# NORTH DAKOTA SUPREME COURT REVIEW

The North Dakota Supreme Court Review summarizes important decisions rendered by the North Dakota Supreme Court. The purpose of the Review is to indicate cases of first impression, cases of significantly altered earlier interpretations of North Dakota law, and other cases of interest. As a special project, Associate Editors assist in researching and writing the Review.[1] The following topics are included in the Review:



---

1. The North Dakota Law Review would like to thank the 2011-12 student articles editor, Jonathan Voigt for his hard work in writing these Supreme Court Reviews. A special thanks to Associate Editor Jennifer Albaugh for her work on the *In Re R.A.* review.

ATTORNEY AND CLIENT—THE OFFICE OF ATTORNEY—DISCIPLINARY PROCEEDINGS

*In re Disciplinary Action Against Lucas*

In *In re Disciplinary Action Against Lucas*,[2] the Disciplinary Board recommended Attorney A. William Lucas be publicly reprimanded and pay the costs of the disciplinary proceeding after the panel found that Lucas violated North Dakota Rule of Professional Conduct 4.2 by communicating with a represented party.[3] Counsel for the Disciplinary Board objected to the recommendation, contending Lucas should be suspended from the practice of law for thirty days.[4] Lucas argued the evidence did not support the conclusion that he violated Rule 4.2.[5] The North Dakota Supreme Court ruled clear and convincing evidence established Lucas violated the rule, and the court ordered Lucas be suspended from the practice of law for thirty days and pay the costs of the proceeding.[6] Chief Justice VandeWalle, joined by Surrogate Judge Graff, sitting in place of Justice Maring, dissented because the court did not adopt the hearing panel's sanction.[7]

The Disciplinary Board filed a petition for discipline against Lucas in April 2009, claiming Lucas violated Rule 4.2 by sending letters to his Condominium Association and members of its board about pending litigation while the Association was represented by counsel.[8] Lucas was a party to two cases against the Association, and he represented himself in both cases.[9] The Association was represented by counsel in those cases.[10] During the second case, Lucas sent two letters to the board of the Association, one to a board member and one to an officer.[11] These letters, as well as subsequent ones, criticized the Association's lawyer's performance, sought information about an interrogatory answer, and expressed a desire to settle the case.[12]

---

2. 2010 ND 187, 789 N.W.2d 73.
3. *In re Disciplinary Action Against Lucas*, ¶ 1, 789 N.W.2d at 74.
4. *Id.* ¶¶ 1, 15, 789 N.W.2d at 74, 77.
5. *Id.* ¶ 1, 789 N.W.2d at 74.
6. *Id.*
7. *Id.* ¶ 22, 789 N.W.2d at 79 (VandeWalle, C.J., dissenting).
8. *Id.* ¶ 2, 789 N.W.2d at 74 (majority opinion).
9. *Id.* ¶ 3.
10. *Id.*
11. *Id.*
12. *Id.* ¶ 4, 789 N.W.2d at 74-75.

The North Dakota Supreme Court explained that while Rule 4.2 forbids attorneys from speaking to a represented party in a matter about the subject of the matter, it does not specify whether the rule applies to attorneys representing themselves.[13] The court noted Lucas sent letters to the Association's board, which was represented by counsel, as well as a board member and officer, who have authority to act on issues in litigation.[14] Due to their authorization, the letters were, therefore, sent to people who were included under the scope of Rule 4.2.[15]

Lucas argued the letters do not violate Rule 4.2 because he was representing himself in the litigation.[16] The court rejected his reasoning as "too narrow."[17] The court demonstrated Rule 4.2 was designed to protect represented parties from "overreaching by other lawyers who are participating in the matter, interference by those lawyers with the lawyer-client relationship, and the uncounseled disclosure of information relating to the representation."[18] In other words, the rule was created "to prevent lawyers from taking advantage of laypersons."[19] The court also noted the majority of courts in other states have applied Rule 4.2 to attorneys representing themselves.[20]

Lucas relied on a case from the Connecticut Supreme Court, *Pinsky v. Statewide Grievance Committee*,[21] which ruled an attorney representing himself could communicate with a represented party because the attorney was not representing a client.[22] The North Dakota Supreme Court rejected this reasoning, however, in favor of the majority rule. The court explained the majority rule as expressed in *In re Disciplinary Action Against Haley*[23] and *Runsvold v. Idaho State Bar*[24] fits better with the court's precedent and explained "the policies underlying [Rule 4.2] are better served by extending the restriction to lawyers acting pro se."[25]

---

13. *Id.* ¶ 7, 789 N.W.2d at 75.
14. *Id.* ¶ 8, 789 N.W.2d at 75-76.
15. *Id.* at 76.
16. *Id.* ¶ 9.
17. *Id.*
18. *Id.* (quoting N.D. RULES OF PROF'L CONDUCT R. 4.2 cmt. 1 (2012)).
19. *Id.* (quoting *In re* Disciplinary Action Against Hoffman, 2003 ND 161, ¶ 17, 670 N.W.2d 500, 504).
20. *Id.*
21. 578 A.2d 1075 (Conn. 1990).
22. *In re Disciplinary Action Against Lucas*, ¶ 10, 789 N.W.2d at 76 (citing *Pinsky*, 578 A.2d at 1079).
23. 126 P.3d 1262 (Wash. 2006).
24. 925 P.2d 1118 (Idaho 1996).
25. *In re Disciplinary Action Against Lucas*, ¶ 10, 789 N.W.2d at 76 (quoting *In re Disciplinary Action Against Haley*, 126 P.3d at 1267).

Both parties further challenged the sanction imposed on Lucas by the hearing panel.[26] Disciplinary Counsel argued suspension was a more appropriate sanction because Lucas had been suspended once before for similar conduct.[27] Lucas argued that because he was relying on *Pinsky*, he should not be sanctioned for his conduct.[28]

The North Dakota Supreme Court held Lucas' prior conduct, along with the fact that the majority of jurisdictions had rejected *Pinsky*, should have informed Lucas that his letters to the Association board, board member, and officer violated Rule 4.2.[29] The court noted suspension is generally appropriate if a lawyer has previously been reprimanded for similar conduct.[30] The court, therefore, concluded reprimand was not a sufficient sanction, and ordered Lucas be suspended from the practice of law for thirty days.[31]

Chief Justice VandeWalle wrote a dissenting opinion, asserting the court should have adhered to the hearing panel's sanction.[32] The Chief Justice agreed Lucas' conduct violated Rule 4.2.[33] He did not agree, however, that a lawyer should be disciplined for relying on a minority position if the court has not yet rejected that position.[34] For that reason, the Chief Justice would have imposed public reprimand rather than suspension.[35]

26. *Id.* ¶ 15, 789 N.W.2d at 77.
27. *Id.*
28. *Id.* ¶ 16, 789 N.W.2d at 78.
29. *Id.*
30. *Id.* ¶ 18.
31. *Id.*
32. *Id.* ¶ 22, 789 N.W.2d at 78-79 (VandeWalle, C.J., dissenting).
33. *Id.* ¶ 23, 789 N.W.2d at 79.
34. *Id.*
35. *Id.* ¶ 25.

AUTOMOBILES—EVIDENCE OF SOBRIETY TESTS—MOTORISTS' RIGHT TO TEST OR TO ADDITIONAL OR ALTERNATIVE TEST
*State v. Tompkins*

In *State v. Tompkins*,[36] Randy Tomkins appealed the criminal judgment entered after he conditionally pled guilty to the charge of driving under the influence.[37] Tompkins reserved the right to appeal the district court's denial of his motion to suppress.[38] The North Dakota Supreme Court affirmed the district court's decision, holding the State did not impermissibly interfere with Tompkins' right to obtain and independent blood test.[39]

In October 2009, Tompkins was arrested and charged with driving under the influence.[40] After being stopped for a problem with his muffler and put through several field sobriety tests, Tompkins was placed under arrest.[41] Tompkins was then taken to the Jamestown law enforcement center, where he was given a breath test.[42] The test indicated his blood-alcohol content exceeded the legal limit.[43] Tompkins requested a blood test, and the officer replied that he could have one in addition to the breath test, but at his own expense.[44] The officer then drove Tompkins to the Jamestown Hospital for the blood test and informed the hospital staff, while en route, that they would be coming for an independent blood test.[45]

The officer remained present while the blood draw was performed.[46] The nurse performing the draw used the State Crime Lab kit, which the hospital uses for all blood draws that may be introduced in court.[47] The blood draw was sent to the State Crime Lab to be analyzed.[48] The nurse who administered the blood test admitted sending the sample to the State Crime Lab was standard procedure for legal, rather than personal medical

