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.* The following topics are included in the Review:

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CRIMINAL LAW—CRIMINAL PROCEDURE—PUBLIC TRIAL RIGHT

State v. Morales

In *State v. Morales*,[1] Bradley Joe Morales appealed from a criminal judgement after a jury verdict found him guilty of murdering his ex-girlfriend.[2] Morales argued a motion hearing, an evidentiary hearing, and parts of his trial were closed to the public without the pre-closure analysis necessary under *Waller v. Georgia*.[3] Finding the trial court's failure to analyze the closure under *Waller* was a violation of Morales's right to a public trial under the Sixth Amendment, the court reversed the judgement and remanded for a new trial.[4]

During an argument, Morales stabbed his ex-girlfriend in the neck.[5] After the victim died from her injuries, Morales was charged with murder.[6] Morales's trial attracted substantial public interest and media coverage.[7] The trial judge expressed concern about the coverage "tainting the jury" and robbing Morales of a fair and impartial trial.[8] The trial court then issued an expansive order advising all participants, including potential witnesses, to refrain from making or authorizing extrajudicial comments to the media and the public.[9]

On appeal, Morales argued his public trial right was violated by the trial court's closure of a motion hearing, an evidentiary hearing, and parts of the jury trial.[10] Specifically, Morales argued the trial court "improperly closed the courtroom on eight separate occasions" during the trial or pretrial hearings.[11] Seven of the eight closures were initiated by the court, while only one closure was requested by Morales.[12] Before several of the closures, the trial court failed to conduct the analysis necessary under *Waller*.[13] In some instances the trial court discussed the *Waller* factors after the courtroom had been closed.[14] Before three of the closures, the court "failed to articulate

1. 2019 ND 206, 932 N.W.2d 106.
2. *Morales*, 2019 ND 206, ¶ 1, 932 N.W.2d 106.
3. 467 U.S. 39 (1984); *Morales*, 2019 ND 206, ¶ 1, 932 N.W.2d 106.
4. *Morales*, 2019 ND 206, ¶ 1, 932 N.W.2d 106.
5. *Id.* at ¶ 2.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at ¶ 2.
11. *Id.* at ¶ 4.
12. *Id.*
13. *Id.*
14. *Id.*

findings on all of the factors."[15] The court determined in each of the eight closures the public was excluded from Morales's trial without the trial court considering the possibility of observers from the public remaining while the jury was excluded.[16]

Two pretrial hearings were closed by the district court to the public..[17] The first hearing "was closed by a written order issued prior to the hearing."[18] The court made no findings supporting the closure at the hearing and neither party objected.[19] The second pretrial hearing was closed despite objection from the State.[20] The State reminded the district court of the *Waller* requirements and requested that the court make "specific findings and adequately tailor the closure."[21] The district court, concerned about the possibility of tainting potential jurors, then closed the hearing to the public without any pre-closure findings under *Waller*.[22]

The trial court closed its door to the public just before the jury was given preliminary instructions.[23] The courtroom was closed so that a single juror could be questioned by Morales and the State about whether the juror had spoken to others about the case.[24] Once the court was satisfied the juror had complied with the court's prohibition against speaking to others about the case, the juror was excused back to the jury room.[25] The trial court characterized the closure as "a conference at the bench."[26]

The court closed its doors to the public for the second time on the first day of the trial.[27] The court was closed to the public in order to review graphic video footage of the crime scene.[28] Neither Morales nor the State made any objection to the closure and the court made no findings under *Waller*.[29]

The third closure occurred at the start of the second day of trial.[30] The court was closed in order to discuss a limiting instruction.[31] The court stated

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15. *Id*.
16. *Id*.
17. *Id*. at ¶ 5.
18. *Id*.
19. *Id*.
20. *Id*. at ¶ 6.
21. *Id*.
22. *Id*.
23. *Id*. at ¶ 7.
24. *Id*.
25. *Id*.
26. *Id*.
27. *Id*. at ¶ 8.
28. *Id*.
29. *Id*.
30. *Id*. at ¶ 9.
31. *Id*.

that it did not see any alternative to the closure.[32] After multiple closed sessions throughout the morning the court discussed the limiting instructions and Morales's dissatisfaction with his legal representation.[33] The courtroom reopened to the public at 1:00 P.M, after the jury returned.[34]

Morales initiated the fourth closure following a recess, before the jury reentered the court.[35] Without making *Waller* findings the courtroom was closed to everyone except Morales, the attorneys, and the court staff.[36] During the closure Morales explained his intent to take the stand.[37] The court then discussed the requirements of decorum and whether Morales would be questioned by his attorney or testify in narrative form.[38]

The fifth closure occurred just before closing arguments and before the jury had reentered the courtroom.[39]The court discussed a report that two jurors might have seen Morales brought into the courthouse in shackles.[40] The court made no analysis or findings under *Waller*.[41] During the closure the court discussed procedures for questioning jurors about whether they had seen him in shackles and whether it would affect any juror's ability to be fair and impartial.[42]

The sixth closure occurred while the court questioned a juror that indicated that she had seen Morales outside the courtroom.[43] The court explained that questioning the juror so far into trial would require "a lot of sensitivity."[44]

Because Morales argued that the closures were constitutional violations, the court applied a de novo standard of review.[45] The court explained that errors not raised in the district court may be forfeited errors, waived errors, or structural errors.[46] In contrast, a structural error is an error that affects the framework of a trial, rather than an error in the trial process itself.[47] Structural errors render a criminal trial fundamentally unfair and are not to be analyzed

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32. *Id*.
33. *Id*.
34. *Id*.
35. *Id*. at ¶ 10.
36. *Id*.
37. *Id*.
38. *Id*.
39. *Id*. at ¶ 11.
40. *Id*.
41. *Id*.
42. *Id*.
43. *Id*. at ¶ 12.
44. *Id*.
45. *Id*. at ¶ 14 (citing State v. Rogers, 2018 ND 244, ¶ 3, 919 N.W.2d 193).
46. *Id*.
47. *Id*.

by harmless-error standards.[48] With structural errors it is not necessary to find that the error impacted the trial's outcome.[49]

Citing prior caselaw the court reiterated a violation of a defendant's right to a public trial is a structural error.[50] The court explained such structural errors are so "intrinsically harmful" that they warrant automatic reversal even if a defendant was forfeited or waived the errors.[51]

The court explained the first step in reviewing a claimed violation of the right to a public trial is to determine whether there was a closure that implicated that right.[52] The public trial right attaches from the beginning of adversarial proceedings and runs up through sentencing.[53] Closures of pretrial hearings implicate the public trial right, however they do not always require a reversal of a subsequent conviction.[54] Brief sidebars or bench conferences do not generally implicate the public trial right.[55] Arguments and rulings that need to be conducted without the jury hearing do not need to be conducted so the public can hear.[56]

The court concluded bench conferences concerning evidentiary objections seeking to exclude evidence do not constitute closures for public trial right purposes.[57] The court reasoned during such bench conferences the public remains present and is able to see and hear everything the jury is able to see and hear.[58] On the other hand, a court proceeding concerning a motion in limine or motion to suppress evidence that is held either before trial or outside the presence of the jury implicates the public trial right and must indeed comport with *Waller*.[59] A trial court must make pre-closure findings under *Waller* to justify such a closure.[60]

The court explained under the Sixth Amendment defendants have a right to a public trial.[61] However, in rare instances the public trial right must give way to other interests.[62] One such interest is a defendant's right to a fair

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48. *Id*.
49. *Id*.
50. *Id*. at ¶ 15 (citing *Rogers*, 2018 ND 244, ¶ 5, 919 N.W.2d 193).
51. *Id*.
52. *Id*. at ¶ 16.
53. *Id*.
54. *Id*.
55. *Id*. at ¶ 17.
56. *Id*. (citing State v. Smith, 334 P.3d 1049, 1054 (Wash. 2013); State v. Smith, 876 N.W.2d 310, 329 (Minn. 2016)).
57. *Id*. at ¶ 19.
58. *Id*.
59. *Id*.
60. *Id*.
61. *Id*. at ¶ 20.
62. *Id*. at ¶ 21.

trial.[63] A proper closure must be based on findings that show that the closure is necessary and the closure must be narrowly tailored.[64]

Under *Waller*, the analysis consists of: (1) the claiming party must advance an overriding interest that is likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) the trial court must consider reasonable alternatives to closing the proceeding; and (4) it must make findings adequate to support the closure.[65]

If the *Waller* requirements are met then the public trial right is not violated and the proceedings may be closed.[66] If, however, a closure is not consistent with *Waller* then the remedy is a new trial.[67]

The Court explained public trials are for the benefit of defendants.[68] Public trials allow the public to see that a defendant is dealt with fairly and help to keep courts aware of their responsibility.[69] Without the basic protections afforded by public trials, no criminal judgement can be regarded as fundamentally fair.[70]

The court highlighted the four principles embodied in the public trial right.[71] Public trials: (1) ensure fair trials; (2) remind courts of their responsibility to defendants; (3) encourage witnesses to testify; and (4) discourage perjury.[72]

The court stressed *Waller* findings must be made before a closure.[73] Further, the court highlighted the importance of courts placing *Waller* findings into the record, as higher courts cannot review closures without a record.[74]

The court next focused its review on the second trial closure during which the trial court closed the courtroom in order to review graphic videos of the crime scene.[75] The court, finding Morales failed to timely object to the closure, reviewed the closure only for obvious error.[76] The court explained obvious error is established by demonstrating that (1) there was an error, (2)

