NORTH DAKOTA SUPREME COURT REVIEW

The North Dakota Supreme Court Review summarizes significant decisions rendered by the North Dakota Supreme Court. The purpose of the Review is to identify cases of first impression, cases that significantly alter earlier interpretations of North Dakota law, and other noteworthy cases. As a special project, Associate Editors assist in researching and writing the Review.* The following topics are included in the Review:

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AUTOMOBILES – IMPLIED CONSENT ADVISORY REQUIRED BEFORE ADMINISTERING CHEMICAL TEST
City of Grand Forks v. Barendt

After an appeal from a district court order suppressing the results of a chemical breath test, the North Dakota Supreme Court held that "North Dakota's implied consent advisory must be read after placing an individual under arrest and before the administration of a chemical test."[1] A Grand Forks police officer suspected Thomas Barendt of being under the influence of alcohol while Barendt was "slumped over in his vehicle."[2] Barendt refused a breath test for alcohol after submitting to field-sobriety tests.[3] The officer then explained North Dakota's implied consent advisory.[4] At this point, the officer arrested Barendt, brought him to the Grand Forks Correctional Center, and administered a breath test to him.[5] Barendt showed a blood alcohol level above .08%.[6]

Barendt moved to suppress the results of his breath test because he was not given the implied consent advisory before his breath test after he was formally placed under arrest.[7] Citing *State v. O'Connor*,[8] the district court agreed with Barendt and held "that the rule of law in North Dakota is that an implied consent advisory must be given *after* an individual has been placed under arrest and *before* the chemical test is administered."[9] Although *O'Connor* dealt with the same statutory sections as *Barendt*, the court distinguished it because *O'Connor* dealt with an officer providing an incomplete implied consent advisory.[10]

The City of Grand Forks ("City") appealed on two grounds. First, Barendt's motion was filed after the pretrial motion deadline.[11] While there was no question that Barendt's motion was filed nine days after the deadline, "a district court may consider an untimely motion if the party shows good cause."[12] The North Dakota Supreme Court held that the district court "implicitly found" cause because Barendt's motion was still filed two months before trial, Barendt could have attempted to suppress the evidence at trial,

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1. City of Grand Forks v. Barendt, 2018 ND 272, ¶ 1, 920 N.W.2d 735.
2. *Id.* at ¶ 2.
3. *Id.*
4. *Id.* at ¶ 3.
5. *Id.*
6. *Id.*
7. *Barendt*, 2018 ND 272, ¶ 4, 920 N.W.2d 735.
8. 2016 ND 72, 887 N.W.2d 312.
9. *Barendt*, 2018 ND 272, ¶ 4, 920 N.W.2d 735 (emphasis in original).
10. *Id.* at ¶¶ 15–16 (citing *O'Connor*, 2016 ND 72, 877 N.W.2d 312).
11. *Id.* at ¶ 5.
12. *Id.* at ¶ 9 (citing N.D. R. CRIM. P. 12(c)(3)).

and the City failed to show prejudice resulting from the district court's decision.[13]

Second, the City argued that the implied consent advisory required by N.D.C.C. § 39-20-01could only be given contemporaneous to arrest.[14] As a question of law, statutory interpretation is fully reviewable.[15] A court seeks to determine legislative intent though the statute's language.[16] Unless there is a plain, contrary definition, words in statutes are given their ordinary and commonly used meaning.[17] Statutes are read together to "harmonize them if possible."[18]

The two statutes at issue were subsections of N.D.C.C. § 39-20-01. Subsection 2 contemplates "that the *individual is or will be charged* with the offense . . . ." while subsection 3 refers only to the "individual charged."[19] Because of this change in language, "a plain reading of subdivisions (2) and (3) suggests that the implied consent requirements of N.D.C.C. § 39-20-01(3)(a) relating to refusal of the test must also be read to the individual charged after placing the individual under arrest."[20] Because the arresting officer did not follow this procedure, the North Dakota Supreme Court held that the district court properly granted the motion to suppress.[21]

