

## 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.<sup>1</sup> The following topics are included in the Review:

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1. The North Dakota Law Review would like to thank the 2012-2013 Student Articles Editor, John Schroeder, and Associate Editor, Christopher LeCates, for their hard work in writing the Supreme Court Review.

ATTORNEY AND CLIENT – DISCIPLINE – DECEPTION OF COURT  
OR OBSTRUCTION OF ADMINISTRATION OF JUSTICE

*Disciplinary Board of the Supreme Court of the State of North Dakota  
v. Cynthia M. Feland*

*In re Disciplinary Action Against Feland*<sup>2</sup> involved an objection by both Cynthia Feland and Disciplinary Counsel to the report of an attorney disciplinary hearing panel finding Feland had violated North Dakota Rule of Professional Conduct 3.8(d).<sup>3</sup> The recommended sanction by the panel was a sixty day suspension, and for Feland to pay the costs of the proceeding totaling \$11,272.21.<sup>4</sup> The North Dakota Supreme Court adopted the panel's finding on the violation, but imposed more lenient sanctions for the violation.<sup>5</sup>

Feland at the time in issue was an Assistant State's Attorney in Burleigh County.<sup>6</sup> The allegation of professional misconduct arose out of Feland's prosecution of Charles Blunt.<sup>7</sup> Feland prosecuted Blunt for misapplication of entrusted property.<sup>8</sup> Blunt was the executive director of Workforce Safety and Insurance, and one of the issues in his criminal prosecution was whether he failed to pursue the repayment of some employee expenses WSI had paid to one of its hires.<sup>9</sup> A WSI employee was hired, and had his relocation expenses paid by WSI, contingent on repayment of half the expenses if the employee left WSI within two years.<sup>10</sup> The employee left within two years, but Blunt did not attempt to recoup those expenses.<sup>11</sup> An audit of the WSI finances turned up the unrecouped expenses.<sup>12</sup> Blunt told the auditors the employee had actually been forced to resign, and that is why he did not pursue recovering the expenses.<sup>13</sup> Based on that, the auditors did not further push the expense recoupment.<sup>14</sup> Feland, during the criminal investigation of Blunt, asked one of the auditors to draft a memorandum about the relocation expense issue, which the

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2. 2012 ND 174, 820 N.W.2d 672.

3. *Feland*, ¶ 1, 820 N.W.2d at 675.

4. *Id.*

5. *Id.*

6. *Id.* ¶ 2.

7. *Id.*

8. *Id.* This prosecution was before the North Dakota Supreme Court three separate times. *State v. Blunt*, 2011 ND 127, 799 N.W.2d 363; *State v. Blunt*, 2010 ND 144, 785 N.W.2d 909; *State v. Blunt*, 2008 ND 135, 751 N.W.2d 692.

9. *Feland*, ¶ 2.

10. *Id.*

11. *Id.*

12. *Id.* ¶ 3.

13. *Id.*

14. *Id.*

auditor drafted.<sup>15</sup> At Blunt's criminal trial, the auditor testified about Blunt's failure to recoup the expenses.<sup>16</sup> Following his conviction, Blunt brought a motion to vacate his conviction arguing the State had violated North Dakota Rule of Criminal Procedure 16 for failing to turn over the auditor's memo in pretrial discovery.<sup>17</sup>

At the disciplinary evidentiary hearing, the panel was presented conflicting accounts of whether Feland had turned over the auditor's memo to Blunt.<sup>18</sup> Feland testified she had given the memo to her legal assistant, and the legal assistant testified she thought the memo was provided, but was not sure.<sup>19</sup> The memo was not noted on the State's Attorney's discovery checklist in the Blunt file.<sup>20</sup> Blunt's attorney testified the document was not provided to him in pretrial discovery.<sup>21</sup> The hearing panel held failure to disclose the memo was a violation of North Dakota Rule of Professional Conduct 3.8(d).<sup>22</sup> The panel recommended that Feland's license to practice law be suspended for sixty days and she be required to pay the full costs of the disciplinary proceeding.<sup>23</sup>

Feland made several arguments on appeal, the first being, that the findings on Blunt's post-conviction motion appeal that Blunt had not been prejudiced simply foreclosed a finding of professional misconduct.<sup>24</sup> The North Dakota Supreme Court rejected this argument, noting the Rules of Professional Conduct are concerned with the ethical conduct of attorneys whereas the Rules of Criminal Procedure are not.<sup>25</sup> The court held the strength of the prosecutor's case or prejudice to the criminal defendant does not change where the ethical duty to disclose was violated.<sup>26</sup> Accordingly, the court held the failure to establish a violation of North Dakota Rule of

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15. *Id.* ¶ 4, 820 N.W.2d at 675-76.

16. *Id.* ¶ 5, 820 N.W.2d at 676.

17. *Id.* ¶ 6. The North Dakota Supreme Court affirmed the denial of Blunt's post-conviction motion because he was not prejudiced by the failure to disclose. *Id.*

18. *Id.* ¶ 7.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* ¶ 8. That provision states

The prosecutor in a criminal case shall:

(d) disclose to the defense at the earliest practical time all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

N.D. R. PROF'L CONDUCT 3.8(d).

23. *Feland*, ¶ 8, 820 N.W.2d at 676-77.

24. *Id.* ¶¶ 11-12, 820 N.W.2d at 677-78.

25. *Id.* ¶ 13, 820 N.W.2d at 678.

26. *Id.*

Criminal Procedure 16 by the defendant in a criminal case is not a defense to the prosecutor in a professional misconduct proceeding.<sup>27</sup>

Feland next argued a violation of Rule 3.8(d) should only be found where there is clear and convincing evidence of intentionally withholding exculpatory evidence.<sup>28</sup> Disciplinary Counsel argued even knowing or negligent failure to disclose violates Rule 3.8(d).<sup>29</sup> After reviewing different jurisdictions' and commentators approaches to Rule 3.8(d), the North Dakota Supreme Court held any failure to disclose is a violation.<sup>30</sup> The plain language of the Rule has no mens rea requirement, and as such, the court would not graft a mens rea requirement onto the Rule.<sup>31</sup> The court also noted that adopting an intentional failure to disclose standard could lead to abusive practice in prosecutor's discovery practices, such as having no tracking of evidence disclosure.<sup>32</sup> The standard is not one of strict liability, however, and any of the three levels of culpable conduct under the North Dakota Standards for Imposing Lawyer Sanctions – 3.0, intentional, knowingly, and negligently, are required.<sup>33</sup> Thus, even the negligent failure to disclose is now a violation of Rule 3.8(d), with the level of intent primarily affecting the appropriate level of sanction to impose.<sup>34</sup>

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27. *Id.* ¶ 14.

