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:

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CONSTITUTIONAL LAW – RIGHT TO ABORTION – STATE V. FEDERAL CONSTITUTION

MKB Management v. Burdick

By per curiam opinion in *MKB Management v. Burdick*,[2] the North Dakota Supreme Court agreed that there was not sufficient majority among them to declare unconstitutional a statute that restricted medication abortions, which resulted in overturning the district court's enjoinment of the State enforcing the law.[3] Four out of the five justices are needed to declare a legislative enactment unconstitutional, and only three justices were of the opinion that this particular enactment was unconstitutional.[4] There were four separate opinions issued in this case.[5] Chief Justice VandeWalle held that the statute was constitutional under both the state and federal constitutions.[6] Justice Kapsner and then Judge Maring held that the law was unconstitutional under the state and federal constitutions.[7] Justice Crothers held that the law was unconstitutional under the federal constitution and that no analysis was required under the state constitution.[8] Justice Sandstrom held that the law was constitutional under the state

2. 2014 ND 197, 855 N.W.2d 31 (per curiam).
3. *Id.* ¶ 1, 855 N.W.2d at 31.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

constitution and that any analysis under the federal constitution was not properly before the court.[9]

During the 2011 North Dakota legislative session, the Legislative Assembly passed a provision to amend the North Dakota Abortion Control Act.[10] The amendment provided a ban on certain abortion-inducing prescriptions that are not authorized and tested by the FDA, required physicians providing these medications to have to contract with another physician for emergencies, and required that the medication be administered in the same room and presence of the prescribing physician.[11] Red River Women's Clinic, the only clinic to provide abortion services in North Dakota, sought a declaration from district court that the provision was unconstitutional under the North Dakota Constitution.[12] The clinic provided two prescription drugs for its medication abortions, and only twenty percent of its patients use the medication-based abortion method.[13] The first prescription drug, mifepristone, blocks a hormone needed to sustain the pregnancy[14] and results in the fetus detaching from the uterus.[15] The second prescription drug, misoprostol, assists the uterus in contracting[16] to expel the fetus out of the body.[17] The medication abortion is only administered before nine weeks of pregnancy.[18] While the FDA approved the use of the two medications together, the drugs have several variations of off-label use that is not reviewed by the FDA.[19] The clinic used the medications off-label, which the FDA did not prohibit.[20]

The district court entered judgment that enjoined the State from enforcing House Bill 1297, due to the likelihood that the plaintiffs would prevail in the state constitutional challenge.[21] In determining this likelihood, the court reviewed the case under the undue burden standard from *Planned Parenthood v. Casey*[22] and the Fourteenth Amendment to the United States Constitution.[23] In addition, the district court also relied on the

9. *Id.*
10. *Id.* ¶ 4, 855 N.W.2d at 32 (VandeWalle, C.J., opinion).
11. *Id.* ¶ 8, 855 N.W.2d at 34.
12. *Id.* ¶ 5, 855 N.W.2d at 32.
13. *Id.* ¶ 65, 855 N.W.2d at 54.
14. *Id.* ¶ 66.
15. *Id.* ¶ 6, 855 N.W.2d at 33.
16. *Id.* ¶ 66, 855 N.W.2d at 54.
17. *Id.*
18. *Id.* ¶ 5, 855 N.W.2d at 52.
19. *Id.* ¶ 6, 855 N.W.2d at 33.
20. *Id.*
21. *Id.* ¶ 10.
22. 505 U.S. 833 (1992).
23. *MKB Mgmt.*, ¶ 10, 855 N.W.2d at 35.

North Dakota Constitution and noted that the state constitution provided more expansive due process rights.[24] Ultimately, the district court applied strict scrutiny and found the plaintiffs were likely to prevail for three reasons.[25]

First, the court found the amendment effectively banned all medication abortions because one of the drugs was used off-label.[26] Second, the court found it impossible for a physician to abide with the emergency services contract requirement.[27] Finally, the court found it impossible, due to staffing concerns, to always have the prescribing physician in the same room as the medication abortion.[28] As a result, the district court found that the amendment failed the strict scrutiny standard and the plaintiffs were likely to prevail.[29] The district court further stated that the amendment was unconstitutional under the federal constitution because it was an undue burden on the right to an abortion before viability.[30] The Chief Administrator of the North Dakota Department of Health appealed the judgment that enjoined enforcement of House Bill 1297, arguing that there was no fundamental right to an abortion under the state's constitution.[31]

Chief Justice VandeWalle found that the district court erred in determining a fundamental right to abortion exists under the North Dakota Constitution and in applying strict scrutiny to House Bill 1297.[32] Chief Justice VandeWalle first analyzed the federal constitutional issue.[33] He mentioned that in *Roe v. Wade*,[34] the United States Supreme Court concluded an individual's right to privacy was broad enough to include the right to an abortion.[35] He cautioned that the Court also stated any right to an abortion was not an absolute right and that the states may still have an interest in limiting abortions.[36]

Next, Chief Justice VandeWalle noted that *Casey* utilized the undue burden standard, not strict scrutiny, to analyze abortion regulations,[37] which the Court adopted out of deference to the state's important and legitimate

24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* ¶ 11.
31. *Id.* ¶ 4, 855 N.W.2d at 32.
32. *Id.*
33. *Id.* ¶ 15, 855 N.W.2d at 36.
34. 410 U.S. 113 (1973).
35. *MKB Mgmt.*, ¶ 15, 855 N.W.2d at 36.
36. *Id.*
37. *Id.* ¶ 16.

interests in a woman's health.[38] The undue burden standard prevents the government from placing an undue burden upon a woman's right to an abortion if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[39]

In *Gonzales v. Carhart*,[40] the Court found that a law banning partial-birth abortions did not provide a substantial obstacle for a woman seeking an abortion because it was only one type of abortion procedure.[41] The Court stated regulating the medical profession and promoting respect for life justified the state in allowing or banning certain practices.[42] The Court additionally observed that there was no undue burden because alternative abortion procedures existed.[43]

After this survey of precedent under the federal constitution, Chief Justice VandeWalle analyzed precedent under the state constitution[44] and recognized that there are inherent rights under the state constitution.[45] The Chief Justice outlined a few cases showing an individual's liberty and the state's interest of police power do not always require the strict scrutiny standard.[46] Some states have declared abortion a fundamental right and subject to strict scrutiny under their respective constitutions even though their constitutions are silent on the matter.[47] The Chief Justice opined that because there is no provision under the North Dakota Constitution specifically referencing a right to an abortion,[48] there was no intention to create a fundamental right to abortion that would entail a review of strict scrutiny.[49]

Accordingly, Chief Justice VandeWalle then reviewed the challenged House Bill 1297 under the federal constitution's undue burden standard.[50] He recognized that despite the state constitution not providing a right to abortion, there is still the right to obtain an abortion under the federal constitution.[51] The contended language of the enactment was the

38. *Id.* ¶ 17, 855 N.W.2d at 37-39.
39. *Id.*
40. 550 U.S. 124 (2007).
41. *MKB Mgmt.*, ¶¶ 19-20, 855 N.W.2d at 39-40.
42. *Id.* ¶ 20, 855 N.W.2d at 40.
43. *Id.*
44. *Id.* ¶ 22, 855 N.W.2d at 41.
45. *Id.* ¶ 27, 855 N.W.2d at 42.
46. *Id.* ¶¶ 27-31, 855 N.W.2d at 42-44.
47. *Id.* ¶ 32, 855 N.W.2d at 44.
48. *Id.* ¶¶ 33-35, 855 N.W.2d at 44-45.
49. *Id.* ¶ 38.
50. *Id.* ¶ 41, 855 N.W.2d at 46.
51. *Id.*

requirement of FDA approval,[52] as the FDA had not approved the two prescription drugs to be used together for medication abortions.[53] The legislative history did not indicate an intention to ban all drugs used for abortions, just the drugs that have not been tested and authorized by the FDA.[54] Because the FDA had approved the two medications used by the clinic, the Chief Justice opined that it was improper for the district court to conclude House Bill 1297 banned all medication abortions.[55]

After this analysis, the Chief Justice turned to precedent from other jurisdictions that had applied the undue burden standard.[56] In *Planned Parenthood Southwest Ohio Region v. DeWine*,[57] the Sixth Circuit Court of Appeals upheld an Ohio statute that required the FDA approved dosage requirements and gestational time limits.[58] The court found that these regulations were not an undue burden because the woman still had the option for surgical abortion.[59] Moreover, the court observed that the right to choose an abortion does not confer the right to choose the method.[60] In *Planned Parenthood Arizona, Inc. v. Humble*,[61] the Ninth Circuit Court of Appeals invalidated an Arizona regulation requiring FDA approval for medication abortions because Arizona provided no evidence of its interest in the woman's health.[62] Chief Justice VandeWalle chose to follow *DeWine's* reasoning because he believed it showed the proper deference afforded to the state's interest in a woman's health.[63] Using *DeWine's* reasoning, the Chief Justice found there was enough evidence to show that on its face, the House Bill 1297 furthered the state's interest in protecting women against the dangers of off-label uses of abortion drugs.[64]

The Chief Justice also observed that the other provisions of House Bill 1297 failed to create an undue burden on a woman's right to an abortion.[65] He rejected the contention that requiring abortion providers to have an emergency services contract with another physician created any type of

52. *Id.* ¶ 47, 855 N.W.2d at 48.
53. *Id.*
54. *Id.*
55. *Id.* ¶¶ 47-48, 855 N.W.2d at 48-49.
56. *Id.* ¶ 51, 855 N.W.2d at 49-50.
57. 696 F.3d 490 (6th Cir. 2012).
58. *MKB Mgmt.*, ¶ 52, 855 N.W.2d at 50.
59. *Id.*
60. *Id.*
61. 753 F.3d 905 (9th Cir. 2014).
62. *MKB Mgmt.*, ¶ 54, 855 N.W.2d at 51.
63. *Id.* ¶ 55.
64. *Id.* ¶ 57.
65. *Id.* ¶ 58, 855 N.W.2d at 52.

substantial obstacle.[66] Although the district court found the contract had to be exclusive, the Chief Justice found that the plain language did not require it to be so.[67] Based upon the foregoing, Chief Justice VandeWalle found House Bill 1297 constitutional under both the state and federal constitutions, and he would have reversed the district court's opinion in all respects.[68] Furthermore, the Chief Justice found that under article VI, section 4 of the North Dakota Constitution, four justices are required to rule a legislative enactment unconstitutional.[69]

Justice Kapsner, joined by then Surrogate Judge Maring,[70] wrote a separate opinion agreeing with the district court that there is a fundamental right to an abortion under the North Dakota Constitution, such that strict scrutiny was the appropriate standard and that House Bill 1297 banned all medication abortions.[71] Justice Kapsner took the position that the case should not be about the right to abortion because such a right already exists under federal law.[72] Justice Kapsner was of the opinion that this case should more properly be viewed as a dispute about a woman's right to consult with her physician and make informed medical decisions.[73] She concluded that legislation should not be an obstacle with these decisions, especially when a woman cannot have a surgical abortion.[74] Moreover, Justice Kapsner opined that this case involved the "doctor's right to practice good medicine without fear of prosecution."[75]

Justice Kapsner began her analysis by interpreting the statutory language as enacted by House Bill 1297.[76] She concluded that the law created a "de facto" ban on medication abortions.[77] She observed that the FDA only approved one of the drugs for medical abortions.[78] However, the second, unapproved drug was necessary to complete the abortion for about 93% of cases.[79] Therefore, in Justice Kapsner's opinion, the law created a

66. *Id.* ¶ 49, 855 N.W.2d at 49.
67. *Id.*
68. *Id.* ¶ 4, 855 N.W.2d at 32.
69. *Id.* ¶ 60, 855 N.W.2d at 52.
70. Although Justice Maring retired by the time the time the North Dakota Supreme Court rendered this decision, she took part in the decision because she was on the court when the court heard this appeal.
71. *Id.* ¶ 63, 855 N.W.2d at 53 (Kapsner, J., opinion).
72. *Id.* ¶ 64.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* ¶ 75, 855 N.W.2d at 56.
77. *Id.* ¶ 78, 855 N.W.2d at 58.
78. *Id.*
79. *Id.*

de facto ban on abortion.[80] Furthermore, she found the enactment was a complete ban for any woman who could not have a surgical abortion.[81]

With this conclusion, Justice Kapsner turned to the questions of whether there is a fundamental right to an abortion under the state constitution and whether House Bill 1297 should be analyzed under the strict scrutiny or undue burden standard.[82] First, Justice Kapsner opined there is a fundamental right under the state constitution to choose an abortion.[83] In doing so, she noted that the state constitution does not parallel the federal constitution because the state constitution creates a more expansive liberty under article I, section 1.[84] Justice Kapsner looked to other states that have constitutions similar to North Dakota and whether such states recognize a right to an abortion.[85] She found that eleven states with such constitutions recognize a fundamental right to an abortion and most use the strict scrutiny standard.[86] However, some of these states still use the undue burden standard.[87] Additionally, some states allow the right to abortion under the right to privacy.[88] Justice Kapsner also pointed out that North Dakota recognizes a person's liberty interests in refusing unwanted medical treatment, personal autonomy, and self-determination.[89] Moreover, Justice Kapsner concluded that the contended legislation impedes on this self-determination and the doctor's right to give medical advice.[90]

Next, Justice Kapsner applied the strict scrutiny standard.[91] To survive the strict scrutiny test, the government must have a compelling interest, and the restriction must be narrowly tailored to effectuate such interest.[92] Kapsner found that the concern for maternal health was not a compelling state interest.[93] The State argued that its interest was for the protection of "the health of women seeking abortions."[94] The State claimed that abortions are unique to other medical procedures and require unique

