ 19-21.
658. *Id.* ¶ 23 (Maring, J., dissenting).
659. *Id.*
660. *Id.* ¶ 24.
661. *Id.* at 559-60.
662. *Id.*
663. *Id.* ¶¶ 25-26, 718 N.W.2d at 560.
664. *Id.* ¶ 28, 718 N.W.2d at 561.
665. *Id.* ¶ 29.
666. *Id.* ¶ 35-36, 718 N.W.2d at 562-63 (VandeWalle, C.J., concurring).
667. *Id.* ¶ 35, 712 N.W.2d at 562.
668. *Id.* ¶ 36, 712 N.W.2d at 563.

FAMILY LAW—DIVORCE—CHILD CUSTODY AND VISITATION

WILSON V. IBARRA

In *Wilson v. Ibarra*,[669] Esteban Ibarra (Ibarra) appealed from an amended judgment and decree that denied him visitation with his minor daughter.[670] The North Dakota Supreme Court reversed Ibarra's denial of visitation and remanded for sufficiently detailed findings.[671] In particular, the court remanded for "more detailed findings to establish that any form of visitation would result in physical or emotional harm to the child."[672] Alternatively, the court recommended that the district court order supervised visitation before terminating all visitation.[673] Justice Crothers wrote a dissenting opinion.[674]

Ibarra and Ruth Jewel Wilson (Wilson) were married in Wahpeton, North Dakota, on May 13, 2000, approximately eight months after their daughter was born.[675] Throughout their relationship, Ibarra was an alcoholic and physically abused Wilson.[676] Wilson brought several criminal charges against Ibarra for the physical abuse.[677] In December 2000, Wilson left the parties' home with their daughter and Ibarra's minor son.[678] In October 2002, Wilson filed an action for divorce against Ibarra.[679] Prior to the divorce being granted, Ibarra moved to California in December 2002, without leaving a forwarding address.[680] Ultimately, in February 2003, the district court entered a default divorce judgment and decree, which awarded Wilson custody of their daughter, ordered Ibarra to pay child support, and granted Ibarra "reasonable visitation."[681] Ibarra returned to North Dakota in October 2004 with his new wife.[682] In November 2004, Ibarra made his first child support payment.[683] Ibarra only saw the child once during a chance meeting in February 2005.[684] Ibarra entered into anger management

669. 2006 ND 151, 718 N.W.2d 568.
670. *Wilson*, ¶ 1, 718 N.W.2d at 569.
671. *Id.*
672. *Id.* ¶ 15, 718 N.W.2d at 573.
673. *Id.*
674. *Id.* ¶ 18, 718 N.W.2d at 573 (Crothers, J., dissenting).
675. *Id.* ¶ 2, 718 N.W.2d at 569.
676. *Id.*
677. *Id.*
678. *Id.*
679. *Id.* ¶ 3.
680. *Id.*
681. *Id.* ¶ 3, 718 N.W.2d at 570.
682. *Id.* ¶ 4.
683. *Id.* ¶ 5.
684. *Id.*

therapy and underwent alcohol evaluations.[685] Ibarra's last contact with the child had occurred in 2002.[686]

In April 2005, Ibarra moved to amend the divorce judgment and decree in order to set a visitation schedule with the child.[687] Wilson responded with a motion to deny Ibarra's request and to amend the divorce judgment to either completely deny Ibarra visitation with their daughter or grant Ibarra only supervised visitation.[688]

Following a hearing, the district court denied Ibarra's request and granted Wilson's motion to deny Ibarra any visitation.[689] Pursuant to sections 14-07-17 and 27-20-02 of the North Dakota Century Code, the district court determined Ibarra had abandoned the child and that any form of visitation would be "likely to endanger her physical or emotional health and well being."[690] The district court provided eight separate findings on which its decision was based.[691]

On appeal, the North Dakota Supreme Court concluded that the district court's findings did not "demonstrate in detail the physical or emotional harm to the child resulting from any form of visitation."[692] Moreover, the court stated that the district court provided "no nexus or link demonstrating how Ibarra's past problems would result in physical or emotional harm to the child at this time."[693]

The governing standard in such visitation disputes is "whether allowing visitation would physically or emotionally harm the child."[694] The court discussed that while state statutes and case law "clearly recognize that visitation with a noncustodial parent may be curtailed or eliminated entirely if it is likely to endanger the child's physical or emotional health,"[695] the primary purpose of such visitation is to promote the best interests of the child and limitations on visitation must be based on a preponderance of the evidence.[696] The court reiterated that "[a]bsent a detailed demonstration of

685. *Id.*
686. *Id.* ¶ 4.
687. *Id.* ¶ 6.
688. *Id.*
689. *Id.* ¶ 7.
690. *Id.*
691. *Id.* at 570-71.
692. *Id.* ¶ 14, 718 N.W.2d at 573.
693. *Id.*
694. *Id.*
695. *Id.* ¶ 10, 718 N.W.2d at 571 (quoting Litoff v. Pinter, 2003 ND 172, ¶ 12, 670 N.W.2d 860, 862).
696. *Id.*

harm, such a restriction appears punitive."[697] Moreover, the court determined that the district court's decision was punitive because it did not provide for any possibility of future visitation regardless of a change in circumstances.[698] Ultimately, the North Dakota Supreme Court held that the district court did not make sufficient findings to support a total termination of Ibarra's visitation.[699]

Justice Crothers dissented.[700] Justice Crothers's dissent is based on his belief that the district court had made sufficient findings and conclusions for the court to affirm a total termination of Ibarra's visitation.[701] Justice Crothers criticized the majority for moving "the goalposts out of range by ignoring the applicable preponderance of evidence burden of proof," rather than accepting the district court's conclusion and findings of fact.[702] Specifically, Justice Crothers charged the North Dakota Supreme Court with substituting its judgment for that of the district court to achieve supervised visitation for Ibarra.[703]

INSURANCE LAW—AUTOMOBILE INSURANCE—UNINSURED OR UNDERINSURED MOTORIST COVERAGE

HASPER V. CENTER MUTUAL INSURANCE COMPANY

In *Hasper v. Center Mutual Insurance Company*,[704] Jason Hasper brought an action against his automobile insurer, Center Mutual Insurance Company (Center Mutual), to recover underinsured motorist (UIM) benefits after settling a tort claim without Center Mutual's consent.[705] The district court entered summary judgment in favor of Center Mutual and Hasper appealed.[706] The North Dakota Supreme Court held that an insurer must demonstrate actual prejudice resulting from lack of notice of tort settlement, that a tortfeasor's assets are material to determination of actual prejudice,