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13. *Id.* at ¶ 9.
14. *Id.* at ¶ 10.
15. *Barendt*, 2018 ND 272, ¶ 11, 920 N.W.2d 735 (citing Zajac v. Traill Cty. Water Res. Dist., 2016 ND 134, ¶ 6, 881 N.W.2d 666).
16. *Id.* (citing State v. Ngale, 2018 ND 172, ¶ 10, 914 N.W.2d 495).
17. *Id.*; N.D. CENT. CODE § 1-02-02 (2017).
18. *Barendt*, 2018 ND 272, ¶ 11, 920 N.W.2d 735 (quoting Broeckel v. Moore, 498 N.W.2d 170, 172 (N.D. 1993)).
19. *Id.* at ¶ 14 (citing N.D. CENT CODE § 39-20-01(2), (3)).
20. *Id.*
21. *Id.* at ¶ 17.

FAMILY LAW – PROPERTY VALUATION IN DIVORCE PROCEEDINGS
Schultz v. Schultz

In *Schultz v. Schultz*,[22] the plaintiff, Chad Schultz, appealed a final judgment and decree of divorce.[23] Schultz specifically appealed the district court's valuation of marital assets and the allocation of the marital estate.[24] Chad challenged the district court's overall allocation of the marital property.[25] Chad further argued that the district court mistakenly determined his marriage to Kelli Schultz as "long term."[26] Chad also argued the district court erred by incorrectly valuing the couple's farmland; by failing to allocate the farm to him without a reciprocal allocation to Kelli; by incorrectly valuing the salon Kelli owned; by awarding Kelli a portion of Chad's North Dakota Public Employees Retirement System ("NDPERS") account; by including the home of Chad's father in the valuation; by including property as part of an equalization payment; and by applying a four percent interest rate to said equalization payment.[27] The North Dakota Supreme Court determined the district court did not err in its determination of any of Chad's challenges.[28] The supreme court reviewed the findings of fact for the division of property under a clearly erroneous standard.[29]

Chad and Kelli were married in September 2008 after cohabiting for one and a half years.[30] The parties separated in February 2016 after about seven and a half years of marriage, and Chad moved out of the marital home.[31] The district court determined the marriage to be "long-term" due to the approximately ten and a half years combined time period of cohabitation, marriage, and marriage while living apart.[32] The supreme court agreed with the district court that Chad and Kelli were in a long-term marriage prior to divorce.[33]

Prior to the marriage, Chad inherited a fifty percent interest in three separate quarters of farmland in Nelson County.[34] During the divorce, Chad and

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22. 2018 ND 259, 920 N.W.2d 483.
23. *Schultz*, 2018 ND 259, ¶ 1, 920 N.W.2d 483.
24. *Id.*
25. *Id.* at ¶ 9.
26. *Id.*
27. *Id.*
28. *Id.* at ¶ 13.
29. *Schultz*, 2018 ND 259, ¶ 14, 920 N.W.2d 483.
30. *Id.* at ¶ 13.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at ¶ 15.

Kelli agreed that Chad would receive the farmland during the property distribution, but they could not agree on a reciprocal value allocated to Kelli.[35] Chad argued that because the property was inherited prior to marriage, the property should have been allocated to him and no reciprocal allocation of value should have been awarded to Kelli.[36] Kelli requested an equal division of the farmland's value through post-judgment payments.[37]

The district court agreed with Kelli and ordered a series of post-judgment equalization payments from Chad to Kelli, which included a four percent interest rate.[38] The supreme court agreed with this ruling, reasoning that even though Chad brought more assets into the marriage, the district court's decision to allocate the farmland in this manner was not erroneous.[39]

Chad and Kelli also argued over the valuation of the farmland.[40] Chad offered testimony to support his opinion of the value of the land, while Kelli used the values from the 2017 County Rents and Values survey by the North Dakota Department of Trust Lands.[41] The district court came to a value in between the amounts suggested by the parties.[42] The supreme court found the decision of the district court was not erroneous because the determination came within the range of evidence presented at trial.[43]

Another point of contention was that the parties had purchased a salon as a business for Kelli to operate.[44] Chad paid $35,000, and Kelli paid $5000.[45] Through the divorce proceedings, the parties agreed that the salon would be distributed to Kelli, but again could not agree on a valuation.[46] Chad argued the valuation should have been $160,000, while Kelli argued the valuation of the salon was only $40,000.[47] The district court agreed with Kelli's determination of value for the salon.[48] The supreme court presumed the trial court's property valuations were correct and upheld the $40,000 valuation.[49]