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63. *Id*.
64. *Id*.
65. *Id*.
66. *Id*.
67. *Id*.
68. *Id*. at ¶ 22.
69. *Id*.
70. *Id*. (quoting Arizona v. Fulimante, 499 U.S. 279, 310 (1991)).
71. *Id*.
72. *Id*.
73. *Id*. at ¶ 23.
74. *Id*.
75. *Id*. at ¶ 2.
76. *Id*.

it was plain, and (3) it affected substantial rights.[77] An obvious error must be a clear deviation from applicable law.[78]

Addressing the second prong, the court determine the closure was an error that was plain because the trial court's failure to make *Waller* findings was a clear deviation from applicable law.[79] Under the third prong the court found the closure affected substantial rights.[80] The court reasoned errors that are immune to harmless error analysis–such as structural errors–necessarily affect substantial rights.[81] Continuing its reasoning, the court determined because the trial closure was a structural error it affected substantial rights.[82] The second trial closure was therefore an obvious error.[83]

Turning to the third trial closure the court again found that Morales failed to timely object and again limited its review to obvious error.[84] The court reiterated closing a proceeding without making *Waller* findings is a plain error.[85] Mirroring its previous analysis the court explained the closure was made without *Waller* findings and was therefore a deviation from applicable law.[86] Continuing, the court found the closure was a structural error, that it affected substantial rights, and was thus obvious error.[87]

The court declined to address the fourth trial closure because it was specifically requested by Morales.[88] The court left open the question of whether it is a reversible error for a trial court to order a closure on a defendants request without a *Waller* analysis.[89]

Addressing the district court's closure of the pretrial hearings, the court held the closures were also errors because they were ordered without *Waller* findings.[90] However, the court pointed out that improper closures of pretrial hearings do not always require a new trial.[91] The court found the first pretrial hearing closure was an obvious error.[92]

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77. *Id*.
78. *Id*. at ¶ 24.
79. *Id*. at ¶ 25.
80. *Id*. at ¶ 26.
81. *Id*.
82. *Id*.
83. *Id*.
84. *Id*. at ¶ 27.
85. *Id*. at ¶ 28.
86. *Id*.
87. *Id*.
88. *Id*. at ¶ 29.
89. *Id*. at ¶ 30.
90. *Id*. at ¶ 32.
91. *Id*.
92. *Id*.

The court explained it does not lightly reverse a conviction in the absence of apparent prejudice to the defendant.[93] Further, the court acknowledged the trial court's motivations to preserve the fairness of Morales's right to a fair trial in ordering the closures.[94] Ultimately, the court concluded the repeated closures, absent *Waller* findings, negatively affected the fairness, integrity, and reputation of the criminal justice system.[95] Accordingly, the court reversed the judgement and remanded for a new trial.[96]

93. *Id*. at ¶ 34.
94. *Id*.
95. *Id*.
96. *Id*.

CRIMINAL LAW—SEARCH AND SEIZURE—STOP AND SEARCH

State v. Vetter

In *State v. Vetter*,[97] Dylan Vetter appealed from a criminal judgement entered after a conditional plea to possession of controlled substances and drug paraphernalia.[98] Vetter argued the officer who stopped him for speeding lacked reasonable suspicion to believe Vetter's car contained contraband.[99] Vetter also argued the officer unlawfully expanded the scope of the traffic stop by asking if there were illegal items in the vehicle and conducting a canine search around the car.[100] The court affirmed, finding that the district court did not err in denying Vetter's motion to suppress because the stop was not expanded in violation of the Fourth Amendment.[101]

Deputy Chad Thompson stopped Vetter for a speeding violation.[102] As Thompson approached Vetter's car he noticed the car rocking back and forth and saw two occupants moving around inside the car.[103] Thompson suspected the occupants were trying to move or hide something.[104] Upon reaching the car, Thompson saw an open alcoholic beverage on the floor by Vetter's feet.[105] Upon questioning, Vetter admitted to drinking earlier.[106] Vetter consented to field sobriety tests, including a breath test, none of which indicated impairment.[107] Upon questioning, Vetter denied having anything illegal in his car.[108]

Corporal Hedin arrived during this questioning.[109] Deputy Thompson directed Hedin to write Vetter a warning ticket while Thompson conducted a canine search of Vetter's car.[110] The canine alerted on the passenger side door.[111] Upon searching the vehicle, controlled substances and drug paraphernalia were discovered.[112] The district court denied Vetter's motion to

97. 2019 ND 138, 927 N.W.2d 435.
98. *Vetter*, 2019 ND 138, ¶ 1, 927 N.W.2d 435.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at ¶ 2.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at ¶ 3.
110. *Id.*
111. *Id.*
112. *Id.*

suppress the evidence and Vetter subsequently entered a conditional guilty plea to possession of controlled substances and drug paraphernalia.[113]

On appeal, Vetter argued the scope of the stop was expanded when Officer Thompson asked Vetter if there was anything illegal in the car because it was not within the purpose of the traffic stop.[114] Vetter also argued the length of the stop was extended past the time required to issue him a speeding ticket.[115] Vetter claimed there was no reasonable suspicion to expand a traffic stop into an investigation of controlled substances.[116]

The court explained under the standard of review for a trial court's decision on a motion to suppress the court gives great deference to the trial court's decision.[117] Conflicts in testimony are to be resolved in favor of affirmance.[118] Whether findings of fact meet a legal standard is a question of law which is fully reviewable by the court.[119] However, the court will not conduct a de novo review of the findings of fact.[120]

The court explained that traffic violations justify a stop.[121] An officer is justified in investigating such a violation.[122] A stop, however, may not extend for longer than the amount of time necessary to meet the purpose of the stop.[123] A traffic stop that is extended beyond the time reasonably necessary to complete the stop's mission is unlawful.[124] Unrelated inquiries are allowed during a stop so long as they do not extend the time the individual is detained.[125] A stop may be prolonged only when an officer has reasonable suspicion to detain the individual for inquiries unrelated to the stop.[126]

In determining whether an officer has a reasonable suspicion an objective standard is applied.[127] The court looks at the totality of the circumstances and takes into account the inferences and deductions an officer would make that may elude a layperson.[128]

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113. *Id.*
114. *Id.* at ¶ 4.
115. *Id.*
116. *Id.*
117. *Id.* at ¶ 5 (citing State v. Montgomery, 2018 ND 20, ¶ 4, 905 N.W.2d 754).
118. *Id.* (citing *Montgomery*, 2018 ND 20, ¶ 4, 905 N.W.2d 754).
119. *Id.* (citing *Montgomery*, 2018 ND 20, ¶ 4, 905 N.W.2d 754).
120. *Id.*
121. *Id.* at ¶ 6.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* (citing Rodriguez v. United States, 575 U.S. 348, 355 (2015)).
127. *Id.* at ¶ 9.
128. *Id.*

The court explained a canine search is not a search implicating an individual's Fourth Amendment rights.[129] A canine search is lawful so long as the traffic stop is not extended in order to perform the search.[130] The court illustrated as long as a traffic stop is not prolonged or delayed a canine search may be performed without considering whether there is enough reasonable suspicion to support the search.[131] If, on the other hand, the purpose of the stop has been completed or there was an unreasonable delay before completion, then reasonable suspicion would be necessary to justify the seizure.[132]

Turning to Vetter's arguments, the court found there was no violation of Vetter's Fourth Amendment rights because there was no delay or extension of the stop.[133] The court explained because two officers were present one officer was able to perform the mission of the stop while the other officer conducted the canine search.[134] As to Vetter's argument about the questioning concerning contraband, the court determined the questioning did not unreasonably prolong the stop.[135]

The court drew attention to the fact that the 16 second delay caused by the questioning occurred during the stop rather than after the stop.[136] The Court reasoned because the delay occurred during rather than after the stop the delay did not require a constitutionally sufficient basis to seize the driver under *Rodriguez v. United States*.[137]

The court concluded the questioning of Vetter did not establish a Fourth Amendment violation.[138] The court affirmed the district court's order and judgement denying Vetter's motion to suppress the evidence from the canine search.[139]

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129. *Id*. at ¶ 10 (citing Illinois v. Caballes, 543 U.S. 405, 410 (2005)).
130. *Id*. (quoting United States v. Fuehrer, 844 F.3d 767, 773 (8th Cir. 2016)).
131. *Id*.
132. *Id*.
133. *Id*. at ¶¶ 12, 13.
134. *Id*. at ¶ 13.
135. *Id*. at ¶ 15.
136. *Id*. at ¶ 16.
137. 575 U.S. 348 (2005); *Vetter*, 2019 ND 138, ¶ 16, 927 N.W.2d 435.
138. *Id*. at ¶ 18.
139. *Id*. at ¶ 19.