697. *Id.* ¶ 11, 718 N.W.2d at 572 (quoting Johnson v. Schlotman, 502 N.W.2d 831, 835 (1993)).
698. *Id.* ¶ 14, 718 N.W.2d at 573.
699. *Id.*
700. *Id.* ¶ 18, 718 N.W.2d at 573.
701. *Id.*
702. *Id.* ¶ 23, 718 N.W.2d at 574.
703. *Id.*
704. 2006 ND 220, 723 N.W.2d 409.
705. *Hasper*, ¶ 1, 723 N.W.2d at 410-11.
706. *Id.* ¶ 4, 723 N.W.2d at 411.

and here the factual issues regarding prejudice precluded summary judgment.[707]

In November 2000, Hasper was injured in a motor vehicle accident in South Dakota.[708] Hasper was a passenger in the vehicle and the driver was his cousin, Chris Goehring.[709] In January 2001, Goehring's insurer, Allied Insurance (Allied), informed Hasper that Goehring's policy limit was $100,000.[710] Hasper later received the $100,000 policy limit and executed a release from all claims arising out of the accident.[711] Hasper lived with his parents and his parents had an automobile insurance policy from Center Mutual that provided UIM coverage and personal injury protection (PIP) coverage.[712] Hasper accepted the $100,000 settlement from Allied without contacting or notifying Center Mutual.[713] In April 2001, Hasper's attorney sent a letter to Center Mutual indicating Hasper's intentions to claim UIM benefits and release the other driver, Chris Goehring, unless Center Mutual preserved its subrogation claim against Goehring by substituting its own check for the $100,000 that Hasper received.[714] Center Mutual refused to substitute its check because Hasper had previously signed a release and accepted the policy limits from Allied.[715]

In May 2002, Hasper sued Center Mutual in order to recover UIM and PIP benefits.[716] The district court ruled that Hasper was prohibited from seeking UIM benefits because he failed to provide prior notice of the settlement to Center Mutual.[717] The district court dismissed the UIM claim and the PIP claim went to district.[718] In July 2005, the district court awarded Hasper damages against Center Mutual under his PIP claim.[719] Hasper appealed the district court's dismissal of his UIM claim against Center Mutual.[720]

Under section 26.1-40-15.3(1) of the North Dakota Century Code, the insured is entitled to UIM coverage from his insurer that is equal to the

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707. *Id.* ¶¶ 16, 18, 19, 723 N.W.2d at 416-17.
708. *Id.* ¶ 2, 723 N.W.2d at 411.
709. *Id.*
710. *Id.*
711. *Id.*
712. *Id.* ¶ 3.
713. *Id.*
714. *Id.*
715. *Id.*
716. *Id.* ¶ 4.
717. *Id.*
718. *Id.*
719. *Id.*
720. *Id.*

uninsured motorist coverage.[721] The UIM coverage must pay compensatory damages to the insured because the insured would be entitled to such coverage from the owner or operator of the underinsured vehicle.[722] If a UIM insured settles with the underinsured tortfeasor, the insured must provide written notice of the proposed settlement to the UIM insurer.[723] If the insured fails to give prior written notice, its UIM insurer may exclude coverage.[724] However, once the UIM insurer has received notice of the proposed settlement, the insurer must substitute its own funds for the settlement to preserve its subrogation rights against the underinsured tortfeasor.[725] In this case, Center Mutual's provisions corresponded to North Dakota's statutory provisions on UIM coverage.[726]

Under state law and Center Mutual's policy provisions, the insured should promptly notify the UIM carrier of a proposed settlement with the tortfeasor and the tortfeasor's insurer.[727] Then, the UIM insurer has thirty days to decide whether there is a reasonable possibility of collecting more than the policy limits from the underinsured tortfeasor.[728] The crucial question was whether Hasper's acceptance of the settlement and release, without providing prior notice to Center Mutual, "adversely affect[ed] the rights of the insurer."[729]

The district court found that Center Mutual was adversely affected by Hasper's settlement because Center Mutual could have sought a judgment against Goehring that could have been collected in the future.[730] Furthermore, the district court expanded its ruling and held that the failure of the insured to provide prior notice of a settlement always, as a matter of law, adversely affects the UIM insurer because the insurer loses its right to pursue a subrogation claim, which might be collectable some time in the future.[731]

This was a case of first impression and the North Dakota Supreme Court evaluated rulings in other jurisdictions to determine whether consent-

721. *Id.* ¶ 7, 723 N.W.2d at 412.
722. *Id.* ¶ 7.
723. *Id.*
724. *Id.*
725. *Id.*
726. *Id.* ¶ 8.
727. *Id.* ¶ 9, 723 N.W.2d at 413.
728. *Id.*
729. *Id.* ¶ 10 (citing N.D. CENT CODE § 26.1-40-15.6(1) (2002)). Section 26.1-40-15.6(1) states in part, "The insurer is not bound by any agreement or settlement without its prior knowledge and consent." N.D. CENT CODE § 26.1-40-15.6(1) (2002).
730. *Id.*
731. *Id.*

to-settle or notice-of-settlement clauses require actual prejudice to be enforced.[732] A majority of state courts have held that the insurer bears the burden of establishing that an unauthorized settlement had an actual adverse effect on the insurer's interests.[733] Under the majority view, if the consent-to-settle clause is enforced without a showing of actual prejudice, the result is forfeiture of the UIM coverage and the insurer receives a windfall while the deserving insured person is deprived of recovery.[734] Therefore, the North Dakota Supreme Court determined that if the insurer is required to demonstrate actual prejudice, an appropriate balance is created between protecting an insurer's interests and avoiding forfeiture of coverage when an insurer has not been harmed.[735]

The court found that a UIM insurer must prove that it suffered actual prejudice to deny coverage when the insured's fails to notify the insurer of a proposed settlement with the tortfeasor.[736] The court held that the determination of whether an insurer has been adversely affected or prejudiced by an unauthorized settlement is a question of fact that is generally inappropriate for summary judgment.[737] The court found that the district court erred in finding the tortfeasor's assets immaterial. The court stated that particular factors should have been evaluated by the district court in determining whether summary judgment was met: (1) the amount of tortfeasor's assets; (2) the likelihood that the insurer would recover via subrogation; (3) the amount of the insured's damages; and, (4) the expenses and risks involved in litigating the insured's cause of action.[738] Because the district court did not analyze these factors, it applied an incorrect legal standard.[739]

The North Dakota Supreme Court found that the district court improperly granted summary judgment to dismiss Hasper's UIM claim against Center Mutual.[740] Additionally, the district court failed to apply the correct factors to determine whether Center Mutual suffered actual prejudice by Hasper's settlement and release.[741] Therefore, the court reversed and remanded the case for a determination of actual prejudice under the proper legal standard.[742]

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732. *Id.* ¶ 11, 723 N.W.2d at 413-14.
733. *Id.*
734. *Id.* ¶ 12, 723 N.W.2d at 414-15.
735. *Id.* ¶ 14, 723 N.W.2d at 415.
736. *Id.* ¶ 16.
737. *Id.* ¶ 17.
738. *Id.* ¶ 18.
739. *Id.* ¶ 19.
740. *Id.*
741. *Id.*
742. *Id.*

INSURANCE LAW—AUTOMOBILE INSURANCE—UNINSURED OR UNDER-INSURED MOTORIST COVERAGE

SANDBERG V. AMERICAN FAMILY INS. CO.