28. *Id.* ¶ 15, 820 N.W.2d at 678-79.

29. *Id.*

30. *Id.* ¶ 22, 820 N.W.2d at 680.

31. *Id.* ¶¶ 19, 22.

32. *Id.* ¶ 23, 820 N.W.2d at 680-81.

33. *Id.* ¶ 24, 820 N.W.2d at 681.

34. *See id.* ¶¶ 40-42, 820 N.W.2d at 684-85.

## BURGLARY – INSTRUCTIONS – AS TO INTENT

*State of North Dakota v. Trevor Lance Mertz*

In *State v. Mertz*,<sup>35</sup> Trevor Mertz appealed his conviction for burglary, arguing the jury instructions given at trial were erroneous.<sup>36</sup> Mertz argued the judge should have answered a question posed to the court by the jury, instead of instructing the jury they had already been given the law in the jury instructions.<sup>37</sup> The North Dakota Supreme Court affirmed the conviction, concluding the district court had properly instructed the jury.<sup>38</sup>

Mertz was charged for burglary for taking a television after entering his former girlfriend's home.<sup>39</sup> Mertz testified he loaned the television to his former girlfriend, but two of the State's witnesses testified the television belonged to the former girlfriend.<sup>40</sup> Following the presentations of both sides' cases the district judge gave the closing jury instructions on burglary.<sup>41</sup> The judge instructed the jury on the statutory definition of burglary then gave the jury the essential elements that the state had to prove in this case.<sup>42</sup> Nowhere in the definition or in the elements did the judge instruct the jury that it needed to find Mertz had intent to commit a specific crime after having broken into his ex-girlfriend's home.<sup>43</sup> The jury was not given any instruction on theft or any other offense.<sup>44</sup> At no time before the jury retired for deliberations did Mertz object to the jury instructions given.<sup>45</sup>

While retired, the jury posed the following question to the court: "Can someone be convicted of Burglary if they break into someone else's home for the sole purpose of retrieving their own personal property? Yes or No?"<sup>46</sup> After hearing argument from counsel, the judge responded that the jury instruction given would stand, and did not answer the question yes or no.<sup>47</sup> The jury found Mertz guilty of burglary.<sup>48</sup>

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35. 2012 ND 145, 818 N.W.2d 782.

36. *Mertz*, ¶ 1, 818 N.W.2d at 783.

37. *Id.*

38. *Id.*

39. *Id.* ¶ 2.

40. *Id.* at 783-84.

41. *Id.* ¶ 3, 818 N.W.2d at 784.

42. *Id.* The judge followed the North Dakota State Bar Association's recommended instruction verbatim. See STATE BAR ASS'N OF N.D. & N.D. PATTERN JURY INSTRUCTION COMM'N, N.D. PATTERN JURY INSTRUCTIONS CRIMINAL § K-9.10 (2011).

43. *Mertz*, ¶ 3, 818 N.W.2d at 784.

44. *Id.*

45. *Id.* ¶ 9, 818 N.W.2d at 785.

46. *Id.* ¶ 4, 818 N.W.2d at 784.

47. *Id.*

48. *Id.* ¶ 6.

Mertz argued on appeal the proper response to the jury's question was "no" but also attacked the legal sufficiency of the jury instructions.<sup>49</sup> He argued the jury instructions needed to include a provision requiring the jury find he had intent to commit a specific crime, in this case theft, following his break in.<sup>50</sup> Because Mertz failed to object to the jury instructions when given, review of this issue was for plain error.<sup>51</sup>

The statute Mertz was charged under states

A person is guilty of burglary if he willfully enters or surreptitiously remains in a building or occupied structure, or a separately secured or occupied portion thereof, when at the time the premises are not open to the public and the actor is not licensed, invited, or otherwise privileged to enter or remain as the case may be, with intent to commit a crime therein.<sup>52</sup>

Mertz argued the language "with the intent to commit a crime therein" required the State to prove intent to commit some specific crime.<sup>53</sup> He argued the State did not show he had the intent to commit the specific crime of theft because theft involves the unauthorized possession of another person's property,<sup>54</sup> while Mertz maintained the television was owned by him.<sup>55</sup>

In this appeal, the North Dakota Supreme Court was forced to interpret the meaning of the "intent to commit a crime therein" provision in the burglary statute.<sup>56</sup> A majority of the court held the statute was not clear on its face whether the State needed to prove intent to commit some specific crime in a burglary prosecution.<sup>57</sup> Since the statute was ambiguous, looking at the legislative history was appropriate to determine the legislature's goal.<sup>58</sup>

North Dakota Century Code title 12.1 is based on the proposed Federal Criminal Code.<sup>59</sup> Accordingly, the comments to the proposed Federal Criminal Code are helpful in interpreting the North Dakota Criminal Code.<sup>60</sup> Examining the comments to the section on burglary, the North

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49. *Id.* ¶ 9, 818 N.W.2d at 785.

50. *Id.* ¶ 10.

51. *Id.* ¶ 9.

52. *Id.* ¶ 10 (quoting N.D. CENT. CODE § 12.1-22-02(1) (2012)).

53. *Id.*

54. *See* N.D. CENT. CODE § 12.1-23-02(1) (2012).

55. *Mertz*, ¶ 10, 818 N.W.2d at 785.

56. *Id.* ¶ 11.

57. *Id.* ¶ 12.

58. *Id.*

59. *Id.*

60. *Id.* at 785-86.

Dakota Supreme Court noted the precise crime intended to be committed was not specified in the code so that a prosecutor would not need to prove that precise crime.<sup>61</sup> Because the precise crime intended to be committed is not an element of burglary, the North Dakota Supreme Court held the district court's jury instruction was correct.<sup>62</sup>

Justice Sandstrom concurred in the judgment of the court, but did not find the statute to be ambiguous.<sup>63</sup> He found the plain words of the statute do not require the State to prove intent to commit a specific crime, and so he agreed with the majority's interpretation of the statute.<sup>64</sup> Justice Sandstrom, therefore, found it inappropriate to consult the official comments to the proposed Federal Criminal Code.<sup>65</sup>

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61. *Id.* ¶ 13, 818 N.W.2d at 786.