36. 2011 ND 61, 795 N.W.2d 351.
37. *Tompkins*, ¶ 1, 795 N.W.2d at 353.
38. *Id.*
39. *Id.*
40. *Id.* ¶ 2.
41. *Id.* ¶ 3.
42. *Id.*
43. *Id.*
44. *Id.* ¶ 4.
45. *Id.* at 353-54.
46. *Id.* at 354.
47. *Id.* ¶ 5.
48. *Id.*

purposes.[49] The State Crime Lab analyzed the blood sample and returned the results to the Jamestown Hospital.[50] The Stutsman County State's Attorney's office also received a copy of the results.[51]

Tomkins argued that because the officer did not adequately explain to him his rights in obtaining an independent blood test, the nurse used the State Crime Lab test kit, the State Crime Lab analyzed the sample, and the State's attorney received a copy of the results, the State improperly interfered with his right to obtain and independent blood test.[52] Therefore, Tomkins argued the blood test as well as the initial breath test given by the police should be suppressed.[53] The district court partially agreed, suppressing the blood test because "there was too much government involvement."[54] The district court, however, did not suppress the breath test, and Tompkins entered his conditional guilty plea reserving the right to appeal the district court's decision.[55]

On appeal, Tompkins argued the district court erred when it suppressed the blood test for excessive state involvement, but failed to also suppress the breath test.[56] The North Dakota Supreme Court began its analysis by noting suppression of a police-administered blood alcohol test is an appropriate remedy if a suspect is denied by police a reasonable to obtain an independent test.[57] In response to Tompkins' argument that the officer failed to inform him of his right to choose his clinic and nurse, the court noted an officer has no affirmative duty to assist a suspect in obtaining an independent blood alcohol content test.[58] While an officer simply cannot deny a suspect the opportunity to obtain the test,[59] the court squarely rejected the notion that law enforcement has "an affirmative duty to ensure the accused receives an independent blood test."[60] In this case, the officer arranged the blood draw and drove the defendant to the hospital.[61] The court determined the officer went above and beyond his duty to Tompkins,

49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* ¶ 6.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* ¶ 7.
57. *Id.* ¶ 9.
58. *Id.* ¶¶ 11-12, 795 N.W.2d at 355.
59. *Id.* ¶ 12.
60. *Id.* ¶ 13.
61. *Id.* ¶ 14

and if Tompkins objected to the hospital or medical professional performing the blood draw, it was the officer's duty to object.[62]

The court also rejected Tompkins' argument that the use of the State Crime Lab kit and the involvement of the State Crime Lab in analyzing the blood sample impermissibly interfered with his right to obtain an independent blood test.[63] The court laid out the rights North Dakota Century Code section 39-20-02 affords an accused regarding an independent blood test.[64] First, the accused has the right to the independent blood test.[65] Second, the accused has the right to choose who administers the test.[66] The court noted it has ruled in the past that it is the accused duty to assert these rights.[67] Therefore, it was not law enforcement that failed to afford Tompkins these rights, but Tompkins that failed to assert his own rights.[68]

Tompkins attempted to use Alaska cases which placed strict restrictions on government involvement in independent blood tests.[69] The court demonstrated, however, that Alaska's independent blood test statute places affirmative duties on those who administer the tests to inform the defendant of his or her rights.[70] North Dakota does not have a similar provision in its independent test statute.[71] The court, therefore, ruled the Alaska cases were inapplicable to North Dakota.[72]

Because the court ruled the government did not impermissibly interfere with Tompkins' right to obtain and independent blood test, the court held the lower court should not have suppressed the blood test.[73] However, because the error did not affect the criminal judgment due to Tompkins' conditional plea of guilty, the North Dakota Supreme Court affirmed the district court's criminal judgment.[74]

---

62. *Id*.
63. *Id*. ¶ 16, 795 N.W.2d at 356.
64. *Id*. ¶ 18.
65. *Id*.
66. *Id*.
67. *Id*.
68. *Id*.
69. *Id*. ¶ 19 (citing Moberg v. Municipality of Anchorage, 152 P.3d 1170, 1174 n.5 (Alaska Ct. App. 2007); McCormick v. Municipality of Anchorage, 999 P.2d 155, 163 (Alaska Ct. App. 2000)).
70. *Id*. ¶ 20, 795 N.W.2d at 357.
71. *Id*.
72. *Id*.
73. *Id*. ¶ 23.
74. *Id*.

AUTOMOBILES—EVIDENCE OF SOBRIETY TESTS—PROCEDURE; EVIDENCE AND FACT QUESTIONS

*Lange v. North Dakota Department of Transportation*

In *Lange v. North Dakota Department of Transportation*,[75] the North Dakota Department of Transportation (DOT) appealed the district court's reversal of a DOT hearing officer's suspension of Lange's driving privileges for ninety-one days.[76] Lange's driving privileges were suspended after she was arrested for driving under the influence of intoxicating liquor.[77] The North Dakota Supreme Court reversed the district court's decision, and reinstated the hearing officer's suspension of Lange's driving privileges.[78]

Lange was stopped by Mandan Police Officer Michael Kapella after the officer observed her vehicle drift on the roadway.[79] Lange failed both a field sobriety test and an SD-5 breath test.[80] She had spoken to her attorney on her cell phone prior to taking the SD-5 test.[81] Lange was transported to Morton County Jail, where she requested a blood test to determine her blood alcohol content.[82] After speaking with her attorney again, Lange requested the blood test take place at the hospital.[83] The officer informed Lange that blood draws were normally done at the jail by a nurse.[84] Thereafter, a nurse took Lange's blood sample, and the results indicated her blood alcohol content was over the legal limit.[85]

At the administrative hearing, the hearing officer concluded Officer Kapella understood Lange requested her blood draw take place at the hospital, but Lange did not clearly communicate that she wanted an independent blood draw and no one impeded her ability to obtain an independent blood draw.[86] The hearing officer, therefore, admitted the

75. 2010 ND 201, 790 N.W.2d 28.
76. *Lange*, ¶ 1, 790 N.W.2d at 29-30.
77. *Id.*
78. *Id.* at 30.
79. *Id.* ¶ 2.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* ¶ 3.

results of the blood test and suspended Lange's driving privileges.[87] Lange appealed the decision to the district court.[88] The district court reversed the hearing officer's decision, ruling the officer should have concluded it was possible Lange was requesting an independent blood draw and he should have tried to clarify what Lange wanted.[89]

On appeal, the DOT argued Lange did not make a reasonable request for an independent blood draw.[90] Lange argued her communications were sufficient to at least prompt Officer Kapella to clarify her intentions.[91] The supreme court began its analysis by noting the great deference it gives to an administrative hearing's decision.[92] It noted its review is limited to the record filed with the court and it does not make independent findings of fact.[93]

The court then explained that while law enforcement chooses the type and location of its own chemical test, an arrestee is entitled to obtain an independent test at his or her own expense, by a medically qualified individual of the arrestee's choosing, and in the location of his or her choosing.[94] If law enforcement denies an arrestee the right to an independent chemical test, the results of law enforcement's test may be suppressed or the charges dismissed.[95]

It is incumbent upon the arrestee to request the independent test.[96] The arrestee's request for an independent test must further be "clear and unambiguous."[97] If the arrestee's statements are ambiguous, an arrestee cannot complain about an officer's reasonable interpretation of those statements.[98] An arrestee, however, need not use any particular words to request an independent test.[99] A law enforcement officer should attempt to clarify an ambiguous statement the officer believes may invoke the right to an independent chemical test, even if the arrestee does not use the words "independent test."[100] However, the court has ruled "if the law enforcement

87. *Id*.
88. *Id*.
89. *Id*.
90. *Id*. ¶ 4.
91. *Id*.
92. *Id*. ¶ 5.
93. *Id*. at 31.
94. *Id*. ¶ 6.
95. *Id*.
96. *Id*. ¶ 7, 790 N.W.2d at 32.
97. *Id*.
98. *Id*.
99. *Id*. ¶ 8.
100. *Id*.

officer does not inquire into the arrestee's intentions, the arrestee cannot rely on ambiguous statements."[101]

According to Officer Kapella's testimony he had only interpreted Lange's request one way: she wanted an alternate location for the blood draw.[102] The officer also testified that when Lange was told blood draws were conducted at the jail, she did not object or request an independent test.[103] The North Dakota Supreme Court noted that when it was clear Officer Kapella was not giving her more information on an independent test, Lange still did not protest.[104] The court also noted Officer Kapella's testimony was the only evidence presented and the hearing officer's decision was based on that testimony.[105]

Lange also argued that because Officer Lange told her blood draws were only done at the jail, she was denied the opportunity to obtain an independent blood test.[106] She supported her claim by arguing that upon first being told she could not be tested at a different location, she may have been afraid to make an additional request.[107] The DOT argued Lange was not denied an opportunity to obtain an independent chemical test.[108]

The court explained that while a law enforcement officer cannot prevent or hinder an arrestee's attempt to obtain an independent blood test, law enforcement is under no obligation to assist in such a request.[109] Law enforcement must at least provide access to a telephone in order to obtain an independent test.[110] In this case, the court ruled it was clear Lange was afforded the opportunity to obtain an independent blood test, as was displayed by the fact that she spoke on the phone with her attorney at the jail.[111] The court found no evidence suggesting Lange attempted to obtain an independent test, but was hindered by law enforcement.[112] The court further found no evidence Lange attempted to make arrangements for an independent test at all.[113] Therefore, the North Dakota Supreme Court held the hearing officer's decision was supported by the facts, and law

101. *Id.*
102. *Id.* ¶ 9.
103. *Id.*
104. *Id.*
105. *Id.* ¶ 11, 790 N.W.2d at 33.
106. *Id.* ¶ 12.
107. *Id.*
108. *Id.*
109. *Id.* ¶ 13.
110. *Id.*
111. *Id.* ¶ 14.
112. *Id.*
113. *Id.*

enforcement did not interfere with Lange's right to obtain an independent blood test.[114]

114. *Id*.