In *Sandberg v. American Family Insurance Co.*,[743] Laura Sandberg (Sandberg) appealed from a grant of summary judgment dismissing her action for uninsured motorist coverage against American Family Insurance Company (American Family), her uninsured motor vehicle insurer.[744] The North Dakota Supreme Court concluded that American Family was not adversely affected by Sandberg's settlement with Workforce Safety and Insurance (WSI).[745] Moreover, the court concluded that disputed issues of material fact did exist regarding American Family's statutory right to reduce damages payable to Sandberg for uninsured motorist coverage by the amount paid or payable to her for workers' compensation benefits, thus reversing and remanding.[746] Justice Crothers specially concurred with the majority's opinion.[747]

In April 1999, Sandberg was injured in a motor vehicle-pedestrian accident, during the course of her employment, while attempting to stop a suspected shoplifter from leaving the Wal-Mart parking lot in a motor vehicle.[748] Neither the driver nor the vehicle was covered under motor vehicle liability insurance.[749] Consequently, Sandberg initially received benefits for her injury from WSI; however, WSI subsequently determined she had misrepresented her claim, and ordered Sandberg to repay $4108.33 in previously paid benefits and to forfeit all future benefits in connection with her claim.[750] In April 2001, without obtaining American Family's consent, Sandberg entered into a settlement agreement with WSI in which she agreed to "a 'full and complete settlement' of all future workers' compensation benefits and WSI agreed not to pursue collection of any previously paid benefits unless Sandberg received a settlement in a third-party action."[751] Also under the settlement agreement, WSI "'retain[ed] its subrogated interest in [Sandberg's] third party action for all benefits paid on [her] claim,'" pursuant to section 65-01-09 of the North Dakota Century

743. 2006 ND 198, 722 N.W.2d 359.
744. *Sandberg*, ¶ 1, 722 N.W.2d at 360.
745. *Id.*
746. *Id.*
747. *Id.* ¶ 19, 722 N.W.2d at 364 (Crothers, J., concurring).
748. *Id.* ¶ 2, 722 N.W.2d at 360.
749. *Id.* ¶ 3, 722 N.W.2d at 361.
750. *Id.* ¶ 2, 722 N.W.2d at 360.
751. *Id.*

Code.[752] Thereafter, Sandberg sought uninsured motorist coverage under her policy with American Family.[753]

When American Family denied her claim, Sandberg sued American Family for breach of contract and bad faith.[754] In granting American Family's motion for summary judgment, the district court determined that Sandberg was not eligible for uninsured motorist coverage because she had not obtained American Family's consent to the settlement with WSI and the settlement adversely affected American Family.[755]

On appeal, Sandberg argued that her settlement with WSI did not preclude her from pursuing a claim for uninsured motorist coverage because WSI is not a person who may be legally liable for her injuries.[756] Sandberg also claimed that her settlement with WSI did not adversely affect American Family under section 26.1-40-15.6(7) of the North Dakota Century Code.[757] American Family argued that Sandberg's "settlement with WSI adversely affected its rights because WSI would be liable for future medical expenses, disability benefits, and potentially a permanent impairment award."[758]

The applicable segment of American Family's policy with Sandberg allowed the "limits of her uninsured coverage to be reduced by '[a] payment made or amount payable because of bodily injury under any workers' compensation or disability benefits law or any similar law.'"[759] Additionally, the policy provided that an insured would not be eligible for uninsured coverage due to bodily injury when the insured enters into a settlement agreement when American Family did not consent to the agreement.[760] However, the North Dakota statutory provisions for uninsured coverage, contained in sections 26.1-40-15.1 through 26.1-40-15.7 of the North Dakota Century Code, are more restrictive than American Family's policy and require that an unauthorized settlement adversely affect the insurer.[761] Since an insurer may provide coverage terms more favorable, but not less favorable, to its insured than are required by statute, the court determined

752. *Id.* ¶ 2, 722 N.W. 2d at 360-61.
753. *Id.* ¶ 3, 722 N.W.2d at 361
754. *Id.*
755. *Id.*
756. *Id.* ¶ 5.
757. *Id.*; *see* N.D. CENT. CODE § 26.1-40-15.6(7) (2006) (providing that uninsured coverage does not apply when the insured, without the written consent of the insurer, makes any agreement or settlement with any person who may be legally liable for the insured's bodily injury, sickness, disease, or death if the agreement adversely affects the rights of the insurer).
758. *Sandberg*, ¶ 11, 722 N.W.2d at 362.
759. *Id.* ¶ 6, 722 N.W.2d at 361.
760. *Id.*
761. *Id.* ¶¶ 7-8, 722 N.W.2d at 361-62.

that the issues on appeal are controlled by the statutory language and not American Family's policy.[762]

Section 26.1-40-15.4(1)(a) of the North Dakota Century Code provides that an insurer has a statutory right to reduce an insured's damages for uninsured motorist coverage by the amount "paid or payable" to the insured under any workers' compensation law.[763] However, section 26.1-40-15.4(1) does not reduce the amount of available coverage for uninsured motorist coverage because it relates to how damages are dealt with in determining what amount the insurance company must pay.[764] Similarly, the only purpose of section 26.1-40-15.4(1) is to avoid any potential duplication for recovery of the same loss.[765] Here, the court construed "payable" to mean "any workers' compensation benefits Sandberg would have been paid had WSI not ordered her to forfeit all future benefits in connection with her claim."[766] Ultimately, the North Dakota Supreme Court concluded "an insured's unauthorized settlement with WSI does not adversely affect the insurer because, notwithstanding the settlement with WSI, the insurer retains his statutory right to reduce the damages payable to the insured for uninsured coverage by the amount paid or payable to the insured under workers' compensation law."[767]

The North Dakota Supreme Court found it did not need to decide whether WSI was a "person who may be legally liable" for Sandberg's injuries under section 26.1-40-15.6(7) because the court concluded that American Family had not been adversely affected by Sandberg's settlement with WSI.[768] Therefore, the court found that American Family's right to reduce its damages payable to Sandberg for uninsured coverage by any amount paid or payable to her by WSI was not adversely affected by the settlement.[769]

The North Dakota Supreme Court reversed the summary judgment and remanded for further proceedings regarding the extent of Sandberg's injuries caused by the accident and what amount of workers' compensation benefits Sandberg would have been paid.[770] The North Dakota Supreme Court further provided that if Sandberg is awarded damages at trial for past