80. *Id.*
81. *Id.* ¶ 79.
82. *Id.* ¶¶ 83-84, 855 N.W.2d at 59.
83. *Id.* ¶ 85, 855 N.W.2d at 59-60.
84. *Id.* ¶ 86, 855 N.W.2d at 60.
85. *Id.* ¶¶ 93-96, 855 N.W.2d at 62-64.
86. *Id.* ¶ 93, 855 N.W.2d at 62-63.
87. *Id.*
88. *Id.* ¶ 96, 855 N.W.2d at 64.
89. *Id.* ¶ 98.
90. *Id.*
91. *Id.* ¶ 100, 855 N.W.2d at 65.
92. *Id.*
93. *Id.* ¶ 111, 855 N.W.2d at 72.
94. *Id.* ¶ 101, 855 N.W.2d at 65.

remedies.[95] Courts have recognized the state's interest in maternal health for abortion, but only during a time when abortions were considered very unsafe and dangerous.[96]

Justice Kapsner pointed out that with medical advancement, abortions are safe and only require regulation similar to that of other medical procedures.[97] In this case, the evidence at the district court and an amicus brief on appeal showed that there was no safety reason to limit medication abortions.[98] Justice Kapsner found that the law was also not narrowly tailored to address the State's interest[99] because it did not promote women's health.[100] She was of the opinion that if the law failed to promote women's health, it could not be narrow enough to satisfy this test.[101]

Justice Kapsner reviewed the enactment under the undue burden test.[102] She found this test appropriate because the plaintiffs brought the action under sections of the state constitution that mirrored language with the federal constitution.[103] *Roe* used strict scrutiny analysis to evaluate the right to have an abortion before viability.[104] In *Casey*, the Court turned away from strict scrutiny to use the undue burden standard.[105] That standard provides that if the "state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus," then that state regulation is unconstitutional.[106] The Court upheld this test in *Gonzales*, which held that prohibiting partial-birth abortions, where the fetus is removed in intact, but allowing a fetus to be removed in parts was not an undue burden.[107]

Utilizing the undue burden standard, Justice Kapsner reviewed the purpose and effect of House Bill 1297.[108] The state offered that the purpose of the amendment was to protect women's health.[109] However, courts cannot just take such an assertion at face value and must ensure that the

95. *Id.*
96. *Id.* ¶¶ 103-104, 855 N.W.2d at 66.
97. *Id.* ¶ 105.
98. *Id.* ¶¶ 107-108, 855 N.W.2d at 67-71.
99. *Id.* ¶ 113, 855 N.W.2d at 72.
100. *Id.* ¶ 112.
101. *Id.*
102. *Id.* ¶ 114.
103. *Id.*
104. *Id.* ¶ 115, 855 N.W.2d at 73 (citing Roe v. Wade, 410 U.S. 113, at 117-18 (1973)).
105. *Id.* ¶ 116 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871-72 (1992)).
106. *Id.* ¶ 117 (quoting *Casey*, 505 U.S. at 877-79).
107. *Id.* ¶¶ 118-19, 855 N.W.2d at 74-75.
108. *Id.* ¶ 120, 855 N.W.2d at 75.
109. *Id.*

purpose is actually served by the legislation.[110] In doing so, the court would need to weigh the rationale for the law and the burden the law imposes.[111]

Justice Kapsner agreed that the district court properly weighed the evidence that was presented regarding the rationale of the law versus its burden.[112] She agreed that the legislation did not protect women's health when the legislation required the strict use of the FDA label when off-label use is common practice in the medical community.[113] She also noted that the North Dakota law has allowed the off-label use of other medications and even requires health insurance to cover such use.[114] Furthermore, Justice Kapsner found that the emergency contract provision in House Bill 1297, which requires abortion-providing doctors to contract with another physician for emergency services, did not protect women's health.[115]

Justice Kapsner found the "de facto ban" on medication abortions created a substantial obstacle for a woman seeking pre-viability abortion.[116] The district court found that there were some women who cannot medically have the surgical abortion.[117] Also, victims of abuse may find medication abortions less traumatizing and such treatment may be necessary for their emotional health.[118] The legislation's ban of off-label uses of one of the drugs also created a substantial obstacle for women seeking pre-viability abortions.[119] The use of the two drugs was the standard of care for medication abortions.[120] The only drug that would be allowed under the new legislation is considered a "relic" in the medical community.[121] The plaintiffs offered evidence that the two drugs at issue were safer than the older drug.[122] Based on the foregoing district court findings, Justice Kapsner found that House Bill 1297 created a substantial obstacle for women seeking a pre-viability abortion.[123]

110. *Id.*
111. *Id.* ¶¶ 121-23, 855 N.W.2d at 75-76.
112. *Id.* ¶ 125, 855 N.W.2d at 76.
113. *Id.* ¶¶ 126-32, 855 N.W.2d at 76-79.
114. *Id.* ¶ 133, 855 N.W.2d at 79.
115. *Id.* ¶ 140, 855 N.W.2d at 81.
116. *Id.* ¶ 142, 855 N.W.2d at 83.
117. *Id.* ¶ 141, 855 N.W.2d at 81.
118. *Id.* at 82-83.
119. *Id.* ¶ 143, 855 N.W.2d at 83.
120. *Id.*
121. *Id.* at 84.
122. *Id.* at 84-85.
123. *Id.* ¶ 145, 855 N.W.2d at 83.

Justice Kapsner was of the opinion that state could not offer much, if any, evidence that showed the older drug protected women's health.[124] The effect of having the emergency contract provision did not protect women's health.[125] This provision would be impossible to fulfill, as no other physician would be willing to enter in such a contract.[126] Also, emergency services are rarely needed.[127] Justice Kapsner also stated that because the U.S. Constitution is supreme to the state constitution, the four-justice minimum required to overrule a legislative enactment as stated in the North Dakota Constitution is trumped.[128] Based upon the foregoing, Justice Kapsner would have affirmed the appeal.[129]

Justice Crothers offered his separate opinion, concurring that the statute was unconstitutional under the federal constitution, which made it unnecessary to analyze the issues under state law.[130] He believed that because this was a constitutional issue, the court was "obliged to adhere to our established principles."[131] In beginning his analysis, Justice Crothers noted the fundamental principle that the North Dakota Constitution can confer rights in addition to those afforded by the federal constitution, but it cannot grant fewer rights than the federal constitution.[132] This principle originates in the Supremacy Clause of the U.S. Constitution.[133]

The second principle Crothers mentioned was the restraint that courts must exercise in deciding on constitutional questions "in advance of the necessity of deciding them," in order to avoid advisory opinions.[134] He also opined that the issue must first survive the federal constitution in order to be decided under state precedent, as the federal constitution sets the floor in regards to individual rights.[135] Crothers then noted his concurring agreement with Justice Kapsner's federal analysis, and therefore concluded there was nothing to decide under the state constitution.[136] Finally, Justice Crothers opined that because only three justice concluded the enactment

124. *Id.* ¶ 143, 855 N.W.2d at 85-86.
125. *Id.* ¶ 146, 855 N.W.2d at 88.
126. *Id.*
127. *Id.*
128. *Id.* ¶¶ 151-55, 855 N.W.2d at 89.
129. *Id.* ¶ 150.
130. *Id.* ¶ 157, 855 N.W.2d at 91 (Crothers, J., opinion).
131. *Id.* ¶ 161, 855 N.W.2d at 92.
132. *Id.*
133. *Id.*
134. *Id.* ¶¶ 162-63, 855 N.W.2d at 92-93 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445 (1998)).
135. *Id.* ¶ 164, 855 N.W.2d at 93.
136. *Id.* ¶ 165, 855 N.W.2d at 94.

was unconstitutional, an insufficient majority, the district court's judgement declaring H.B. 1297 unconstitutional should be reversed.

In Justice Sandstrom's separate opinion, he commented that the sole issue brought before the court was the constitutionality of the statute under the North Dakota Constitution, not the federal constitution.[137] He noted that none of the parties mentioned federal constitution arguments; rather, the plaintiffs exclusively sought to challenge the statute under the North Dakota Constitution.[138] As such, Justice Sandstrom was unwilling to address the argument that the statute violated the federal constitution because it was never pled or tried by consent.[139] He then opined that Chief Justice VandeWalle had a persuasive argument of the constitutionality of House Bill 1297 under the North Dakota Constitution.[140] Finally, Justice Sandstrom agreed with Chief Justice VandeWalle and Justice Crothers "that the statute has not been declared unconstitutional under either constitution by a sufficient majority, as required by the North Dakota Constitution."[141]

137. *Id.* ¶ 168 (Sandstrom, J., opinion).
138. *Id.* ¶ 169.
139. *Id.* ¶ 166, 855 N.W.2d at 94.
140. *Id.* ¶ 170, 855 N.W.2d at 94-95.
141. *Id.* ¶ 184, 855 N.W.2d at 98.

CONTRACTS – CONSIDERATIONS OF FORBEARANCE – QUESTIONS FOR THE JURY

Finstad v. Ransom-Sargent Water Users, Inc.

In *Finstad v. Ransom-Sargent Water Users, Inc.*,[142] the North Dakota Supreme Court reversed the district court judgment because the district court erred as a matter of law when it ruled that John and Lori Finstad were relieved, due to the economic duress doctrine, from meeting the requirements of an agreement and release contract.[143] The Finstads owned a tract of land and granted Ransom-Sargent Water Users, Inc., known as Southwest Water Users District ("District"), an option to purchase said land.[144] As part of the option, the Finstads were allowed to lease back the property for five years and had the right of first refusal to lease the property for an additional five years.[145] After some unsanctioned land use by the Finstads transpired, the District terminated the Finstads' lease-back rights.[146]

To maintain Production Flexibility Contract ("PFC") payments on the property, the Finstads and the District executed a farm rental contract and an "Agreement and Release" contract.[147] Allegedly, because the Finstads were undergoing economic difficulties causing them a great deal of stress at the time, they choose not to argue with the District over the provisions of the agreement and release.[148] The Finstads eventually sued the District, in part, because they claimed that the "District obtained the agreement and release through fraud, duress or coercion."[149]

The district court found that the agreement and release "was legally ineffective" because it was procured under economic duress.[150] As a result, the court rescinded the agreement and release and determined that the Finstads did not violate the lease agreement by using the land, such that the District inappropriately prevented the Finstads from exercising their lease-back rights.[151] The district court also awarded the Finstads $53,000.99 in damages and interest.[152] The Finstads appealed the district court's decision,

142. 2014 ND 146, 849 N.W.2d 165.
143. *Id.* ¶ 1, 849 N.W.2d at 166.
144. *Id.* ¶ 2.
145. *Id.*
146. *Id.* ¶ 3, 849 N.W.2d at 167.
147. *Id.* ¶ 4.
148. *Id.* ¶ 5, 849 N.W.2d at 168.
149. *Id.* ¶ 6.
150. *Id.* ¶ 7.
151. *Id.*
152. *Id.*

because they believed they were owed more damages, and the District cross-appealed.[153] The court addressed only the cross-appeal issue as to whether the "court erred in rescinding the agreement and release based on the economic duress doctrine."[154]

The court contemplated and determined that North Dakota does not recognize the economic duress doctrine.[155] North Dakota statutes require "consent of the parties" for a valid contract.[156] This consent must be "free," meaning that it cannot be obtained through duress.[157] North Dakota law defines "duress" in North Dakota Century Code section 9-03-05, which requires physical action to find that there is duress.[158] Because the elements necessary to determine economic duress did not exist in the statute, the court refused to adopt the economic duress doctrine, reasoning that although there may be policy reasons for adopting the doctrine, its adoption should be up to the legislature, not the courts, to decide.[159] The legislature, at the time the case was decided, had not recognized the economic duress doctrine.[160]

The Finstads also argued that the assignment and release did not have lawful consideration because it was merely a "sham rental agreement" meant to "secure PFC payments on the land."[161] The court explained that because the contracts themselves were not inherently illegal, the contracts are not void for illegality.[162] The court found there was adequate consideration for the agreement and release contract because the agreement stated that the Finstads received "consideration in the form of 'the right to collect all government payments available for 2001.'"[163] Ultimately, because North Dakota does not recognize the economic duress doctrine, the agreement and release contract was valid, thereby preventing the Finstads' action, which prompted the court to reverse the district court judgment.[164]

153. *Id.* ¶ 8.
154. *Id.*
155. *Id.* ¶ 14, 849 N.W.2d at 170.
156. *Id.* ¶ 10, 849 N.W.2d at 169.
157. *Id.*
158. *Id.* ¶ 13, 849 N.W.2d at 170.
159. *Id.* ¶¶ 13-14, 849 N.W.2d at 170-71.
160. *Id.* ¶ 13, 849 N.W.2d at 170.
161. *Id.* ¶ 16, 849 N.W.2d at 171.
162. *Id.* ¶¶ 17-19.
163. *Id.* ¶ 21, 849 N.W.2d at 172.
164. *Id.* ¶ 24.

CONTROLLED SUBSTANCES – FORFEITURES – PRESCRIPTION DEFENSE UNRECOGNIZED

State v. Kuruc

In *State v. Kuruc*,[165] defendants Rebecca Larson and Brian Kuruc both appealed after conditionally pleading guilty to possession of marijuana with intent to deliver and possession of drug paraphernalia.[166] Kuruc also had a charge of tampering with physical evidence.[167] Both filed motions to suppress evidence and provided their Washington medical marijuana prescriptions as a defense to the crimes of possession and possession with intent to deliver.[168] The district court denied both the motions to suppress and the defense proffered by Larson and Kuruc.[169] This review only discusses the applicability of medical marijuana prescriptions as a defense.