CONTROLLED SUBSTANCES—SEARCHES AND SEIZURES—
SEARCH WITHOUT A WARRANT
*State v. Huber*

In *State v. Huber*,[115] Jason Huber appealed the district court's criminal judgment convicting him of possession of drug paraphernalia, possession of a controlled substance, and manufacture of a controlled substance.[116] Huber argued the district court should have suppressed the police's search of his apartment.[117] The North Dakota Supreme Court held the discovery of evidence in Huber's apartment without a warrant was justified under the emergency exception to the warrant requirement, upholding Huber's conviction.[118]

On December 11, 2009, Huber's landlord received a phone call from a tenant complaining of a "terrible odor" in the apartment building.[119] The landlord went to investigate the smell and, being unsure of its source, called the Mandan Fire Department.[120] Two firefighters and the landlord checked all of the other apartments except Huber's before proceeding to Huber's.[121] By the time they were ready to check Huber's apartment, two Mandan Police Officers had arrived to help identify the source of the smell, which was routine procedure.[122] The landlord knocked on the door, but received no response.[123] The landlord, who had the right of entry for emergency purposes, then began to unlock the door.[124] At this point, Huber opened the door a crack, and a very strong ammonia and chemical smell emitted from inside that apartment.[125] When the emergency personnel attempted to gain entry by explaining the situation to Huber, he refused to let them in.[126]

Mandan Police Officer Bill Stepp then ordered Huber to step aside so the firemen could investigate the source of the smell.[127] Huber stepped

115. 2011 ND 23, 793 N.W.2d 781.
116. *Huber*, ¶ 1, 793 N.W.2d at 782.
117. *Id.* ¶ 9, 793 N.W.2d at 784.
118. *Id.* ¶ 1, 793 N.W.2d at 782.
119. *Id.* ¶ 2.
120. *Id.* at 783.
121. *Id.* ¶ 3.
122. *Id.*
123. *Id.*
124. *Id.* ¶ 4.
125. *Id.* ¶ 5.
126. *Id.*
127. *Id.*

aside, and as they entered the apartment, a lit propane torch fell to the floor.[128] Once inside, the firefighters and police found a partial apparatus for making methamphetamine, as well as several other indicators of methamphetamine production, such as the torn off outer casings of lithium batteries.[129] Huber was arrested, and the Mandan Police obtained a search warrant before going back to seize the evidence.[130]

Huber filed a motion to suppress with the district court, arguing there was no emergency or exigent circumstances which justified the police's warrantless entry of his apartment.[131] The district court denied his motion to suppress, noting the landlord's right of entry and the efforts of emergency personnel to secure the safety of tenants rather than conduct a thorough search.[132] Huber then conditionally pled guilty, reserving the right to appeal the denial of his motion to suppress.[133]

On appeal, Huber argued there were no exigent or emergency circumstances justifying law enforcement's warrantless entry into his apartment.[134] The supreme court began its analysis with the Fourth Amendment, stating "[t]he right to be secure in one's home against unreasonable searches and seizures is guaranteed in the United States Constitution."[135] This means, according to the court, that when a search or seizure is within the scope of the Fourth Amendment, law enforcement must obtain a warrant to conduct the search.[136] The court also noted, however, that emergencies or exigent circumstances may present an exception to the general warrant requirement.[137]

The court defined an exigent circumstance as "'an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence.'"[138] The court also defined the emergency exception, stating "'the emergency exception does not involve officers investigating a crime; rather, the officers are assisting citizens or protecting property as part of their general caretaking responsibilities to the public.'"[139] The court ruled

128. *Id*.
129. *Id*. ¶ 6, 793 N.W.2d at 784.
130. *Id*. ¶ 7.
131. *Id*. ¶ 8.
132. *Id*.
133. *Id*.
134. *Id*. ¶ 9.
135. *Id*. ¶ 12 (citing U.S. CONST. amend. IV).
136. *Id*. (citing State v. Hammer, 2010 ND 152, ¶ 11, 787 N.W.2d 716, 720).
137. *Id*.
138. *Id*. at 784-85 (quoting State v. DeCoteau, 1999 ND 77, ¶ 15, 592 N.W.2d 579, 584).
139. *Id*. ¶ 13 (quoting State v. Matthews, 2003 ND 108, ¶ 13, 665 N.W.2d 28, 32).

the emergency exception was more applicable under Huber's circumstances, because firefighters and police entered the apartment not to investigate a crime, but to investigate the source of a potentially dangerous smell.[140]

The court then recited the three requirements to invoke the emergency exception.[141] First, the police must have a reasonable basis to believe an emergency is taking place, and there is an immediate need for action to protect life or property.[142] Second, the officer's primary motive must not have been to arrest or seize evidence.[143] Third, there must be a reasonable basis, approximating probable cause, that the emergency is associated with the place to be searched.[144]

The supreme court then proceeded to analyze each element, beginning with whether it was reasonable for the officers to believe an emergency was at hand.[145] In determining the whether an officer reasonably believed an emergency exists, the court uses an objective standard.[146] While Huber pointed out there was a significant time lapse between the call to the landlord and the 911 call, and the firefighters initially responded under the impression there was no emergency, the court noted many people on the scene testified they believed it was an emergency.[147] Officer Jessica Doolin told Huber it was an emergency when she asked him to open the door.[148] Officer Stepp also stated he believed they should enter the apartment to check for an emergency because of the large about of ammonia and chemical smell emerging from the apartment.[149] The testimony of all of the emergency responders as a whole reflected a belief that the ammonia smell presented a serious risk to the building's occupants.[150] For this reason, the court ruled it was reasonable for the officers to believe an emergency was at hand.[151]

Next, the court analyzed whether the search of Huber's apartment was motivated by a desire for seize evidence.[152] The court noted law enforce-

140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* ¶ 14.
146. *Id.*
147. *Id.* ¶¶ 15-16, 793 N.W.2d at 785-86.
148. *Id.* ¶ 16, 793 N.W.2d at 786.
149. *Id.*
150. *Id.* ¶ 17.
151. *Id.* ¶ 18.
152. *Id.* ¶ 19.

ment stayed back and did not help in the search until the evidence of a methamphetamine lab was found.[153] The court then ruled that upon finding this lab, the dangers worsened and law enforcement was justified in entering further to assist in searching the apartment.[154] The search was justified because a methamphetamine lab's volatile nature requires an immediate search to dissipate the danger.[155] Therefore, the court found the police were not primarily motivated by finding evidence when they entered the apartment.[156]

Finally, the court analyzed whether the police had a reasonable basis, approximating probable cause, to associate the emergency with the place to be searched.[157] The circumstances indicated the odor that was the subject of the emergency could logically be connected to Huber's apartment.[158] Every other unit had been searched and no source had been found for the odor; Huber's windows were open in subzero temperatures; and when Huber opened his door, fumes poured out of the apartment.[159] These circumstances were enough, according to court, to satisfy the third requirement.[160]

Therefore, the supreme court held the emergency exception to the warrant requirement of the Fourth Amendment applied, and law enforcement was justified in entering Huber's apartment without a warrant.[161] The supreme court upheld the district court's denial of Huber's motion to suppress and upheld the criminal judgment.[162]

Justice Crothers specially concurred to state that while he agreed with the majority's decision, he wanted to clarify the need for a warrant once the emergency has dissipated.[163] Justice Crothers noted that while multiple entries may be justified under the facts of a certain case, the emergency exception does not give law enforcement a passkey to enter the premises at any time in the future.[164] When the emergency has dissipated will depend

153. *Id.* ¶ 21, 793 N.W.2d at 787.
154. *Id.* ¶ 22, 793 N.W.2d at 787-88.
155. *Id.* at 788.
156. *Id.* ¶ 23.
157. *Id.* ¶ 24.
158. *Id.* ¶ 25.
159. *Id.* ¶¶ 25-26, 793 N.W.2d at 788-89.
160. *Id.* ¶ 26, 793 N.W.2d at 789.
161. *Id.* ¶ 28.
162. *Id.*
163. *Id.* ¶ 30 (Crothers, J., concurring).
164. *Id.* ¶¶ 30, 33, 793 N.W.2d at 789-90.

on the facts of the case and, at that time, law enforcement will be required to obtain a warrant to reenter the premises.[165]

165. *Id.* ¶ 35.