62. *Id.* ¶ 14.

63. *Id.* ¶ 20, 818 N.W.2d at 787 (Sandstrom, J., concurring).

64. *Id.*

65. *Id.*

## CHILD SUPPORT – APPEAL AND ERROR

*Michiel James Nuveen v. Elizabeth Ann Nuveen*

In *Nuveen v. Nuveen*,<sup>66</sup> Michiel Nuveen appealed from a district court judgment that deviated upward from the Child Support Guidelines, ordering him to pay \$3,620.00 per month in child support.<sup>67</sup> Michiel and Elizabeth Nuveen were married in 1991.<sup>68</sup> During their marriage, they had three children together.<sup>69</sup> Under a Partial Divorce Judgment entered on October 16, 2007, Elizabeth was awarded primary custody of all three children.<sup>70</sup> Also pursuant to this judgment, Michiel's child support was set at \$4,250 per month, the highest guidelines monthly support amount.<sup>71</sup>

Subsequent to this Divorce Judgment, one of the Nuveen children began residing with Michiel.<sup>72</sup> Michiel moved the district court to modify the monthly support amount given the new arrangement.<sup>73</sup> Based on Michiel's monthly income of more than \$42,000 and Elizabeth's monthly income of \$6191, the district court subtracted Elizabeth's presumptive support from Michiel's presumptive support as required by statute.<sup>74</sup> Because under the new arrangement Michiel's presumptive monthly support would be \$3543, and Elizabeth's monthly support would be \$1087, the district court determined Michiel's new monthly support obligation was \$2456.<sup>75</sup>

Nevertheless, upon a finding that the children's needs were more expansive than children accustomed to a lower standard of living, and that Michiel had an increased ability to pay, the district court found an upward deviation Michiel's child support would be in the best interests of the children, and ordered Michiel to pay \$3750 per month to Elizabeth.<sup>76</sup>

Michiel Nuveen filed a Rule 59 Motion for a New Trial on Child Support Motion or in the Alternative for Amended Findings of Fact, Conclusions of Law and Order.<sup>77</sup> In the motion, Michiel asked the court to reconsider the deviation and to correct a mathematical error in calculating

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66. 2012 ND 260, No. 20120246, 2012 WL 6582491 (N.D. Dec. 18, 2012).

67. *Nuveen*, at \*1.

68. *Id.* ¶ 2.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* ¶ 3.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* ¶ 4.

77. *Id.* ¶ 5, 2012 WL 6582491, at \*2.

Elizabeth's income.<sup>78</sup> The court granted the motion in correcting the mathematical error, but refused to reconsider the upward deviation.<sup>79</sup> Michiel then appealed to the North Dakota Supreme Court, claiming the district court erred in granting the deviation.<sup>80</sup>

In the North Dakota Supreme Court's analysis, the court found that the presumptive support obligation in the guidelines may be rebutted if, among other things, the obligor has an increased ability to pay, and the adjustment is in the best interests of the children.<sup>81</sup> In this instance, because Michiel's income far exceeds the amount of \$12,500 per month, and because his monthly entertainment budget is much greater than Elizabeth's, the facts are sufficient to justify the district court's upward deviation from the guidelines.<sup>82</sup>

In response to Michiel's argument that *Hegen v. Hegen*<sup>83</sup> should be followed, the court found that the clearly erroneous standard of review guided that decision, and such standard must be followed in this case.<sup>84</sup> Because there was sufficient evidence in the record to uphold the district court judgment, the court refused to reverse the decision.<sup>85</sup> The court likewise found that the upward deviation did not require a showing of the appropriate needs in specific amounts, in a line-by-line accounting fashion.<sup>86</sup> The "appropriate needs" analysis allows the court to look to the lifestyle a child may expect when the parent's have substantial income, without requiring specific findings of these expanded needs.<sup>87</sup>

Lastly, the court refused to find any error as a matter of law in the district court's findings.<sup>88</sup> The district court had not misapplied the guidelines by determining the deviation after offsetting the parties' presumptive child support amounts.<sup>89</sup> The lower court had found that Michiel could afford to pay more, not that Elizabeth should pay less.<sup>90</sup>

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78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* ¶ 6.

82. *Id.* ¶ 8, 2012 WL 6582491, at \*3.

83. In *Hegen v. Hegen*, the Supreme Court upheld a district court ruling, despite argument that the non-custodial parent could afford to pay an additional amount. 452 N.W.2d 96, 102 (N.D. 1990).

84. *Id.* ¶¶ 9-10 (citing *Hegen v. Hegen*, 452 N.W.2d 96, 102 (N.D. 1990)).

85. *Id.* ¶ 11.

86. *Id.* ¶ 12, 2012 WL 6582491, at \*4 (citing *Martire v. Martire*, 2012 ND 197, ¶ 24, 822 N.W.2d 450, 462).

87. *Id.* ¶ 13 (citing *Hegen v. Hegen*, 452 N.W.2d 96, 102 (1990)).

88. *Id.* ¶ 15.

89. *Id.*

90. *Id.*

Therefore, the district court's judgment deviating upward from the Child Support Guidelines and ordering Michiel Nuveen to pay \$3650 per month in child support was affirmed.<sup>91</sup>

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91. *Id.* ¶ 16, 2012 WL 6582491, at \*5.