On the morning of January 9, 2013, the Cass County Sheriff's office received a call from a front desk clerk at the Days Inn hotel in Casselton, North Dakota, complaining of a marijuana odor emanating from one of their rooms, which was occupied by Larson and Kuruc.[170] Officers arrived and spoke with the front desk, where they learned that the occupants had requested a 1:00 p.m. checkout time and that there were about six people in the room.[171] The officers could smell an odor of marijuana in the lobby, and as they followed the scent to the room, the odor became "significantly stronger."[172]

A deputy knocked on the door, and Kuruc answered and denied the deputy permission to investigate the complaint.[173] Kuruc tried to close the door, but the deputy wedged her foot in the way to prevent the door from closing.[174] The officers lacked a warrant at this time, but were preventing the door from closing.[175] The deputy informed everyone in the room they were not free to leave and again asked to enter and was denied.[176]

165. 2014 ND 95, 846 N.W.2d 314.
166. *Id.* ¶ 1, 846 N.W.2d at 317.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* ¶ 2.
171. *Id.*
172. *Id.*
173. *Id.* ¶ 3.
174. *Id.* at 317-18.
175. *Id.* at 318.
176. *Id.* ¶ 4.

It was at this time that Larson offered that she had a medical marijuana prescription from the State of Washington and that there might be marijuana located in her rental car.[177] Upon hearing this information, a deputy called to get a warrant for the premises.[178] Meanwhile, the deputy in the doorway observed Kuruc bring a large duffle bag to the bathroom and lock the door.[179] The deputy pushed passed the door and observed Kuruc trying to flush marijuana down the toilet.[180] Kuruc was arrested and the other occupants were detained in the hallway and read their Miranda rights.[181] A search warrant was obtained, and during the search, officers discovered marijuana and paraphernalia in the room and contraband in Larson's vehicle.[182]

The district court denied Larson's and Kuruc's motion in limine to enter their prescriptions as evidence, and the North Dakota Supreme Court affirmed.[183] Larson and Kuruc argued the district court abused its discretion by refusing their motion in limine to admit individual medical marijuana prescriptions from the State of Washington and that this was a lawful defense under North Dakota's Uniform Controlled Substances Act ("NDUCSA").[184] The North Dakota Supreme Court reviews motions in limine under the abuse of discretion standard, and reverses only where the district court acted in an arbitrary, unreasonable, or unconscionable manner.[185]

Larson and Kuruc argued that possessing a controlled substance pursuant to a prescription was a valid defense.[186] They argued under Washington law they were allowed to each possess up to twenty-four ounces per their prescriptions, which was prescribed by a licensed neuropathic doctor in Washington.[187] They further contend that because the prescription was lawfully obtained under Washington law, they were lawfully in possession of marijuana, which would be a defense against the charges of possession and possession with an intent to deliver.[188]

177. *Id.*
178. *Id.*
179. *Id.* ¶ 5.
180. *Id.*
181. *Id.*
182. *Id.* ¶ 6.
183. *Id.* ¶ 1, 846 N.W.2d at 317.
184. *Id.* ¶ 25, 846 N.W.2d at 322.
185. *Id.* ¶ 26.
186. *Id.* ¶ 27.
187. *Id.* at 322-23.
188. *Id.* at 323.

The court began by discussing marijuana's schedule I classification under NDUCSA.[189] In North Dakota, to be classified as a schedule I controlled substance, the substance must "1. Ha[ve] a high potential for abuse; and 2. Ha[ve] no accepted medical use in treatment in the United States or lack[] accepted safety for use in treatment under medical supervision."[190] The NDUCSA contains a prescription exception that allows a person to possess a controlled substances if "the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice."[191] The burden of proving this exception is on the party asserting it.[192]

The court defined a "valid prescription" as "a prescription that is issued for a legitimate medical purpose in the usual course of professional practice by a: (1) Practitioner who has conducted at least one in-person medical evaluation of the patient; or (2) Covering practitioner."[193] A practitioner is defined as a "person licensed, registered, or otherwise permitted by the jurisdiction in which the individual is practicing to distribute, dispense, conduct research with respect to, or to administer a controlled substance in the course of professional practice or research."[194] The district court reviewed the "no accepted medical use" language in the definition of a schedule I drug and the language used in the valid prescription exception and finally resorted to statutory interpretation to resolve the apparent conflict.[195] The district court reasoned that "[c]onstruction of the relevant statutes is harmonized by the interpretation the valid prescription defense only applies to substances listed on the schedules II through IV" because the language describing those schedules states the substance has a "currently accepted medical use."[196]

Beginning its analysis, the North Dakota Supreme Court stated that statutory interpretation is a question of law and that statutes must be construed as a whole, interpreted in context to give meaning and effect to every word, phrase, and sentence, and the context of the statutes and the purposes for which they were enacted must be considered.[197] If general provisions conflict with specific provisions of another statute, the court

189. *Id.* ¶ 28.
190. *Id.* (quoting N.D. CENT. CODE § 19-03.1-04 (2013)).
191. *Id.* ¶ 29.
192. *Id.* ¶ 30.
193. *Id.*
194. *Id.*
195. *Id.* ¶ 31.
196. *Id.*
197. *Id.* ¶ 32.

must attempt to give effect to both.[198] And "[w]hen statutes relate to the same subject matter, this Court makes every effort to harmonize and give meaningful effect to each statute."[199]

Here, the court concluded that the "plain language of the act does not provide for a medical marijuana prescription defense" after construing and harmonizing the prescription exception with the schedule I language.[200] The court looked to the North Dakota Board of Pharmacy's determination that marijuana has a "high potential for abuse, and no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision" that was codified by the legislature.[201] Essentially, the court felt it could not be put in a situation where North Dakota would have to legally recognize out-of-state marijuana prescriptions when such prescriptions would not be legal for its own citizens.[202]

The court went on further to point out that not only is medical marijuana illegal in North Dakota, but it also remains illegal under federal law.[203] Even under federal law marijuana has no accepted medical use.[204] Using the Supremacy Clause, the court reasoned that the Washington medical marijuana prescriptions are contrary to federal law, and therefore the "district court properly construed the North Dakota statute" and properly denied the prescriptions as a defense.[205]

198. *Id.* at 323-24.
199. *Id.* at 324.
200. *Id.* ¶ 33, 846 N.W.2d at 324.
201. *Id*.
202. *Id.*
203. *Id.* ¶ 34.
204. *Id.*
205. *Id.*

CONTROLLED SUBSTANCES – SEARCHES AND SEIZURES – POLICE OFFICERS AND PROBABLE CAUSE

State v. Otto

In *State v. Otto*,[206] the North Dakota Supreme Court decided a case of first impression, holding that the automobile exception applies to a camper, and, as a result, probable cause was sufficient to search the camper without a warrant.[207] On July 26, Police Officer Vetter observed a camper that was located in a parking lot and appeared to have some kind of light flashing around inside of it.[208] After backup arrived, Officer Vetter and two other officers approached the camper and immediately noticed a strong odor of marijuana.[209] An individual, later identified to be Loretta Stroud, emerged from the camper and stated there was no one else inside.[210] It was soon discovered that Wayne Otto was in the trailer, who was subsequently arrested for an outstanding warrant.[211]

Without having been granted a search warrant, Officer Vetter and Sergeant Hellman decided to do a sweep of the trailer without Otto's consent because they were concerned for their safety.[212] During the sweep, they observed a shoebox full of marijuana and what appeared to be zip-lock baggies filled with meth.[213] As a result, Otto was charged with three drug-related offenses.[214] Although Otto moved to dismiss the charges and suppress the evidence derived from the warrantless search of the camper, the district court denied his motion, deciding that the safety sweep was "properly conducted for exigent circumstances present at the scene."[215] Wayne Otto appealed the district court decision to deny his motion to suppress evidence obtained during the warrantless search of camper.[216]

It was Otto's contention that the mere possible presence of other individuals in the camper failed to create the proper exigent circumstances to justify a safety sweep of the camper, which Otto claimed to be his residence.[217] Instead of using the validity of the safety sweep to uphold the

206. 2013 ND 239, 840 N.W.2d 589.
207. *Id.* ¶¶ 17-18, 840 N.W.2d at 595.
208. *Id.* ¶ 2, 840 N.W.2d at 590.
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.* ¶ 3.
213. *Id.* at 591.
214. *Id.* ¶ 5.
215. *Id.* ¶ 7.
216. *Id.* ¶ 1, 840 N.W.2d 590.
217. *Id.* ¶ 7, 840 N.W.2d 591.

district court decision, the North Dakota Supreme Court affirmed the decision on another basis properly before it: the validity of the search based on the automobile exception.[218] The court reiterated that officers can search an automobile for illegal contraband without a warrant if probable cause exists.[219] For the court, the question was whether the camper in this case qualified as an automobile.[220] The court reviewed the justifications for the automobile exception delineated in *California v. Carney*,[221] which includes the "inherently mobile" nature of the automobile and the "lesser expectation of privacy" in automobiles.[222] In applying the automobile exception to the camper, the court referred to variables considered by the Second Circuit Court of Appeals in *United States v. Navas*,[223] which explained that "[e]ven where there is little practical likelihood that the vehicle will be driven away, the [automobile] exception applies."[224]

Because the court not only accepted the automobile exception reasoning laid out in *Carney*, but also the federal courts' inclusion of campers in interpreting *Carney*, the court held that the automobile exception applied to Otto's camper.[225] Additionally, the two *Carney* justifications were met.[226] Although the camper was detached from a vehicle, had attached plugs, and its landing gear down, the court nevertheless determined that the camper "was capable of being mobilized within a very short time."[227] Furthermore, being that the camper was located in a commercial parking lot, it was not in a location normally associated with or used for "residential purposes."[228] For these reasons, it was determined that the camper could properly be classified as an automobile.

Finally, the court determined that the automobile exception applied to Otto's camper because probable caused existed making the search permissible.[229] Probable cause was found because of Officer Vetter's testimony that in nearing the camper, she smelled "a very strong odor of marijuana coming from the camper."[230] The probable cause, combined

218. *Id.* ¶¶ 7-8, 840 N.W.2d at 595.
219. *Id.* ¶ 10, 840 N.W.2d at 592.
220. *Id.* ¶ 11.
221. 471 U.S. 386 (1985).
222. *Otto*, ¶ 13, 840 N.W.2d at 593.
223. 597 F.3d 492, 499-500 (2d Cir. 2010).
224. *Id.* (quoting U.S. v. Howard, 489 F.3d 484, 493 (2d Cir. 2007)).
225. *Otto*, ¶ 16, 840 N.W.2d at 594.
226. *Id.* at 594-95.
227. *Id.* ¶ 16, 840 N.W.2d 595.
228. *Id.* ¶ 17.
229. *Id.* ¶ 18.
230. *Id.* ¶ 19.

with the determination by the court that Otto's camper fell "within the scope of the automobile exception," lead the court to affirm the judgment of the district court.

CONSTITUTIONAL LAW – SEARCHES AND SEIZURES – CURTILAGE

State v. Nguyen

In *State v. Nguyen*,[231] the North Dakota Supreme Court held that the use of a drug-sniffing dog in a secure apartment hallway does not violate the Fourth Amendment rights against unreasonable searches and seizures.[232] The court reversed and remanded the trial court's suppression of evidence.[233]

Nguyen was charged with possession of marijuana with intent to deliver and drug paraphernalia.[234] The facts of the case were never in dispute.[235] On November 8, 2012, law enforcement officers were called to an apartment building located on Villa Drive South, Fargo, North Dakota, after a tenant complained of smelling marijuana on the second floor of the building.[236] The building was added to a list of properties to be investigated further because the officers were unable to identify the source of the odor.[237] On December 9, 2012, an officer with the narcotics division and an officer with the K-9 unit conducted further investigation using Earl, a drug-sniffing dog.[238] Because the apartment building in question had locked main entrances and restricted access, tenants were given keys and guests could only gain access by tenants electronically opening the door.[239] Tenants in the apartment building shared secured, common hallways and often left personal property, such as shoes, bikes, and other craftwork, in this common hallway.[240]

Officers gained access by catching the door before it closed after a tenant either left or entered the building.[241] Officers brought Earl into the building and first swept the third floor hallway, where nothing was detected.[242] Officers then brought Earl to the second floor hallway, where Earl was immediately alerted to the door of unit 214.[243] Using this information from the drug-sniffing dog sweep, officers obtained a search

231. 2013 ND 252, 841 N.W.2d 676.
232. *Id.* ¶ 1, 841 N.W.2d at 678.
233. *Id.*
234. *Id.* ¶ 5, 841 N.W.2d at 679.
235. *Id.* ¶ 2, 841 N.W.2d at 678.
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.* ¶ 3.
240. *Id.*
241. *Id.* at 678-79.
242. *Id.* at 679.
243. *Id.*

warrant and executed it on December 12, 2012.[244] During the search, "officers seized approximately one-half pound of marijuana, paraphernalia including a snort tube, two digital scales, a grinder, two glass bongs, two glass pipes, and $2,433 in cash, which were all attributed to Nguyen" after he made incriminating statements when questioned by officers.[245]

On April 29, 2013, an evidentiary hearing was held after "Nguyen moved to suppress the evidence arguing the warrantless sweep of the apartment building that formed the basis for the search warrant constituted an illegal search."[246] He also argued suppression was appropriate because the successive searches were constitutionally unreasonable.[247] The trial court granted Nguyen's motion to suppress evidence, and the State appealed.[248]