CRIMINAL LAW—EVIDENCE—OTHER MISCONDUCT BY ACCUSED

*State v. Aabrekke*

In *State v. Aabrekke*,[166] Ivan Lee Aabrekke appealed the criminal judgment entered after a jury found him guilty of gross sexual imposition, as well as the denial of his motions for a judgment of acquittal and for a new trial.[167] The North Dakota Supreme Court reversed and remanded for a new trial, holding the district court failed to properly apply the analysis under the North Dakota Rules of Evidence to determine whether prior act evidence is admissible.[168]

Aabrekke was charged with gross sexual imposition North Dakota Century Code section 12.1-20-03(1)(d).[169] The State alleged Aabrekke engaged in a sexual act with his thirteen-year-old granddaughter, the complainant, on August 16, 2009.[170] The alleged incident occurred in Aabrekke's home in Minnewauken, North Dakota.[171] Prior to trial, Aabrekke moved to exclude evidence that he "has a history of engaging in various types of sexual activity with the [complainant] and that this activity has occurred over the years" as well as evidence that "relatives of [Aabrekke] may have engaged in sexual acts with either the [complainant], or the [complainant's] mother."[172] The district court denied the motion, allowing the evidence which could "show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[173] At trial, Aabrekke's granddaughter testified a sexual act occurred on the morning of August 19, 2009 while she, her mother, and her brother were staying at Aabrekke's home for the weekend.[174] The complainant did not tell her mother, Aabrekke's daughter, about the incident until after they had returned to their home in Minnesota.[175] The

166. 2011 ND 131, 800 N.W.2d 284
167. *Aabrekke*, ¶ 1, 800 N.W.2d at 285.
168. *Id.*
169. *Id.* ¶ 2.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* ¶ 3.
175. *Id.*

complainant's mother then informed authorities in Minnesota of the incident.[176]

After the complainant testified about the August 16, 2009 incident, the State asked the complainant if she had previously told her mother about any sexual contact.[177] Aabrekke objected to the question, and the court questioned the State out of the presence of the jury about what the State intended to prove by the question.[178] During the colloquy, the State argued the evidence was indicative of a continuing course of conduct by Aabrekke, and the continuing course of conduct amounted to plan or preparation.[179] Aabrekke, on the other hand, argued the evidence was being offered as character evidence to make the alleged incident seem more likely.[180] Aabrekke also argued the prejudicial nature of the evidence "far outweighed" the probative value because the prosecution does not need the evidence to prove the elements of gross sexual imposition.[181] The district court allowed the evidence, ruling the evidence fit within the exception to North Dakota Rule of Evidence 404(b) allowing evidence of prior crimes, wrongs, or acts if it is introduced for other purposes besides proving conformity with such acts.[182]

The complainant went on to testify Aabrekke had engaged in prior sexual contact with her.[183] The complainant also testified Aabrekke had raped the complainant's mother in the past.[184] During the complainant's mother testimony, the State questioned her about past sexual abuse she experienced in the family.[185] Aabrekke objected to this testimony as well, arguing the testimony was irrelevant, but the court allowed the testimony as proof that "there are not strong defense mechanisms within the family."[186] The prosecution then used this testimony to explain why the complainant did not tell her mother about the incident immediately.[187]

On appeal, Aabrekke argued the district court erred in allowing evidence of prior sexual contact with his granddaughter, as well as his

176. *Id*.
177. *Id*. at 285-86.
178. *Id*. at 286.
179. *Id*.
180. *Id*. at 287.
181. *Id*.
182. *See id*.
183. *Id*. ¶ 4, 800 N.W.2d at 287-88.
184. *Id*. at 288.
185. *See id*. ¶ 5.
186. *Id*. at 289.
187. *Id*. at 290.

daughter's testimony about being raped by her uncle.[188] Aabrekke also argued the district court failed to apply the proper three-prong analysis for admitting prior bad act evidence, and the court failed to give a cautionary instruction regarding the limited purpose of the evidence.[189] Finally, Aabrekke argued the danger of unfair prejudice inherent in the evidence of his prior acts outweighed the probative value of the evidence.[190]

The North Dakota Supreme Court began its analysis by pointing out that it has repeatedly warned courts about the dangers of allowing evidence of prior acts to show propensity.[191] The court then outlined the general rule for admitting evidence of prior crimes, wrongs, or acts, found in North Dakota Rule of Evidence 404(b).[192] Rule 404(b) first makes evidence of prior crimes, wrongs, or other acts inadmissible to prove conformity therewith.[193] The rule does not, however, make such evidence inadmissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[194] In other words, the evidence must be "substantially relevant for some purpose other than" showing the person's character and the person's conformity therewith.[195]

When considering this evidence, the court noted "the mere invocation of an exception does not end the inquiry," but the district court must instead apply a three-step analysis to determine whether the evidence is admissible.[196] First, "the [district] court must look to the purpose for which the evidence is introduced."[197] Next, the district court must determine if the of the prior act is "substantially reliable or clear and convincing."[198] Finally, in criminal cases, there must be proof of the crime alleged independent of the prior act, which permits the trier of fact to establish guilt or innocence.[199] The district court may satisfy the third prong by a cautionary instruction warning the jury of the limited purpose of the prior act evidence.[200] Even if all three prongs are satisfied, the district court must

188. *Id.* ¶ 7, 800 N.W.2d at 290-91.
189. *Id.* at 291.
190. *Id.*
191. *Id.* ¶ 8.
192. *Id.*
193. *Id.*
194. *Id.* (citing State v. Schmeets, 2009 ND 163, ¶ 15, 772 N.W.2d 623, 629).
195. *Id.*
196. *Id.* ¶ 9.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.* ¶ 10, 800 N.W.2d at 292.

still consider whether the prejudicial effect of the prior act evidence outweighs the probative value of the evidence under Rule 403.[201]

The North Dakota Supreme Court noted that in several cases—*State v. Paul*,[202] *State v. Alvarado*,[203] and *State v. Christensen*—[204]evidence prior acts and crimes had been admitted for a variety of purposes other than showing conformity with criminal character.[205] The court also noted the "common thread" among these cases was that the district court was required to conduct the necessary analysis under Rules 404(b) and 403 and give the proper cautionary instruction.[206] The supreme court ruled the State's purpose for presenting the evidence—to show planning, preparation, and grooming, as well as to prove why the complainant did not tell her mother about the conduct immediately—was a proper purpose under North Dakota Rule of Evidence 404(b).[207] However, the supreme court found no evidence in the record that the district court applied the three-prong analysis to the prior act evidence the State sought to introduce, or that the district court gave the proper limiting instruction to the jury to ensure the evidence was only considered for its stated limited purpose.[208]

Because the supreme court found the district court misapplied the law when weighing the admission of the prior bad act evidence, it held the district court abused its discretion in admitting the evidence.[209] The court did not pass judgment on whether the evidence would be admissible if the correct analysis was applied.[210] Rather, the North Dakota Supreme Court reversed the judgment and remanded for a new trial.[211]

Justice Sandstrom dissented, concluding the district court did not abuse its discretion in admitting the evidence of Aabrekke's prior acts.[212] Justice Sandstrom reasoned that the district court properly allowed the complainant's testimony about prior victimization by Aabrekke as evidence of "plan and the like."[213] Justice Sandstrom also noted the defendant's questioning elicited some of the evidence, thus making it unobjectable, and

---

201. *Id*.
202. 2009 ND 120, 769 N.W.2d 416.
203. 2008 ND 203, 757 N.W.2d 570.
204. 1997 ND 57, 561 N.W.2d 631.
205. *Aabrekke*, ¶¶ 12-14, 800 N.W.2d at 292-93.
206. *Id*. ¶ 15, 800 N.W.2d at 293.
207. *Id*.
208. *Id*.
209. *Id*. ¶ 16, 800 N.W.2d at 293-94.
210. *Id*. at 294.
211. *Id*.
212. *Id*. ¶ 20 (Sandstrom, J., dissenting).
213. *Id*. ¶ 26.

the evidence of the other family member's prior sexual abuse acts against the complainant's mother were not admitted to show Aabrekke's conformity therewith.[214] Furthermore, Justice Sandstrom reasoned that while the district court did not give a cautionary instruction, a district court is not required to give such an instruction unless requested by a party.[215] As a result, Justice Sandstrom would have affirmed the district court's decision.[216]

214. *Id.* ¶¶ 27-28.
215. *Id.* ¶¶ 30-31, 800 N.W.2d at 295.
216. *Id.* ¶ 34.