762. *Id.* ¶ 8, 722 N.W.2d at 362 (citing N.D. CENT. CODE § 26.1-40-15.7(5) (2006)).
763. *Id.* ¶ 12, 722 N.W.2d at 363.
764. *Id.* (citing DeCoteau v. Nodak Mut. Ins. Co., 2000 ND 3, ¶ 13, 603 N.W.2d 906, 911).
765. *Id.* (citing *DeCoteau*, ¶ 13, 603 N.W.2d at 912).
766. *Id.* ¶ 13.
767. *Id.* ¶ 14, 722 N.W.2d at 363-64.
768. *Id.* at 364.
769. *Id.*
770. *Id.* ¶ 15.

and future losses, American Family can then request that the district court reduce those damages by the amounts which would be paid or payable under the workers' compensation statutes.[771]

Justice Crothers specially concurred with the majority's conclusions.[772] However, he wrote separately to express concern regarding the excessive scope and resulting dicta of particular portions of the majority's opinion.[773] Therefore, Justice Crothers concurred in the majority's conclusions only, and not in its method of reaching the conclusions.[774]

INSURANCE LAW—CONTRACTUAL LIABILITY

ACUITY V. BURD & SMITH CONSTR., INC.

ACUITY, a mutual insurance company, appealed a summary judgment decision that obligated ACUITY, to indemnify its insured, Burd & Smith Construction, Inc. (Burd & Smith) under a commercial general liability insurance (CGL) policy.[775] More specifically, the summary judgment required ACUITY to indemnify Burd & Smith for damages to an apartment owned by Chad and Rebecca Caillier.[776] The North Dakota Supreme Court held that the "CGL policy did not provide coverage to repair or replace a defective roof on the apartment building, but did provide coverage for other property damage to the apartment building."[777]

The Cailliers brought suit against Burd & Smith and Mark Ehley seeking to recover for damage to an apartment building they owned in Fargo.[778] The Cailliers alleged that they had hired Burd & Smith as a general contractor and Ehley as a subcontractor or employee of Burd & Smith to replace their roof.[779] The Cailliers specifically claimed that Ehley had failed to properly secure the roof during the course of repairs, which resulted in water damage to the building from rainstorms.[780] The Cailliers asserted claims of negligence and breach of contract against Burd & Smith and Ehley for replacement of the roof.[781] Moreover, "two building tenants

771. *Id.*
772. *Id.* ¶ 19 (Crothers, J., concurring).
773. *Id.*
774. *Id.* ¶ 21, 722 N.W.2d at 365.
775. Acuity v. Burd & Smith Constr., Inc., 2006 ND 187, ¶ 1, 721 N.W.2d 33, 35.
776. *Id.*
777. *Id.*
778. *Id.* ¶ 29, 721 N.W.2d at 42-43.
779. *Id.* ¶ 2, 721 N.W.2d at 35.
780. *Id.*
781. *Id.*

claimed they sustained property loss as a result of water damage and also sued Burd & Smith and Ehley."[782]

Burd & Smith was insured under a CGL policy issued by ACUITY during the time that it was working on Cailliers' roof.[783] The underlying action proceeded to trial and the district court entered a directed verdict, finding that Ehley had breached his contract with the Cailliers.[784] The jury found that Ehley was not acting as Burd & Smith's employee or as its agent at the time he entered into his contract with the Cailliers.[785] However, the jury did find that Burd & Smith had ratified the contract between Ehley and the Cailliers, and awarded the Cailliers $370,000 in damages.[786] Following the jury verdict, the district court concluded that the jury's finding that Burd & Smith had ratified Ehley's contract with the Cailliers was "manifestly contrary to the greater weight of the evidence" and granted a new trial.[787]

While the underlying action remained pending, ACUITY commenced this action for declaratory judgment seeking a determination that it was not obligated to defend or indemnify Burd & Smith in connection with the underlying action.[788] ACUITY brought a motion for summary judgment, seeking a determination that the liability policy under which Burd & Smith was insured did not provide coverage for the Cailliers' damages.[789] While the motion for summary judgment was pending, the Cailliers and Burd & Smith entered into a settlement in which "Burd & Smith consented to a judgment of $412,788.45 against it, on the condition that any recovery would be collected only from the proceeds of the CGL policy."[790]

The district court denied ACUITY's summary judgment motion and granted the Cailliers summary judgment, finding that ACUITY must indemnify Burd & Smith for Burd & Smith's responsibility for damages to the apartment building.[791] The district court ruled there was coverage under the insuring provisions of the CGL policy because the Cailliers' claim against Burd & Smith in the underlying action constituted an

782. *Id.*
783. *Id.* ¶ 3.
784. *Id.*
785. *Id.*
786. *Id.*
787. *Id.*
788. *Id.* ¶ 4.
789. *Id.*
790. *Id.* at 35-36.
791. *Id.* ¶ 5, 721 N.W.2d at 36.

"'occurrence.'"[792] The district court decided that the "contractual liability" exclusion was inapplicable because Burd & Smith's liability was not an assumed contract under the language of that exclusion.[793] The district court also decided that two "damage to property" exclusions were ambiguous, and construed them against ACUITY so that Burd & Smith were not excluded coverage for damages to the apartment building.[794]

On appeal, the North Dakota Supreme Court reviewed whether the district court properly granted summary judgment by reviewing the interpretation of ACUITY's CGL policy with Burd & Smith, to determine if there was coverage.[795] First, the court stated that a CGL policy was not intended to insure business risk nor the insured's work itself, but rather it was intended to insure the consequential damages that stem from that work.[796] As a result, the court stated that breach of contract claims may be within the scope of coverage of a CGL policy and that the policy could provide coverage for tort claims, contact claims, and claims of statutory violations as long as requisite accidental occurrence and property damage were present.[797]

The court looked to the rulings of the Wisconsin Supreme Court to determine what types of claims constitute "occurrences" under the insuring provisions of a CGL policy.[798] The Wisconsin Supreme Court held that a CGL's policy language did not support a distinction between a tort and a

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792. *Id.* The policy provided that the insurance applied "[t]o bodily injury or property damage only if: (a) The bodily injury or property damage is caused by an occurrence that takes place in the coverage territory." *Id.* ¶ 8, 721 N.W.2d at 37.

793. *Id.* ¶ 5, 721 N.W.2d at 36. ACUITY's policy concerning contractual liability provided in part:

> Bodily injury or property damage for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages: (1) That the insured would have in the absence of the contract or agreement; or (2) Assumed in a contract or agreement that is an insured contract, provided the bodily injury or property damage occurs subsequent to the execution of the contract or agreement.

Id. ¶ 9, 721 N.W.2d at 37.