On appeal, the State argued that the trial court erred in granting Nguyen's motion because the use of a drug-sniffing dog in the common hallway of a secured apartment building did not constitute an illegal search under either the federal or state constitutions.[249] The North Dakota Supreme Court began by reviewing the standard of review concerning a trial court's decision to grant or deny a motion to suppress.[250] The court "affirm[s] a district court decision regarding a motion to suppress if there is sufficient competent evidence fairly capable of supporting the district court's findings, and the decision is not contrary to the manifest weight of the evidence."[251] Violations of constitutional rights are reviewed de novo.[252]

The court began its analysis by quoting the Fourth Amendment: "The Fourth Amendment of the United States Constitution, made applicable to the States by the Fourteenth Amendment, and Article [I], Section 8 of the North Dakota Constitution, prohibit unreasonable searches and seizures."[253] These rights are not only viewed as property rights, but also as a protection of "individual privacy against certain kinds of governmental intrusion" but they "cannot be translated into a general constitutional 'right to

244. *Id.* ¶ 4.
245. *Id.*
246. *Id.* ¶ 5.
247. *Id.*
248. *Id.*
249. *Id.* ¶ 6.
250. *Id.* ¶ 7.
251. *Id.*
252. *Id.*
253. *Id.* ¶ 8, 841 N.W.2d at 679 (quoting State v. Dunn, 2002 ND 189, ¶ 4, 653 N.W.2d 688, 690).

privacy.'"[254] This means that in order for there to be a violation, there must be an intrusion into the person's expectation of privacy.[255] The court stated that an individual's reasonable expectation of privacy has two requirements: "[F]irst that a person ha[s] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[256] Therefore, if a person has a reasonable expectation of privacy in a certain area, the "government must obtain a warrant prior to conducting a search unless an exception to the warrant requirement applies."[257]

In determining whether a legitimate expectation of privacy exists, there must be a showing that there was both a subjective expectation of privacy and that the expectation is objectively reasonable.[258] There are several factors in this determination, including: whether there is a possessory interest in the things seized or the place searched, whether the party can exclude others, whether the party took precautions to maintain privacy, and whether the party had a key to the premises.[259] The Eighth Circuit Court of Appeals has regularly held that tenants of multifamily dwellings do not have a legitimate expectation of privacy in common or shared areas.[260] Other circuits agree with this stance.[261]

In this case, the court reasoned that the locked and secured entrance to Nguyen's apartment was designed to provide security for the tenants rather than to provide privacy in the common hallway.[262] The court further articulated that "[a]n expectation of privacy necessarily implies an expectation that one will be free of any intrusion, not merely unwarranted intrusions."[263] Here, the common hallways in Nguyen's apartment building were available for use by tenants as well as their guests, the landlord and his agents, and others that had legitimate reasons to be there.[264] Nguyen could not bar entry, nor could he exclude others from the common hallway.[265] Even though the law enforcement agents were technical trespassers in the common hallways, it was of no consequence because there was no

254. *Id.* (quoting Katz v. United States, 389 U.S. 347, 350 (1967)).
255. *Id.* at 680.
256. *Id.* (quoting *Katz*, 309 U.S. at 361).
257. *Id.* (quoting State v. Mittleider, 2011 ND 242, ¶ 14, 809 N.W.2d 303, 307).
258. *Id.* ¶ 9.
259. *Id.*
260. *Id.*
261. *Id.* at 680-81 (citing cases from the First, Second, Third, Seventh, and Ninth Circuits).
262. *Id.* ¶ 10, 841 N.W.2d at 681.
263. *Id.* (quoting United States v. Eisler, 567 F.2d 814, 816 (8th Cir. 1977)).
264. *Id.*
265. *Id.*

reasonable expectation of privacy by Nguyen that the hallway would be free from any intrusion.[266] Therefore, the entry by law enforcement into the common hallway was not a search.[267]

The court went on further to reason that "no legitimate expectation of privacy is violated by governmental conduct that can reveal only information about contraband and nothing about arguably 'private' facts."[268] Here, there was no legitimate interest in privately possessing marijuana, and the probability that the "use of a drug-sniffing dog in the common hallway of a secure apartment building will actually compromise any legitimate interest in privacy is too remote to characterize the use of the drug-sniffing dog as a search subject to the Fourth Amendment."[269]

Nguyen used *Florida v. Jardines*[270] to argue the use of the drug-sniffing dog was a search.[271] In *Jardines*, the United States Supreme Court determined "officer use of a drug-sniffing dog on a homeowner's porch (curtilage) to investigate the contents of the home did constitute a 'search' under the Fourth Amendment."[272] The Fourth Amendment protects curtilage of a house.[273] To determine the extent of curtilage, one looks at "whether the area harbors . . . intimate activity associated with the sanctity of a man's home and the privacies of life."[274] The United States Supreme Court articulated four factors in determining curtilage:

> the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.[275]

The court determined that, unlike the curtilage of a home, a party does not have a "legitimate expectation of privacy in the common hallways and shared spaces of an apartment building."[276] The court concluded that because the common hallway was not an area within the curtilage of Nguyen's apartment, no expectation of privacy existed.[277] Under these

266. *Id.*
267. *Id.*
268. *Id.* ¶ 11, 841 N.W.2d at 681.
269. *Id.* at 681–82.
270. 133 S.Ct. 1409 (2013).
271. *Nguyen*, ¶ 12, 841 N.W.2d at 682.
272. *Id.*
273. *Id.* ¶ 13.
274. *Id.* (quoting United States v. Dunn, 480 U.S. 294, 300 (1987)).
275. *Id.* (quoting *Dunn*, 480 U.S. at 301).
276. *Id.*
277. *Id.*

specific circumstances, the drug-dog sniff was not a Fourth Amendment search.[278]

278. *Id.*

CRIMINAL LAW – HOMICIDE – EVIDENCE OF RELATIONSHIP OF DEFENDANT AND WIFE

State v. Kalmio

In *State v. Kalmio*,[279] Omar Mohamed Kalmio appealed from a judgment of conviction for four counts of class AA felony murder after a jury trial.[280] The North Dakota Supreme Court affirmed the judgment of the district court.[281] Kalmio was charged with the murders of Sabrina Zephier, Jolene Zephier, Dillon Zephier, and Jeremy Longie, all of which occurred on January 28, 2011.[282] The five-month-old daughter of Sabrina Zephier and Kalmio was found unharmed at the scene of Sabrina's murder.[283] Sabrina's mother Jolene, brother Dillon, and Jolene's boyfriend Jeremy Longie were found dead in their home.[284] The same firearm, which was never located, killed all four people.[285]

The district court held a hearing on the State's motion in limine to allow hearsay evidence of various witnesses regarding Kalimo's prior bad acts.[286] The district court made preliminary rulings on admissibility regarding each witness's testimony: depending on how the testimony was presented at trial, these rulings were subject to change.[287]

At trial, testimony showed that Kalmio worked near Williston and was at an oil rig site during the time of the murders.[288] However, the State presented contradictory witness testimony, which stated that Kalmio and his brother were seen leaving the rig site in a white company truck during the same time frame.[289] Other State testimony also showed that a white pickup was observed near Sabrina's apartment on the night of the murders.[290] The State also elicited a great deal of testimony on Sabrina and Kalmio's tumultuous relationship and disagreements over various parenting decisions.[291] Evidence demonstrated that Kalmio and Jolene Zephier had disagreed over Jolene's claiming of Sabrina and Kalmio's child on her tax

279. 2014 ND 101, 846 N.W.2d 752.
280. *Id.* ¶ 1, 846 N.W.2d at 755.
281. *Id.* at 756.
282. *Id.* ¶ 2.
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.* ¶ 4.
287. *Id.*
288. *Id.* ¶ 5.
289. *Id.*
290. *Id.*
291. *Id.*

return in order to obtain a refund.[292] In addition, evidence established that the same weapon was used in each killing, and Kalmio had previously sought information on how to obtain a firearm.[293]

Kalmio requested an alibi instruction, but did not submit a notice of alibi as required by North Dakota Rule of Criminal Procedure 12.1.[294] The district court denied Kalmio's request for an alibi instruction.[295] Kalmio objected to the State's use of a PowerPoint in closing argument, which contained images of a gun and red circles, which Kalmio claimed looked like blood.[296] The district court denied Kalmio's request for a mistrial, but directed the images to be removed and the jury to disregard the images.[297] The jury found Kalmio guilty on all four counts of murder and Kalmio was sentenced to four consecutive life sentences without the possibility of parole.[298]

Kalmio's main argument on appeal was that the district court abused its discretion by allowing hearsay testimony and testimony concerning his prior bad acts.[299] The North Dakota Supreme Court began by stating that the decision of the district court determining whether to admit or exclude evidence will only be reversed on appeal for abuse of discretion.[300] The court explained that "[a] district court abuses its discretion in evidentiary rulings when it acts arbitrarily, capriciously, or unreasonably, or when it misinterprets or misapplies the law."[301] The court concluded that Kalmio had preserved the hearsay issues for appeal by objecting consistently to the testimony and by the district court granting a standing objection.[302]

After concluding the issues had been preserved for appeal, the court stated that the key issue was "whether the district court abused its discretion in allowing hearsay testimony and in performing its relevancy analysis."[303] The court cited North Dakota Rule of Evidence 801(c), which states "'[h]earsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[304] The court explained that hearsay is generally

292. *Id.*
293. *Id.*
294. *Id.* ¶ 7, 846 N.W.2d at 757.
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.* ¶ 8.
299. *Id.* ¶ 9.
300. *Id.* ¶ 10.
301. *Id.* (internal quotation omitted).
302. *Id.* ¶ 12, 846 N.W.2d at 758.
303. *Id.* ¶ 13.
304. *Id.* ¶ 14 (quoting N.D. R. EVID. 801(c)).

inadmissible without an exception and that North Dakota Rule of Evidence 803(3) provides the exception relied upon by the district court.[305]

Rule 803(3) provides an exception for "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition . . . but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of the declarant's will."[306] Statements must be contemporaneous with the state of mind the parties seeks to prove, there cannot be any circumstances suggesting an ulterior motive to misrepresent his or her state of mind, and the state of mind of the declarant must be relevant to an issue in the case.[307] In addition, the court explained that statements cannot be offered as proof of the underlying facts, but only to show the declarant's actual state of mind.[308]

The court also stated that the Confrontation Clause of the Sixth Amendment to the United States Constitution prohibits the admission of testimonial hearsay against the accused in a criminal case, unless the witness is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant.[309] The court made clear that the Confrontation Clause does not apply to non-testimonial hearsay, but the United States Supreme Court has not provided a definition for what is testimonial.[310]

The court then addressed the admissibility of the testimony of each witness whose testimony was addressed at the motion in limine hearings and who testified at the trial.[311] The first witness was Kari Salmon, who testified about Sabrina Zephier's overall physical condition, an injury to Sabrina's eye, and Ms. Salmon's referral of Sabrina to the Domestic Abuse Crisis Center.[312] The court concluded that the district court did not abuse its discretion in admitting this testimony.[313]

Next, the court considered the testimony of Ashley Counts, an employee of the Domestic Violence Crisis Center, who testified that Sabrina had expressed fear of Kalmio and testified that Sabrina's physical condition indicated she had been abused.[314] Kalmio argued that the district

305. *Id.*
306. *Id.* (quoting N.D. R. EVID. 803(3)).
307. *Id.*
308. *Id.*
309. *Id.* ¶ 15, 846 N.W.2d at 759.
310. *Id.*
311. *Id.* ¶ 16.
312. *Id.* ¶ 17.
313. *Id.*
314. *Id.* ¶¶ 19-22, 846 N.W.2d at 759-61.

court erred in following the *Schumacker* test delineated by the court in this criminal case and that the court should have applied the rule from *Bernhardt v. State*.[315] The court rejected the *Bernhardt* test, but decided to clarify the state of mind exception.[316]

In *Schumacker*, the Minnesota Supreme Court stated that the declarant's state of mind must be relevant to an issue in the case in order to be admissible.[317] Kalmio argued that this formulation is too broad and North Dakota should follow Minnesota's *Bernhardt* test, which limits the use of this exception to where "the victim's state of mind *is a relevant issue* and notes those cases generally arise when 'the defendant raises the defense of accident, suicide, or self-defense.'"[318] The court rejected this test and explained that even when the victim's state of mind is not an element of the crime, cause of action, or defense, it may still be relevant to other factual issues such as the motive or intent of the defendant.[319] The court required a case-specific analysis of whichever ultimate fact the evidence regarding the victim's state of mind is offered to support.[320] The court found that the district court did not abuse its discretion in admitting Ashley Counts's testimony because the evidence of Sabrina's fear and physical condition were relevant to Kalmio's motive.[321] The court found it relevant that Sabrina and Jolene Zephier were afraid and that Kalmio knew of their fear and the possible consequences for him if their fears were reported to Kalmio's parole officer or law enforcement.[322]

The court next decided that Terri Zephier's testimony about her sister Sabrina's indicated fear of Kalmio, the beatings Sabrina received from Kalmio, as well as statements detailing Sabrina's swollen face and body covered in belt marks, were at least minimally relevant to show motive or intent.[323] Subsequently, the court found Rochelle Greger's testimony, including statements regarding several altercations Sabrina had with Kalmio and Sabrina's desire to move to a safer building, was at least minimally relevant to the issue of Kalmio's motive or intent, and such statements were thusly admissible.[324] The court found similar statements of Joyce Tacan, Amy Dauphinais, Gloria Carbajal, and Elizabeth Lambert

315. *Id.* ¶ 19, 846 N.W.2d at 759 (citing Bernhardt v. State, 684 N.W.2d 465 (Minn. 2004)).
316. *Id.*
317. *Id.* ¶ 20.
318. *Id.* ¶ 21, 846 N.W.2d at 760.
319. *Id.*
320. *Id.*
321. *Id.* ¶ 22, 846 N.W.2d at 761.
322. *Id.* ¶ 20, 846 N.W.2d at 760.
323. *Id.* ¶ 25, 846 N.W.2d at 762.
324. *Id.* ¶ 27.