COMPARATIVE FAULT – DERIVATIVE ACTION OF A PARENT – A  
PARENT’S RIGHT TO RECOVER MEDICAL EXPENSES PAID  
ON BEHALF OF A CHILD

*M.M. and Thomas Moore v. Fargo Public School District No. 1*

In *M.M. v. Fargo Public School District No. 1*,<sup>92</sup> Thomas Moore appealed a judgment dismissing his claim for medical expenses incurred by his son, M.M., in their personal injury action against Fargo Public School District No. 1 and Eugenia Hart.<sup>93</sup> The North Dakota Supreme Court affirmed the district court’s decision, holding that Moore’s claim for medical damages was correctly denied because his past economic damages were derived from M.M.’s injuries.<sup>94</sup>

In May 2004, M.M., a fifteen year old student at Discovery Middle School in Fargo, was injured while practicing a bike stunt in the school auditorium.<sup>95</sup> The stunt was being practiced in preparation for 60s day, which was part of the curriculum for Hart’s history class.<sup>96</sup>

Moore and M.M. brought a personal injury action against Hart and the District.<sup>97</sup> After the district court dismissed their action against the District as a matter of law, the North Dakota Supreme Court reversed the district court, finding, among other things, it had erred in ruling that the recreational immunity statute barred the action against the district, and remanded for a new trial.<sup>98</sup>

On remand, Hart settled and the case was tried to a jury only against the District.<sup>99</sup> The jury awarded Moore \$285,000 for past economic damages based on M.M.’s medical expenses incurred while he was a minor.<sup>100</sup> The jury allocated thirty percent of the fault to Hart, and seventy percent to M.M.<sup>101</sup> Because the jury concluded that M.M.’s fault was greater than the fault of the District, the court entered judgment dismissing the action against the district and awarded costs in its favor.<sup>102</sup> The district court also denied Moore’s request to have judgment entered in his favor for \$85,500, which represents thirty percent of the \$285,000 award for M.M.’s

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92. 2012 ND 79, 815 N.W.2d 273.

93. *M.M.*, ¶ 1, 815 N.W.2d at 274.

94. *Id.*

95. *Id.* ¶ 2.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* ¶ 3.

100. *Id.* ¶ 3, 815 N.W.2d at 275.

101. *Id.*

102. *Id.*

past medical expenses.<sup>103</sup> The district court concluded “a child’s negligence should be considered in determining the extent of a parent’s recovery against a third party for medical expenses paid.”<sup>104</sup>

Moore argued on appeal that the district court erred in rejecting his claim for \$85,500 in past medical expenses for M.M. because North Dakota law allows a parent without fault to recover medical expenses for a child’s injury in proportion to the defendant’s fault.<sup>105</sup>

The North Dakota Supreme Court began its analysis by discussing the comparative fault provisions of North Dakota Century Code section 32-03.2-02.<sup>106</sup> The court found that in enacting this section, the Legislature “clearly intended to replace joint and several liability with several allocation of damages among those who commit torts in proportion to the fault of those who contributed to an injury.”<sup>107</sup> Nevertheless, section 32-03.2-02 does not create an independent basis for tort liability, but deals only with the allocation of damages where parties have already been found to be at fault.<sup>108</sup> With regard to the modified comparative fault statutes, nothing is written concerning whether a parent without fault may recover medical expenses for a child’s injuries in proportion to the defendant’s fault when the child’s fault exceeds the defendant’s fault.<sup>109</sup>

Because nothing is found specifically in the statutes regarding this particular matter, the court cited the general doctrine that a parent’s claims “for medical expenses paid on behalf of an injured . . . child are derivative, and the negligence of the injured family member is attributed to the person with the derivative claim.”<sup>110</sup> After demonstrating that the weight of authority prevented Moore’s recovery in this case, the court looked to additional arguments presented by Moore.<sup>111</sup>

The court went on to reject Moore’s argument that barring his recovery because of M.M.’s negligence violates the plain language and purpose of North Dakota Century Code section 14-09-21, finding that attributing M.M.’s fault to Moore does not impose liability upon Moore for any torts that may have been committed by M.M.<sup>112</sup>

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103. *Id.*

104. *Id.*

105. *Id.* ¶ 5.

106. *Id.* ¶¶ 6, 7, 815 N.W.2d at 275-76.

107. *Id.* ¶ 7, 815 N.W.2d at 276 (quoting *Rodenburg v. Fargo-Moorhead YMCA*, 2001 ND 139, ¶ 25, 632 N.W.2d 407, 417).

108. *Id.* ¶ 9.

109. *Id.*

110. *Id.* ¶ 10 (citing 57B AM. JUR. 2D *Negligence* § 1030, at 294 (2004)).

111. *See id.* ¶ 5-17, 815 N.W.2d at 276-80.

112. *Id.* ¶ 11, 815 N.W.2d at 277.

The court likewise rejected Moore's argument that his obligation to support M.M. under section 14-09-08 somehow distinguished North Dakota from those jurisdictions that have adopted the majority rule, and refused to follow the Iowa Supreme Court in *Handeland v. Brown*, because the decision is almost forty years old and has received little acceptance outside the state of Iowa.<sup>113</sup>

Instead, citing *Hockema v. J.S.*, the court discussed the persuasiveness of this decision, agreeing with the Indiana court's analysis of a parent's derivative rights with respect to his children.<sup>114</sup> Because of the derivative nature of a parent's right to *recover* a child's medical expenses, the parent may likewise be barred by the child's comparative negligence if it exceeds that of the tortfeasor.<sup>115</sup>

After subsequently rejecting an attempt by Moore to distinguish *Hockema*, as well as leaving the matter of unjust enrichment by the district to North Dakota's Legislature, the court concluded that a parent is not entitled to recover medical expenses paid on behalf of an injured minor child where the child's comparative fault is greater than that of the tortfeasor.<sup>116</sup> Because Moore's claim for past medical expenses derives from M.M.'s injuries, and M.M. was denied recovery under comparative fault statutes, the court held that the district court correctly dismissed Moore's claim for M.M.'s medical expenses, and affirmed the district court's judgment.<sup>117</sup>

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113. *Id.* ¶¶ 13, 14, 815 N.W.2d at 277-78.

114. *Id.* ¶ 15, 815 N.W.2d at 279 (citing *Hockema v. J.S.*, 832 N.E.2d 537 (Ind. Ct. App. 2005)).

115. *Id.* (citing *Hockema v. J.S.*, 832 N.E.2d 537, 541 (Ind. Ct. App. 2005)).

116. *Id.* ¶ 9, 815 N.W.2d at 279-80.

117. *Id.* ¶ 17, 815 N.W.2d at 280.