794. *Id.* ¶ 5, 721 N.W.2d at 36-37. The two property exclusions read as follows:

> (5) That particular part of the real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the property damage arises out of those operations; or (6) That particular part of any property that must be restored, repaired or replaced because your work was incorrectly performed on it.

Id. ¶ 9, 721 N.W. 2d at 37.

795. *Id.* ¶¶ 6, 7, 721 N.W.2d at 36.

796. *Id.* ¶¶ 11-12, 721 N.W.2d at 37 (citing Grinnell Mut. Reinsurance Co. v. Lynne, 2004 ND 166, ¶ 9, 686 N.W.2d 118, 122).

797. *Id.* ¶ 12, 721 N.W.2d at 38.

798. *Id.* ¶ 13 (citing American Family Mut. Ins. Co. v. American Girl, Inc., 2004 WI 2, ¶¶ 37-49, 673 N.W.2d 65, 75-79).

contract for purposes of deciding whether a loss was within an initial grant of coverage and an occurrence was not defined by the legal category of the claim.[799] Upon that determination, the North Dakota Supreme Court rejected ACUITY's claim that breach of contract claims were not per se within the scope of coverage of a CGL policy.[800]

As the court explained, the critical issue was whether the property damage to the apartment building was caused by an "occurrence."[801] ACUITY's CGL policy defined an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions," but did not define "accident."[802] Therefore, the court relied on precedent, which defined the word accident as "happening by chance, unexpectedly taking place, not according to the usual course of things."[803] Combining the definitions of "accident" and "occurrence" within the context of a CGL policy, the court stated that when defective workmanship results in damage only to the insured's work product itself, there is no accidental occurrence.[804] On the other hand, when the faulty workmanship causes bodily injury or property damage to something other than the insured's work product, and unintended and unexpected event has occurred and coverage does exist.[805] Therefore, the court held that the Cailliers' claim alleging damages to the interior of the apartment building was the type of "occurrence" covered by ACUITY's policy.[806]

Additionally, ACUITY argued that its two property damage exclusions unambiguously excluded coverage for damages against Burd & Smith in the underlying action.[807] The court found that the exclusions were not ambiguous when construed in their entirety.[808] It disagreed with ACUITY's argument that the entire apartment building is the insured's work product or project, because that argument ignored the limiting language "particular part" of property used in two of the exclusions.[809] The court looked to dictionary definitions of the words "particular" and "part" to determine that

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799. *Id*.

800. *Id*. ¶ 13, 721 N.W.2d at 39.

801. *Id*. ¶ 14.

802. *Id*.

803. *Id*. (citing Wall v. Penn. Life Ins. Co., 274 N.W.2d 208, 216 (N.D. 1979); Kasper v. Provident Life Ins. Co., 285 N.W.2d 548, 553 (N.D. 1979)).

804. *Id*. ¶ 15 (citing Auto Owners Ins. Co. v. Home Pride Cos., Inc., 684 N.W.2d 571, 578 (Neb. 2004)).

805. *Id*. (citing *Auto-Owners*, 684 N.W.2d at 578).

806. *Id*. ¶ 17, 721 N.W.2d at 40.

807. *Id*. ¶ 20.

808. *Id*. ¶ 26, 721 N.W.2d at 41.

809. *Id*.

the exclusion only applied to the roof because the contract was for the replacement of the roof.[810]

The North Dakota Supreme Court held that any damages for repair or replacement of a defective roof are excluded from coverage under the CGL policy, but damages to the interior of the apartment building are not excluded.[811] Therefore, the court modified the district court decision to the extent so that the Cailliers can claim damages to the interior of the apartment building, but the damages to the roof are excluded.[812]

LANDLORD AND TENANT—RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD

LIVINGGOOD V. BALSDON

In *Livinggood v. Balsdon*,[813] a landlord appealed the district court's decision to award treble damages, plus court costs, to the tenant for the landlord's forcible ejection of the tenant from farmland he was leasing.[814] The North Dakota Supreme Court affirmed the district court's decision.[815] The court held that the district court did not abuse its discretion in not holding a hearing on remand regarding the issue of treble damages and found a sufficient basis for forcible eviction under section 32-03-29 of the North Dakota Century Code.[816]

Danny Livinggood (Livinggood) and DeWayne Balsdon entered into a five-year farm lease in February 2003 and Livinggood farmed the land, made an advanced lease payment, and prepared the land throughout that year.[817] In April 2004, DeWayne Balsdon sold the farmland to his nephew Aaron Balsdon (Balsdon).[818] When Livinggood tried to farm the land in the spring of 2004, Balsdon interfered and claimed that Livinggood's lease was invalid.[819] Balsdon twice drove in front of Livinggood's tractor and threatened to call law enforcement in order to prevent Livinggood from farming the land.[820] Livinggood sued Balsdon to enforce the lease and

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810. *Id.* at 41-42.
811. *Id.* ¶ 27, 721 N.W.2d at 42.
812. *Id.* ¶¶ 29-30, 721 N.W.2d at 42-43.
813. 2006 ND 215, 722 N.W.2d 716.
814. *Livinggood*, ¶¶ 1, 3, 722 N.W.2d at 717-18.
815. *Id.* ¶ 6, 722 N.W.2d at 718.
816. *Id.*
817. *Id.* ¶ 2, 722 N.W.2d at 717.
818. *Id.*
819. *Id.*
820. *Id.*

requested damages in the form of lost profits for Balsdon's failure to enforce the lease or triple damages for Balsdon's forcible exclusion of Livinggood from the leased land.[821]

The district court found that Livinggood held a valid lease to farm the land and awarded him $15,106.92 in lost profits.[822] The district court did not allow Livinggood to continue to farm the land because money damages were adequate compensation and it did not award triple damages for forcible exclusion from the property.[823] Livinggood appealed to the North Dakota Supreme Court, and in *Livinggood v. Balsdon*,[824] the North Dakota Supreme Court agreed that Livinggood was entitled to monetary damages rather than enforcement of the lease.[825] The court remanded the case because the district court failed to make findings on damages under the correct legal standard for forcible ejectment or exclusion of real property.[826] On remand, the district court evaluated testimony from the original proceeding and concluded that Balsdon forcibly ejected Livinggood.[827] The district court awarded Livinggood treble damages and determined the treble damage amount by using its original damage calculation of lost profits for one year, multiplying it by three, and then adding court costs.[828] In this case, Balsdon appealed the district court's award of treble damages.[829]

The first issue that the North Dakota Supreme Court evaluated on appeal was whether the district court should have held a hearing on remand.[830] Balsdon impliedly argued that the district court should have held a hearing on remand, while Livinggood argued that the district court has the discretion to either hold a hearing or not to hold a hearing because the North Dakota Supreme Court did not explicitly require that a hearing be held on remand.[831] The North Dakota Supreme Court stated that the district court had the discretion to hold a hearing on remand, based on evidence already before it or with additional evidence collected, and the trial court's decision would be reversed only upon an abuse of discretion.[832]

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821. *Id.*
822. *Id.*
823. *Id.*
824. 2006 ND 11, 709 N.W.2d 723.
825. *Livinggood*, ¶ 2, 722 N.W.2d at 717; *see also Livinggood*, ¶¶ 7-9, 709 N.W.2d at 725 (stating that Livinggood was not entitled to specific performance of the enforcing the lease, but was entitled to monetary damages).
826. *Id.*
827. *Id.* ¶ 3, 722 N.W.2d at 717-18.
828. *Id.*
829. *Id.*
830. *Id.* ¶ 5.
831. *Id.*
832. *Id.* (citing Kautzman v. Kautzman, 2000 ND 116, ¶ 7, 611 N.W.2d 883, 885).