CRIMINAL LAW—QUESTIONS OF FACT AND FINDINGS—POST-CONVICTION RELIEF

*Johnson v. State*

In *Johnson v. State*,[217] Johnson appealed from the summary dismissal of his application for post-conviction relief.[218] The North Dakota Supreme Court ruled summary dismissal of an application for post-conviction relief was not appropriate because res judicata is an affirmative defense and a district court cannot dismiss a proceeding on the basis of res judicata on the court's own motion.[219] The court reversed the judgment and remanded for further proceedings.[220]

Johnson was convicted of two counts of contact by bodily fluids in 2008.[221] The trial consisted of both a criminal act phase and a criminal responsibility phase.[222] On appeal from the trial, the North Dakota Supreme Court summarily upheld the conviction.[223] After the appeal, Johnson applied for post-conviction relief, claiming prosecutorial misconduct and ineffective assistance of counsel.[224] The district court denied his application and the North Dakota Supreme Court summarily affirmed the dismissal on appeal.[225] Johnson applied for post-conviction relief a second time by a letter, which was denied as res judicata.[226]

Johnson then applied for post-conviction relief a third time, claiming insufficient evidence as to his criminal responsibility and ineffective assistance of counsel by both his direct-appeal counsel and first post-conviction proceeding counsel.[227] The district court summarily dismissed the application on its own motion, ruling the application was res judicata because the supreme court had already ruled on the sufficiency of the evidence regarding his criminal responsibility.[228] The district court further ruled that because the direct appeal lawyer did raise the sufficiency of the

217. 2010 ND 213, 790 N.W.2d 741.
218. *Johnson*, ¶ 1, 790 N.W.2d at 742.
219. *Id.*
220. *Id.*
221. *Id.* ¶ 2.
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.* ¶ 3, 790 N.W.2d at 742-43.
227. *Id.* ¶ 4, 790 N.W.2d at 743.
228. *Id.*

evidence argument on appeal, Johnson could not claim his direct-appeal counsel was ineffective for not raising the issue and likewise could not claim his first post-conviction counsel was ineffective for not raising an ineffective assistance of counsel claim against his direct-appeal counsel on the same basis.[229]

The North Dakota Supreme Court held the district court erred in summarily dismissing the case because it errantly believed the supreme court had previously ruled on Johnson's challenge of the sufficiency of the evidence on the finding of criminal responsibility.[230] The court explained its ruling in the direct appeal only dealt with the sufficiency of the evidence concerning the criminal act.[231] The court, therefore, had not ruled on whether the evidence was sufficient to find criminal responsibility, and the issue could not have been res judicata.[232]

The supreme court also held that while the district court does have the power to summarily dismiss an application for post-conviction relief on grounds of res judicata, the district court does not have the power to do so sua sponte.[233] Res judicata and misuse of process are affirmative defenses that must first be pled by the State before the court can summarily dismiss the application.[234] The court, therefore, reversed the district court's summary dismissal of Johnson's application for post-conviction relief and remanded the matter for further proceedings.[235]

229. *Id*.
230. *Id*. ¶ 9, 790 N.W.2d at 744.
231. *Id*.
232. *Id*.
233. *Id*. ¶ 10.
234. *Id*. at 744-45.
235. *Id*. ¶ 11, 790 N.W.2d at 745.

INFANTS—RIGHTS AND PRIVILEGES AS TO ADULT PROSECUTIONS—JUVENILE TRANSFERS AND CERTIFICATIONS

*IN RE R.A.*

In *In re R.A.*,[236] R.A. appealed a juvenile court order transferring jurisdiction to district court under North Dakota Century Code section 27-20-34(1)(b).[237] He also appealed the district court order affirming the transfer.[238] The North Dakota Supreme Court affirmed, holding the juvenile court did not err in finding probable cause existed, the juvenile court did not misinterpret or misapply the transfer statute, and R.A.'s confrontation rights were not violated.[239]

A delinquency petition and notice of intent to transfer to district court was filed in March 2010, alleging R.A. committed the offenses of gross sexual imposition, terrorizing, and harassment.[240] The delinquency petition specifically alleged R.A. had engaged in a sexual act with A.H., another juvenile, by compelling her to submit by threat of imminent death or serious bodily injury.[241]

During the transfer hearing, A.H. testified to the circumstances that lead to the allegations against R.A.[242] The State also offered copies of numerous text messages and other written messages that A.H. had received from R.A.[243] A.H. testified she had previously been in a dating relationship with R.A. from November 2008 to August 2009, but after their dating relationship ended, the two of them remained friends.[244] A.H. testified she spoke on the phone to R.A., received text messages from his cellular phone, and received Facebook messages from him everyday from February 18, 2010 to February 28, 2010.[245] She further testified R.A. told her drug dealers were attempting to get his uncle to traffic drugs and, as a result, he was being threatened.[246] R.A. told A.H. the drug dealers were threatening

236. 2011 ND 119, 799 N.W.2d 332.
237. *In re R.A.*, ¶ 1, 799 N.W.2d at 333.
238. *Id.*
239. *Id.*
240. *Id.* ¶ 2.
241. *Id.*
242. *Id.* ¶ 9, 799 N.W.2d at 335.
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*

to harm her, as well, and if they went to the police, the drug dealers would find out and kill them both.[247] R.A. told A.H. they had to comply with the drug dealers demands at all times, if they wanted to stay alive.[248]

A.H. testified to numerous demands made by the drug dealers.[249] According to her testimony, the drug dealers demanded she change her relationship status on Facebook to reflect she was in a relationship with R.A.[250] In one instance, she received a text message from R.A.'s cell phone that stated R.A. was being drugged because she did not comply with the demand fast enough.[251] A.H. also testified she received other text messages, which she believed were from the drug dealers, advising her she was being watched to ensure she complied with their demands.[252] In another instance on February 22, 2010, A.H. received a Facebook message from R.A.'s account demanding that she be with R.A. sexually.[253] A.H. testified the next day she invited R.A. to her house and he gave her a hickey, claiming it was one of the demands.[254] R.A. also tried to have sex with A.H., there was penetration, and R.A. again claimed it was one of the demands.[255]

On February 24, 2010, before leaving on a trip to New York, A.H. testified R.A. called and told her the drug dealers were demanding she come over to his house and kiss him before she left town.[256] However, A.H. testified she was unable to go to R.A.'s house before leaving town, and on February 25, 2010, she received a text message from R.A. indicating the drug dealers had drugged him and he had to go to the hospital.[257] While traveling to New York, A.H. then received a message from R.A.'s Facebook account making several demands for her to tell her friends that R.A. gave her a hickey, purchase R.A. an expensive gift, call and meet with R.A. as soon as she returned home, and perform oral sex on each other.[258] The message also stated that if A.H. only completed two of the demands,

---

247. *Id.*

248. *Id.* R.A. told A.H. that if they did not comply, the drug dealers were "gonna take my dick and shove it up your pussy and take a knife and put it there too and turn it around and rotate it. Then they will just slit your throat but this is all of course after they rape you in front of me." *Id.*

249. *Id.* ¶¶ 9-16, 799 N.W.2d at 335-37.

250. *Id.* ¶ 10, 799 N.W.2d at 336.

251. *Id.*

252. *Id.*

253. *Id.* ¶ 11.

254. *Id.*

255. *Id.*

256. *Id.* ¶ 12.

257. *Id.*

258. *Id.* ¶ 13.

R.A. would be drugged enough to make him sick and if she chose to only complete one of the demands, R.A. would be electrocuted.[259] A.H. testified she told her friends about the threats after they became suspicious of her behavior.[260]

Between February 27, 2010 and February 28, 2010, A.H. testified she received numerous demands from the drug dealers.[261] These demands included apologizing to R.A. for failing to tell him she loved him, having sex with R.A., and performing sexual acts on R.A., as well as time limits by which she needed to respond or the drug dealers "would make many people feel pain."[262] A.H. testified she tried to negotiate with the drug dealers, but they told her "she needed to give her answer or they would rape her."[263] On February 28, 2010, A.H. returned from New York and invited R.A. over to her house.[264] A.H. testified she showed R.A. the text messages she had received and they decided they should cooperate with the demands of the drug dealers.[265] A.H. testified she and R.A. performed oral sex on each other; however, she also testified she felt uncomfortable, was very upset, and kept crying.[266] She further testified "she only participated to keep R.A. and herself safe and alive."[267]

Approximately a half an hour after R.A. left her house, A.H. testified she received another message from the drug dealers through her Facebook account.[268] The message stated the drug dealers were not satisfied and indicated they saw her crying inside her house.[269] The drug dealers demanded A.H. go over to R.A.'s house and give him his present by 3:00 a.m. or they were going to drug him and he would probably die.[270] A.H. testified she locked the doors to her house, closed the blinds, and went into her bedroom and cried because she was so scared.[271]

During the transfer hearing, A.H.'s mother also testified.[272] She testified A.H.'s friends showed her the numerous Facebook messages in

---

259. *Id.*
260. *Id.*
261. *Id.* ¶ 14. These demands came through text messages sent from R.A.'s cell phone and a Facebook message sent to A.H. *Id.*
262. *Id.*
263. *Id.*
264. *Id.* ¶ 15, 799 N.W.2d at 337.
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.* ¶ 16.
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.* ¶ 17.