CRIMINAL LAW—SENTENCING—DANGEROUS SPECIAL OFFENDERS

State v. Hoehn

In *State v. Hoehn*,[140] Hoehn appealed from a criminal judgement of conviction for conspiracy to commit kidnapping and giving false information to law enforcement.[141] The district court, having found Hoehn had previously been convicted of a similar offense, sentenced him as a dangerous special offender to life in prison.[142] On appeal, Hoehn argued the district court erred in its dangerous special offender finding, in applying a life expectancy table not authorized by statute, in failing to advise him of the maximum sentence prior to accepting his guilty plea, and in listing kidnapping rather than conspiracy to commit kidnapping on the amended judgement.[143] The court affirmed the conviction, vacated the sentence, and remanded for resentencing without application of the dangerous special offender statute.[144]

William Hoehn was in a relationship with Brooke Crews.[145] Crews murdered Savanna LaFontaine-Greywind by cutting open her abdomen and removing her pre-term baby.[146] Hoehn came home after Crews had killed Greywind and taken the baby.[147] Hoehn helped Crews to clean up the evidence of the crime, including hiding Greywind's body.[148] Hoehn also helped Crews to hide the baby from Greywind's family and law enforcement.[149] Hoehn carried the baby in a book bag when in public.[150]

Hoehn was charged with conspiracy to commit murder, conspiracy to commit kidnapping, and giving false information to law enforcement.[151] After Hoehn's initial appearance, the State filed notice of intent to sentence Hoehn as a dangerous special offender.[152] Hoehn pled guilty to conspiracy to commit kidnapping and false information to law enforcement and proceeded to trial on conspiracy to commit murder.[153] A jury acquitted Hoehn of

140. 2019 ND 222, 932 N.W.2d 553.
141. *Hoehn*, 2019 ND 222, ¶ 1, 932 N.W.2d 553.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at ¶ 2.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at ¶ 3.
152. *Id.*
153. *Id.*

conspiracy to commit murder.[154] Hoehn appealed his sentence and conviction on the kidnapping charge.[155]

The court explained a "dangerous special offender" may be given an extended sentence.[156] The court reviewed the dangerous special offender proceeding and the district court's application of sentencing enhancement for abuse of discretion.[157] Citing prior caselaw, the court stated a trial court abuses its discretion when it acts in an arbitrary, unreasonable, or capricious manner, or misinterprets or misapplies the law.[158]

The court explained that in order to find Hoehn to be a dangerous special offender under section 12.1-32-09(1)(d) of the North Dakota Century Code there must be a finding he (1) "was convicted of an offense that seriously endangered the life of another person" and he (2) "had previously been convicted of a similar offense."[159] A hearing must be conducted to determine "beyond a reasonable doubt whether an offender is a dangerous special offender."[160] The district court found Hoehn was a dangerous special offender beyond a reasonable doubt.[161] The district court's reasoning was that by pleading guilty to the conspiracy to commit kidnapping charge, Hoehn had been "convicted of an offense that seriously endangered the life of another person."[162] Hoehn had also previously "been convicted of a similar offense," a 2012 conviction for child abuse.[163]

To prove Hoehn "had previously been convicted of a similar offense," the State set forth his 2012 conviction of abuse or neglect of a child.[164] The court pointed out that the term "similar offense" had not been defined in either the North Dakota Century Code or prior caselaw.[165] The district court did not further explain why it found Hoehn's kidnapping offense was similar to his 2012 child abuse conviction.[166]

The court reasoned, through dictionary definitions, the term "similar" is less stringent than the term "equivalent."[167] Because the term "equivalent" is

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154. *Id*.
155. *Id*.
156. *Id*. at ¶ 4 (citing N.D. CENT. CODE § 12.1-32-09(1) (2019)).
157. *Id*. (citing N.D. CENT. CODE § 12.1-32-09 (2019)).
158. *Id*. (quoting State v. Cain, 2011 ND 213, ¶ 16, 806 N.W.2d 597).
159. *Id*. (quoting N.D. CENT. CODE § 12.1-32-09(1)(d) (2019)).
160. *Id*. at ¶ 5 (citing N.D. CENT. CODE § 12.1-32-09(4) (2019)).
161. *Id*.
162. *Id*.
163. *Id*.
164. *Id*. at ¶ 6.
165. *Id*.
166. *Id*.
167. *Id*. at ¶ 7.

evaluated in caselaw, the court opted to refer to caselaw on the term "equivalent" to inform its decision on the term "similar."[168]

The court explained two equivalent offenses need not be identical.[169] In determining whether two offenses are equivalent, the court examine the two statutes in question and, if necessary, the facts underlying each conviction.[170] The process used to determine whether two offenses are equivalent should also be used to determine if two offenses are similar, although a simplified comparison of the statutes could be insufficient.[171]

Turning to the two statutes in question in Hoehn's case, the court determined Hoehn's child abuse offense was not similar to his kidnapping offense.[172] First, the child abuse statute requires that the defendant inflicted harm on the victim and caused some type of injury.[173] Further, the child abuse statute also requires that the victim is a child.[174] By contrast, the kidnapping statute required none of these elements."[175] Second, the kidnapping statute required "an abduction and an interference with a governmental or political function."[176] The child abuse statute does not require either element.[177]

The court proceeded to examine the underlying conduct behind the child abuse and kidnapping charges.[178] Even when the elements of two statutes do not support a finding that they are similar, because of prosecutorial discretion in deciding what charges to bring, an inquiry into the conduct underlying the charge could support finding them similar.[179] Here, the conduct surrounding the two charges was not similar.[180] In the child abuse case, Hoehn caused injuries to his infant son when he put him down on a changing table with force that caused skull fractures.[181] In the kidnapping case, Hoehn's conduct consisted of hiding the baby in a bag and helping Crews deceive both law enforcement and the victim's family.[182] Because Hoehn's conduct in the

168. *Id.*
169. *Id.* at ¶ 8.
170. *Id.*
171. *Id.*
172. *Id.* at ¶¶ 9-13.
173. *Id.* at ¶ 12.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at ¶ 14.
179. *Id.*
180. *Id.* at ¶ 15.
181. *Id.*
182. *Id.*

kidnapping did not result in injuries to the baby, the court found the underlying conduct between the two offenses was not similar.[183]

The court then addressed Hoehn's argument that "the district court violated [North Dakota Rule of Criminal Procedure] 11 by not informing him of the maximum possible penalty or any mandatory minimum penalties."[184] Defendants must enter guilty pleas "knowingly, intelligently, and voluntarily[.]"[185] Under Rule 11 of the North Dakota Rules of Criminal Procedure , the court must address the defendant in open court, inform the defendant of his rights, and determine whether the defendant understands those rights.[186] While the district court initially informed Hoehn of the penalties for his charges, the court failed to inform him of the increased penalties after the State filed notice of its intent to sentence him as a dangerous special offender.[187]

Because Hoehn did not move for withdrawal of his guilty plea or object to the higher sentence during his sentencing hearing, the court reviewed the issue under an obvious error standard.[188] The court outlined the requirements of the obvious error standard.[189] First, an error is required.[190] An obvious error must be a clear deviation from the applicable law.[191] Second, the error must be plain.[192] From the language of Rule 11 and applicable caselaw, the court determined the rule clearly states "the court must inform the defendant of the maximum possible penalty prior to the court's accepting a guilty plea."[193] Third, the defendant must also show that the error affected a substantial right.[194]

The court found the first and second prongs of the obvious error standard were met in Hoehn's case.[195] As Rule 11 mandates defendants are informed of the maximum penalties, the fact that the district court failed to do so was a clear deviation from applicable law.[196] The third prong, which requires the plain error impact a substantial right, was not satisfied because the district court had previously read the penalty that would apply absent the special

183. *Id*.
184. *Id*. at ¶ 17.
185. *Id*. at ¶ 18 (citing Peltier v. State, 2015 ND 35, ¶ 14, 859 N.W.2d 381).
186. *Id*.
187. *Id*. at ¶ 19.
188. *Id*. at ¶ 20.
189. *Id*. at ¶¶ 20-21.
190. *Id*. at ¶ 21.
191. *Id*.
192. *Id*. at ¶¶ 21-23.
193. *Id*. at ¶ 23.
194. *Id*. at ¶ 24.
195. *Id*. at ¶¶ 22-23.
196. *Id*. at ¶ 22.

offender statute to him.[197] Thus, any error did not affect Hoehn's substantial rights because the dangerous special offender sentencing rules would not apply.[198] Finally, Hoehn's argument regarding the life expectancy calculation the district court utilized was moot because Hoehn was not a dangerous special offender.[199]

The court affirmed Hoehn's conviction, but vacated the sentence and remanded for resentencing without the dangerous special offender statute factors applied.[200]

197. *Id*. at ¶ 24.
198. *Id*. at ¶ 25.
199. *Id*. at ¶ 26.
200. *Id*. at ¶ 28.

CRIMINAL LAW—SENTENCING—MANDATORY MINIMUM SENTENCES

State v. Nelson

In *State v. Nelson*,[201] Jessica Dawn Nelson appealed from a criminal judgement sentencing her to three years' imprisonment, the mandatory sentence under section 19-03.1-23(1)(1) of the North Dakota Century Code.[202] Nelson argued that the district court erred in denying her request to withdraw her guilty plea and erred by considering a prior dismissed deferred imposition of sentence when imposing the mandatory minimum sentence.[203] The North Dakota Supreme Court reversed and remanded for resentencing.[204]

Nelson had entered a plea of guilty to possession with intent to manufacture or deliver methamphetamine.[205] The district court postponed sentencing to allow the parties to prepare arguments about the appropriateness of deviating from the mandatory minimum sentence applicable under section 12.1-32-02.3 of the North Dakota Century Code.[206]

At the sentencing hearing, but before the district court imposed a sentence, Nelson's counsel withdrew to allow Nelson to seek counsel for withdrawing her plea.[207] The court continued the sentencing for a month and Nelson applied for, and was appointed, a public defender.[208]

At the rescheduled hearing, Nelson's new counsel requested the district court order a presentence investigation to determine if the mandatory minimum sentence was appropriate or, alternatively, requested the hearing be postponed another month.[209] During the hearing Nelson's counsel expressed concern about imposing the mandatory minimum sentence.[210] The conviction the State asserted as the trigger for the mandatory minimum was a completed deferred sentence.[211] The completed deferred sentence had resulted in Nelson's guilty plea being vacated and the case dismissed.[212] During the hearing,

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201. 2019 ND 204, 932 N.W.2d 101.
202. *Nelson*, 2019 ND 204, ¶ 1, 932 N.W.2d 101.
203. *Id.*
204. *Id.*
205. *Id.* at ¶ 2.
206. *Id.*
207. *Id.* at ¶ 3.
208. *Id.*
209. *Id.* at ¶ 4.
210. *Id.*
211. *Id.*
212. *Id.*