The North Dakota Supreme Court originally remanded "with directions to consider the issue of treble damages" under the standard set forth in *Wegner v. Lubenow*[833] and section 32-03-29 of the North Dakota Century Code.[834] Neither section 32-03-29 of the North Dakota Century Code or *Wegner* requires a hearing.[835] In determining treble damages, the district court relied on testimony and the actions of the parties to derive the calculation of multiplying the one-year lost-profit figure by three.[836] Balsdon admitted in his brief that while he disagreed with the facts found by the district court, "there was a sufficient basis for the trial court to have found those facts from the evidence at trial."[837] Therefore, the court found that the district court did not abuse its discretion when it did not hold a hearing on remand.[838]

The second issue that the North Dakota Supreme Court evaluated on appeal was whether Balsdon forcibly ejected Livinggood from the farmland.[839] Balsdon argued that his actions did not amount to forcible ejectment because Livinggood failed to prove that he feared physical force.[840] Additionally, Balsdon asserted that Livinggood did not produce evidence that he was physically ejected from the farmland, so the treble damage award should not stand.[841] Livinggood claimed that he feared force from both Balsdon and law enforcement and that he removed himself from the property because of his fear.[842]

Section 32-03-29 of the North Dakota Century Code governs damage entitlements for a party who is forcibly ejected from real property.[843] The North Dakota Supreme Court interpreted section 32-03-29 to mean that a "district court must award treble damages if it concludes that one person forcibly ejected or excluded another from real property."[844] Relying on the two-step process laid out in *Wegner*, the court found that forcible ejectment from real property does not require actual physical force, if physical force is

833. 95 N.W. 442 (1903).
834. *Livinggood*, ¶ 6, 722 N.W.2d at 718 (citing Livinggood v. Balsdon, 2006 ND 11, ¶ 11, 709 N.W.2d 723, 726).
835. *Id.*
836. *Id.*
837. *Id.*
838. *Id.*
839. *Id.* ¶ 7.
840. *Id.*
841. *Id.*
842. *Id.*
843. *Id.* ¶ 9
844. *Id; see also* N.D. CENT. CODE § 32-03-29 (2006).

present and threatened and if it is justly to be feared.[845] In other words, a plaintiff must have reason to believe that he would be subject to the application of physical force if disobeyed the verbal commands.[846] Also, in an attempt to clarify the standard, the court limited the definition of force on which Balsdon previously relied.[847]

The North Dakota Supreme Court determined that "the presence and result of the threat rather than its form of delivery controls" in finding whether a forcible ejectment existed.[848] Because Balsdon came onto the farmland and twice drove in front of Livinggood's tractor, claimed that Livinggood's lease was invalid, and threatened to call law enforcement, Balsdon removed himself from the property.[849] Therefore, the North Dakota Supreme Court found that Balsdon forcibly ejected Livinggood from the leased land.[850] Finally, the court found that there was a sufficient basis for the facts that the district court used to calculate the treble damages figure, so the district court's findings of fact were not clearly erroneous.[851] Ultimately, the North Dakota Supreme Court affirmed the judgment of the district court.[852]

TORT—NEGLIGENCE—RECREATIONAL USE IMMUNITY

LEET V. CITY OF MINOT

In *Leet v. City of Minot*,[853] Charles and Jane Leet appealed the district court's grant of summary judgment, which dismissed the complaint against the City of Minot (Minot) and awarded costs and disbursements to

845. *Livinggood*, ¶ 10, 722 N.W.2d at 719. *Wegner* outlined a two-step process for determining forcible ejectment: (1) the district court must determine whether there was sufficient evidence for the party to experience fear and whether that fear caused the party to leave the property; and (2) upon finding forcible ejectment, the court shall apply damages, pursuant to N.D. CENT. CODE § 32-03-29. Wegner v. Lubenow, 95 N.W. 442, 446 (N.D. 1903).

846. *Livinggood*, ¶ 10, 722 N.W.2d at 719.

847. *Id.* In earlier proceedings, Balsdon relied on the definition of force in Helgeson v. Locken, 130 N.W.2d 573 (N.D. 1964). The *Helgeson* Court permitted forcible entry to include "circumstances which would naturally inspire fear." *Id.* at 575. The *Livinggood* Court determined that although the *Helgeson* clause fits in the *Wegner* standard when it is paired with the other terms of actual physical violence, it muddled the definition of force, so it limited the definition of force only in this case. *Livinggood*, ¶ 11, 722 N.W.2d at 720.

848. *Livinggood*, ¶ 13, 722 N.W.2d at 720-21.

849. *Id.* at 721.

850. *Id.*

851. *Id.* ¶ 17.

852. *Id.* ¶ 18.

853. 2006 ND 191, 721 N.W.2d 398.

Minot.[854] The North Dakota Supreme Court reversed and remanded the district court's grant of summary judgment to Minot.[855] In its reversal, the North Dakota Supreme Court held: (1) Minot was not precluded from raising the recreational use immunity as an affirmative defense for the first time in its summary judgment motion;[856] (2) the user's intent in entering the recreational property may be considered, but is not controlling;[857] and (3) Charles Leet's presence at the Minot Auditorium was for employment purposes, and not for "recreational use."[858] Justice Daniel J. Crothers concurred in part and dissented in part with the majority opinion.[859]

In May 2002, Charles Leet was working at the Minot Auditorium to set up a booth on behalf of his employer, Experience Works, for the Salute to Seniors event, which was taking place the following day.[860] While working, Charles Leet was injured when a curtain divider system fell and a pipe struck him on the head.[861] Minot owned, operated, and maintained the auditorium, and city employees had erected the curtain divider system.[862] In August 2003, the Leets brought suit against Minot alleging that the city negligently caused Charles's injuries.[863] It was undisputed that the purpose for Charles's presence at the auditorium was to work for his employer.[864] The district court granted Minot's summary judgment motion, finding that Minot was immune from liability of Charles's injuries.[865]