A.H.'s account.[273] A.H.'s mother testified she went to R.A.'s house and met with him and one of his parents.[274] According to A.H.'s mother, although R.A. initially claimed he was being threatened, he finally admitted to writing and sending the messages to A.H.[275]

Following the transfer hearing, the judicial referee found probable cause existed to believe R.A. "committed the offense of gross sexual imposition by force or by threat of imminent death, serious bodily injury, or kidnapping . . . ."[276] The judicial referee also ordered the case be transferred to district court under North Dakota Century Code section 27-20-34(1)(b).[277] Subsequently, R.A. argued "the evidence did not support a finding of probable cause, the judicial referee misinterpreted or misapplied the transfer statute because the statute requires the threats be to the victim and not another person, and his confrontation rights were violated."[278] Therefore, he requested a district court judge review the judicial referee's findings and order.[279] The district court affirmed as well as adopted the judicial referee's findings and order.[280]

On appeal, the North Dakota Supreme Court reviewed the juvenile court's factual findings under a clearly erroneous standard of review.[281] R.A. first argued it was an error for the juvenile court to transfer jurisdiction to district court because the State failed to establish probable cause and failed to present any evidence that R.A. acted by force or his conduct presented an imminent threat to A.H.[282] R.A. next argued the charge of gross sexual imposition could only be transferred if probable cause existed to believe there were threats of imminent harm to the victim because the evidence failed to demonstrate A.H. suffered threats of imminent harm.[283] Lastly, R.A. argued his inability to cross-examine A.H. during the transfer hearing about her sexual history with him resulted in his Sixth Amendment confrontation rights being violated.[284]

---

273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.* ¶ 2, 799 N.W.2d at 334.
277. *Id.*
278. *Id.* ¶ 3.
279. *Id.*
280. *Id.*
281. *Id.* ¶ 4. "A finding of fact is clearly erroneous if there is no evidence to support it, if the reviewing court is left with a definite and firm conviction that a mistake has been made, or if the finding was induced by an erroneous view of the law. This Court reviews questions of law de novo." *Id.* (quoting *In re* A.R., 2010 ND 84, ¶ 5, 781 N.W.2d 644, 646).
282. *In re R.A.*, ¶ 6, 799 N.W.2d at 335.
283. *Id.* ¶ 23, 799 N.W.2d at 339.
284. *Id.* ¶ 29, 799 N.W.2d at 340.

R.A.'s first argument was that the threats of physical harm were not imminent, but instead were threats of future conduct, and this evidence was insufficient to support the juvenile courts finding of probable cause.[285] R.A. asserted his case was similar to *Lawrence v. Delkamp*[286] and *Ficklin v. Ficklin*,[287] where the court previously held that "district court's findings of domestic violence were clearly erroneous because the threats of physical harm were not imminent."[288] After an examination of *Lawrence* and *Ficklin*, the court determined R.A.'s case was distinguishable based upon the juvenile court's findings.[289] During the transfer hearing, A.H. testified she believed the threats were being carried out and, if she did not comply with the deadlines, the drug dealers would harm R.A.[290] A.H. also testified she believed the drug dealers were watching her constantly and were able to act immediately if she did not comply with their demands.[291] The court noted "imminent" means close or near at hand rather than touching; it does not mean immediate.[292] Based upon the evidence presented at the transfer hearing, the court determined a finding of probable cause to believe threats of imminent death or serious bodily injury was supported.[293]

R.A. also claimed there was conflicting evidence and the actions of A.H. failed to denote a fear of imminent physical harm.[294] However, the court emphasized a transfer hearing is comparable to a preliminary examination in a criminal proceeding, and the juvenile court does not determine the credibility of the evidence presented because questions regarding conflicting evidence or credibility are questions of fact for a jury to decide.[295] The court held "the juvenile court did not err in finding there [was] substantial evidence establishing probable cause to believe R.A. committed the offense

---

285. *Id.* ¶ 19, 799 N.W.2d at 338.

286. 2000 ND 214, 620 N.W.2d 151. The North Dakota Supreme Court found the findings of domestic violence in *Lawrence* to be clearly erroneous because the district court did not make any findings regarding immediate fear or imminent physical harm at the time the threats were made. *Lawrence*, ¶¶ 10, 12, 620 N.W.2d at 155.

287. 2006 ND 40, 710 N.W.2d 387. The threats in *Ficklin* could not be defined as actual or imminent because the wife's fear was a perceived fear of future possibility, and therefore, the North Dakota Supreme Court found the district court's issuance of a domestic violence protection order clearly erroneous. *Ficklin*, ¶¶ 21-22, 710 N.W.2d at 392.

288. *In re R.A.*, ¶ 19, 799 N.W.2d at 338.

289. *Id.* ¶ 20.

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.* ¶ 21.

295. *Id.*

of gross sexual imposition by threat of imminent death or serious bodily injury."[296]

The court next addressed whether the juvenile court misinterpreted and misapplied North Dakota Century Code section 27-20-34.[297] Specifically, R.A. argued the plain language of the gross sexual imposition statute required that there be probable cause to believe threats of imminent harm were made to the victim before a case could be transferred from juvenile court to district court.[298] R.A. alleged the evidence did not show A.H. suffered threats of imminent harm and, therefore, his case was transferred erroneously.[299]

The court explained when it examines statutes, each word is given its ordinary meaning; however, if a statute is ambiguous or if an absurd or ludicrous result is reached by adhering to the strict letter, they may look at extrinsic aids, such as legislative history, to interpret the statute's meaning.[300] Although the court presumes the legislature did not intend a statute to yield an absurd or ludicrous result or unjust consequence, a statute is deemed ambiguous "if it is susceptible to different, rational meanings."[301]

The plain language of section 27-20-34(1)(b) indicates the crime of gross sexual imposition of a victim by threat of imminent death, serious bodily injury, or kidnapping shall be transferred.[302] After an examination of the plain language of this statute, the court decided the statute was not ambiguous.[303] However, R.A. was charged with gross sexual imposition in violation of section 12.1-20-03(1)(a), "which states that an individual is guilty of gross sexual imposition if he engages in a sexual act with another or causes another to engage in a sexual act by compelling the victim to submit . . . by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being."[304]

R.A. argued because the wording of section 27-20-34 does not use the language "inflicted on any human being," like section 12.1-20-03(1)(a), the threat must be inflicted on the victim.[305] The court found the difference in wording of these two statutes insignificant.[306] In support of its finding, the

296. *Id.* ¶ 22, 799 N.W.2d at 339.
297. *Id.* ¶ 23.
298. *Id.*
299. *Id.*
300. *Id.* ¶ 24.
301. *Id.*
302. *Id.* ¶ 25.
303. *Id.*
304. *Id.* ¶ 26 (internal quotation marks omitted).
305. *Id.*
306. *Id.*

court indicated the legislature included several offenses in the transfer statute they determined should be transferred to district court, including gross sexual imposition under section 12.1-20-03(1)(a).[307] The court noted the purpose of section 27-20-34 was to transfer violent crimes to district court and gross sexual imposition by force or threat of imminent harm is a transferrable crime.[308] After determining the evidence supported the juvenile court's finding, the court held R.A.'s case was properly transferred to district court and the transfer statute was not misinterpreted or misapplied.[309]

Lastly, the court explained R.A.'s confrontation rights were not violated when he was not allowed to cross-examine A.H. regarding her sexual history with him.[310] The court began by stating that although the Sixth Amendment Confrontation Clause grants criminal defendant's the right to physically face whoever is testifying against them, a juvenile involved in a juvenile transfer hearing is not entitled all of the constitutional guarantees granted in a criminal proceeding.[311] However, a juvenile transfer hearing must satisfy the basic requirements of due process and fairness because it is considered a "critically important" proceeding.[312] The court emphasized A.H. testified at the transfer hearing and R.A. cross-examined her, and therefore, the issue raised by R.A. was an issue of the admissibility of evidence rather than a confrontation issue.[313] The court indicated that during a juvenile transfer hearing, a juvenile is not allowed greater evidentiary protection than criminal defendants receive at pretrial proceedings.[314] Because the rules of evidence do not apply during a juvenile transfer hearing, the court held R.A.'s Sixth Amendment confrontation rights were not violated.[315]

307. *Id*.
308. *Id*. ¶ 27.
309. *Id*. ¶ 28, 799 N.W.2d at 340.
310. *Id*. ¶ 32.
311. *Id*. ¶ 30.
312. *Id*.
313. *Id*. ¶¶ 30-31.
314. *Id*. ¶ 31.
315. *Id*. ¶¶ 31-32.