## CONSTITUTIONAL LAW – NORTH DAKOTA COURTS

*North Dakota State Board of Higher Education v. Al Jaeger, Secretary of State, in his official capacity, Fighting Sioux Ballot Measures aka Committee For Understanding and Respect*

In *North Dakota State Board of Higher Education v. Jaeger*,<sup>118</sup> the North Dakota Supreme Court majority sought to exercise the court's original jurisdiction and decide the constitutionality of the legislative enactment requiring the University of North Dakota (UND) to use the "Fighting Sioux" nickname and logo.<sup>119</sup> It concluded that the question of the constitutional authority of the Board of Higher Education, in contrast to the constitutional authority of the legislature, was properly before the court and ready to be decided.<sup>120</sup> However, because the necessary number of Justices required to decide the merits was lacking, the court denied the application of the State Board of Higher Education.<sup>121</sup>

The North Dakota Attorney General, as representative of the Board of Higher Education (Board), petitioned the court to exercise its original jurisdiction and prevent Secretary of State Al Jaeger from placing on the June 2012 primary election ballot a referendum measure to reject 2011 North Dakota Sessions Laws chapter 580 (Senate Bill 2370).<sup>122</sup> The submission of the referendum reinstated North Dakota Century Code section 15-10-46, which requires UND to use the Fighting Sioux nickname and logo.<sup>123</sup> The Board asked the court to declare section 15-10-46 unconstitutionally infringes on the Board's authority for the control and administration of UND.<sup>124</sup>

Although a majority of the court was willing to exercise its discretionary original jurisdiction and consider the underlying constitutional issue surrounding the Board's authority over UND, two members of the court disagreed, preventing the four votes necessary under North Dakota Constitution article VI, section 4 to declare a legislative enactment unconstitutional.<sup>125</sup> Because there were not enough members of the court willing to decide the constitutional issue at the time, the court declined to

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118. 2012 ND 64, 815 N.W.2d 215.

119. *Jaeger*, ¶ 1, 815 N.W.2d at 16.

120. *Id.* ¶ 1.

121. *Id.*

122. *Id.* ¶ 2.

123. *Id.*

124. *Id.* ¶ 2, 815 N.W.2d at 216-17.

125. *Id.* ¶ 2, 815 N.W.2d at 217.

enjoin the Secretary of State from placing the referendum measure on the June 2012 primary election ballot.<sup>126</sup>

The court then went on to discuss the history of the UND nickname issue.<sup>127</sup> In *Davidson v. State*, the court found a settlement agreement between the Board and UND against the NCAA permitted the Board to end UND's use of the "Fighting Sioux" nickname and logo.<sup>128</sup> In response, during the 2011 regular legislative session, the legislature enacted section 15-10-56, requiring UND to continue its use of the "Fighting Sioux."<sup>129</sup> During the 2011 special legislative session, the legislature repealed section 15-10-56 through Senate Bill 2370, which likewise provided that neither the Board, nor UND could adopt a nickname or logo before 2015.<sup>130</sup>

The Secretary of State subsequently approved a referendum petition for circulation to North Dakota voters which would repeal Senate Bill 2370.<sup>131</sup> After acquiring a sufficient number of signatures, the Sponsoring Committee placed the referendum on the 2012 primary election ballot and submitted it to the Secretary of State.<sup>132</sup> This effectively reinstated section 15-10-56, requiring UND to use the Fighting Sioux nickname and logo for its intercollegiate teams.<sup>133</sup>

On February 17, 2012, the Attorney General, on behalf of the Board, petitioned the North Dakota Supreme Court to exercise its original jurisdiction and enjoin the Secretary of State from placing the referendum on the June 2012 primary election ballot.<sup>134</sup> The court, on its own motion, added the Sponsoring Committee for the referendum petition as a party to the proceeding, and subsequently granted the Assembly's motion to intervene.<sup>135</sup>

The Board argued that the Court has mandatory original jurisdiction under North Dakota Constitution article III, sections 6 and 7 to review decisions by the Secretary of State regarding initiative and referendum petitions.<sup>136</sup> The Board also argued that if the court lacked mandatory original jurisdiction to review referendum decisions by the Secretary of

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126. *Id.*

127. *Id.* ¶¶ 3-7, 815 N.W.2d at 217-18

128. *Id.* ¶ 3, 815 N.W.2d at 217.

129. *Id.* ¶ 4 (citing *Davidson v. State*, 2010 ND 68, ¶¶ 2-7, 781 N.W.2d 73-74).

130. *Id.* ¶ 5.

131. *Id.* ¶ 6.

132. *Id.* at 217-18.

133. *Id.*

134. *Id.* ¶ 7, 815 N.W.2d at 218.

135. *Id.*

136. *Id.* ¶ 8.

State, it should exercise its discretionary original jurisdiction under North Dakota Constitution article VI, section 2.<sup>137</sup>

The Secretary of State, the Sponsoring Committee, and the Legislative Assembly, on the other hand, responded that the Secretary of State has a limited ministerial role when reviewing petitions for a referred measure.<sup>138</sup> They asserted that if the petitions are proper in form and contain the requisite number of valid signatures, the Secretary of State must place the measure on the ballot without considering the substance or determining the constitutionality of the referred measure.<sup>139</sup> The Sponsoring Committee and the Legislative Assembly argued that constitutionality of North Dakota Century Code section 15-10-46 is not ripe for review before the voters have an opportunity to vote on the referendum measure.<sup>140</sup> The Legislative Assembly also argued that the specific language in North Dakota Constitution article III, sections 6 and 7 controls the general language for the Court's discretionary original jurisdiction in North Dakota Constitution article VI, section 2.<sup>141</sup>

Under the mandatory self-executing provisions of North Dakota Constitution article III, the Secretary of State's responsibilities are limited to the form and the sufficiency of the petition.<sup>142</sup> The court found that the Secretary of State's responsibilities under those provisions do not include the authority to review the constitutionality of the measure.<sup>143</sup>

The majority also decided that because it has discretionary authority to exercise original jurisdiction to issue remedial writs, it must decide whether it had original jurisdiction in this case.<sup>144</sup> Although the court is required by the constitution to review decisions by the Secretary of State regarding the form and sufficiency for placement of referendum measures on the ballot, those mandatory provisions did not apply to this case because the Board never asserted that the Secretary improperly performed his ministerial functions.<sup>145</sup> Nevertheless, under the circumstances of the case, the majority concluded it had original jurisdiction in the case.<sup>146</sup>

The court then analyzed a number of cases, concluding discretionary original jurisdiction for issues involving referendum petitions is not

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137. *Id.*

138. *Id.* ¶ 9.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* ¶ 10.

143. *Id.*

144. *Id.* ¶ 11, 815 N.W.2d at 218-19.

145. *Id.* ¶ 13, 815 N.W.2d at 219.