The Leets's first argument on appeal was that Minot was barred from raising the recreational immunity defense for the first time in a summary judgment motion, which was filed less than two months before trial.[866] Since recreational use immunity is generally recognized to be an affirmative defense, the failure to plead it will normally result in a waiver of the defense.[867] However, the North Dakota Supreme Court has held that North Dakota Rule of Civil Procedure 8(c) must be read in conjunction with North

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854. *Leet*, ¶ 1, 721 N.W.2d at 401.
855. *Id.* ¶¶ 22-23, 721 N.W.2d at 406-07.
856. *Id.* ¶ 10, 721 N.W.2d at 403.
857. *Id.* ¶¶ 18-19, 721 N.W.2d at 405-06.
858. *Id.* ¶ 21, 721 N.W.2d at 406.
859. *Id.* ¶ 25, 721 N.W.2d at 407 (Crothers, J., concurring).
860. *Id.* ¶ 2, 721 N.W.2d at 401 (majority opinion).
861. *Id.*
862. *Id.*
863. *Id.* ¶ 3.
864. *Id.* ¶ 21, 721 N.W.2d at 406.
865. *Id.* ¶ 3, 721 N.W.2d at 401.
866. *Id.* ¶¶ 4, 9, 721 N.W.2d at 401-03.
867. *Id.* ¶ 5, 721 N.W.2d at 401-02; *see* N.D. R. CIV. P. 8(c) (providing that "[i]n pleading to a proceeding pleading, a party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense").

Dakota Rule of Civil Procedure 15(a), which results in the district court having sound discretion to amend a pleading upon receipt of a motion.[868] Such a decision on a motion to amend a pleading will not be overruled on appeal unless the district court abused its discretion.[869] Here, the district court effectively granted a motion to amend by permitting the affirmative defense to be raised for the first time in Minot's motion for summary judgment.[870] The district court also found that the Leets had not alleged any prejudice, nor was prejudice apparent from the record.[871] Moreover, the Supreme Court of North Dakota affirmed that mere delay does not necessarily result in prejudice to the litigant.[872] Ultimately, the court concluded that the district court did not act in an arbitrary, unreasonable, or unconscionable manner when it allowed Minot to raise recreational use immunity as an affirmative defense for the first time in its summary judgment motion.[873]

The second issue addressed by the North Dakota Supreme Court on appeal was whether the district court erred in concluding that Charles Leet was using the auditorium for a recreational purpose.[874] Minot argued that Charles's presence was recreational in purpose because he was preparing for an event that was recreational.[875] The interpretation and application of recreational use immunity statutes found in chapter 53-08 of the North Dakota Century Code is a question of law, which is fully reviewable on appeal.[876] The court utilized statutory construction and explored the chapter's legislative history in order to ascertain the North Dakota Legislature's intent behind recreational use immunity.[877] Cumulatively, the statutes

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868. *Leet*, ¶¶ 6-7, 721 N.W.2d at 402; N.D. R. CIV. P. 15(a), stating, in part:

> A party's pleading may be amended once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party's pleading may be amended only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Id.

869. *Leet*, ¶ 7, 721 N.W.2d at 402.
870. *Id.* ¶ 8.
871. *Id.*
872. *Id.* ¶ 9, 721 N.W.2d at 402-03.
873. *Id.* ¶ 10, 721 N.W.2d at 403.
874. *Id.* ¶ 11.
875. *Id.*
876. *Id.* ¶ 13.
877. *Id.*, ¶¶ 13-21, 721 N.W.2d at 403-06.

provide that where a landowner allows others to use his property without charging a fee, the landowner does not owe a duty to those persons entering the property for recreational purposes, including any activity engaged in for the purpose of exercise, relaxation, pleasure, or education, with a focus on the user's actions in entering the landowner's property.[878]

The North Dakota Supreme Court concluded that the district court erred in holding that the landowner's intent controlled when determining whether the recreational use immunity statutes applied.[879] However, the landowner's intent is not irrelevant.[880] Although the Court declined to adopt a specific test, it stated that "[t]he proper analysis in deciding whether to apply the recreational use immunity statues must include consideration of the location and nature of the injured person's conduct when the injury occurs."[881] The court concluded that "[a]lthough Minot's intent in opening its auditorium may have been for a public recreational use . . . as a matter of law Charles Leet's presence . . . was for employment purposes and not for a recreational purpose."[882]

Justice Crothers concurred with the majority's decision that the district court did not err in permitting Minot to raise the recreational use immunity defense.[883] However, Justice Crothers dissented from the majority's conclusion regarding summary judgment because he believed chapter 53-08 of the North Dakota Century Code barred the Leets's claim.[884] Justice Crothers argued that the majority "misread the statutes, misappl[ied] legislative intent, and reach[ed] a result antithetical to the Legislature's goal leading to adoption of recreational use immunity laws."[885] He maintained that intent of the Legislature in enacting the original recreational use immunity statutes was to encourage landowners to open their land for free

878. *Id.* ¶ 18, 721 N.W.2d at 405; *see* N.D. CENT. CODE § 53-08-01 (2005) (expanding the definition of "land" to include "all public and private land"); *Id.* § 53-08-02 (providing "an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition . . . to persons entering for such purposes"); *Id.* § 53-08-03 (explaining that a landowner who "directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby" assure that the premises are safe, confer on that person a duty of care, or incur liability for any injury to person or property); *Id.* § 53-08-05 (excluding limitations on liability for landowner conduct that is "willful and malicious" in failing to warn users of existing dangers, and limiting liability for landowners that charge a fee for the recreational use of the land).

879. *Leet*, ¶ 19, 721 N.W.2d at 406.

880. *Id.*

881. *Id.* ¶ 20.

882. *Id.* ¶ 21.

883. *Id.* ¶ 25, 721 N.W.2d at 407 (Crothers, J., concurring).

884. *Id.*

885. *Id.* ¶ 26.

recreational use by others.[886] Justice Crothers stated that even though the Legislature later expanded the statutes to include both private and public land, the intent remained the same.[887] He argued that while the Legislature has continually focused on the owner's purpose in making the property available for open access, the majority has focused on the user's use of the property.[888] As a result, Justice Crothers maintained that the majority thwarted the Legislature's goal by reducing, rather than expanding the land available for recreational use.[889]

WORKERS' COMPENSATION LAW—PROCEEDINGS TO SECURE COMPENSATION—ATTORNEY'S FEES

ROJAS V. WORKFORCE SAFETY AND INS.