Nelson's counsel also raised the issue of Nelson withdrawing her guilty plea.[213]

The district court denied Nelson's request for a continuance.[214] No written motion was filed, but the court stated even if one had been filed, the court would still not find grounds to withdraw the plea.[215] The court concluded that section 12.1-32-02 of the North Dakota Century Code allowed it to consider the deferred sentence and then imposed the mandatory minimum of three years imprisonment.[216]

The court began by explaining district courts are "allowed the widest range of discretion in fixing a criminal sentence."[217] The court stated that if the term of imprisonment is within the range authorized by statute then the court has no power to review the sentence.[218] The court explained, however, that statutory interpretation is a question of law that is fully reviewable on appeal.[219]

In interpreting section 12.1-32-02(4), the court concluded it referred to a deferred sentence that had not been dismissed.[220] The court explained Nelson's prior offense resulted in an order deferring imposition of sentence, placing it within section 12.1-32-02(4).[221] However, the court pointed out after Nelson had completed her probation the district court entered an order withdrawing the guilty plea, entering a plea of not guilty, and dismissing the charges.[222]

The court concluded under Rule 32.1 of the North Dakota Rules of Criminal Procedure, the district court could not consider Nelson's previous conviction because it had been dismissed.[223] The court explained if the prior offense had not been dismissed then the State would have been able to "plead and prove" the prior conviction under section 12.1-32-02(4).[224] The court

213. *Id*.
214. *Id*. at ¶ 5.
215. *Id*.
216. *Id*.
217. *Id*. at ¶ 7 (quoting State v. Smith, 2015 ND 133, ¶ 8, 864 N.W.2d 259).
218. *Id*.
219. *Id*.
220. *Id*. at ¶¶ 10-11 (quoting N.D. CENT. CODE § 12.1-32-02(4) (2019)("[i]n any subsequent prosecution, for any other offense, the prior conviction for which imposition of sentence is deferred may be pleaded and proved, and has the same effect as if probation had not been granted or the information or indictment dismissed . . . .").
221. *Id*.
222. *Id*.
223. *Id*.
224. *Id*. at ¶¶ 8-11 (quoting N.D. CENT. CODE § 12.1-32-02-(4) (2019)).

reiterated that the State may not plead and prove a previous conviction once it had been dismissed.[225]

The court declined to address Nelson's claim that the district court erred by denying her request to withdraw her plea of guilty.[226] The court determined the district court would be able to review the issue on remand and explained that issues not necessary to the appeal do not require review.[227]

The court ultimately held a completed deferred imposition of sentence that has resulted in a dismissal may not be used to enhance a sentence unless the State sufficiently pleads and proves the underlying case.[228] The court reversed the criminal judgement and remanded for resentencing.[229]

225. *Id*. at ¶ 13.

226. *Id*. at ¶ 12.

227. *Id*. (explaining issues not necessary to the appeal need not be reviewed) (citing State v. Foley, 2000 ND 21, ¶12, 610 N.W.2d 49).

228. *Id*. at ¶ 13.

229. *Id*.

CRIMINAL LAW—CRIMINAL PROCEDURE—IMPLIED CONSENT

City of Bismarck v. Melanie Jean Vagts

In *City of Bismarck v. Vagts*[230], Melanie Vagts appealed from a criminal judgment after she conditionally pled guilty to actual physical control of a vehicle while under the influence and the district court denied her motion to suppress.[231] The North Dakota Supreme Court reversed the district court's decision because the implied consent advisory read to Vagts did not comply with the statutory requirements.[232] The breath test results were deemed inadmissible and she was able to withdraw her conditional guilty plea.[233]

In August 2018, Vagts was charged with actual physical control while under the influence of alcohol.[234] Bismarck Police Officer Adam Baker became involved after he was informed of a vehicle being drove erratically.[235] Upon arriving at the vehicle matching the description Officer Baker had received, it was parked and loud music was playing in it.[236] Baker approached and noticed two individuals were in the car, the keys were thrown out of the passenger side of the vehicle, and when got closer to the vehicle he could smell alcohol.[237] After talking to Vagts in the driver seat, Baker could smell alcohol coming from her breath, she had slurred speech, and bloodshot eyes.[238] Vagts repeatedly denied driving the vehicle and would not consent to taking any field sobriety tests.[239] Baker then arrested Vagts, read her Miranda rights, and read her an implied consent advisory, which was eventually deemed insufficient.[240] While at the police station, a chemical test indicated that Vagts' blood alcohol level was over the legal limit.[241]

After evidentiary hearings, the district court denied Vagts' attempts to suppress her chemical tests.[242] The district court determined that law enforcement did not violate Vagts' constitutional rights and that Officer Baker substantially complied with the statutory implied consent advisory in section 39-

230. 2019 ND 224, 932 N.W.2d 523.
231. *Vagts*, 2019 ND 224, ¶ 1, 932 N.W.2d 523.
232. *Id.*
233. *Id.*
234. *Id.* at ¶ 2.
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.* at ¶ 3.

20-01-(3)(a) of the North Dakota Century Code.[243] Due to this determination, Vagts entered a conditional guilty plea to the charge.[244]

The first part of Vagts' motion to suppress claimed that Officer Baker's encounter violated her Fourth Amendment rights.[245] She argued Baker did not have "reasonable and articulable suspicion" she violated the law and her encounter with Baker was an unreasonable search and seizure.[246] The Fourth Amendment of the United States Constitution and Article I, Section 8 of the North Dakota Constitution, prohibit unreasonable searches and seizures.[247]

The North Dakota Supreme Court disagreed, and used *Abernathy v. N.D. Department of Transportation*[248] to explain the differences of a police officer approaching a parked vehicle and a moving vehicle.[249] Essentially, *Abernathy* stands for the proposition that an officer's approach to a parked vehicle is a casual encounter, but after communicating with the suspect, the encounter can turn into a seizure if reasonable suspicion of a crime arises.[250] Relying on this analysis, the North Dakota Supreme Court reasoned the district court was correct in determining a Fourth Amendment violation did not occur and denying Vagts' motion to suppress was not in error.[251]

The second part of Vagts' motion to suppress claimed that Officer Baker failed to comply with the statutory requirements for an implied consent advisory under section 39-20-01(3)(a).[252] Vagts argued the breath test was inadmissible as a result of Officer Baker's failure to comply with the statute.[253] A law enforcement officer is authorized to request an individual who is under arrest for driving under the influence to submit a chemical test of the individual's blood, breath, or urine, but must follow a certain procedure to do so.[254]

Interestingly, the implied consent statute changed from the time Vagts was arrested and the case went to trial.[255] At the time of the arrest, the implied consent advisory statute stated, in pertinent part,

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243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* at ¶ 5.
247. *Id.* at ¶ 6; *see also* State v. Reis, 2014 ND 30, ¶ 10, 842 N.W.2d 845; Abernathy v. N.D. Dep't of Transp., 2009 ND 122, ¶ 8, 768 N.W.2d 485.
248. 2009 ND 122, 768 N.W.2d 485.
249. *Vagts*, 2019 ND 224, ¶ 7, 932 N.W.2d 523 (citing *Abernathy*, 2009 ND 122, ¶ 8, 768 N.W.2d 485).
250. *Id.*
251. *Id.* at ¶ 8.
252. *Id.* at ¶ 3.
253. *Id.* at ¶ 9; *see also* State v. O'Connor, 2016 ND 72, ¶ 14, 877 N.W.2d 312.
254. *Vagts*, 2019 ND 224, ¶ 10, 932 N.W.2d 523; *see also* N.D. CENT. CODE § 39-20-01 (2019).
255. *Vagts*, 2019 ND 224, ¶ 10, 932 N.W.2d 523.

> The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take a chemical test to determine whether the individual is under the influence of alcohol or drugs and that refusal of the individual to submit to a test *directed by the law enforcement officer* may result in a revocation of the individual's driving privileges for a minimum of one hundred eighty days and up to three years. In addition, the law enforcement officer shall inform the individual refusal to take a breath or urine test is *a crime* punishable in the same manner as driving under the influence.[256]

All parties agreed Officer Baker omitted the phrases "directed by the law enforcement officer" and "a crime" under the applicable language of section 39-20-01(3)(a).[257] The district court decided that Officer Baker's failure to read the implied consent advisory verbatim was not a fatal issue requiring the test results to be dismissed.[258] *LeClair v. Sorel*[259] established an implied consent advisory may still be admissible, even if it is imperfect, so long as it conveys all substantive information from the statute.[260] Here, the North Dakota Supreme Court stated the omission "directed by the law enforcement officer" was a substantive omission, and therefore did not comply with the statutory requirements for the implied consent advisory.[261]

The court did not consider whether the omission of "a crime" constituted a substantive omission, because one substantive omission was enough to render the implied consent advisory inadmissible.[262] The court noted failure to include the phrase "directed by law enforcement" resulted in "uncertainty regarding the juxtaposition of the test directed by the law enforcement officer and the individual's opportunity for an additional test."[263] In conclusion, the results of Vagts' breath test were deemed inadmissible because the implied consent advisory did not substantively comply with the statutory requirements.[264]

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256. *Id.* at ¶ 11 (emphasis added).
257. *Id.* at ¶¶ 18-19.
258. *Id.* at ¶ 13.
259. 2018 ND 255, 920 N.W.2d 306.
260. *Vagts*, 2019 ND 224, ¶ 16, 932 N.W.2d 523 (citing *Sorel*, 2018 ND 255, ¶ 7, 920 N.W.2d 306).
261. *Id.* at ¶ 17.
262. *Id.* at ¶ 18.
263. *Id.*
264. *Id.* at ¶ 20.