146. *Id.*

precluded by the Court's mandatory jurisdiction to review the Secretary of State's decisions under North Dakota Constitution article III.<sup>147</sup>

The Attorney General's petition rose fundamental questions involving the prerogatives of the State and the sovereign rights of its people, which the Court ruled are statewide interests and go to core issues involving the limits of governmental authority in the context of the Board's authority to decide the name and logo for UND's intercollegiate athletic teams.<sup>148</sup> The majority essentially found that the Attorney General, on behalf of the Board, seeks a declaration on the constitutionality of North Dakota Century Code section 15-10-46 and the posture of the issues satisfy the requirements for the court to exercise its original jurisdiction in the case.<sup>149</sup> Nevertheless, although a majority of the court was willing to exercise its discretionary original jurisdiction and consider the underlying constitutional issue about the Board's authority over UND, two members concluded this was not an appropriate case for the court to exercise its discretionary original jurisdiction.<sup>150</sup> As a result, the court concluded there were not enough members willing to decide the constitutional issue at that time.<sup>151</sup>

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147. *Id.* ¶ 15-16, 815 N.W.2d at 220.

148. *Id.* ¶ 17, 815 N.W.2d at 221.

149. *Id.*

150. *Id.* ¶ 18.

151. *Id.*

CRIMINAL LAW – RIGHT OF ACCUSED TO CONFRONT  
WITNESSES – USE OF DOCUMENTARY EVIDENCE

*State of North Dakota, ex rel. Nathan Kirke Madden v. The Honorable Joshua B. Rustad*

In *State ex rel. Madden v. Rustad*,<sup>152</sup> James Christianson sought to have the State produce the Director of the State Crime Laboratory as a witness at trial in his prosecution for driving while intoxicated.<sup>153</sup> The State opposed his objection, and the district court issued an order requiring the Director to testify, or the state could not introduce the lab report showing Christianson's blood-alcohol content at the time of arrest.<sup>154</sup> The State filed a petition for a supervisory writ with the North Dakota Supreme Court, asking the court to reverse the district court's pretrial order.<sup>155</sup> The North Dakota Supreme Court issued the supervisory writ.<sup>156</sup>

Christianson was arrested for suspicion of DUI and agreed to a blood draw taken at a Williston hospital.<sup>157</sup> The State notified Christianson of its intent to introduce the laboratory report analyzing the blood sample under North Dakota Rule of Evidence 707.<sup>158</sup> Under Rule 707(b), Christianson objected to the introduction of the report and identified various witnesses requested to testify at trial, including the lab analyst and the Director.<sup>159</sup> The district court ruled the analytic report was inadmissible without the testimony of the Director because the plain language of Rule 707(b) says the State must produce the person requested by the defendant.<sup>160</sup>

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152. 2012 ND 242, 823 N.W.2d 767.

153. *Rustad*, ¶ 2, 823 N.W.2d at 768.

154. *Id.* ¶ 3, 823 N.W.2d at 768-69.

155. *Id.* ¶ 1, 823 N.W.2d at 768.

156. *Id.*

157. *Id.* ¶ 2.

158. *Id.* The notice requirement provides:

If the prosecution intends to introduce an analytical . . . in a criminal trial, it must notify the defendant or the defendant's attorney in writing of its intent to introduce the report and must also serve a copy of the report on the defendant or the defendant's attorney at least 30 days before the trial.

N.D. R. EVID. 707(a).

159. *Rustad*, ¶ 2.

160. *Id.* ¶ 3, 823 N.W.2d at 768-69. The objection provision states:

At least 14 days before the trial, the defendant may object in writing to the introduction of the report and identify the name or job title of the witness to be produced to testify about the report at trial. If objection is made, the prosecutor must produce the person requested. If the witness is not available to testify, the court must grant a continuance.

N.D. R. EVID. 707(b).

The State argued first that this case was appropriate for the issuance of a writ because the State lacks another adequate remedy.<sup>161</sup> The North Dakota Association of Criminal Defense Lawyers, as amicus curiae, argued the State could have produced the Director, or deposed her and presented the deposition at trial, and therefore, the State was so harmed as to require the issuance of a supervisory writ.<sup>162</sup> The North Dakota Supreme Court concluded that this in an extraordinary case, because there very limited alternatives for the State to obtain review in a criminal case.<sup>163</sup> Either the defendant would be acquitted, and under North Dakota Century Code section 29-28-07, the State could not appeal,<sup>164</sup> or if the defendant were convicted, he or she would not raise an issue on appeal about a pretrial order that was beneficial to the defendant, and the State would be prevented from raising that issue.<sup>165</sup> Because there was no other remedy available, the North Dakota Supreme Court found this to be an appropriate case to exercise its supervisory powers.<sup>166</sup>

On the merits, the State argued the witness to be produced by the state under Rule 707(b) must only be a person making a testimonial statement.<sup>167</sup> The State's position was that the Director had not part in the actual conduct of the chemical analysis in Christianson's case and should not have to testify.<sup>168</sup> Under the United States Supreme Court's reasoning in *Crawford v. Washington*, a "witness" whom the State is required to produce at trial under the Sixth Amendment Confrontation Clause is a person who makes a solemn declaration of some fact.<sup>169</sup> The North Dakota Supreme Court held Rule 707 only covers those witnesses who are considered to have given testimonial statements.<sup>170</sup> The Director, the court held, made no testimonial statements in this case.<sup>171</sup> The Director's only statement was that the lab analyst was a "designee" of the Director, and thus qualified to conduct the laboratory analysis.<sup>172</sup> There was nothing that the Director would have been examined about at trial that would have been useful to prove or disprove the statements made in the chemical analysis report of

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161. *Rustad*, ¶ 6.

162. *Id.* ¶ 7.

163. *Id.* ¶ 6.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* ¶ 8.

168. *Id.* at 769-70.

169. *Id.* ¶ 10, 823 N.W.2d at 770.

170. *Id.* ¶¶ 14-15, 823 N.W.2d at 772-73 (citing *State ex rel. Roseland v. Herauf*, 2012 ND 151, 819 N.W.2d 546); *State v. Lutz*, 2012 ND 256, 820 N.W.2d 111.

171. *Id.* ¶ 17, 823 N.W.2d at 773.