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35. *Schultz*, 2018 ND 259, ¶ 3, 920 N.W.2d 483.
36. *Id.* at ¶ 3.
37. *Id.*
38. *Id.*
39. *Id.* at ¶ 15.
40. *Id.* at ¶ 4.
41. *Schultz*, 2018 ND 259, ¶ 4, 920 N.W.2d 483.
42. *Id.*
43. *Id.* at ¶ 17.
44. *Id.* at ¶ 5.
45. *Id.*
46. *Id.*
47. *Schultz*, 2018 ND 259, ¶ 5, 920 N.W.2d 483.
48. *Id.*
49. *Id.* at ¶ 19.

The next disagreement the parties had revolved around Chad's father's home. Both Chad and his father jointly held title to the property, and therefore, Chad argued it should not have been considered part of the marital estate.[50] The district court ruled Chad's one-half interest in the home was marital property. The supreme court determined that under North Dakota law, the district court was required to include Chad's interest in the home shared with his father in the marital estate for distribution.[51] Chad also argued the district court should now have awarded Kelli any portion of his NDPERS retirement account.[52] The supreme court did not analyze this argument but stated it did not find the district court's allocation of any marital property to be erroneous.[53]

Finally, the supreme court ruled that the district courts have broad authority when it comes to cash payments in order to achieve an equitable distribution.[54] Because the district court had broad authority and the district court used an interest rate below the rate of 7.5% used by the State Court Administrator, the district court did not err in using a four percent interest rate as the appropriate standard.[55]

50. *Id.* at ¶ 6.
51. *Id.* at ¶ 23.
52. *Id.* at ¶ 22.
53. *Schultz*, 2018 ND 259, ¶ 22, 920 N.W.2d 483.
54. *Id.* at ¶ 29.
55. *Id.* at ¶ 30.

CRIMINAL LAW – TAMPERING WITH A PUBLIC SERVICE
State v. Jessee

During the Dakota Access Pipeline protests, Rebecca Kathleen Jessee was arrested and charged with tampering with a public service.[56] During protests in November of 2016, law enforcement observed a small group of protestors "placing debris on the railroad tracks."[57] Ms. Jessee was present at the protest and was observed standing on the tracks but was not involved in placing debris on them.[58] A district court found Ms. Jessee guilty under N.D.C.C. § 12.1-21-06, which prohibits the "tampering with or damaging the tangible property" of public services.[59] Ms. Jessee appealed, arguing that the statute "requires physical action with a material object of alteration or damage" and that she "was merely present."[60]

The court began by determining whether there was sufficient evidence to support Ms. Jessee's criminal conviction by applying a sufficiency of the evidence standard.[61] Under this standard, a court "merely reviews 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."[62] Evidence at trial supported the claim that trains were delayed for one hour and forty-five minutes, leading the district court to find Ms. Jessee caused a substantial interruption in train service.[63] However, on review, the North Dakota Supreme Court held that the conviction "lack[ed] support for tampering with tangible property."[64]

To decide whether Ms. Jessee was "tampering," the court needed to interpret the use of that key word in N.D.C.C. § 12.1-21-06.[65] This interpretation presented a question of law and was reviewed de novo.[66] "Whenever the meaning of a word or phrase is defined in any statute, such definition is applicable to the same word or phrase wherever it occurs in the same or subsequent statutes, except when a contrary intention plainly appears."[67] "When a statutory definition, however, is limited by prefatory

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56. State v. Jessee, 2018 ND 241, ¶¶ 1–2, 919 N.W.2d 335.
57. *Id.* at ¶ 2.
58. *Id.* at ¶¶ 2, 13.
59. *Id.* at ¶ 4.
60. *Id.*
61. *Id.* at ¶ 5 (citing State v. Johnson, 425 N.W.2d 903, 906 (N.D. 1988)).
62. *Jessee*, 2018 ND 241, ¶ 5, 919 N.W.2d 335 (quoting State v. Demarais, 2009 ND 143, ¶ 7, 770 N.W.2d 246).
63. *Id.* at ¶ 6.
64. *Id.*
65. *Id.*
66. *Id.* at ¶ 6 (citing State v. Chacano, 2012 ND 113, ¶ 10, 817 N.W.2d 369).
67. *Id.* at ¶ 9; N.D. CENT. CODE § 1-01-09 (2017).