were all admissible because they showed Sabrina Zephier's and Jolene Zephier's states of mind and were at least minimally relevant to Kalmio's motive or intent.[325]

The court next addressed Kalmio's argument that the district court abused its discretion in refusing to give an alibi jury instruction.[326] The court stated that North Dakota Rule of Criminal Procedure Rule 12.1(a) requires a defendant to "serve written notice on the prosecuting attorney of any intended alibi defense and file the notice within the time provided for making pretrial motions."[327] Kalmio failed to raise his alibi defense as required by Rule 12.1, and therefore, the court did not find the district court abused its discretion when it rejected Kalmio's alibi defense request.[328]

Kalmio also argued that the State engaged in prosecutorial misconduct and inflamed the jury by showing a PowerPoint with images of a firearm and red dots resembling blood during closing arguments.[329] The court stated the test for prosecutorial misconduct is whether "the conduct, in the context of the entire trial, was sufficiently prejudicial to violate a defendant's due process rights."[330] The court reviewed the issue de novo and concluded that, even assuming there was misconduct, the misconduct was not sufficiently prejudicial to violate Kalmio's due process rights because the court ordered the images to be removed and instructed the jury to disregard the images.[331]

Finally, the court reviewed Kalmio's claim that the evidence was insufficient to support his conviction.[332] Kalmio argued that the evidence was largely circumstantial and thusly was insufficient to support his conviction.[333] Review of sufficiency of the evidence is limited to the court reviewing "the record to determine if there is competent evidence allowing the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction."[334] The court concluded that there was ample evidence to allow a jury to reasonably infer that Kalmio was guilty.[335] As

325. *Id.* ¶¶ 28-38, 846 N.W.2d at 762-65.
326. *Id.* ¶ 39, 846 N.W.2d at 765.
327. *Id.* ¶ 40.
328. *Id.* ¶ 43, 846 N.W.2d at 766.
329. *Id.* ¶ 44.
330. *Id.* ¶ 45.
331. *Id.* ¶ 47, 846 N.W.2d at 767.
332. *Id.* ¶ 48.
333. *Id.* ¶ 50.
334. *Id.* ¶ 49.
335. *Id.* ¶¶ 50-51, 846 N.W.2d at 767-68.

such, the court affirmed the conviction.[336] Chief Justice VandeWalle and Justice Sandstrom concurred.[337]

Justice Kapsner dissented from parts II, V, and VI of the majority opinion.[338] Justice Kapsner conducted a detailed review of the hearsay statements admitted under the state of mind exception and concluded that the evidence was inadmissible because the declarant's state of mind was not relevant to an issue in the case.[339] Justice Kapsner stated that the district court admitted the evidence because it believed the evidence was relevant to show why the victims "did what they did before their deaths," but Justice Kapsner noted that only Kalmio's actions, intentions, and purpose were relevant.[340] Justice Kapsner also took issue with the majority opinion's suggestion that the victim's fear was relevant to show Kalmio's motive to murder them.[341] Justice Kapsner pointed out that not once during the course of the trial did the State argue or the district court find that the victim's fear was relevant to Kalmio's alleged motive.[342] Justice Kapsner concluded "without some basis for the theory that Kalmio killed Sabrina and Jolene Zephier because of their fear, the witnesses' statement about Sabrina and Jolene's fear are not relevant to an issue in this case."[343] Furthermore, Justice Kapsner noted that several of the witnesses' testimony, concerning past physical and verbal altercations between the witnesses and Kalmio, exceeded the scope of the state of mind exception and the district court erroneously admitted them.[344] Finally, Justice Kapsner stated that, even if the evidence was properly admitted under the state of mind exception to the rule against hearsay, the district court should have evaluated the evidence under the "unfairly prejudicial" criteria stated in North Dakota Rule of Evidence 403.[345]

336. *Id.* ¶ 52, 846 N.W.2d at 768.
337. *Id.* ¶ 53.
338. *Id.* ¶ 55 (Kapsner, J., dissenting).
339. *Id.* ¶ 59.
340. *Id.* ¶ 69, 846 N.W.2d at 773.
341. *Id.* ¶ 70.
342. *Id.* ¶ 74, 846 N.W.2d at 774.
343. *Id.* ¶ 75.
344. *Id.* ¶¶ 76-81, 846 N.W.2d at 775-76.
345. *Id.* ¶ 83, 846 N.W.2d at 776.

CRIMINAL LAW – SEARCHES AND SEIZURES – LACK OF PROBABLE CAUSE FOR WARRANTLESS SEARCH
State v. Hart

In *State v. Hart*,[346] Alicia Hart appealed her conviction of possession of drug paraphernalia, which was entered after her conditional guilty plea that reserved her right to appeal her denied motion to suppress.[347] The second defendant, Paul Sitte, also appealed from a criminal judgment resulting from his conditional guilty plea for the possession of methamphetamine drug paraphernalia and possession of marijuana drug paraphernalia.[348] The parties consolidated the appeal because it arose out of the same facts.[349]

In August 2012, police received an anonymous tip that two individuals, Chad Grubb and his girlfriend, were selling methamphetamine from a particular residence in Bismarck.[350] The Burleigh County Sheriff's department had a bench warrant for Grubb for misdemeanor driving charges.[351] Deputies arrived at the residence indicated in the tip to serve the bench warrant on Grubb.[352] The residence was a duplex, horizontally split into separate upstairs and downstairs units.[353] Officers made contact with other tenants of the duplex who stated Grubb was not currently home, but such persons gave the officers permission to search.[354] During the search, the officers located a locked gun safe in a common area laundry room that contained what appeared to be a large amount of methamphetamine and a semiautomatic handgun.[355]

Officers then questioned the other occupants and learned Grubb was there previously in the day but left with Paul Sitte in a red pickup "after grabbing some of his stuff from there."[356] Officers then drove to Sitte's residence, where an officer was able to see a red pickup and two males in the driveway.[357] Based on the warrant photo alone, the officer was unable to identify Grubb.[358] However, the officer saw the two males "take

346. 2014 ND 4, 841 N.W.2d 735.
347. *Id.* ¶ 1, 841 N.W.2d at 737.
348. *Id.*
349. *Id.* ¶ 2.
350. *Id.*
351. *Id.*
352. *Id.* ¶ 3.
353. *Id.*
354. *Id.*
355. *Id.*
356. *Id.* ¶ 4.
357. *Id.*
358. *Id.*

something out of the vehicles and carry it into the residence. And not come back out."[359]

Backup arrived on the scene as the officers served the bench warrant.[360] Officers knocked on the door, and eventually Grubb answered the door, identified himself, and was arrested without resistance in the "foyer."[361] The district court found that the officer "chose to enter the Sitte house to place Grubb under arrest instead of asking Grubb to exit the house and arrest him in the garage."[362]

Because the officers knew there was another individual in the house, they began to ask whoever was inside to come out.[363] The officers feared for their safety due to the "large amount of methamphetamine and two handguns" that were found at the other duplex.[364] After arresting Grubb, they conducted a protective sweep of the Sitte residence and arrested Sitte and his girlfriend Hart.[365] Sitte appeared to be under the influence and was arrested in the vicinity of drug paraphernalia, which included a little baggy with residue, razor blades, and pieces of tin foil.[366] Hart was arrested in a locked basement room with drug paraphernalia in her purse.[367] After the officers cleared the house, the officers obtained a search warrant and found additional paraphernalia and drugs.[368]

Sitte and Hart each filed a motion to suppress all the evidence seized from the Sitte residence, arguing the seizure violated their Fourth Amendment rights.[369] The State argued that the protective sweep was permissible due to exigent circumstances, which would render the discovered evidence admissible.[370] The district court denied the motions to suppress, and the defendants appealed.[371]

In reviewing a denial of a motion to suppress, the North Dakota Supreme Court will affirm a district court decision after finding "sufficient competent evidence fairly capable of supporting the district court's findings exists and the decision is not contrary to the manifest weight of the

359. *Id.* at 738.
360. *Id.* ¶ 5.
361. *Id.*
362. *Id.*
363. *Id.* ¶ 6.
364. *Id.*
365. *Id.* ¶¶ 7-8, 841 N.W.2d at 738-39.
366. *Id.* ¶ 7, 841 N.W.2d at 738.
367. *Id.* ¶ 8.
368. *Id.* at 739.
369. *Id.* ¶ 9.
370. *Id.*
371. *Id.*

evidence."[372] Sitte and Hart argued there was no probable cause or exigent circumstance justifying the protective sweep.[373]

In its analysis, the court reiterated the Fourth Amendment protections of the "right of the people to be secure . . . against unreasonable searches and seizures."[374] A search occurs when officers intrude upon an individual's reasonable expectation of privacy.[375] The Fourth Amendment primarily concerns an intrusion into an individual's home, and warrantless and non-consensual searches and seizures within a home are presumptively unreasonable.[376]

The exigent circumstances exception is one exception to this general prohibition.[377] The North Dakota Supreme Court has 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."[378] The court, quoting United States Supreme Court precedent, also stated a hesitation in finding an exigent circumstance exists where the "underlying offense for which there is probable cause to arrest is relatively minor."[379] The burden of showing the presence of an exigent circumstance is on the government, and the North Dakota Supreme Court applies a de novo standard of review in determining if the facts constitute an exigent circumstance.[380]

In this case, Hart and Sitte had a reasonable expectation of privacy in their home, and the officers conducted a warrantless search because the officers "entered an open vehicle-garage door, passed through [Sitte's] garage, and entered into his home without consent to execute a routine misdemeanor bench warrant."[381] The State argued it was an appropriate "protective sweep" because the sweep occurred incident to Grubb's arrest and was based on a reasonable and articulable concern for officer safety.[382] The court proceeded to discuss a United States Supreme Court case regarding this issue, *Maryland v. Buie*.[383] Based upon *Buie*, the North Dakota Supreme Court stated that the issue is "whether officers possessed a

372. *Id.* ¶ 10 (quoting State v. Gagnon, 2012 ND 198, ¶ 7, 821 N.W.2d 373, 378).
373. *Id.* ¶ 11.
374. *Id.* ¶ 12 (quoting U.S. CONST. amend. IV).
375. *Id.*
376. *Id.*
377. *Id.*
378. *Id.* ¶ 14, 840 N.W.2d at 740 (quoting State v. Gagnon, 2012 ND 198, ¶ 13, 821 N.W.2d 373, 378).
379. *Id.* (quoting Welsh v. Wisconsin, 466 U.S. 740, 750 (1984)).
380. *Id.*
381. *Id.* ¶ 15.
382. *Id.* ¶ 16.
383. 494 U.S. 325 (1990).

'reasonable belief' based on 'specific and articulable facts,' which taken together with rational inferences drawn from those facts, reasonably warranted the officer in believing 'that the area swept harbored an individual posing a danger to the officer or others.'"[384]

The court then discussed two separate North Dakota Supreme Court cases, *State v. Gagnon*[385] and *State v. Mitzel*.[386] In *Gagnon*, the majority held that a warrantless police "walk through" of a residence was an unreasonable search because there was neither the possibility of "destruction of evidence or the need to protect officer safety."[387] In *Mitzel*, the court held, "[b]ecause the facts did not show an emergency requiring swift action to prevent imminent danger to life or property," there was no exigent circumstances to justify a warrantless search.[388]

Here, the State made several arguments justifying the protective sweep including: the officers uncovered large amounts of methamphetamine and two weapons, the officers knew suspect Grubb had taken off with "stuff," one officer observed two unidentified men going into the residence and "taking something out of the vehicle and carry[ing] it with them," and the concern over the amount of time it took someone to answer the door.[389] The State contended that altogether these facts gave the officers a reasonable belief that a protective sweep was necessary to find an individual posing.[390]

The court disagreed with the State's argument.[391] The court concluded the officers were not justified because it was clear that the decision to enter the Sitte residence was effected by their previous discovery of weapons and methamphetamine, which could not be accurately linked to suspect Grubb.[392] The evidence found at the duplex did not reveal any "concrete, articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbored an individual posing a danger . . . ."[393]

The court also looked at other factors indicating the officer's sweep was unjustified, as there was not "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property . . .

384. *Hart*, ¶ 16, 841 N.W.2d at 741.
385. 2012 ND 198, 821 N.W.2d 373.
386. 2004 ND 157, 685 N.W.2d 120.
387. *Hart*, ¶ 17, 841 N.W.2d at 741 (quoting *Gagnon*, ¶ 13, 821 N.W.2d at 378).
388. *Id.* ¶ 18 (quoting *Mitzel*, ¶ 23, 685 N.W.2d at 127).
389. *Id.* ¶ 19, 841 N.W.2d at 742.
390. *Id.*
391. *Id.* ¶ 20.
392. *Id.*
393. *Id.*

."[394] These factors included: the catalyst of the warrant came from an anonymous tip that was on the low end of reliability, the officers had no information that Grubb was dangerous or had violent tendencies because Grubb was being arrested on non-violent misdemeanor crimes, the officers were unable to identify Grubb or Sitte as either of the two males in the driveway, and the officers were unable to identify what they had carried into the house.[395] The court also noted that Grubb eventually identified himself and was arrested without incident, such that the officers could have simply escorted Grubb out through the garage and left the premises.[396] Finally, the court felt that expanding the protective sweep doctrine to these facts would "go beyond the holding of *Buie*, and encroach upon the constitutional right of the people to be secure in their homes."[397] Based upon these considerations, the court unanimously reserved the judgments against Hart and Sitte and remanded the cases for further proceedings consistent with its opinion.[398]

394. *Id.* ¶ 21 (internal quotation omitted).
395. *Id.* at 742-43.
396. *Id.*
397. *Id.* ¶ 22, 841 N.W.2d at 743.
398. *Id.* ¶ 23.