TORTS—MALPRACTICE—STATUTE OF LIMITATIONS

Broten v. Carter

In *Broten v. Carter*,[265] James Broten appealed the dismissal of his claim against his former attorney for malpractice.[266] Broten argued the district court should not have granted summary judgment because the statute of limitations had not run on his malpractice claim.[267] Further, Broten challenged the inclusion of expert witness fees in the damages awarded by the district court to the opposing party.[268] The North Dakota Supreme Court affirmed both decisions made by the district court.[269]

Broten was the personal representative of his father's estate.[270] Broten's sisters sued him for breach of his fiduciary duty after he transferred land out of the trust into his personal estate.[271] Subsequently, Broten retained attorney Ralph Carter to defend him against his sisters' claims.[272] During this representation, Broten provided Carter with about sixty boxes of records to provide a defense to his sisters' claims.[273] Carter never disclosed these records to opposing counsel, but they were disclosed after Broten acquired new counsel in March 2013 to replace Carter.[274]

On August 15, 2013 the district court found that Broten had breached his fiduciary duty as personal representative. [275] Following an evidentiary hearing on January 21, 2014, the court issued a judgment requiring Broten to pay damages to his sisters in an amount of $1,300,054.[276]

Two years later, on January 14, 2016, Broten sued Carter for legal malpractice because he never provided the boxes of documents to opposing counsel during discovery.[277] Broten alleged that Carter's failure to provide the documentation was the reason why Broten had a judgment rendered against him with damages awarded to his sisters.[278] Carter subsequently moved for summary judgment due to the two year statute of limitations

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265. 2019 ND 268, 935 N.W.2d 654.
266. *Broten*, 2019 ND 268, ¶ 1, 935 N.W.2d 654.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.* at ¶ 2.
271. *Id.*
272. *Id.*
273. *Id.* at ¶ 3.
274. *Id.*
275. *Id.* at ¶ 4.
276. *Id.*
277. *Id.* at ¶ 5.
278. *Id.*

preventing his claim.[279] The district court granted summary judgement in favor of Carter and also awarded him court costs, including expert witness fees.[280] On February 25, 2019, the district court dismissed all of Broten's claims with prejudice.[281] Broten argued the court erred in granting summary judgment because the statute of limitations had not run and the court should not have awarded expert witness fees in the judgement.[282]

Broten believed the court erred in granting summary judgment when it found the statute of limitations had run before he started his action.[283] Both parties agreed that, under section 28-01-18(3) of the North Dakota Century Code, a two year statute of limitations applied.[284] However, the parties disagreed about when the statute of limitations began to run.[285] The district court believed August 15, 2013—the day the district court determined Broten breached his fiduciary duties—was the day the statute of limitations began to run.[286] Broten argued the statute of limitations began on January 21, 2014, which is the day that damages were awarded for the August 15 decision.[287] Broten had an issue with "whether the offsets would eliminate any potential obligation to his sisters," which "creates a question of fact of whether the statute of limitations was tolled until a damage award became a certainty following the January 21, 2014, order."[288]

The North Dakota Supreme Court has adopted the discovery rule to govern the statute of limitations in legal malpractice actions.[289] Essentially, this rule asserts that statute of limitations do not begin to run "until the plaintiff 'knows, or with reasonable diligence should know, of the injury, its cause, and the defendant's possible negligence.'"[290] The North Dakota Supreme Court has recognized "the discovery rule employs an objective standard of knowledge, and it is not necessary that a plaintiff be subjectively convinced of the injury and that the injury was caused by the defendant's negligence."[291]

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279. *Id*.
280. *Id*.
281. *Id*.
282. *Id*. at ¶ 6.
283. *Id*. at ¶ 7.
284. *Id*. at ¶ 8 ("Under [N.D. CENT. CODE] § 28-01-18(3), a client must commence a malpractice suit within two years after the claim for relief has accrued."); *see also* Larson v. Norkot Mfg., Inc., 2001 ND 103, ¶ 9, 627 N.W.2d 386.
285. *Broten,* 2019 ND 268, ¶ 9, 935 N.W.2d 654.
286. *Id*.
287. *Id*.
288. *Id*.
289. *Id*. at ¶ 10 (citing Wall v. Lewis, 393 N.W.2d 758, 761 (N.D. 1986)).
290. *Id*. at ¶ 9 (citing *Lewis*, 393 N.W.2d at 761).
291. *Id*. (citing Riemers v. Omdahl, 2004 ND 188, ¶ 6, 687 N.W.2d 445). In *Riemers*, the North Dakota Supreme Court considered the extent to which a Plaintiff is required to appreciate the injury caused by the attorney's malpractice. *Riemers*, 2004 ND 188, ¶ 7, 687 N.W.2d 445.

Further, using the discovery rule, "knowledge of when the plaintiff should have discovered there was a potential malpractice claim is a question of fact precluding summary judgment."[292]

The August 15, 2013 order stipulated Broten was liable for breaching his duties as executor and personal representative of his father's estate.[293] Further, the land transfer he made to his own trust was deemed invalid.[294] It was not required that Broten subjectively understand the potential liability, as the objective standard only requires that Broten be aware of facts that would place a reasonable person on notice of the claim against them.[295]

Broten's complaint included a claim for treble damages under section 27-13-08 of the North Dakota Century Code for Carter's allegedly intentional delay of the litigation between Broten and his sisters.[296] The court declined to determine if this was a separate claim with a different statute of limitations, because Broten did not argue in the district court that his claim for treble damages was governed by a different statute of limitations.[297]

Broten challenged the district court's award of costs and expenses concerning the expert witnesses hired by Carter to defend the malpractice claim.[298] Carter argued he had to hire expert witnesses to respond to anticipated testimony of Broten's expert, and that until the motion for summary judgment was resolved it was reasonable to prepare and have the witnesses ready for trial.[299]

"Under [North Dakota Century Code] § 28-26-06(5), the district court has discretion to award expert witness fees that are reasonable plus actual expenses."[300] The district court "awarded costs for Carter's two experts after finding one of the experts" had done a lot of work and even provided a deposition.[301] Even though "the experts were not used during the motion for summary judgment, because they would have been used at trial, the fees were reasonable."[302] Further, "Carter followed the district court's scheduling order

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292. *Broten*, 2019 ND 268, ¶ 12, 935 N.W.2d 654 (citing *Riemers*, 2004 ND 188, ¶ 8, 687 N.W.2d 445).

293. *Id*. at ¶13.

294. *Id*.

295. *Id*. at ¶ 14.

296. *Id*. at ¶ 15.

297. *Id*.

298. *Id*. at ¶ 16.

299. *Id*. at ¶ 17.

300. *Id*. at ¶ 18.

301. *Id*. at ¶ 19. The expert reviewed documents, attended meetings, prepared an expert report, and the deposition. *Id*.

302. *Id*.; *see also* Pratt v. Heartview Foundation, 512 N.W. 2d 675, 679 (N.D. 1994) (explaining where it is not required to have an expert witness testify to award them fees in a party's costs and disbursements.).

which required . . . . the disclosure of expert witnesses."[303] So, because Carter was following a court order, the expert witnesses would have been required if the case went to trial, and because the fees awarded were reasonable, the district court did not abuse its discretion in awarding fees for the expert witnesses.[304]

Accordingly, the North Dakota Supreme Court affirmed the district court's order.[305] The statute of limitations claim had expired prior to beginning the legal malpractice claim against Carter and the district court did not abuse its discretion in awarding fees for the expert witnesses acquired by Carter.[306]

Justice Crothers filed a dissenting opinion arguing the North Dakota Supreme Court did not have jurisdiction.[307] The court did not have jurisdiction because not all of the claims had been adjudicated, thus Rule 54 (b) of the North Dakota Rules of Civil Procedure explains the court lacks appellate jurisdiction.[308] Essentially, because the treble damages claim was not adjudicated, it was therefore not appealable, the issue is still pending and that leaves the court without jurisdiction.[309] Justice Crothers stated "I would dismiss the appeal for lack of jurisdiction. So this case is not caught in legal limbo, upon dismissal of the appeal I also would exercise this Court's supervisory jurisdiction and vacate the district court's judgment so the statutory claim can be adjudicated."[310]

303. *Broten*, 2019 ND 268, ¶ 22, 935 N.W.2d 654
304. *Id*.
305. *Id*. at ¶ 23.
306. *Id*.
307. *Id*. at ¶ 26.
308. *Id*.
309. *Id*. at ¶ 41; *see also* N.D. CENT. CODE §§ 27-13-08, 28-27-02 (2019) (concerning what orders are reviewable).
310. *Broten*, 2019 ND 268, ¶ 42, 935 N.W.2d 654.