language such as 'in this title' or 'for the purposes of this title,' the legislature has expressly evidenced its intent that the definition have no application beyond that act."[68]

The state encouraged the court to apply N.D.C.C. § 49-04.1-01(3), relating to metering of utility services, which defines tampering as "damaging, altering, adjusting, or in any manner interfering with or obstructing the action or operation of any meter provided for measuring or registering the amount of utility service passing through the meter." However, the statute "has the limiting language 'As used in this chapter, unless the context or subject matter otherwise requires.'"[69] The court found that "[t]he context and subject matter of railroad operations and utility services such as natural gas or electricity are very different." Further, this expansive definition would be "inconsistent"[70] with similar cases involving tampering.[71] Since Ms. Jessee's presence did not constitute tampering with tangible property, her conviction was reversed.[72]

68. *Jessee*, 2018 ND 241, ¶ 9, 919 N.W.2d 335.

69. *Id*. at ¶ 10 (quoting N.D. CENT. CODE § 49-04.1-01).

70. *Id*.

71. *See* State v. Damron, 1998 ND 71, ¶ 2, 575 N.W.2d 912 (cutting telephone lines to evade security systems and commit burglary is tampering with a public service); W.W. Wallwork, Inc. v. Duchscherer, 501 N.W.2d 751 (N.D. 1993) (tampering with odometer includes rolling back mileage); *In re* Estate of Larsen, 143 N.W.2d 656 (N.D. 1966) (tampering with a handwritten note includes erasing provisions within); Erickson v. N.D. Workmen's Comp. Bureau, 123 N.W.2d 292 (N.D. 1963) (before admittance as evidence, a material object must be shown to have no tampering; likened to a substantial change in the material object); Howser v. Pepper, 8 N.D. 484, 79 N.W. 1018, 1021 (N.D. 1899) (tampering with a ballot box or ballot requires some sort of change to the item). Other states have addressed tampering with public services or utilities in a manner which requires alteration or harmful conduct. *See* Kreiling v. Field, 431 F.2d 502 (9th Cir. 1970) (slight movement of two levers inside a public telephone making it inoperable was tampering); United States v. Davis, No. 10-6451-RSR, 2010 WL 4722483 (S.D. Fla. Nov. 15, 2010) (trespassing into water treatment plant and turning off main breakers and back-up generator supports charges of tampering with public water system); Commonwealth v. Faherty, 781 N.E.2d 864 (Mass. App. Ct. 2003) (vandalism by inserting foreign objects into a parking meter is tampering); Sanchez v. State, No. 05-15-00098, 2016 WL 3947841 (Tex. Ct. App. July 15, 2016) (removing portions of an electric meter to facilitate diversion of electric power supply is sufficient evidence to prove tampering); Howlett v. State, 994 S.W.2d 663 (Tex. Crim. App. 1999) (unauthorized tap connected to inlet riser of gas meter was tampering).

72. *Jessee*, 2018 ND 241, ¶ 14, 919 N.W.2d 335.

CONTRACTS – PARTIES TO A CONTRACT ARE LIABLE FOR DAMAGES CAUSED BY THIRD PARTIES ASSIGNED TO PERFORM THEIR DUTIES
Bakke v. Magi-Touch Carpet One Floor & Home, Inc.