CRIMINAL LAW – SEARCHES AND SEIZURES – NIGHT SERVICE OF SEARCH WARRANT

State v. Zeller

In *State v. Zeller*,[399] Todd Zeller appealed his judgment of conviction, which was obtained after he conditionally pled guilty to possession of methamphetamine and marijuana, both with intent to manufacture or deliver.[400] The North Dakota Supreme Court found that the underlying search warrant was not supported by probable cause and reversed the judgment and remanded the case.[401]

Early in the morning on November 17, 2012, Detective Witte of the Fargo Police Department applied for a warrant to search Zeller's home.[402] Detective Witte's presented a supporting affidavit, which alleged Zeller was involved in drug trafficking.[403] Specifically, the affidavit claimed that Detective Witte had been informed in 2010 that Zeller was distributing methamphetamine in Fargo and that in July 2012 Detective Witte had received several complaints through the narcotics tip line alleging "a high volume of short stay, come and go traffic, particularly on the weekend, and that many of the vehicles displayed out-of-state license plates."[404] The affidavit further stated that two of the license plates seen at Zeller's home belonged to individuals known to Detective Witte to be methamphetamine users.[405]

In addition, the affidavit reported a controlled buy of methamphetamine from John Gust in the vicinity of Zeller's residence.[406] A confidential informant performed the controlled buy using recorded funds.[407] Mr. Gust told the confidential informant that he was going to meet his "dealer" to get more methamphetamine.[408] Within a short time, a police detective observed Gust in the alley immediately behind Zeller's residence.[409] Police tested the substance purchased by the confidential informant from Gust and confirmed it was methamphetamine.[410] Officers

399. 2014 ND 65, 845 N.W.2d 6.
400. *Id.* ¶ 1, 845 N.W.2d at 8.
401. *Id.*
402. *Id.* ¶ 2.
403. *Id.*
404. *Id.*
405. *Id.*
406. *Id.* ¶ 3, 845 N.W.2d at 9.
407. *Id.*
408. *Id.*
409. *Id.*
410. *Id.*

then arrested Gust for delivery of methamphetamine and searched Gust's phone, which led to discovery of a message from "Todd Z" asking if Gust was "close to the area."[411] The message was confirmed to have come from a number belonging to Zeller.[412]

The magistrate authorized a search of Zeller's home at 3:25 a.m. and issued a warrant that included a nighttime search provision.[413] Police executed the warrant around 4:00 a.m. and discovered narcotics and paraphernalia.[414] Zeller was arrested and charged with nine felonies.[415] Zeller moved to suppress the evidence on the grounds that the search warrant itself and the nighttime provision in the warrant were not supported by probable cause.[416] The district court denied Zeller's motion to suppress.[417]

Zeller again moved to dismiss, this time on the grounds that Detective Witte had misled the magistrate to obtain the search warrant.[418] Zeller requested a Franks hearing to evaluate whether the search warrant was issued based upon false statements of Detective Witte.[419] The district court, after a hearing, denied the motion, and Zeller entered a conditional guilty plea while reserving the right to appellate review of the court's ruling on his motions to suppress.[420]

The North Dakota Supreme Court began its analysis by stating it would "affirm a district court's order denying a motion to suppress evidence if there is sufficient competent evidence fairly capable of supporting the court's findings, and the decision is not contrary to the manifest weight of the evidence."[421] The court explained that questions of law are fully reviewable on appeal, including questions of whether a finding of fact meets a legal standard.[422] The court also stated that whether there was sufficient probable cause to issue a search warrant is a fully reviewable question of law.[423] The court stated it would "generally defer to a magistrate's determination of probable cause if there was a substantial basis

411. *Id.* ¶ 4.
412. *Id.*
413. *Id.* ¶ 5.
414. *Id.*
415. *Id.*
416. *Id.*
417. *Id.*
418. *Id.* ¶ 6.
419. *Id.*
420. *Id.*
421. *Id.* ¶ 7.
422. *Id.*
423. *Id.*

for the conclusion, and doubtful or marginal cases should be resolved in favor of the magistrate's determination."[424]

After explaining the general standard of review for probable cause determinations, the court made clear that the key issue in this case was nighttime search provisions.[425] A nighttime search is one that does not occur between the hours of 6:00 a.m. and 10:00 p.m. local time.[426] The court explained that if a warrant applicant requests authorization to perform a nighttime search, then a second showing of probable cause is required.[427] In order for probable cause to exist for a nighttime search, a showing must be made that the evidence sought can be quickly and easily disposed of if the warrant is not promptly executed.[428] Allegations about the mere existence of evidence is not sufficient; rather, an officer must set forth some facts suggesting the evidence will actually be destroyed without a nighttime search.[429]

The court concluded that the district court had erred in its determination that probable cause existed to support the approval of a nighttime search.[430] In arriving at this conclusion, the court stated that there was no support in the record, aside from one controlled buy, to indicate that without a nighttime search the evidence would be destroyed or removed from Zeller's home before a search could be executed.[431]

In *State v. Roth*,[432] the North Dakota Supreme Court had concluded that a search warrant affidavit averring that the house in question had methamphetamine manufacturing occurring in the basement during the late night hours, that police observations detailed late night activities in the house, and that at least one person who was connected with drug activity was in the house at the time was sufficient to establish probable cause for a nighttime search provision.[433] But the court in *Roth* made clear that particularized facts, and not general averments, were required to meet the probable cause standard.[434]

The court found that, unlike *Roth*, the averments here were of a generalized nature and were insufficient to establish probable cause for a

424. *Id.* (quoting Roth v. State, 2007 ND 112, ¶ 18, 735 N.W.2d 882, 890).
425. *Id.* ¶¶ 9-10, 845 N.W.2d at 10.
426. *Id.* ¶ 10.
427. *Id.*
428. *Id.* ¶ 11.
429. *Id.*
430. *Id.* ¶ 14, 845 N.W.2d at 11.
431. *Id.*
432. 2007 ND 112, 735 N.W.2d 882.
433. *Zeller*, ¶ 16, 845 N.W.2d at 12.
434. *Id.*

nighttime search provision.[435] Detective Witte had admitted he had no information showing exigent circumstances or that Zeller would destroy evidence.[436] The court found there was no indication that the drugs or money would be gone if the officers waited until 6:00 a.m. to execute the search warrant and no evidence that the controlled buy was part of an ongoing operation of trafficking conducted during the nighttime.[437] Finally, the court found that the affidavit did not reflect any risk to officer safety that would justify a nighttime entry provision.[438] The court reversed the conviction and remanded with instructions to allow Zeller to withdraw his guilty pleas and to suppress any evidence obtained during the nighttime search.[439]

Justice Sandstrom dissented.[440] Justice Sandstrom was concerned that the court has been improperly equating nighttime searches to no-knock search warrants in drug cases.[441] Justice Sandstrom pointed out that the United States Supreme Court has made clear that no special showing is constitutionally required for a nighttime search other than a showing that the contraband is likely to be on the property or person to be searched at the time.[442] In contrast, the United States Supreme Court has made clear that no-knock entries are permissible only if the police have reasonable suspicion that knocking and announcing their presence would be dangerous or futile given the circumstances, or would inhibit the effective execution of a crime by destruction of evidence.[443]

435. *Id.* ¶ 14, 845 N.W.2d at 11.
436. *Id.*
437. *Id.* ¶ 15, 845 N.W.2d at 11-12.
438. *Id.* ¶ 20, 845 N.W.2d at 14.
439. *Id.* ¶ 21.
440. *Id.* ¶ 24 (Sandstrom, J., dissenting).
441. *Id.*
442. *Id.* ¶ 27.
443. *Id.* ¶ 26.

DOMESTIC LAW – CHILD CUSTODY – GRANDPARENTS VISITATION RIGHTS – PARENTS RIGHT TO REAR CHILDREN

In re S.B.

In re S.B.,[444] the North Dakota Supreme Court considered an appeal from a district court order awarding grandparent visitation. In the district court, the paternal grandparents of three children sought a court ordered visitation schedule.[445] During the evidentiary hearing in the district court, the grandparents advocated for visitation because of the value the children would receive from growing up with grandparents in their lives.[446] The grandparents also noted that they already had a close relationship with the children.[447] The grandmother testified that the parents stopped letting them see the children after the grandmother reported the parents to the police.[448] The grandmother denied this accusation and another accusation that she made negative comments in front of the children.[449]

The parents offered testimony that there had been "negative situations" and an ongoing tension between the parents and grandparents.[450] The father of the children also testified that the grandparents did not honor the parents' authority with the children.[451] The father also disputed the contention that the grandparents maintained a close relationship with the two youngest children.[452] Despite this, the parents were open to resolving the issues to allow the grandparents to see the children on a visitation schedule.[453] After the district court ordered visitation, and later modified the schedule, the parents appealed to the North Dakota Supreme Court.[454]

The parents contend that the district court erred in ordering visitation for the grandparents because the grandparent visitation statute is unconstitutional.[455] The parents argued that the statute interfered with the parents' fundamental right to rear their children.[456] In 1993, the North Dakota Supreme Court struck down as unconstitutional a prior grandparent

444. 2014 ND 87, 845 N.W.2d 317.
445. *Id.* ¶ 2, 845 N.W.2d at 318.
446. *Id.* ¶ 3.
447. *Id.*
448. *Id.* ¶ 4.
449. *Id.*
450. *Id.* ¶ 5.
451. *Id.* at 319.
452. *Id.*
453. *Id.*
454. *Id.* ¶ 6.
455. *Id.* ¶ 9.
456. *Id.*

visitation statute.[457] The court decided in *Berg* that the State did not have a compelling interest in presuming visitation rights to grandparents.[458] Shortly after this decision, the United States Supreme Court similarly struck down a Washington statute of third-party visitation because it did not provide any weight towards the parents' determinations regarding their children's best interests.[459] The North Dakota Legislature responded to these decisions by amending the grandparent visitation statute.[460] As a result of this statute, a parents' decision regarding grandparent visitation is presumed to be in the child's best interests, and grandparents have the burden to overcome this presumption by proving that visitation is in the best interests of the child.[461] Before this case, the court had never considered the constitutionality of this amended statute.[462]

In deciding on the statute's constitutionality, the court deferred to the statutes construction and context for statutory interpretation.[463] Pursuant to the avoidance doctrine of statutory construction, if there are two possible constructions of a statute, one of which invalidates a statute and one of which does not, the court must construe the statute so as to avoid constitutional invalidity.[464] The court then referred to the legislative history in a committee report, which emphasized the legislative concern that the statute be constitutionally valid.[465] Looking to the statute, the court could not find any presumption of favor or burden of proof, nor procedural requirements.[466] Accordingly, the implicated visitation statue was dissimilar than those invalidated in *Berg* and *Troxel*, such that the amended visitation statute passed constitutional muster.[467]

After the court decided that the grandparent visitation statute was constitutional, it then reviewed if the visitation order was in the best interests of the child.[468] The parents contend that the grandparent visitation was not in the best interests of the children because it interfered with the parent-child relationship.[469] Even with the testimony from the father about the negative situations and lack of relationship with some of the children,

457. *Id.* ¶ 12, 845 N.W.2d at 320 (citing Hoff v. Berg, 1999 ND 115, 595 N.W.2d 285).
458. *Id.* ¶ 21, 845 N.W.2d at 323 (citing *Berg*, 595 N.W.2d 285).
459. *Id.* ¶¶ 13-14, 845 N.W.2d at 320-21 (citing Troxel v. Granville, 530 U.S. 57 (2000)).
460. *Id.* ¶ 15, 845 N.W.2d at 321.
461. *Id.* ¶ 22, 845 N.W.2d at 323.
462. *Id.* ¶ 16, 845 N.W.2d at 321.
463. *Id.* ¶ 17
464. *Id.*
465. *Id.* ¶¶19-20, 845 N.W.2d at 321-22.
466. *Id.* ¶ 18, 845 N.W.2d at 322.
467. *Id.* ¶ 22, 845 N.W.2d at 323.
468. *Id.* ¶ 23.
469. *Id.*

the district court determined that the visitation was not detrimental to the children[470] and the district court did not presume the parents' acted in the best interests of the child.[471] The North Dakota Supreme Court found that the district court erred by not giving any favorable presumption to the parents' decision.[472] The court reversed and remanded the district court's award of grandparental visitation because the grandparent visitation statute requires deference for fit parents' judgment as to the best interests of the child.[473]

The court did not review the third issue of whether the district court awarded too much visitation.[474] However, it did offer guidance to the district court on remand.[475] The grandparents were awarded visitation that was similar to a non-custodial parent.[476] The court warned that if the grandparents were to be given visitation upon remand, it should "not be so significant that it is comparable to parenting time for a non-custodial parent."[477]

470. *Id.* ¶¶ 25-26, 845 N.W.2d at 323.
471. *Id.* ¶ 26.
472. *Id.* ¶¶ 26-28, 845 N.W.2d at 323-24.
473. *Id.* ¶ 28, 845 N.W.2d at 324.
474. *Id.* ¶ 32.
475. *Id.*
476. *Id.* ¶ 33, 845 N.W.2d at 325.
477. *Id.* ¶ 34.

INDIANS – INDIAN RESERVATION INVOLVING NON-INDIAN PARTY – CHILD SUPPORT – SUPPORT OF CHILDREN
State v. B.B.