172. *Id.*

Christianson's blood sample.<sup>173</sup> Accordingly, the North Dakota Supreme Court issued a supervisory writ, and directed the district court to vacate its pretrial order.<sup>174</sup>

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173. *Id.*

174. *Id.* ¶ 20.

EMINENT DOMAIN – DELEGATION OF POWER – FOREIGN  
CORPORATIONS AND CORPORATIONS  
SUBORDINATE THERETO

*Minnkota Power Cooperative, Inc. v. Thomas Anderson*

In *Minnkota Power Cooperative v. Anderson*,<sup>175</sup> several landowners in Wells and Sheridan Counties appealed a district court judgment which permitted Minnkota Power Cooperative, Inc. to enter their properties for inspection and surveying.<sup>176</sup> The North Dakota Supreme Court determined that Minnkota, despite being a foreign corporation, was properly entitled to exercise the power of eminent domain under North Dakota public utility statutes, and could therefore request the inspections.<sup>177</sup>

Minnkota is an electricity generating cooperative organized under Minnesota law, but authorized as a foreign cooperative to do business in North Dakota.<sup>178</sup> As part of its operations, Minnkota was planning on building a 250 mile transmission line from Center, North Dakota to Grand Forks, North Dakota.<sup>179</sup> Minnkota first asked landowners along the proposed route for permission to conduct surveys and testing, and while many landowners consented, several declined.<sup>180</sup> In response, Minnkota petitioned the district courts of Wells and Sheridan Counties to gain access by court order.<sup>181</sup> The landowners objected, and moved to dismiss the petitions.<sup>182</sup> Both the district courts in Wells and Sheridan Counties granted Minnkota's petition.<sup>183</sup>

On appeal, the landowners argued foreign cooperatives are not entitled to exercise eminent domain because the chapter of the North Dakota Century Code which contains the eminent domain power only applies to North Dakota cooperatives.<sup>184</sup> They argued that since electric cooperatives are governed by North Dakota Century Code chapter 10-13 and Minnkota is a foreign cooperative operating under chapter 10-15, Minnkota cannot have the power of eminent domain granted under chapter 10-13.<sup>185</sup>

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175. 2012 ND 105, 817 N.W.2d 325.

176. *Minnkota*, ¶ 1, 817 N.W.2d at 326.

177. *Id.* ¶ 16, 817 N.W.2d at 331.

178. *Id.* ¶ 2, 817 N.W.2d at 327.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* ¶¶ 3-4. Both district courts held the authorization of Minnkota as a foreign cooperative included the power of eminent domain, but the Wells County court held the issuance of a certificate of site compatibility by the North Dakota Public Service Commission also authorized Minnkota to use eminent domain for this project. *Id.*

184. *Id.* ¶¶ 7, 9, 12, 817 N.W.2d at 328-31.

185. *Id.*

First, the North Dakota Supreme Court noted the arguments advanced by the landowners required statutory interpretation, which the court considers *de novo*.<sup>186</sup> The court highlighted North Dakota Century Code section 10-15-52, which grants foreign cooperatives “all rights, exemptions, and privileges of a cooperative organized for the same purposes under the laws of this state.”<sup>187</sup> Since the power of eminent domain is a right given to domestic electric cooperatives, Minnkota would be entitled to that right as well.<sup>188</sup>

Second, the North Dakota Supreme Court explored the ambiguous terms of North Dakota Century Code section 10-15-60.<sup>189</sup> That section provides in part

All foreign and domestic cooperatives are governed by the provisions of this chapter except that they shall not apply to cooperatives governed by . . . chapter[] . . . 10-13, . . . except when the laws governing such associations clearly adopt or refer to any provisions of this chapter or refer to provisions of the general law governing cooperatives.<sup>190</sup>

The landowners argued that Minnkota is a foreign cooperative operating under chapter 10-15, and thus cannot use the eminent domain power under chapter 10-13.<sup>191</sup> They argued that “cooperative” as defined in chapter 10-15 precluded the finding that Minnkota could be considered an electric cooperative under chapter 10-13.<sup>192</sup> The North Dakota Supreme Court disagreed, noting that North Dakota Century Code section 10-13-01 permits an electric cooperative to be organized under either chapter 10-13, chapter 10-15, or both.<sup>193</sup> Looking at the legislative history surrounding the adoption of section 10-15-60, the court noted the intention of the legislature was to clear up contradictory organization requirements for cooperatives, but also to give cooperatives flexibility to determine under which chapter to organize.<sup>194</sup> Because Minnkota is a foreign cooperative permitted to do business in North Dakota, and an electric cooperative can be organized under both chapter 10-13 and/or 10-15, Minnkota is granted all powers as if

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186. *Id.* ¶ 6, 817 N.W.2d at 328. The court also noted the grant of a certificate of cite compatibility by the ND PSC could not confer the power of eminent domain, thus partially disagreeing with the Wells County District Court. *Id.*

187. *Id.* ¶ 8 (quoting N.D. CENT. CODE § 10-15-52 (2012)).

188. *Id.* at 329.

189. *Id.* ¶¶ 9-10.

190. N.D. CENT. CODE § 10-15-60 (2012).

191. *Minnkota*, ¶ 12, 817 N.W.2d at 330-31.

192. *Id.*

193. *Id.* ¶ 13, 817 N.W.2d at 331.

194. *Id.* ¶ 11, 817 N.W.2d at 330.

organized under the laws of North Dakota, including the power of eminent domain under chapter 10-13.<sup>195</sup> The court held the use of the definition of cooperative is not a proper means to limit a foreign cooperative when the legislature clearly stated a foreign cooperative, if properly registered in North Dakota, has all the powers of a domestic cooperative under state law, not just the particular chapter on general cooperative law.<sup>196</sup> Accordingly, the North Dakota Supreme Court found Minnkota was entitled to use eminent domain and could properly petition for survey access to the landowner's property in furtherance of that power.<sup>197</sup>

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195. *Id.* ¶ 14, 817 N.W.2d at 331.

196. *Id.*

197. *Id.* ¶ 16.