CRIMINAL LAW—SEARCH AND SEIZURE—REASONABLE SUSPICION

State of North Dakota v. Dustin Tory Hendrickson

In *State of North Dakota v. Hendrickson*,[311] Dustin Hendrickson was appealing his driving under the influence/actual physical control charge, which he conditionally pled guilty to, arguing that the police officers "did not have reasonable suspicion to conduct an investigative stop."[312] The North Dakota Supreme Court affirmed the district court's judgment.[313]

Hendrickson was charged with actual physical control of a vehicle while under the influence of alcohol while being accompanied by a minor.[314] He argued officers did not have reasonable suspicion to stop him based on what was provided by a 911 caller.[315] While Hendrickson was going through the drive thru at Taco Johns, an employee called 911 and explained Hendrickson was "beyond drunk," slurring his speech, and having trouble keeping his eyes open.[316] Hendrickson argued the caller's 911 call was insufficient to establish reasonable suspicion Hendrickson was intoxicated because the information was too vague.[317]

There was no evidentiary hearing in this case.[318] Hendrickson's motion was denied based off the briefs submitted by the parties and the court also found there was sufficient reasonable and articulable suspicion based on the 911 call to justify the investigative stop.[319] After this, an amended complaint was filed charging Hendrickson with actual physical control of a motor vehicle while under the influence of alcohol.[320] Hendrickson conditionally pled guilty to this new charge, and reserved his right to appeal the court's order that denied his motion to suppress.[321]

Hendrickson's appeal was limited to the issue he raised in his motion to suppress because he conditionally pled guilty when the court initially denied his motion.[322] Concerning Hendrickson's argument the officers did not have reasonable suspicion to conduct an investigative stop, the North Dakota

311. 2019 ND 183, 931 N.W.2d 236.
312. *Hendrickson*, 2019 ND 183, ¶ 1, 931 N.W.2d 236.
313. *Id.*
314. *Id.* at ¶ 2; *see also* N.D. CENT. CODE § 39-08-01.4 (2019).
315. *Hendrickson*, 2019 ND 183, ¶ 2, 931 N.W.2d 236.
316. *Id.*
317. *Id.*
318. *Id.* at ¶ 3.
319. *Id.*
320. *Id.* at ¶ 4.
321. *Id.*
322. *Id.* at ¶ 5; *see also* N.D. R. CRIM. P. 11(a)(2).

Supreme Court concluded that information provided by the caller coupled with the corroboration done by the police officer "was sufficient to raise a reasonable and articulable suspicion of potential criminal activity to justify an investigative stop."[323]

In coming to its conclusion, the North Dakota Supreme Court discussed that individuals are free from unreasonable searches and seizures and "[a]n officer must have a reasonable and articulable suspicion that a motorist has violated or is violating the law in order to legally stop a vehicle."[324] Further, "Information from an informant or tip may provide the factual basis for a stop if it provides the officer with a reasonable suspicion."[325] The reliability of the informant is taken into account when determining whether reasonable suspicion exists.[326] Lastly, "citizen informants are presumed to be reliable."[327]

In this case, because the Taco Johns employee provided detailed information describing the vehicle, license plate, name of the driver, and a description of the driver and his actions, this was deemed sufficient to meet the reasonable and articulable suspicion requirement.[328] Further, because the Taco Johns employee described in detail why she thought Henderson was intoxicated and because of the nature of the encounter, customer to employee and face to face, this added to the credibility of her 911 call.[329] Then, when police arrived on scene and corroborated everything the employee had stated, the district court concluded it was reasonable and an articulable suspicion to justify an investigative stop.[330]

The court then illustrated a case where a 911 caller's report was insufficient to result in a stop.[331] In *State v. Miller*,[332] there was miscommunication between dispatch and the police officer.[333] Essentially, there was difficulty in corroborating what the witness said when the officer arrived.[334] Also, because dispatch did not inform the officer who the 911 caller was, the information was taken as anonymous information.[335] The case here was different than *Miller* as the information was not anonymous and was very detailed.[336]

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323. *Hendrickson*, 2019 ND 183, ¶ 14, 931 N.W.2d 236.
324. *Id.* at ¶ 7 (citing Lies v. N.D. Dep't of Transp., 2019 ND 83, ¶ 5, 924 N.W.2d 448).
325. *Id.* at ¶ 8 (citing State v. Knox, 2016 ND 15, ¶ 8, 873 N.W.2d 664).
326. *Id.* (citing *Knox*, 2016 ND 15, ¶ 8, 873 N.W.2d 664).
327. *Id.*; *see also* State v. Ashby, 2017 ND 74, ¶ 11, 892 N.W.2d 185.
328. *See Hendrickson*, 2019 ND 183, ¶ 9, 931 N.W.2d 236.
329. *See id.*
330. *Id.*
331. *Id.* at ¶ 10 (discussing State v. Miller, 510 N.W.2d 638 (N.D. 1994)).
332. 510 N.W.2d 638 (N.D. 1994).
333. *Hendrickson*, 2019 ND 183, ¶ 10, 931 N.W.2d 236 (citing *Miller*, 510 N.W.2d at 639).
334. *See id.* (citing *Miller*, 510 N.W.2d at 639).
335. *Id.* (citing *Miller*, 510 N.W.2d at 644).
336. *See id.* at ¶ 11.

The North Dakota Supreme Court held the district court did not err in denying Henderson's motion to suppress.[337] The detailed information provided on the 911 call was enough to meet the reasonable and articulable suspicion to justify the investigative stop.[338]

337. *Id*. at ¶ 14.
338. *Id*.

CRIMINAL LAW—SENTENCING ENHANCEMENT—PRIOR DISMISSED DEFERRED IMPOSITION OF SENTENCE

State of North Dakota v. Joe Michael Johns

In *State v. Johns*,[339] the North Dakota Supreme Court reversed the district court's judgment and allowed Joe "Johns to withdraw his conditional guilty plea to an enhanced charge."[340] "Johns appeal[ed] from a criminal judgment entered upon a conditional guilty plea after the district court denied his motion to dismiss a charge for unlawful drug possession of drug paraphernalia[,]" which was a class C felony second offense.[341] Johns argued he did not have a prior conviction and should not be subject to an enhanced sentence because the prior charge was dismissed.[342]

Johns was charged "with unlawful possession of drug paraphernalia as a class C felony second offense under [North Dakota Century Code] § 19-03.4-03(2), which enhances the charge from a class A misdemeanor to a class C felony" on August 30, 2018.[343] The information in this case alleged he had a prior conviction, but Johns moved to dismiss because his prior charge was vacated and dismissed after he successfully completed probation.[344] Further, Johns explained after he successfully completed probation, the guilty plea and verdict was vacated and dismissed and the records were sealed and deleted.[345]

The state resisted Johns' motion, arguing section12.1-32-02(4) of the North Dakota Century Code was applicable to enhance his charge.[346] Further, the State argued it did not matter if a record has been cleared; the relevant factor was that a conviction has taken place in the past under title 19 of the North Dakota Century Code.[347] The district court denied Johns' motion and permitted the enhanced sentence. Johns subsequently entered the conditional guilty plea.[348]

Johns argued the district court misinterpreted section 12.1-32-02(4) in denying his motion to dismiss and his prior, dismissed drug charge was

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339. 2019 ND 227, 932 N.W.2d 893.
340. *Johns*, 2019 ND 227, ¶ 1, 932 N.W.2d 893.
341. *Id.*
342. *Id.*
343. *Id.* at ¶ 2.
344. *Id.* at ¶¶ 2-3.
345. *Id.* at ¶ 3.
346. *Id.* at ¶ 4.
347. *Id.*; *see also* N.D. CENT. CODE § 19-03.4-03(2) (2019); N.D. CENT. CODE § 12.1-32-02(4) (2019) (explaining the enhancement is applicable even after dismissal).
348. *Johns*, 2019 ND 227, ¶ 5, 932 N.W.2d 893.

inapplicable for sentencing enhancement.[349] Johns argued a vacated and dismissed deferred imposition is not a conviction, and statutory interpretation does not allow for an enhancement of his current charge after the dismissal.[350] The state maintained its position that the dismissed charged was relevant to enhance a subsequent charge.[351]

The court discussed the relationship of statutes, deferred sentences, and how the pre-2019 rule automatically required dismissal sixty-one days after a defendant's probation has ended, unless the court ordered otherwise.[352] Next, the court looked to *State v. Nelson*[353] where a completed and deferred sentence resulted in the withdrawal of a guilty plea and dismissal of the proceeding.[354] In that case, the court discussed, "[i]n any subsequent prosecution, for any other offense, the prior conviction for which imposition of sentence is deferred may be pleaded and proved…"[355]

Here, Johns was charged under section 19.1-03.4-03(2) which allows for enhancement of a drug charge, but when read together with sections 12.1-32-02(4) and 12.1-32-07.1, and the decision in *Nelson*, they all refer to and apply to deferred convictions that have not been dismissed.[356] Because Johns' prior case had been dismissed, it was error by the district court to consider his previous charge and to enhance his current sentence.[357] The North Dakota Supreme Court held that Johns' prior dismissed case cannot be considered and his sentence cannot be enhanced.[358] The court reversed and remanded to allow Johns to withdraw his conditional guilty plea to the enhanced charge.[359]

349. *Id*. at ¶ 6.
350. *Id*. (reading N.D. CENT. CODE §§ 12.1-32-02(4) and 12.1.-32-07.1 (2019) together).
351. *Id*. at ¶ 7.
352. *Id*. at ¶ 13 (citing State v. Ebertz, 2010 ND 79, ¶¶ 9-15, 782 N.W.2d 350).
353. State v. Nelson, 2019 ND 204, ¶ 6, 932 N.W.2d 101.
354. *Johns*, 2019 ND 227, ¶ 15, 932 N.W.2d 893.
355. *Id*. (citing *Nelson*, 2019 ND 204, ¶11, 932 N.W.2d 101).
356. *Id*. at ¶ 16.
357. *See id*. at ¶¶ 16-17.
358. *Id*.
359. *Id*. at ¶ 17.