In *State v. B.B.*,[478] the North Dakota Supreme Court determined that the state court had jurisdiction and did not infringe upon the right of the Standing Rock Sioux Tribe to self-govern when it ordered B.B., the father of the child J.Z.T., to repay state support paid to the guardian of the child and to pay for future child support.[479] The child in this case was born and conceived off of the reservation.[480] Although the mother, child, and grandmother are enrolled members of the Standing Rock Sioux Tribe, the father is not an enrolled member.[481] The Standing Rock Sioux tribal court awarded custody of J.Z.T. to the maternal grandmother.[482] In 2012, the State of North Dakota sued B.B. seeking to adjudicate paternity, an "award of future child support," and an order requiring B.B. to reimburse the State for assistance provided to the grandmother of the child.[483] The state district court found that it had jurisdiction to "decide paternity and support" and the tribal court retained jurisdiction with regard to "the issue of residential responsibility and parenting time."[484]

At issue before the North Dakota Supreme Court was whether the state court did, in fact, have jurisdiction to decide paternity and support.[485] B.B. argued that the state court did not have jurisdiction because the child custody proceeding was started in the Standing Rock Sioux Tribal Court and because the grandmother and child are enrolled members.[486] The court first addressed its standard of review by explaining that when the jurisdictional facts are in dispute, questions of law are subjected to the de novo standard of review and questions of fact are subject to the clearly erroneous standard of review.[487] Because the facts were uncontested by B.B. and were supported by evidence at trial, the facts were not clearly erroneous.[488]

478. 2013 ND 242, 840 N.W.2d 651.
479. *Id.* ¶ 1, 840 N.W.2d at 652.
480. *Id.* ¶ 3.
481. *Id.* ¶ 4.
482. *Id.* ¶ 2.
483. *Id.*
484. *Id.*
485. *Id.* ¶ 5.
486. *Id.* ¶ 6.
487. *Id.* ¶ 7, 840 N.W.2d at 652-53.
488. *Id.* ¶ 8, 840 N.W.2d at 653.

Although there are some cases where respecting the tribe's right of self-governances deprives the state court of subject matter jurisdiction, the court explained that this case is not one of those occasions.[489] Some situations where the state would not have subject matter jurisdiction occur where all the parties are members of the tribe and the "conduct giving rise to the action occurred on the reservation."[490] On the other hand, the State would usually have jurisdiction if the conduct occurred outside of Indian country or, "even when a claim arises in Indian country," the state will have jurisdiction if the "claim is brought against a non-Indian."[491]

The court noted that neither B.B. nor the State were members of the tribe.[492] Furthermore, none of the conduct relevant to this case occurred on the lands belonging to the Tribe.[493] This case did not impact the tribe's right to self-government, and, as a result, the court concluded, as a matter of law, that "the tribal court does not have exclusive subject matter jurisdiction" over the paternity and support action.[494] The court further concluded that the paternity and support claim in this case could be bifurcated from the custody action that the Standing Rock Sioux tribal court brought.[495] Therefore, in this case, the state court had subject matter jurisdiction over the paternity and support action.[496] Accordingly, the court affirmed the district court decision.[497]

489. *Id.* ¶¶ 9-10, 840 N.W.2d at 653-54.
490. *Id.* ¶ 10, 840 N.W.2d at 654.
491. *Id.* ¶ 11.
492. *Id.*
493. *Id.*
494. *Id.* ¶¶ 11-12, 840 N.W.2d at 654-55.
495. *Id.* ¶ 16, 840 N.W.2d at 655.
496. *Id.* ¶ 17.
497. *Id.* ¶ 18.

JUDGES – REMOVAL OR DISCIPLINE – INVESTIGATION OF JUDICIAL MISCONDUCT

In re Disciplinary Action Against Corwin

In re Disciplinary Action Against Corwin[498] involved a disciplinary proceeding, where the North Dakota Supreme Court found that Wickham Corwin, judge of the district court for the East Central Judicial District, violated N.D. Code Judicial Conduct Canon 3(C)(1) and Canon 3(C)(2), holding that whether a judge's conduct constituted sexual harassment as defined under federal or state laws is not a relevant inquiry to finding a violation of the preceding rules of judicial conduct.[499] This case arose from a formal disciplinary proceeding initiated in February 2013.[500] Disciplinary counsel commenced the action because of inappropriate conduct perpetuated by Judge Corwin that began in 2010 and was directed towards a female court reporter assigned to work with him.[501] Judge Corwin had engaged in a "pattern of misconduct" that lasted for an eighteen month period and resulted in negative mental and physical effects on the court reporter.[502] The behavior in question included several unsolicited advances on the part of Judge Corwin to not only try to get the court reporter alone with him but also to promote and push a more intimate relationship.[503] When the Judge's conduct was repeatedly rebuffed, Judge Corwin gave the court reporter negative performance reviews.[504] Eventually, Judge Corwin, of his own volition, disclosed the events that transpired between him and the court reporter, announced that he would not seek reelection, and cooperated with disciplinary proceedings.[505]

Judge Corwin argued that the Judicial Conduct Commission erred in finding that he violated the North Dakota Code of Judicial Conduct Canon 3(C)(2), which provided that "[a] judge shall not, in the performance of administrative duties, engage in speech, gestures, or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control."[506] According to Judge Corwin, he believed that "federal and state laws should govern any assessment of the evidence" in the case and that the

498. 2014 ND 50, 843 N.W.2d 830.
499. *Id.* ¶ 1, 843 N.W.2d at 831.
500. *Id.* ¶ 2.
501. *Id.*
502. *Id.* ¶ 28, 843 N.W.2d at 839.
503. *Id.* ¶¶ 5-9, 843 N.W.2d at 832-34.
504. *Id.* ¶¶ 10-11, 843 N.W.2d at 834.
505. *Id.* ¶ 29, 843 N.W.2d at 839.
506. *Id.* ¶ 15, 843 N.W.2d at 836 (quoting N.D. CODE JUD. CONDUCT CANON 3(C)(2)).

Commission erred in not allowing him to present expert testimony on the law regarding sexual harassment.[507] The court, however, rejected Judge Corwin's argument for several reasons including: (1) that North Dakota Code of Judicial Conduct Canon 3(C)(2) "does not require the establishment of sexual harassment under federal or state law to constitute a violation of its provisions" as judicial disciplinary provisions are not civil or criminal in nature, (2) the standard for finding a violation of Canon 3(C)(2) is merely finding "conduct that could be reasonably perceived as sexual harassment," and (3) the issue before the hearing panel was only whether there was a violation of the Code of Judicial Conduct, not whether there was sexual harassment as defined by state or federal law.[508]

Although a finding of sexual harassment is not required to find a violation of North Dakota Code of Judicial Conduct Canon 3(C)(2), the Unified Judicial System Policy 119, which defines harassment, would be enough to inform Judge Corwin of what kind of conduct could be reasonably "perceived as sexual harassment."[509] Furthermore, Judge Corwin's conduct was such that it could "reasonably be perceived as sexual harassment" by the court reporter.[510]

Judge Corwin also argued that there was no "clear and convincing evidence that he violated [North Dakota Code of Judicial] Conduct Canon 3(C)(1)."[511] However, because Judge Corwin treated the court reporter differently than the other members of the team as a result of a physical relationship between them not materializing, the court found that "there [was] clear and convincing evidence that Judge Corwin did not discharge his administrative responsibilities without bias or prejudice in violation of [North Dakota Code of Judicial] Conduct Canon 3(C)(1)."[512] Judge Corwin was suspended for one month and assessed $11,958.56 for the disciplinary proceeding costs.[513]

507. *Id.* ¶ 16.
508. *Id.* ¶ 17.
509. *Id.* ¶¶ 18-19, 843 N.W.2d at 836-37.
510. *Id.* ¶¶ 21-22, 843 N.W.2d at 837-38.
511. *Id.* ¶ 23, 843 N.W.2d at 838.
512. *Id.* ¶ 25.
513. *Id.* ¶ 31, 843 N.W.2d at 840.

JUVENILE – TERMINATION OF PARENTAL RIGHTS – CLEARLY ERRONEOUS STANDARD

In re R.L.-P.

In re R.L.-P.[514] was a case where the North Dakota Supreme Court affirmed a termination of parental rights because the parents were found to have deprived their children, which resulted in their children spending more than 450 out of the past 660 nights in foster care.[515] After the parents' divorce, the mother had primary residential responsibility of their three children.[516] A welfare check in 2011 resulted in the mother being arrested for child abuse and neglect.[517] During this welfare check, the mother tested positive for amphetamines, methamphetamines, and THC.[518] In addition, the home had broken glass, knives, and old food on the floor, an unusable toilet, and other miscellaneous garbage all over the home.[519] The oldest child had missed school, which the mother claimed was the result of sickness, but it was apparent to the social worker that the child was not sick.[520] The children were also very unclean and had only eaten bananas that day.[521] As a result, the children were placed into shelter care.[522]

The State petitioned to have the parental rights terminated, and a trial was held.[523] Under North Dakota law, in order for a court to terminate parent rights, the court must find "'conditions and causes of the deprivation are likely to continue or will not be remedied and that by reason thereof the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm.'"[524] The judicial referee found the mother was only able to sustain sobriety under "very controlled circumstances" in a half-way house and was uncertain if she would be able to maintain this sobriety.[525] The referee found the father had mental health problems, with little progress made in treating these problems.[526] The parents requested a

514. 2014 ND 28, 842 N.W.2d 889.
515. *Id.* ¶ 1, 842 N.W.2d at 891.
516. *Id.* ¶ 2, 842 N.W.2d at 892.
517. *Id.*
518. *Id.*
519. *Id.*
520. *Id.*
521. *Id.*
522. *Id.* ¶ 3.
523. *Id.* ¶ 4.
524. *Id.* ¶ 14, 842 N.W.2d at 894 (quoting N.D. CENT. CODE § 27-20-44(1)(c)(1) (2013)).
525. *Id.* ¶ 5, 842 N.W.2d at 892.
526. *Id.* ¶ 6.

review by the juvenile court, which affirmed the termination findings.[527] The parents then appealed the juvenile court's affirmation.[528]

The North Dakota Supreme Court will only reverse a juvenile court decision if it was clearly erroneous and if it is a question of fact.[529] The mother argued that there was a lack of clear and convincing evidence supporting termination under the statutory, three-part test.[530] The mother claimed that the deprivation element of North Dakota Century Code section 27-20-44(1) was not a result of her actions.[531] For a clearly erroneous finding, the lower court must have had an erroneous view of the law or made a mistake in applying the facts to the law.[532]

The court found that the mother's continued drug use and other evidence in the record justified the juvenile court's findings.[533] Both the mother and father claimed that that there was insufficient evidence of continued deprivation.[534] The court clarified that under North Dakota law there could be two separate grounds of terminating the parental rights.[535] The first stipulates that a child will be considered deprived when the child is in foster care for 450 out of the previous 660 nights.[536] The second ground is finding that the deprivation would "likely continue or will not be remedied."[537] The juvenile court found that there was enough evidence that both are satisfied.[538] The North Dakota Supreme Court only reviewed the fact that a social worker testified that the children were in foster care for 863 days.[539] Thus, the facts of the case satisfied the number of days in foster care requirement.[540] Because this finding alone could terminate the parental rights, the court found it unnecessary to review whether the deprivation could continue.[541]

Both parents contend that the State failed to reunite the children according to North Dakota law.[542] Under North Dakota law, the State must

527. *Id.* ¶ 9, 842 N.W.2d at 893.
528. *Id.* ¶ 10.
529. *Id.* ¶ 12.
530. *Id.* ¶ 14.
531. *Id.* ¶ 15, 842 N.W.2d at 894.
532. *Id.* ¶ 18.
533. *Id.*
534. *Id.* ¶ 19, 842 N.W.2d at 894-95.
535. *Id.* ¶ 20, 842 N.W.2d at 895.
536. *Id.*
537. *Id.*
538. *Id.* ¶ 21.
539. *Id.* ¶ 22.
540. *Id.*
541. *Id.* ¶ 23.
542. *Id.* ¶ 24.

make reasonable efforts to unify the family, and the court will review the findings under the clearly erroneous standard.[543] The father claimed that the social worker had no intention to reunify the children with him.[544] At trial, the social worker stated that she could not reunify because the father did not have custody and the social worker only had an obligation to reunify the children with the mother.[545] A caseworker for the family also recommended several things to the father on how he could see his children.[546] One of the recommendations was supervised visits, but this required psychiatric evaluation and family safety orientation.[547] The father failed to do any of the recommendations, even after having understood the requirements.[548] The juvenile court found such actions satisfied the agency's duty of due diligence to try to reunite the children with their father, and the North Dakota Supreme Court affirmed.[549]

The mother also contended that the State did not provide reasonable efforts to reunify her with her children.[550] The mother claimed that she could not have reasonably completed all the requirements of the State and that she should have been given supervised parenting time after she completed her parenting classes.[551] The court found there was enough evidence on the record to demonstrate that the juvenile court's determination that the agency made reasonable efforts to reunify the mother with her children was not clearly erroneous.[552] The caseworker brought the children to see their mother while she was incarcerated and arranged visitation when out of incarceration.[553] When the mother was not considered an inmate, the mother completed a parental capacity evaluation, but the mother did not release the test results to social services because she disagreed with the testing methods.[554] Also, according to her appearance and demeanor, the caseworker suspected the mother was using drugs again.[555] The court recognized that the State was not required to "exhaust every potential solution" in regards to reunifying parents with their children

543. *Id.* ¶ 28, 842 N.W.2d at 896 (citing N.D. CENT. CODE 27-20-32.2 (2013)).
544. *Id.* ¶ 26.
545. *Id.* ¶ 27.
546. *Id.* ¶ 30.
547. *Id.*
548. *Id.*
549. *Id.* ¶ 31, 842 N.W.2d at 896-97.
550. *Id.* ¶ 32, 842 N.W.2d at 897.
551. *Id.*
552. *Id.* ¶ 34.
553. *Id.* ¶ 33.
554. *Id.*
555. *Id.*

and found that reasonable efforts were made to reunify the children with their mother.[556]

The mother also argued that the juvenile court should have applied the Indian Child Welfare Act to the proceeding.[557] The Indian Child Welfare Act would have provided for a special parental termination process if the child was an Indian.[558] The mother claimed that while the children were not enrolled in an Indian Tribe, they were eligible for inclusion under the Act under their father's heritage.[559] Such a question is one a mixed issue of law and fact, and the court reviews such questions of law de novo.[560]

Under North Dakota law, an individual can be an Indian and not enrolled in a tribe.[561] However, the individual must satisfy the tribe's membership determinations.[562] During trial, the juvenile court found that because the father was not enrolled in the tribe, the children were not eligible to enroll.[563] This determination echoed the tribe's determination that the children were not covered by the Indian Child Welfare Act.[564] The North Dakota Supreme Court recognized that "'state courts may not second-guess the internal decision-making processes of the tribe in regards to its membership determination.'"[565] Based upon the foregoing considerations, the North Dakota Supreme Court affirmed the order terminating parental rights to both of the children.[566]

556. *Id.* ¶ 35.
557. *Id.* ¶ 39, 842 N.W.2d at 898.
558. *Id.* ¶¶ 39-41.
559. *Id.* ¶ 42.
560. *Id.* ¶ 43, 842 N.W.2d at 899.
561. *Id.* ¶ 44.
562. *Id.*
563. *Id.* ¶ 45.
564. *Id.* ¶ 46.
565. *Id.* ¶ 44 (quoting *In re* Adoption of C.D., 2008 ND 128, ¶ 18, 751 N.W.2d 236, 242).
566. *Id.* ¶ 50, 842 N.W.2d at 900.