NUISANCE – DUTY OF CARE FOR ADJOINING PROPERTY  
OWNERS – RIGHT TO RECOVER FOR DAMAGES CAUSE BY  
ENCROACHING TREES

*Richard Herring of Herring Chiropractic Clinic v. Lisbon Partners  
Credit Fund, Ltd. Partnership and Five Star Services*

In *Herring v. Lisbon Partners*,<sup>198</sup> Herring appealed a district court summary judgment dismissing his claim against Lisbon Partners and Five Star Services for nuisance, negligence, and civil trespass.<sup>199</sup> The North Dakota Supreme Court reversed the district court's decision, holding that it had erred in finding that Lisbon Partners and Five Star owed no duty to Herring to prevent damage caused by encroachment of branches from their tree onto Herring's property.<sup>200</sup>

Herring owns a commercial building in Lisbon which houses his chiropractic business.<sup>201</sup> The adjoining property is owned by Lisbon Partners and managed by Five Star.<sup>202</sup> Branches from a large tree on the Lisbon property overhung onto Herring's property and brushed against his building.<sup>203</sup> For many years, Herring trimmed back the encroaching branches and cleaned out his downspouts and gutters, which were clogged by leaves, twigs and debris from the branches.<sup>204</sup> Herring claimed that the encroaching branches had caused damage to his building by creating water and ice dams to build up on his roof, which eventually led to more significant damage.<sup>205</sup> After Lisbon and Five Star denied responsibility for the damages, Herring sued them for the cost of repairs to his building, claiming they had committed civil trespass and negligence, and had maintained a nuisance by breaching their duty to maintain and trim the tree so that it did not cause damage to his property.<sup>206</sup> The district court dismissed Herring's claims, concluding that Lisbon Partners and Fives Star had no duty to trim or maintain the tree, but that Herring could trim the branches back at his own expense.<sup>207</sup>

The North Dakota Supreme Court found Herring's appeal valid because, although an appeal from an order granting summary judgment is

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198. 2012 ND 226, 823 N.W.2d 493.

199. *Herring*, ¶ 1, 823 N.W.2d at 495.

200. *Id.*

201. *Id.* ¶ 2.

202. *Id.*

203. *Id.* ¶ 3.

204. *Id.*

205. *Id.*

206. *Id.* ¶ 4.

207. *Id.*

not appealable, the appeal is treated as an appeal from a judgment because a consistent judgment was entered in this case.<sup>208</sup>

The first part of the court's analysis involved a discussion of the four different approaches used by courts around the country regarding a landowner's duty to maintain and trim trees on his land, which encroach and cause damage to the property of adjoining landowners.<sup>209</sup> Under the "Massachusetts rule," a landowner has no liability to neighboring landowners for damages caused by encroachment.<sup>210</sup> The neighboring landowner's remedy is limited to self-help.<sup>211</sup> Under the "Hawaii rule," the owner of a tree may be held liable when encroaching branches or roots cause harm, or create imminent danger of causing harm, beyond merely casting shade or dropping leaves, flowers, or fruit.<sup>212</sup> However, a landowner may always cut away, only to his property line above or below the surface of the ground, any part of the adjoining owner's trees or other plant life.<sup>213</sup> The "Restatement rule," from the Second Restatement of Torts, finds that an artificially planted or maintained tree may be a nuisance and impose liability on the landowner.<sup>214</sup> However, there is no liability for a naturally growing tree which encroaches on neighboring land.<sup>215</sup> Lastly, the "Virginia rule," makes a distinction between noxious and non-noxious trees.<sup>216</sup> Under this rule, damages are available for encroachment by a damage-causing noxious tree, but damage caused by encroachment of a non-noxious tree is limited to self-help.<sup>217</sup>

After analyzing the various rules, the court surmised that under any of the rules, regardless of the circumstances, the adjoining landowner would have the right to self-help, allowing him to cut back the intruding branches and roots to his property line at his own expense.<sup>218</sup>

The court then disagreed with the district courts analysis, finding that its decision, as well as section 47-01-12, conflict with the more specific section 47-01-17 of the North Dakota Century Code.<sup>219</sup> Because section 47-01-17 contains a particular provision with respect to tree ownership, that

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208. *Id.* ¶ 5, 823 N.W.2d at 496.

209. *Id.* ¶¶ 8-12.

210. *Id.* ¶ 9, 823 N.W.2d at 496-97 (citing *Michalson v. Nutting*, 175 N.E. 490, 490-91 (Mass. 1931)).

211. *Id.* at 497.

212. *Id.* ¶ 10 (citing *Whitesell v. Houlton*, 632 P.2d 1077, 1078 (Haw. 1981)).

213. *Id.*

214. *Id.* ¶ 11 (citing RESTATEMENT (SECOND) OF TORTS §§ 839-40 (1979)).

215. *Id.*

216. *Id.* ¶ 12 (citing *Smith v. Holt*, 5 S.E.2d 492, 495 (Va. 1939)).

217. *Id.* at 497-98.

218. *Id.* ¶ 13, 823 N.W.2d at 498.

219. *Id.* ¶¶ 15-19, 823 N.W.2d at 498-99.

section would take precedence over the conflicting portion of 47-01-12, and requires vesture of ownership of the entire tree in that individual who owns the trunk of the tree.<sup>220</sup> The Supreme Court then concluded that the “Hawaii rule,” which is expressly based on the concept that the owner of the trunk of the tree owns the entire tree, more fully gives effect to both statutory provisions.<sup>221</sup> The court likewise found that, in addition to comporting most closely with North Dakota statutory law, the Hawaii approach is the most fair and well-reasoned of the four approaches because it recognizes the tree owner’s ownership and responsibility for the entire tree, while also protecting the neighboring landowner’s right to everything above and below the surface of his land.<sup>222</sup> Furthermore, the other approaches have either been widely criticized, or been adopted in very few jurisdictions.<sup>223</sup>

Upon adopting the Hawaii rule, the court reversed the district court and held that the owners of the encroaching tree were not liable for any damages caused by the tree dropping leaves, flowers, or fruit.<sup>224</sup> However, remanded the issue whether there was a material factual dispute regarding whether damages have resulted from the tree’s branches physically scraping Herring’s building.<sup>225</sup> If Herring is able to present evidence establishing damages caused by the tree’s branches physically contacting the building, Lisbon Partners and Five Star would be liable for such damages under the Hawaii rule.<sup>226</sup>

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220. *Id.* ¶ 16, 823 N.W.2d at 499.

221. *Id.* ¶ 17.

222. *Id.* ¶ 18.

223. *Id.* ¶¶ 18, 19, 823 N.W.2d at 499-500.

224. *Id.* ¶ 26, 823 N.W.2d at 502.

225. *Id.*

226. *Id.*