JUDGMENT—SUMMARY PROCEEDING—NATURE OF SUMMARY JUDGMENT

*Locken v. Locken*

In *Locken v. Locken*,[316] David Locken appealed the district court's summary judgment dismissal of his action to determine his ownership interest in a tract of land in Dickey County.[317] Locken argued his claim was not barred by the statute of limitations under North Dakota Century Code section 28-01-42 for an action on a contract for deed.[318] The North Dakota Supreme Court held the statute of limitations for a contract for deed did bar David Locken's claim.[319] The supreme court concluded that for a debt secured by a contract for deed, the due date of the last payment is the day when the contract was satisfied.[320]

David Locken purchased a tract of land with his father, Virgil Locken, in February of 1973 from Wanda Johnson and Ardys Sand by a contract for deed.[321] The final payment on the contract for deed was scheduled for March 1, 1998, and upon full performance of the contract for deed, Johnson and Sand would convey to Virgil and David Locken a warranty deed.[322] In 1974, David Locken assigned his interest in the tract of land to Virgil and Marjorie Locken.[323] In 1977, Sand and Johnson conveyed the land by warranty deed to Virgil Locken individually.[324] The deed was recorded in March of 1978.[325] Virgil Locken then gifted the land to his children, except David Locken, who then conveyed the interest in the land to the Virgil and Marjorie Locken Family Trust.[326]

Marjorie Locken died in 2001 and devised by will her interest in the land to David Locken.[327] Virgil Locken died in 2006, and his will also devised all of his interest in the land to David Locken.[328] In 2007, Loren

316. 2011 ND 90, 797 N.W.2d 301.
317. *Locken*, ¶ 1, 797 N.W.2d at 302-03.
318. *Id.* at 303.
319. *Id.*
320. *Id.*
321. *Id.* ¶ 2.
322. *Id.*
323. *Id.* ¶ 3.
324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.* ¶ 4
328. *Id.*

Locken, trustee of the Virgil and Marjorie Locken Family Trust, executed and recorded an affidavit of possession.[329] The Trust then conveyed the land to Bernard Vculek.[330]

David Locken brought an action in January 2008, claiming Marjorie Locken had a one-fourth interest in the land when she died and he was entitled to that one-fourth interest as a devisee of her will.[331] The defendants responded by arguing the statute of limitations had run and the Marketable Record Title Act, therefore, barred the action.[332] The district court granted the defendants' summary judgment motion and dismissed the case, ruling the statute of limitations had expired and the claim was not subject to a statutory exception.[333]

On appeal, David Locken argued the district court erred in finding his January 2008 action was barred by the statute of limitations because he brought the action within ten years of the due date of the final payment of the contract for deed.[334] Locken argued under North Dakota Century Code section 28-01-42, "due date" means the date the last payment was last scheduled, not the date the last payment was actually made.[335] The defendant argued "due date" means "the date the last payment was actually made and the contract for deed was satisfied."[336]

The North Dakota Supreme Court first outlined the Marketable Record Title Act, noting that a person with possession of a piece of land and unbroken chain of title to an interest in the land may convey the land free and clear of any claim based upon an "act, transaction, event, or omission occurring twenty years or more before," and bars the action from commencing.[337] However, "the provisions for marketable record title do not 'bar . . . [r]ights founded upon any mortgage, trust deed, or contract for sale of lands which is not barred by the statute of limitations.'"[338] Therefore, if David Locken's claim was not barred by the statute of limitations for a contract for sale of lands, or a contract for deed in this case, his claim would also not be barred by the Marketable Record Title Act.[339]

---

329. *Id.*
330. *Id.*
331. *Id.* ¶ 5.
332. *Id.*
333. *Id.* ¶ 6, 797 N.W.2d at 304.
334. *Id.* ¶ 8.
335. *Id.*
336. *Id.*
337. *Id.* ¶ 11, 797 N.W.2d at 305.
338. *Id.* ¶ 12, 797 N.W.2d at 306 (quoting N.D. CENT. CODE § 47-19.1-11(1)(c) (1999)).
339. *See id.*

The supreme court next considered whether the statute of limitations as codified in North Dakota Century Code section 28-01-42 had run when David Locken brought his claim in January 2008.[340] The statute bars an action to cancel or enforce a contract for the sale or conveyance of real estate after twenty years from the recording of the instrument unless fewer than ten years have elapsed from the due date of the last payment of the debt on the contract or fewer than ten years since the claim for relief accrued.[341] Because the statute "do[es] not necessarily contemplate earlier satisfaction of a contract for deed," the supreme court ruled the interrelationship between this statute and section 28-01-15(2)-requiring title actions to be brought within ten years after relief has accrued-was ambiguous, and it could look to extrinsic aids beyond the plain language to interpret them.[342]

In order to interpret the statutes, the court looked to the Iowa Supreme Court's interpretation of an Iowa statute similar to North Dakota's section 28-01-42.[343] The Iowa courts explained "a mortgage remains in effect until the debt is paid or discharged, or the mortgage is released."[344] The North Dakota Supreme Court also noted the Iowa authorities made clear the intent of the statutes was to clarify titles to real property from the record itself.[345] Citing this purpose, the court construed "due date of the last payment on the indebtedness or part thereof, secured thereby" to mean the date in the record the contract for deed is satisfied.[346]

As a result, the court ruled that because David Locken brought the action in January 2008, more than ten years after the March 1978 satisfaction of the contract for deed, the action was barred by the statute of limitations.[347] The court therefore affirmed the district court's grant of summary judgment and dismissal of the action.[348]

340. *Id.* ¶¶ 14, 16, 797 N.W.2d at 306-07.
341. N.D. CENT. CODE § 28-01-42 (2006).
342. *Locken*, ¶ 17, 797 N.W.2d at 308.
343. *Id.* ¶¶ 19-22, 797 N.W.2d at 308-11.
344. *Id.* ¶ 23, 797 N.W.2d at 311.
345. *Id.*
346. *Id.*
347. *See id.* ¶ 25, 797 N.W.2d at 312.
348. *Id.* ¶ 26.

VENDOR AND PURCHASER—RIGHTS AND LIABILITIES OF PARTIES—BONA FIDE PURCHASERS

*Swanson v. Swanson*

In *Swanson v. Swanson*,[349] Glenn Swanson appealed the district court's judgment quieting title to real property in Michael Swanson, James Swanson, Robert Swanson, and Candyce Swanson (the Swanson children).[350] The North Dakota Supreme Court held the district court erred in analyzing the notice requirement for a good faith purchaser and erred in finding the Swanson children acted in good faith when purchasing the property.[351] The court, therefore, reversed the judgment and remanded the case for judgment consistent with the opinion.[352]

In 1963, William Swanson and Lorraine Swanson, his wife, conveyed a piece of real estate in Bottineau County to William Swanson and Glenn Swanson, William's brother, as joint tenants by a warranty deed.[353] The property had originally been owned by Glenn and William's stepmother, Anna Swanson, who had conveyed the property to William with Glenn's help.[354] Lorrain had no ownership interest in the land, but was apparently included in the deed to disclaim any homestead claim. Glenn and William never recorded the deed.[355] In 1969, Glenn Swanson recorded a mortgage on the property in favor of Arlo Swanson, his brother.[356]

William Swanson died in 1999.[357] At William's 1999 funeral in Florida, Glenn Swanson asked Lorraine Swanson to look for William's copy of the joint tenancy deed.[358] Despite Glenn's assertion of ownership, Lorraine, as personal representative for the estate, conveyed the property to herself as trustee of her revocable trust in 2000.[359] In 2001, at an inurnment ceremony for William, Glenn again asserted his interest in the property, this time to William and Lorraine's son, Robert Swanson.[360] In 2003, Lorraine,

349. 2011 ND 74, 796 N.W.2d 614.
350. *Swanson*, ¶ 1, 796 N.W.2d at 615.
351. *Id.*
352. *Id.*
353. *Id.* ¶ 3, 796 N.W.2d at 616.
354. *Id.* ¶ 2.
355. *See id.* ¶ 3.
356. *Id.*
357. *Id.* ¶ 4.
358. *Id.*
359. *Id.*
360. *Id.*

as trustee for her revocable trust, conveyed property to the Swanson children.[361] The deed was recorded on July 21, 2003.[362]