CRIMINAL LAW—SEARCH AND SEIZURE—EMERGENCY & PLAIN VIEW EXCEPTIONS

State v. Komrosky

In *State v. Komrosky*,[360] Kerry Komrosky appealed the district court's criminal judgment on three drug-related charges, claiming the district court erred in finding that the warrantless search of his house fell within the emergency exception.[361] The North Dakota Supreme Court affirmed the district court's order, finding that the contraband was in plain view under the emergency exception.[362]

On April 7, 2018, patrol deputy Kerry Komrosky of the Burleigh County Sherriff's department asked for an extended lunch on his shift.[363] The dispatcher was unable to reach him, and after phone calls and radio calls to Komrosky, Sergeant McLeish went to his residence to check on him.[364] Komrosky had recently been having work conduct issues, including being late and no showing to work.[365] When McLeish arrived, Komrosky's squad car was unlocked and running parallel to the garage door, with the driver's door slightly ajar.[366]

McLeish banged on the garage door but got no answer.[367] He then went to the front door of the residence and knocked on the door several times, causing dogs inside the home to jump and make commotion.[368] McLeish knocked and shouted for 5 to 6 minutes without any response before checking the garage one last time.[369] He then entered the residence through the front door and stood in the entryway shouting for Komrosky for several minutes with no reply.[370] McLeish was nervous and scared because he didn't know what he was walking into, as Komrosky had been known to be "in a dark place," and McLeish was concerned Komrosky might have done something to himself.[371] Komrosky had recently lost his "dream job" with the Metro Area Narcotics Task Force.[372]

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360. 2019 ND 300, 936 N.W.2d 82.
361. *Komrosky*, 2019 ND 300, ¶ 1, 936 N.W.2d 82.
362. *Id.*
363. *Id.* at ¶ 2.
364. *Id.* at ¶ 3.
365. *Id.*
366. *Id.* at ¶ 4.
367. *Id.*
368. *Id.*
369. *Id.*
370. *Id.*
371. *Id.* at ¶ 5.
372. *Id.*

On his way upstairs, McLeish radioed for back up and heard his voice over Komrosky's radio on the second floor.[373] McLeish couldn't locate Komrosky on the second floor and made his way to the third floor.[374] After calling for Komrosky, the dogs led him to a hallway where Komrosky came out of a room.[375] Komrosky look disheveled, McLeish told him to get his gear and come downstairs.[376] McLeish then went downstairs to wait in the entryway, and while he was waiting he saw a broken light bulb in the corner.[377] He checked to make sure the light bulbs were not missing in the entryway and the garage light fixtures.[378] When he went to take a closer took he found white milky residue on the broken bulb and realized it was a meth pipe.[379] He took pictures of the broken glass and later confirmed it was meth with a field test.[380]

On appeal, Komrosky "challenge[d] whether McLeish had reasonable grounds to believe there was an emergency at hand and an immediate need for his assistance for the protection of life or property."[381] The court's standard of review is well established: "we 'will not reverse a district court decision on a motion to suppress . . . if there is sufficient competent evidence capable of supporting the court's findings, and if the decision is not contrary to the manifest weight of the evidence.'"[382]

The emergency exception applies when three requirements are met: (1) the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property; (2) the search must not be primarily motivated by intent to arrest and seize evidence; and (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.[383]

The only issue Komrosky raised on appeal regarded the first requirement, that is, whether McLeish had reasonable grounds to believe there was an emergency at hand and an immediate need for his assistance for the

373. *Id*. at ¶ 6.
374. *Id*. at ¶ 7.
375. *Id*.
376. *Id*.
377. *Id*. at ¶ 8.
378. *Id*.
379. *Id*.
380. *Id*. at ¶ 9.
381. *Id*. at ¶ 14.
382. *Id*. at ¶ 10 (quoting State v. Gefroh, 2011 ND 153, ¶ 7, 801 N.W.2d 429).
383. *Id*. at ¶ 13 (citing State v. Stewart, 2014 ND 165, ¶ 13, 851 N.W.2d 153).

protection of life or property.[384] The burden is on the State to prove this existed at the time of warrantless entry into the home.[385]

Komrosky argued, "McLeish exceeded the scope of the emergency by staying in his residence after he made contact with Komrosky . . . ."[386] The court applied an objective standard of reasonableness for the first requirement: "would the facts available to the officer at the moment of [the entry] warrant a man of reasonable caution in the belief that the action taken was appropriate?"[387] The reasonableness of "[a]n officer's belief that an emergency exists 'must be grounded in empirical facts rather than subjective feelings.'"[388]

Komrosky argued *State v. Hyde*[389] was dispositive of the case at hand, but the court distinguished that McLeish had a reasonable basis to believe there was an ongoing emergency before he entered Komrosky's home.[390] This reasonable basis was shown by the concerns from McLeish that Komrosky may have harmed himself from the issues stemming from losing his dream job.[391] Further, McLeish directly observed the patrol vehicle being parked and running with the door open, and he did not receive a response after minutes of yelling and knocking.[392] Due to the quick reaction of going in search of Komrosky and the urgency in checking on his well-being, the court found McLeish's entry was justified under the emergency exception to the warrant requirement.[393]

Alternatively, Komrosky argued McLeish exceeded the scope of the emergency by staying in his residence after he made contact with him, rendering evidence seized after this point not within the plain view exception.[394] The court disagreed, stating there was no additional search after contact.[395]

Komrosky then argued the bulb was not in plain view because McLeish checked the entryway and garage for missing bulbs.[396] Under the plain view exception to Fourth Amendment protections against unlawful search and seizure, officers have a lawful right to access and seize objects without a warrant

384. *Id.* at ¶ 14.
385. *Id.* at ¶ 13.
386. *Id.* at ¶ 21.
387. *Id.* at ¶ 14 (quoting State v. Hyde, 2017 ND 186, ¶ 11, 899 N.W.2d 671).
388. *Id.* at ¶ 14 (quoting State v. Matthews, 2003 ND 108, ¶ 29, 665 N.W.2d 28).
389. 2017 ND 186, ¶ 11, 899 N.W.2d 671.
390. *Komrosky*, 2019 ND 300, ¶¶ 15-20, 936 N.W.2d 82.
391. *Id.* at ¶ 17.
392. *Id.* at ¶ 18.
393. *Id.* at ¶ 20.
394. *Id.* at ¶ 21.
395. *Id.* at ¶ 22.
396. *Id.* at ¶ 25.

if the object's incriminating character is immediately apparent.[397] The court stated that "[i]f an officer views the property and has probable cause to associate it with criminal activity, an officer may take a closer look at an object in plain view to determine if it is contraband."[398] The court found the inspection was not an independent search and due to his lawful position to view the bulb, the evidence seized was in plain view.[399] Accordingly, the North Dakota Supreme Court affirmed the district court's denial to suppress the evidence found by Sergeant McLeish in Officer Komrosky's home.[400]

397. *Id*. at ¶ 23.
398. *Id*. at ¶ 25.
399. *Id*.
400. *Id*.

CIVIL PROCEDURE—PERSONAL JURISDICTION—IMPACT OF DEATH ON RESIDENCY

Wilkens v. Westby

In *Wilkens v. Westby*,[401] Branden Wilkens appealed a district court judgment and order that dismissed his complaint without prejudice due to service under section 39-01-11 of the North Dakota Century Code being improper.[402] On February 14, 2012, Wilkens and Westby were involved in a car accident that resulted in Westby's death that day.[403] In February of 2018, Wilkens served a summons and complaint alleging a claim of negligence against Westby upon the director of the Department of Transportation under section 39-01-11.[404] This statute allows residents to serve legal process upon the director when the party being served is either a resident absent from the state continuously for at least six months following an accident or a nonresident.[405]

Following the complaint, in March 2018, an attorney on behalf of Westby asserted affirmative defenses and "moved to dismiss the complaint, arguing personal jurisdiction was lacking and service under [North Dakota Century Code] § 39-01-11 was improper . . . ."[406] The attorney argued Westby, being a deceased person, did not fit the definition of nonresident under the statute and Westby was not absent from the state by being dead.[407] Wilkens opposed the motion and a hearing occurred finding Westby was neither a nonresident nor absent from the state by virtue of death.[408] Westby's motion to dismiss without prejudice was granted, Wilkens then appealed the dismissal of his claim.[409]

Orders dismissing a complaint without prejudice are usually not appealable, yet, the order may be final and appealable "if the dismissal has the practical effect of terminating the litigation in the plaintiffs chosen forum."[410] The statute of limitations had already passed, meaning "the district court's order dismissing the claim was to terminate the litigation," making the courts order without prejudice final and appealable.[411]

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401. 2019 ND 186, 931 N.W.2d 229.
402. *Wilkens*, 2019 ND 186, ¶ 1, 931 N.W.2d 229.
403. *Id.* at ¶ 2.
404. *Id.*
405. *Id.*
406. *Id.*
407. *Id.*
408. *Id.*
409. *Id.*
410. *Id.* at ¶ 3 (citing James Vault & Precast Co. v. B&B Hot Oil Serv., Inc., 2018 ND 63, ¶ 10, 908 N.W.2d 108).
411. *Id.*

Neither party disputed process had been served on the director, but disagreed about whether Westby, by being deceased, fit within the term "absent."[412] Wilkens argued Westby was a North Dakota resident at the time of the accident but since his death he had "continuously been absent from this state for more than six months."[413] Westby's attorney argued the death of a resident does not trigger the resident being continually absent for the purposes of section 39-01-11.[414] The court noted interpretation and application of statutes are questions of law and are fully reviewable on appeal, "[o]ur primary goal . . . is to ascertain the intent of the legislature, and we first look to the plain language of the statute and give each word of the statute its ordinary meaning."[415]

The statute covers two types of prospective defendants: (1) North Dakota residents who have been *continuously absent from the state for at least six months post-accident*, and (2) nonresidents at any time.[416] Wilkens cited a dictionary definition of absent as "not present or attending, not existing" arguing that someone who has died is absent by definition.[417] The statute does not provide a definition of absent, thus the court started with a dictionary definition of absent in the year the statute was written to assist in the substantive meaning.[418] The definition of "absent" at the time the statute was amended was, in relevant part: "[b]eing away from a place; withdrawn from a place; not present . . . [n]ot existing, lacking."[419] The court found due to multiple meanings, the dictionary definition was not helpful in resolving the question of the interpretation of the statute.[420]