In *Bakke v. Magi-Touch*,[73] plaintiff Shannon Bakke appealed from a judgment in favor of defendant Magi-Touch Carpet One Floor & Home, Inc., ("Magi-Touch") and denial of her motion to amend her complaint.[74] Bakke argued the district court erred when it ruled that she could not pursue a claim against Magi-Touch because Magi-Touch was not liable for the acts of its third-party independent contractor.[75] Bakke also argued the district court erred when it denied her motion to amend her complaint to assert a contract claim against Magi-Touch.[76] The North Dakota Supreme Court affirmed in part, reversed in part, and remanded to the district court for proceedings on Bakke's contract claim.[77]

Bakke entered into a contract with Magi-Touch for the installation of floor tiles, a shower base, and other products in a bathroom within Bakke's home.[78] Magi-Touch hired VA Solutions, LLC, an independent contractor, to install the shower base and tile.[79] Bakke's shower door imploded and caused damage to the property in and around the shower, requiring the bathroom door and trim to be repainted.[80] Bakke asserted the shower door was improperly installed, causing the implosion.[81]

Magi-Touch refused to compensate Bakke for the damaged door and trim. In response, Bakke initiated litigation in small claims court.[82] Magi-Touch filed a formal answer and requested a jury trial.[83] Magi-Touch asserted Bakke's claim was barred by the economic loss doctrine, which limits a plaintiff's recovery for a breach of contract to contractual damages only and generally precludes tort claims such as negligence.[84] Once the case was removed from small claims court to district court, Magi-Touch made a motion for summary judgment.[85] In its motion for summary judgment, Magi-

73. 2018 ND 273, 920 N.W.2d 726.
74. *Bakke*, 2018 ND 273, ¶ 1, 920 N.W.2d 726.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at ¶ 2.
79. *Id.*
80. *Bakke*, 2018 ND 273, ¶ 2, 920 N.W.2d 726.
81. *Id.*
82. *Id.* at ¶ 3.
83. *Id.* at ¶ 4.
84. *Id.*
85. *Id.* at ¶ 5.

Touch asserted VA Solutions was hired to perform the work as an independent contractor, and therefore Magi-Touch could not be held liable for the negligence of an independent contractor.[86]

The district court granted summary judgment, determining that Magi-Touch had no liability for the negligence of an independent contractor.[87] The district court also granted summary judgment for SPS Companies, Inc., dismissing them from the lawsuit because SPS was relieved from liability for distribution of a defective product because SPS was a non-manufacturing seller.[88] The same court denied Bakke's motion to file an amended complaint.[89] The amended complaint would have expanded on the original general claim filed in small claims court by adding claims for breach of contract, fraud, deceit, negligence, and unlawful sales practices.[90] The district court denied this motion, ruling the claims would be futile as the court already ruled Magi-Touch was not responsible for the negligent acts of VA Solutions.[91] On appeal, the supreme court analyzed whether the claim by Bakke would have a valid claim under an implied warranty theory.[92]

The supreme court agreed with the district court that if it tort law had governed the case, Bakke would be precluded from asserting a negligence action against Magi-Touch – however, Bakke wanted to amend her original claim from small claims court to include a breach of contract claim.[93] Under contract law, a contracting party may not escape liability on the contract by assigning its duties and rights under the original contract to a third party.[94]

Even though the North Dakota Supreme Court disagreed with the district court's determination that the breach of contract claim to be added by the original complaint would be futile, it agreed with the district court that the remaining claims for fraud, deceit, and deceptive/fraudulent acts would not withstand a summary judgement ruling.[95] The supreme court ultimately remanded the issue of the amendment, stating that if Bakke could establish a breach of contract claim, she would be entitled to damages caused by that breach.[96]

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86. *Bakke*, 2018 ND 273, ¶ 5, 920 N.W.2d 726.
87. *Id.*
88. *Id.*
89. *Id.* at ¶ 6.
90. *Id.*
91. *Id.*
92. *Bakke*, 2018 ND 273, ¶ 11, 920 N.W.2d 726.
93. *Id.* at ¶ 12.
94. *Id.* at ¶ 14.
95. *Id.* at ¶¶ 18–19.
96. *Id.* at ¶ 22.

INFANTS – DEPENDENCY, PERMANENCY, AND RIGHTS TERMINATION
In re A.L.E.