TORTS – PUBLIC NUISANCES – ACTUAL INJURY FROM PUBLIC INJURY

Hale v. Ward County

In *Hale v. Ward County*,[567] the North Dakota Supreme Court determined that the private persons in this case, the Hales, were unable to maintain a private nuisance claim because they failed to show that the public nuisance they were alleging was specially injurious to them.[568] The Hales owned a house located on agricultural land near a law enforcement shooting range in Ward County.[569] Other homes, farms, and County Road 12 are also located near the shooting range.[570] In a prior action, the Hales sued Ward County and Minot claiming that the shooting range was a private and public nuisance because, allegedly, the shooting range was a danger to their property, their neighbors' properties, and the public using County Road 12.[571] In this prior action, the district court granted summary judgment against the Hales' claims.[572] The court affirmed summary judgment on the private nuisance claim for a lack of evidence showing that a danger was posed to their property and reversed summary judgment on the public nuisance claims, explaining that there were "disputed issues of fact about the Hales' claim that the law enforcement shooting range was a public nuisance for users of County Road 12."[573]

When the case was remanded, the district court decided that the Hales did not meet the requisite showing of a "special injury" as required by North Dakota Century Code section 42-01-08, and the district court accordingly granted summary judgment to Ward County and Minot.[574] The Hales argued that the district court erred in the summary judgment grant for their public nuisance claim because sufficient evidence was proffered to show that Robert Hale suffered a special injury so as to raise a "genuine issue of material fact."[575]

In responding to the Hales allegations, the court first differentiated public from private nuisances.[576] The court began by observing that North Dakota Century Code section 42-01-08 controlled this case and provides

567. 2014 ND 126, 848 N.W.2d 245.
568. *Id.* ¶ 1, 848 N.W.2d at 246.
569. *Id.* ¶ 2.
570. *Id.*
571. *Id.* ¶ 4, 848 N.W.2d at 247.
572. *Id.*
573. *Id.*
574. *Id.* ¶ 6, 848 N.W.2d at 248.
575. *Id.* ¶ 8.
576. *Id.* ¶ 9 (quoting N.D. CENT. CODE § 42-01-08 (2013)).

that "[a] private person may maintain an action for a public nuisance if it is specially injurious to that person or that person's property, but not otherwise."[577] The court looked to California Civil Code section 3493, the source code for the North Dakota statute, for guidance in construing the "specially injurious" phrase from North Dakota Century Code section 42-01-08.[578]

The court agreed with the district court that Susan Hale's claim should be dismissed because she did not show that the shooting range was specially injurious to her in some way that was different than the injury to the public.[579] The court also agreed with the district court that Robert Hale's use of County Road 12 did not show that the shooting range resulted in a specific injury to him because he merely used the road to visit a friend once or twice a month.[580] Thus, the injury to Robert Hale was not a special injury different from how it affects other members of the public.[581] The court also concluded that the district court did not err in denying the Hales' request for joinder of other neighbors to their action, for the denial of joinder was proper in that it "was not arbitrary, unconscionable, or unreasonable, was not a misapplication of law, and was the product of a rational mental process leading to a reasoned determination."[582] In conclusion, the Hales were not the "proper private person[s] to maintain a claim for a public nuisance for the law enforcement shooting range," and the court affirmed the summary judgment, thereby dismissing the Hales' public nuisance claim.[583]

577. *Id.* ¶ 12.
578. *Id.* ¶ 16.
579. *Id.* ¶ 20, 848 N.W.2d at 252.
580. *Id.* ¶ 21.
581. *Id.*
582. *Id.* ¶¶ 24-26, 848 N.W.2d at 253.
583. *Id.* ¶ 23, 848 N.W.2d at 253.

WORKERS' COMPENSATION LAW – COMPENSATION FOR CASUALLY CONNECTED CONDITION – FAIR HEARING – BURDEN OF WAGE LOSS

Brockel v. WSI

In *Brockel v. WSI*, the North Dakota Supreme Court reviewed a judgment that denied Rick Brockel medical benefits and terminated his disability benefits.[584] The court affirmed in part the judgment holding that Brockel's medical condition was not causally related to his workplace injury, reversed in part the judgment because Brockel did not have a fair hearing due to improper notice and an improper finding regarding failure to show wage loss, and remanded to reinstate retroactive benefits for further proceedings.[585] Brockel was in a motor vehicle accident while working, which caused injuries to his to shoulder, spine, and ribs.[586] He later suffered a head injury and cervical myelomalacia related to the spinal injury.[587] He continued to suffer bouts of dizziness and light-headedness and was referred to Mayo Clinic.[588]

Mayo Clinic found a nonunion fracture in his shoulder and a right vertebral artery occlusion.[589] This occlusion restricted the blood flow when Brockel rotated his head.[590] The doctor recommended surgery to the shoulder, but noted that such surgery would be risky due to the artery occlusion.[591] WSI requested a determination of whether the occlusion was due to the motor vehicle accident, and initially the doctor stated "No" on a form.[592]

A few months later, the Mayo doctors performed a reevaluation and opined that it would be reasonable to believe the accident was a "substantial and contributing factor."[593] WSI obtained an independent medical examination, which found there was not enough evidence to show that the accident and the occlusion were related.[594] The examination also stated that Brockel needed the surgery in order to return to work.[595] In a second

584. 2014 ND 26, 843 N.W.2d 15.
585. *Id.* ¶ 1, 843 N.W.2d at 17.
586. *Id.* ¶ 2.
587. *Id.*
588. *Id.* ¶ 3.
589. *Id.*
590. *Id.*
591. *Id.*
592. *Id.* ¶ 4.
593. *Id.*
594. *Id.* ¶ 5.
595. *Id.*

independent medical examination, the doctor concluded that Brockel had no disability from the accident, but still required activity restrictions.[596] This doctor also concluded that Brockel would benefit from the surgery, and the surgery could be performed if careful consideration was given to the position of Brockel's head during the surgery.[597]

WSI sent Brockel a "notice of decision denying medical condition" for the occlusion because the ailment was unrelated to the accident.[598] WSI also sent Brockel a "notice of intention to discontinue/reduce benefits" notifying him that wage loss benefits would be terminated due to the occlusion being his "primary disabling factor."[599] Brockel requested an administrative hearing with WSI.[600] The administrative law judge, and later the district court, affirmed WSI's decision.[601]

Brockel contended that there was enough evidence to establish that his condition was related to his accident.[602] Under North Dakota law, Brockel bore the burden to prove that his medical condition was causally related to the work injury.[603] The condition does not have to be the sole cause of the injury, but it must be causally related.[604] The court agreed with WSI that Brockel failed to show that the employment accident was a substantial contributing factor to the injury.[605]

WSI based its decision primarily on the testimony of the doctor who performed the first independent medical examination, which found the occlusion was not caused by the accident.[606] Specifically, WSI noted that there was a discrepancy between the severity of the symptoms initially reported by Brockel and the severity of the symptoms the independent doctor stated Brockel should have had if the occlusion was caused by the accident.[607] Furthermore, the Mayo Clinic doctors did not explain this discrepancy.[608] In conclusion, the court affirmed the district court's judgment, stating the accident was not a substantial contributing factor of the medical condition.

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596. *Id.*
597. *Id.* at 18.
598. *Id.* ¶ 6.
599. *Id.*
600. *Id.* ¶ 7.
601. *Id.*
602. *Id.* ¶ 10, 843 N.W.2d at 20.
603. *Id.* ¶ 11.
604. *Id.*
605. *Id.* ¶ 11.
606. *Id.* ¶ 12.
607. *Id.*
608. *Id.* ¶ 13, 843 N.W.2d at 21.

Despite Brockel's failure to meet his burden of proof on this issue, the North Dakota Supreme Court concluded that Brockel did not receive a fair hearing.[609] Specifically, WSI failed to give Brockel proper notification to terminate Brockel's disability benefits.[610] Under North Dakota law, WSI was to give notice to Brockel and his doctor twenty-one days before discontinuing benefits.[611] The notice must also include the reasons for discontinuation, Brockel's rights to respond, and how to file the required report.[612] The "notice of intention to discontinue/reduce benefits" did not fulfill this requirement because it was not sent to Brockel's doctor and lacked notice of the procedures on how to file the verification.[613] WSI asserted that Brockel waived his lack of notice by failing to raise it at the administrative hearing.[614] The court denied this argument because Brockel would not have been aware that the verification of his disability would be the determining factor until the administrative law judge's decision.[615]

Brockel also contended that he showed his wage loss was the result of his injury.[616] The court recognized that he carried the burden of proof in regards to his wage loss, concluding that WSI's decision was "flawed in several respects."[617] First, the administrative law judge was focused on the wage loss in connection with the occlusion and not the work-related injury to his shoulder.[618] The court cited precedent from other jurisdictions holding that employers will still be liable for the work-related injury despite an unrelated medical condition prolonging that injury.[619] The court found *Thurston v. Guys With Tools, Ltd.*[620] persuasive, stating "[t]o deny coverage to an employee in such circumstances would 'create a windfall to employers simply because of the employee's misfortune in developing an independent medical condition.'"[621] The court then reiterated the legal principle that a "nonwork-related condition is not a superseding, intervening event that breaks the causal connection between a work-related injury and a claimant's disability."[622] The court concluded that the

609. *Id.* ¶ 17.
610. *Id.* ¶ 16, 843 N.W.2d at 22.
611. *Id.* ¶ 15.
612. *Id.*
613. *Id.* ¶ 16.
614. *Id.*
615. *Id.*
616. *Id.* ¶ 18, 843 N.W.2d at 23.
617. *Id.*
618. *Id.* ¶ 19.
619. *Id.*
620. 217 P.3d 824 (Alaska 2009)).
621. *Id. (*quoting Thurston v. Guys with Tools, Ltd., 217 P.3d 824, 829).
622. *Id.* ¶ 20, 843 N.W.2d at 23-24.

employee does not need to prove the work-related injury is the sole cause of the disability, but only that it is a substantial contributing factor to the disability.[623]

The second flaw with the prior wage loss determination was that the administrative law judge presumed the occlusion was the cause of any wage loss.[624] There was nothing in the record that reflected when Brockel was released to return to his prior form of work after he was disabled by his shoulder injury.[625] Brockel had only received activity restrictions and could have been provided rehabilitation services, but this was ruled out when WSI sent the notice to discontinue his benefits.[626] The administrative law judge's ruling ultimately ignored "WSI's obligation to consider vocational evidence."[627] The court then noted any future functional capacity assessments must take into account both the work-related injury and the occlusion.[628]

Justice Sandstrom dissented from the majority with respect to the part of the opinion where it reverses and remands.[629] Justice Sandstrom asserted that the majority offered its independent findings in replace of the agency's findings.[630] Justice Sandstrom noted that WSI gave proper notice and WSI made its finding on that basis.[631] He also stated that the majority should not have decided on the shoulder injury because it was not a presented issue, and that the majority's findings were contrary to the findings of fact located in the record.[632] Justice Sandstrom found that the findings of fact in the record prove that Brockel's shoulder injury "does not preclude him from working."[633] Justice Sandstrom would have affirmed "on the basis of a proper application of the standard of review."[634]

623. *Id.* ¶ 21, 841 N.W.2d at 24.
624. *Id.* ¶ 22.
625. *Id.*
626. *Id.*
627. *Id.*
628. *Id.*
629. *Id.* ¶ 28, 843 N.W.2d at 25 (Sandstrom, J., dissenting).
630. *Id.*
631. *Id.* ¶¶ 35-37, 843 N.W.2d at 26.
632. *Id.* ¶ 38.
633. *Id.* ¶¶ 42-43, 843 N.W.2d at 27-28.
634. *Id.* ¶ 43, 843 N.W.2d at 28.