In *Rojas v. Workforce Safety & Insurance*,[890] Mark Rojas appealed Workforce Safety and Insurance's (WSI) determination that awarded him only a portion of his attorney fees.[891] The North Dakota Supreme Court reversed and remanded for the district court to determine whether Rojas was entitled to reasonable attorney fees.[892] Justice Kapsner wrote a dissenting opinion.[893]

In January 2000, Rojas was working as a truck driver and injured his knee when he slipped on ice at a truck stop.[894] He submitted a claim for workers' compensation benefits, which WSI accepted and thereafter paid medical and disability benefits.[895] In May 2000, WSI mailed Rojas a Notice of Intention to Discontinue/Reduce Benefits (NOID) and terminated Rojas's benefits on May 31, 2000.[896] Rojas claimed that he never received the NOID and reapplied for disability benefits.[897] WSI denied his reapplication, so Rojas appealed.[898] On appeal, WSI found that Rojas failed to prove that he was entitled to additional disability benefits.[899]

886. *Id.* ¶ 27.
887. *Id.*
888. *Id.* ¶ 28.
889. *Id.* ¶ 31, 721 N.W.2d at 408.
890. 2006 ND 221, 723 N.W.2d 403.
891. *Rojas*, ¶ 1, 723 N.W.2d at 404.
892. *Id.* ¶ 18, 723 N.W.2d at 408.
893. *Id.* ¶ 21 (Kapsner, J., dissenting).
894. *Id.* ¶ 2, 723 N.W.2d at 404.
895. *Id.*
896. *Id.*
897. *Id.* ¶¶ 2-3.
898. *Id.* ¶ 3.
899. *Id.* ¶ 5.

Consequently, he appealed WSI's order to the district court, and the district court directed WSI to reinstate his benefits.[900] WSI appealed to the North Dakota Supreme Court.[901]

After the appeal was filed, Rojas requested that WSI pay $19,679.83 for attorney fees and costs.[902] WSI only paid Rojas $9,876.83 because it argued that sections 65-02-08 and 65-10-03 of the North Dakota Century Code limited the amount of recovery for attorney fees in WSI cases.[903] Therefore, Rojas petitioned the district court for payment of attorney fees under section 28-32-50 of the North Dakota Century Code, which permits reasonable attorney fees in civil judicial proceedings against administrative agencies.[904]

The district court affirmed WSI's determination of attorney fees.[905] The district court concluded that sections 65-02-08 and 65-10-03 supersede section 28-32-50 for actions involving WSI.[906] As interpreted by the district court, section 28-32-50 grants the district court the discretion to award attorney fees, while sections 65-02-08 and 65-10-03 mandate a limited award based upon a specific schedule of fees.[907] Therefore, the district court concluded that sections 65-02-08 and 65-10-03 are special provisions that control in cases involving WSI, and the sections could not be harmonized with the general provision of section 28-32-50 that applies to any civil judicial proceeding against an administrative agency.[908]

In order to determine which statutes govern attorney fees in WSI proceedings, the North Dakota Supreme Court examined the North Dakota Legislature's intent.[909] The court found that sections 65-02-08 and 65-10-03 provide an automatic award of attorney fees when an injured employee prevails against WSI, while section 28-32-50 represents a middle ground between an automatic award of attorney fees for prevailing against an administrative agency and an award of attorney fees for frivolous or meritless claims.[910]

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900. *Id.* ¶ 6.
901. *Id.*
902. *Id.* ¶ 7.
903. *Id.* at 405; *see* N.D. CENT. CODE § 65-02-08 (2005) (authorizing an award of attorney fees to a prevailing injured employee in WSI proceedings); N.D. CENT. CODE § 65-10-03 (2005) (authorizing an award of attorney fees to an injured party who prevails on judicial appeal).
904. *Id.* ¶ 8.
905. *Id.*
906. *Id.*
907. *Id.* ¶¶ 8, 12, 723 N.W.2d at 405, 406.
908. *Id.* ¶ 12, 723 N.W.2d at 406.
909. *Id.* ¶ 13.
910. *Id.* ¶ 14.

Section 28-32-50 does not grant an automatic award of attorney fees.[911] Instead, to obtain attorney fees under section 28-32-50, a party must: (1) prevail on the action; and (2) prove that the agency acted without substantial justification.[912] But the court found that the language of section 28-32-50 does not exclude actions against WSI.[913] Therefore, the court found that all three statutes apply to WSI claims in different situations and can harmoniously be read together.[914]

The court concluded that a prevailing injured employee is entitled to attorney fees in WSI actions under sections 65-02-08 and 65-10-03, up to the statutory limit.[915] However, when WSI denies or reduces the employee's benefits without substantial justification, section 28-32-50 is applicable to award the employee reasonable attorney fees.[916] The court noted that substantial justification means, "justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person."[917] The burden is on the agency to prove that it acted with substantial justification.[918]

The North Dakota Supreme Court reversed the district court's judgment, which stated that section 28-32-50 could not be applied in WSI cases.[919] The court remanded the case for the district court to determine whether WSI acted without substantial justification, which would warrant an award of additional attorney fees.[920]

Justice Kapsner wrote a dissenting opinion.[921] In her dissent, Justice Kapsner argued that Title 65 governs a specific and narrowly defined area of law than Chapter 28-32.[922] Therefore, she determined that sections 65-02-08 and 65-10-03 must control over 28-32-50 in cases involving WSI.[923] Furthermore, Justice Kapsner stated that the statutes could not be read together harmoniously because of the explicit language of sections 65-10-

911. *Id.*
912. *Id.*
913. *Id.* at 407.
914. *Id.*
915. *Id.* ¶ 16.
916. *Id.*
917. *Id.* ¶ 17 (quoting Aggie Investments GP v. Public Service Comm'n of N.D., 470 N.W.2d 805, 814 (N.D. 1991)).
918. *Id.* at 407-08.
919. *Id.* ¶ 18, 723 N.W.2d at 408.
920. *Id.*
921. *Id.* ¶ 21 (Kapsner, J., dissenting).
922. *Id.* ¶ 22.
923. *Id.*

03 and 65-02-08.[924] It was her belief that if the legislature had intended section 28-32-50 to be an exception to the maximum fee exclusions, the language of section 28-32-50 would not have stated, "a court may not order that the maximum fee be excluded."[925] Instead, a claimant can apply to WSI for a fee exceeding the maximum amount in cases of "clear and substantial merit."[926] Because Justice Kapsner believed that this may be the type of case with clear and substantial merit, she would affirm the district court's judgment.[927]

924. *Id*. ¶ 24, 723 N.W.2d at 409; *see* N.D. CENT. CODE § 65-10-03 (2005) (stating that a court may not order an award of attorney fees that exceed the maximum fee); N.D. CENT. CODE § 65-02-08 (2005) (stating that a hearing officer may not order "that the maximum fees be exceeded").

925. *Rojas*, ¶ 25, 723 N.W.2d at 409.

926. *Id*.

927. *Id*. ¶¶ 25-26.