A.E. ("Mother"), the mother of of A.L.E. ("Child"), appealed to the North Dakota Supreme Court from a judgment terminating her parental rights.[97] The father did not participate in the proceedings and did not appeal.[98] Mother's appeal claimed that Child was not deprived, deprivation was not likely to continue, and that reasonable efforts were not made to reunite Child with Mother.[99]

The court began by examining the relevant statutory language, which states that a court may terminate parental rights when "a child is deprived and the court finds . . . [t]he 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[.]"[100] This must be shown through clear and convincing evidence.[101] The court applies the clearly erroneous standard to review a juvenile court's findings.[102] Under this standard, the court will affirm "the decision of the juvenile court unless it is introduced by an erroneous view of the law, if there is no evidence to support it, or if, on the entire record, we are left with a definite and firm conviction a mistake has been made."[103]

Mother first argued that the juvenile court erred in finding Child had been deprived, claiming that Child did not meet the statutory definition in N.D.C.C. § 27-20-02(8)(a). This statute defines "deprived child" as a child "without proper parental care or control, subsistence, education as required by law, or other care or control necessary for the child's physical, mental, or emotional health, or morals, and the deprivation is not due primarily to the lack of financial means of the child's parents, guardian, or other custodian."[104] The juvenile court found that Mother used marijuana during pregnancy,[105] and that methamphetamine, marijuana, and drug paraphernalia were found in Mother's home while Child was present during a probation search.[106] Because these factors were specifically listed as grounds for find-

97. *In re* A.L.E., 2018 ND 257, ¶ 1, 920 N.W.2d 83.
98. *Id.* at ¶ 2.
99. *Id.* at ¶ 3.
100. *Id.* at ¶ 4 (quoting N.D. CENT. CODE § 27-20-44(1)(c)(1) (2017)).
101. *Id.* (citing *In re* C.D.G.E., 2017 ND 13, ¶ 4, 889 N.W.2d 863).
102. *Id.* (citing *In re* A.B., 2017 ND 178, ¶ 12, 898 N.W.2d 676).
103. *A.L.E.*, 2018 ND 257, ¶ 4, 920 N.W.2d 83.
104. N.D. CENT. CODE § 27-20-02(8)(a) (2017).
105. *A.L.E.*, 2018 ND 257, ¶ 4, 920 N.W.2d 83; N.D. CENT. CODE § 27-20-02(8)(f).
106. *A.L.E.*, 2018 ND 257, ¶ 6, 920 N.W.2d 83; N.D. CENT. CODE § 27-20-02(8)(g).

ing deprivation, the court determined that the juvenile court correctly applied the law and its determination was not erroneous.[107]

Mother also argued that "the juvenile court erred in finding that the causes of deprivation are likely to continue, resulting in harm to" Child.[108] The court "noted that a parent's past conduct can form the basis to predict future behavior and a parent's lack of cooperation with social service agencies is evidence that the causes and conditions of deprivations will likely continue."[109] A parent's incarceration is another factor in determining future deprivation.[110]

The juvenile court found that Mother had been incarcerated for six months of Child's life, had failed to address her addiction issues or follow Social Service's recommendations, failed to attend supervised visits with Child, was late or missed judicial proceedings, and personally sought "an additional twelve months to address her addiction issues – an exceptionally long time considering [Child's] age and length of time [Child] has already been in foster care."[111] The court found that the juvenile court correctly determined that there was clear and convincing evidence that deprivation was likely to continue.[112]

Finally, Mother argued that the juvenile court erred in terminating Mother's parental rights for two separate reasons: because Child had been placed with a relative, and because Social Services failed to use reasonable efforts to reunite the family.[113] Under N.D.C.C. §27-20-20.1(3)(a), a "petition for termination of parental rights need not be filed if . . . [t]he child is being cared for by a relative approved by the department . . . ." Here, Mother argued that Child had been living with a maternal aunt and so the case should have been dismissed.[114] However, this list is "permissive, not mandatory" and the court held that the juvenile court "was not required to dismiss the petition because [Child] was being cared for by a relative."[115] The court held that this did not create any reversible error.[116]

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107. *A.L.E.*, 2018 ND 257, ¶ 6, 920 N.W.2d 83.
108. *Id.* at ¶ 7.
109. *Id.* (citing *In re* A.B., 2017 ND 178, ¶ 12, 898 N.W.2d 676).
110. *Id.* (citing *In re* D.H., 2010 ND 103, ¶ 20, 783 N.W.2d 12).
111. *Id.* at ¶ 8.
112. *Id.* at ¶ 9.
113. *A.L.E.*, 2018 ND 257, ¶ 9, 920 N.W.2d 83.
114. *Id.* at ¶ 10.
115. *Id.*
116. *Id.*