Glenn found the joint tenancy deed in 2005, two years after the Swanson children recorded their deed.[363] Glenn recorded his joint tenancy deed in November 2005.[364] In January 2008, the Swanson children initiated a quiet title action against Glenn Swanson.[365] Glenn counterclaimed to quiet title in his name and also brought a third-party action against Lorrain Swanson based on her conveyance in 1963 warranty deed.[366] The district court ruled Glenn Swanson had no interest in the claim and quieted title in the Swanson children because the children acted in good faith when they recorded the deed and paid valuable consideration for the property.[367]

On appeal, Glenn Swanson argued the district court erred in quieting title in the Swanson children.[368] Glenn argued the Swanson children were not good-faith purchasers and they did not pay valuable consideration for the land.[369] Glenn asserted the district court should have quieted title in him because, under the 1963 deed, the property should have passed to him in 1999 as a joint tenant.[370]

The North Dakota Supreme Court began its analysis by stating the dispositive issue was whether the Swanson children acted in good faith.[371] As the court noted, good faith depends on whether the children had actual or constructive notice of Glenn Swanson's claim of ownership of the land.[372] The court then outlined what constitutes actual or constructive notice.[373] Quoting North Dakota Century Code section 1-01-25, the court explained "[e]very person who has actual notice of circumstances sufficient to put a prudent person upon inquiry as to a particular fact and who omits to make such inquiry with reasonable diligence is deemed to have constructive notice of the fact itself."[374] In other words, "a purchaser who fails to make the requisite inquiry cannot claim the protection of a good-faith

361. *Id.*
362. *Id.*
363. *Id.* ¶ 5.
364. *Id.*
365. *Id.* ¶ 6.
366. *Id.*
367. *Id.* ¶ 7, 796 N.W.2d at 616-17.
368. *Id.* ¶ 8.
369. *Id.*
370. *Id.*
371. *Id.* ¶ 9.
372. *Id.*
373. *See id.* ¶¶ 9-10.
374. *Id.* ¶ 10 (quoting N.D. CENT. CODE § 1-01-25 (2008)).

purchaser . . . ."[375] A purchaser who fails to make the requisite inquiry will be assumed to know any facts such an inquiry would have uncovered.[376]

The court then broke the inquiry into two parts: first, whether the Swanson children had actual notice of circumstances which would have put a prudent person on inquiry as to the ownership of the property;[377] and second, whether the Swanson children did inquire into the circumstances as was their duty after having actual notice of the circumstances.[378] The court ruled the Swanson children did have actual notice of Glenn Swanson's claim and, therefore, had a duty to inquire into that claim.[379] To support this ruling, the supreme court pointed to the fact that Glenn Swanson informed Robert Swanson, one of the Swanson children, of his claim to the property at the 2001 inurnment ceremony.[380] The court noted a statement by a claimant to an adverse right to a piece of property could be enough to put a prudent person on inquiry.[381] The court also pointed to its own precedent, which has established a statement of adverse interest need not lay out all of the details of the adverse interest.[382] Thus, the court held the assertion of ownership to Robert Swanson by Glenn Swanson was enough to put the Swanson children on inquiry about the ownership of the land.[383]

The court then turned to whether the Swanson children made any inquiry into Glenn Swanson's claim of ownership over the land.[384] The court noted there was no inquiry found in the record, and the district court even stated it did not know what inquiry had been made.[385] In such a circumstance, a purchaser who has actual notice and has been put on inquiry can be assumed to know any facts that would probably have been discovered if properly pursued.[386] In this case, the supreme court concluded it was likely the Swanson children would have found, upon proper inquiry, that Glenn Swanson had recorded a mortgage on the property in 1969, which granted Arlo Swanson a security interest in Glenn Swanson's interest in the property.[387]

---

375. *Id.*
376. *Id.*
377. *Id.* ¶ 11, 796 N.W.2d at 618.
378. *Id.* ¶ 14, 796 N.W.2d at 619.
379. *Id.* ¶ 11, 796 N.W.2d at 618.
380. *Id.*
381. *Id.* ¶ 12.
382. *Id.*
383. *Id.* ¶ 13, 796 N.W.2d at 619.
384. *Id.* ¶ 14.
385. *Id.*
386. *Id.*
387. *Id.* ¶ 15, 796 N.W.2d at 619-20.

The court also dealt with the district court's ruling that Glenn Swanson was a "stranger" to the chain of title pursuant to Title Standard 2-01 of the North Dakota State Bar Association and, therefore, the record or the mortgage could have been ignored.[388] The court rejected this ruling, pointing to the fact that a prospective purchaser may only ignore a stranger to the title if the prospective purchaser acted in good faith.[389] According to Title Standard 2-01, "[a]ny circumstances which should cause further inquiry to be made as to the status of the 'stranger' which inquiry would disclose the unrecorded interest of the 'stranger', preclude ignoring the 'stranger's' conveyance."[390] Here, the Swanson children conducted no inquiry into Glenn Swanson's claim of ownership and, therefore, could not have acted in good faith.[391] This not only made the "stranger" claim invalid, it prevented the Swanson children from claiming good-faith purchaser status.[392]

Finally, the court ruled the laches and equitable estoppel defenses would not be available to the Swanson children for two reasons.[393] First, the Swanson children had not properly pleaded these defenses at the trial level.[394] Second, laches and equitable estoppel were not available unless the Swanson children were good-faith purchasers, which the court ruled they were not.[395]

Justice Sandstrom dissented from the majority because he would have upheld the lower court's ruling that the Swanson children were good-faith purchasers.[396] Justice Sandstrom first pointed out that absent a reasonable investigation into Glenn Swanson's claim, the Swanson children would only have been charged with the knowledge of the facts a reasonable inquiry would have found.[397] He reasoned a reasonable inquiry by the Swanson children would have yielded nothing.[398] Justice Sandstrom further objected to the majority's ruling that Glenn Swanson was not a "stranger" to the chain of title, reasoning the Swanson children had no knowledge of an actual interest held by Glenn Swanson, but only had knowledge of

388. *Id.* ¶ 16, 796 N.W.2d at 620.
389. *Id.* ¶ 17.
390. *Id.* ¶ 16 (quoting N.D. Title Standard 2-01).
391. *Id.* ¶ 17.
392. *See id.*
393. *Id.* ¶ 19, 796 N.W.2d at 622.
394. *Id.* ¶ 20.
395. *Id.* ¶ 21.
396. *Id.* ¶¶ 30, 32, 796 N.W.2d at 624-25 (Sandstrom, J., dissenting).
397. *Id.* ¶ 31, 796 N.W.2d at 624.
398. *Id.*

Glenn's claim to an interest.[399] Justice Sandstrom warned this ruling would frustrate the rule of Title Standard 2-01 by allowing an unsubstantiated claim to establish title.[400] Because he would rule the Swanson children were good faith purchasers, Justice Sandstrom also would have allowed the Swanson children to pursue the laches and equitable estoppel defenses.[401]

Chief Justice VandeWalle also dissented.[402] The Chief Justice joined in Justice Sandstrom's dissent on the issue of good faith, but would have remanded to the district court to find facts on whether the Swanson children paid valuable consideration for the land.[403] The Chief Justice reasoned that while there was some evidence in the record indicating the Swanson children gave valuable consideration for the land, the district court erred in making its finding of valuable consideration.[404] The Chief Justice noted North Dakota precedent has established that in order to fulfill the "valuable consideration" prong of good-faith purchaser protection, a purchaser must give something substantial in exchange for the property.[405] In this case, the record showed the purported consideration given was ten dollars, plus a promise to visit and care for Lorraine Swanson for the rest of her life.[406] The district court did not make any findings of specific financial value for the support and services given to Lorraine Swanson.[407] The district court framed the question of whether substantial value was given as a question of whether Lorraine received something of value to her.[408] The Chief Justice explained that to determine whether the consideration was valuable, or whether the Swanson children parted with something of value, the district court should have analyzed the value given by the Swanson children against the fair market value.[409] For these reasons, the Chief Justice would have remanded to the district court to find a specific financial value of the services the Swanson children promised to Lorraine Swanson and compare that value with the fair market value to determine whether the Swanson children parted with something of substantial value.[410]

---

399. *Id.* ¶ 37, 796 N.W.2d at 626.
400. *Id.*
401. *Id.* ¶ 49, 796 N.W.2d at 629.
402. *Id.* ¶ 52 (VandeWalle, C.J., dissenting).
403. *Id.*
404. *Id.* ¶ 66, 796 N.W.2d at 635.
405. *Id.* ¶ 58, 796 N.W.2d at 631.
406. *Id.* ¶ 62, 796 N.W.2d at 634.
407. *Id.*
408. *Id.* ¶ 63, 796 N.W.2d at 634-35.
409. *Id.* ¶ 66, 796 N.W.2d at 635.
410. *Id.* ¶ 68, 796 N.W.2d at 638.