CRIMINAL LAW – MANUFACTURING CONTROLLED SUBSTANCE DOES NOT REQUIRE PROOF OF DISTRIBUTION
State v. Brown

In *State v. Brown*,[117] the State of North Dakota ("State") appealed a district court order dismissing with prejudice felony charges against Mitchell James and Taelor Brown.[118] James and Brown were charged with felony possession of a controlled substance with intent to deliver.[119] The North Dakota Supreme Court ruled the district court abused its discretion when the district court determined that manufacturing required evidence of production from a third party.[120] Accordingly, the supreme court reversed and remanded.[121]

James and Brown were charged in December 2017.[122] During a preliminary hearing on March 2, 2018, a law-enforcement officer testified that a search of the defendants' home led to the discovery of marijuana paraphernalia, raw marijuana in a plastic tube, a butane canister, two to three grams of hash oil, and digital scales.[123] After hearing testimony, the district court dismissed the charges of felony possession of a controlled substance with intent to deliver for lack of probable cause.[124] The district court explained James and Brown's actions did not constitute manufacturing, and no evidence was presented showing previous deals, communications, pay sheets, or products for sale to a third party.[125] The district court further ruled there was no intent to deliver after finding the small amount of hash oil recovered could be for personal use.[126]

The State argued that even if the hash oil was not for sale to third parties, the transformation of raw marijuana to hash oil still constituted "manufacturing."[127] The State further argued James and Brown manufactured hash oil by "converting" the plant into an oil-like substance.[128] Under N.D.C.C. 19-03.1-01(17):

> [M]anufacturing means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance,

117. 2018 ND 229, 918 N.W.2d 382.
118. *Brown*, 2018 ND 229, ¶ 1, 918 N.W.2d 382.
119. *Id.* at ¶ 2.
120. *Id.* at ¶ 16.
121. *Id.*
122. *Id.* at ¶ 2.
123. *Id.*
124. *Brown*, 2018 ND 229, ¶ 2, 918 N.W.2d 382.
125. *Id.*
126. *Id.*
127. *Id.* at ¶ 4.
128. *Id.*

> either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis and includes any packaging or repackaging of the substance or labeling or relabeling of its container.[129]

However, the statute also provides an exception when preparation or compounding of a controlled substance is done by an individual for the individual's own use.[130] The supreme court relied on decisions from other states that have ruled the transformation of raw marijuana to hash oil is more than preparation or compounding for personal use.[131] Using these definitions, the supreme court ruled the district court erred by construing the statute to require indicia of preparation for third parties for all the acts listed in the statute.[132] As a result, the supreme court ruled that based on the evidence presented to the district court, the district court erred in dismissing the charge of possession with intent to manufacture.[133]

The State also argued the district court erred in dismissing the charge of possession with intent to deliver.[134] The supreme court agreed with the district court that evidence of sales contacts, packaging of individual doses, and pay-owe sheets would have strengthened the State's case regarding intent to deliver.[135] However, the supreme court stated such evidence should not have resulted in a dismissal of all charges because the State was not required to negate all possible scenarios of innocence to satisfy the burden of proving probable cause at a preliminary hearing.[136] Therefore, the supreme court ruled the element of intent was a question for a jury, reversing and remanding the ruling back to the district court.[137]

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129. N.D. CENT. CODE § 19-03-01(17) (2017).

130. *Brown*, 2018 ND 229, ¶ 6, 918 N.W.2d 382.

131. *Id.* at ¶ 7 (citing People v. Lente, 406 P.3d 829, 830 (Colo. 2017); State v. Naples, No. 17CA011169, 2018 WL 3212658 (Ohio Ct. App. June 29, 2018); People v. Bergen, 166 Cal. App. 4th 161, 164 (Cal. Ct. App. 2014)).

132. *Id.*

133. *Id.*

134. *Id.* at ¶ 9.

135. *Id.* at ¶ 14.

136. *Brown*, 2018 ND 229, ¶ 14, 918 N.W.2d 382.

137. *Id.*