Wilkens then tried to argue that the statute specifically contemplates service upon the director upon ones death because it includes the phrase "or, in the case of the person's death . . . ."[421] This interpretation would allow North Dakota residents who were involved in vehicular accidents resulting in the death of the tortfeasor to serve the director through the nonresident statute instead of initiating probate proceedings.[422] The court found Wilkens misinterpreted the purpose of the statute.[423] Rather, the court found the purpose of

412. *Id*. at ¶ 5.
413. *Id*.
414. *Id*. (citing Riemers v. Jaeger, 2018 ND 192, ¶ 11, 916 N.W.2d 113).
415. *Id*.
416. *Id*. at ¶ 7 (emphasis added).
417. *Id*. at ¶ 8.
418. *Id*.
419. *Id*. (citing Webster's New Int'l Dictionary 8 (2nd ed. 1950)).
420. *Id*.
421. *Id*. at ¶ 9.
422. *Id*.
423. *Id*.

the statute is to benefit local residents who are harmed by non-local tortfeasors by removing the geographical obstacle and expense that out of state suits bring.[424]

Lastly, the court looked to other states who were considering the issue of whether a person's death makes the person continuously absent from the state, and found most of those states have concluded that being dead is not the same as being absent.[425] The Supreme Court of North Dakota held section 39-10-11 only applied to nonresidents or residents continuously absent from the state for six months or more post-accident, and for purposes of this statute, death does not render a resident absent from the state.[426] Therefore, the district court's judgment was affirmed and Wilkens' action was dismissed without prejudice.[427]

424. *Id*. at ¶ 10.
425. *Id*. at ¶ 11.
426. *Id*. at ¶ 12.
427. *Id*.

EMPLOYMENT LAW—WORKERS COMPENSATION—COMPENSABLE INJURIES

Workforce Safety and Insurance v. Sandberg

In *Workforce Safety and Insurance v. Sandberg*,[428] Workforce Safety and Insurance ("WSI") appealed a judgment affirming an administrative law judge's decision that John Sandberg sustained a compensable injury at work.[429] The administrative judgment found Sandberg had sustained a compensable injury because his repeated work activities substantially worsened his preexisting condition.[430] The court held that the administrative law judge's ("ALJ") findings were not sufficient for the basis of the decision and reversed and remanded.[431]

Sandberg drove trucks in the oil industry from the 1970s through the 1980s, before beginning to operate heavy equipment in the 1980s and 1990s.[432] From 2002 through September 28, 2015, he worked for Park Construction operating an excavator unloading and placing rip rap along raised railroad grade.[433] This meant maneuvering large rocks, over uneven terrain with frequent jarring, slipping and twisting, all while sitting on a board covered with a half-inch of foam.[434] Outside of work, Sandberg suffered a non-work related incident resulting in a sore right neck and lower back in 1998 and an x-ray revealed mild degenerative arthritis in his cervical spine.[435] In 2006, Sandberg was treated for upper back and neck pain after a non-work related car accident where he was diagnosed with a soft tissue injury of an upper back and a neck sprain.[436]

In July of 2003, Sandberg saw Dr. Michael Remmick for chiropractic adjustments for his neck, shoulder and arm, including numbness in his fingers.[437] Sandberg had reported jarring and twisting from the excavator at work but by September 2003, Dr. Remmick noted Sandberg was responding favorably and treatment would only be as needed moving forward.[438] Sandberg did another series of treatments from November 2011 to September 2012, again citing the excavator and complaining of pain in his upper back,

428. 2019 ND 198, 931 N.W.2d 488.
429. *Workforce Safety and Ins.*, 2019 ND 198, ¶ 1, 931 N.W.2d 488.
430. *Id.*
431. *Id.*
432. *Id.* at ¶ 2.
433. *Id.*
434. *Id.*
435. *Id.* at ¶ 3.
436. *Id.*
437. *Id.* at ¶ 4.
438. *Id.*

neck, left shoulder, arm and numbness.[439] Lastly, from March to September 2015, Sandberg saw Dr. Remmick for a series of chiropractic adjustments.[440] Shortly after on September 28, 2015, Sandberg said he could no longer perform his job for Park Construction because of back pain and took an early seasonal layoff.[441]

In May 2016, Sandberg again reported complaints of neck and upper back pain and x-rays and MRIs revealed multilevel degenerative disc disease.[442] Shortly after in July 2016 Sandberg filed a claim with WSI for "cervical neck" injury.[443] WSI determined Sandberg's work activities did not "substantially accelerate the progression or substantially worsen his preexisting condition."[444] Sandberg requested an administrative hearing, there Sandberg had to prove by a preponderance of the evidence that his repetitive work activities: "(1) were a substantial contributing factor to his cervical and thoracic degenerative conditions; or (2) substantially accelerated or worsened his preexisting cervical spine and thoracic spinal conditions."[445]

During the hearing Sandberg relied on testimony and letters from Dr. Remmick and his treating physician Dr. Steven Schoneberg.[446] Sandberg claimed his repetitive work activities substantially accelerated the progression or substantially worsened the severity of his preexisting cervical and thoracic condition.[447] WSI had its own medical consultant, Dr. Gregory Peterson, who testified there was no significant clinical evidence indicating Sandberg's work activities accelerated changes in his condition or that his condition was caused by his work activities.[448]

The administrative law judge determined Sandberg's employment did not cause or substantially accelerate the progression of his degenerative disc disease.[449] However, the judge found Sandberg's employment substantially increased the severity of his pain and did not merely trigger symptoms but substantially worsened the severity of his degenerative disc disease.[450] The judge decided Sandberg had met his burden and the district court affirmed the administrative law judge's decision.[451]

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439. *Id.* at ¶ 5.
440. *Id.*
441. *Id.*
442. *Id.* at ¶ 6.
443. *Id.*
444. *Id.* at ¶ 7.
445. *Id.* at ¶ 8.
446. *Id.* at ¶ 9.
447. *Id.*
448. *Id.*
449. *Id.* at ¶ 10.
450. *Id.*
451. *Id.*

Under chapter 28-32 of the North Dakota Century Code, courts exercise limited appellate review of a final order by an administrative agency.[452] In their review, the court "may not make independent findings of fact," they must "determine only whether a reasoning mind reasonably could have determined the findings were proven by the weight of the evidence from the entire record."[453] When reviewing, "deference is given to the ALJ's factual findings," but is not given to the "legal conclusions on questions of law, including interpretation of a statute."[454]

WSI argued the ALJ misapplied the law and that the "mere triggering of pain symptoms in a preexisting injury" is not efficient to establish a compensable injury, and here Sandberg did not establish he sustained a compensable injury.[455] The burden was on Sandberg to prove by a preponderance of the evidence that he had a compensable injury.[456] To show causal connection, Sandberg had to demonstrate the "employment was a substantial contributing factor to the injury," not necessarily the sole reason.[457] The issue on appeal was discerning between work activities that merely trigger pain conditions in preexisting injury and "work activities that substantially accelerate" a preexisting injury and are compensable.[458]

The court looked to *Mickelson v. North Dakota Workforce Safety and Insurance Fund*.[459] There, the case was remanded after it was found the "ALJ misapplied the law by looking too narrowly at the claimant's degenerative disc disease" without considering whether the injury would not have progressed absent the employment accelerating the progression or worsening the severity of the injury.[460] Comparatively, the court looked at *Davenport v. North Dakota Workforce Safety and Insurance Fund*,[461] which was distinguishable by "Davenport's history of neck and lower back complaints" that were "hastened by his chronic smoking" as opposed to Mickleson's concealed condition.[462] Both of these cases "focused on the existence of medical evidence" found by objective medical findings that showed the injury would

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452. *Id.* at ¶ 11.
453. *Id.* at ¶ 12.
454. *Id.*
455. *Id.* at ¶ 13.
456. *Id.* at ¶ 14.
457. *Id.* (citing Bruder v. N.D. Workforce Safety & Ins. Fund, 2009 ND 23, ¶ 8, 761 N.W.2d 588).
458. *Id.* at ¶ 16.
459. 2012 ND 164, 820 N.W.2d 333.
460. *Workforce Safety and Ins.*, 2019 ND 198, ¶ 18, 931 N.W.2d 488 (citing Mickelson v. N.D. Workforce Safety & Ins., 2012 ND 164, ¶ 23, 820 N.W.2d 333).
461. 2013 ND 118, 833 N.W.2d 500.
462. *Workforce Safety and Ins.*, 2019 ND 198, ¶ 20, 931 N.W.2d 488 (citing Davenport v. Workforce Safety & Ins. Fund, 2013 ND 118, ¶ 10, 833 N.W.2d 500.

not have progressed in the absence of employment and which indicate said employment "accelerated the progression or substantially worsened the severity of injury."[463]

In 2013, the North Dakota "legislature amended the definition of "compensable injury" in section 65-01-02(10)(b)(7) of the North Dakota Century Code to add the language that "pain is a symptom and may be considered in determining whether there is a substantial acceleration or substantial worsening of a preexisting injury, disease, or other condition, but pain alone is not a substantial acceleration or a substantial worsening."[464] This amendment to the statute is consistent with *Mickelson* and *Davenport*, and clarifies pain needs to be a symptom of a preexisting injury, whether or not there is a substantial acceleration of the progression or worsening of the severity of the condition.[465] However, the amendment did not change the requirement that a "compensable injury must be established by medical evidence supported by objective medical findings."[466]

Based on the issues identified by the ALJ, the court found Dr. Peterson's medical opinion stating that "Sandberg's work did not cause or substantially accelerate the progression of his degenerative disc disease" to be true.[467] However, the ALJ did find that Sandberg's work activities caused his disc disease to be more painful and increased the severity of his symptoms.[468] The court found that the "ALJ did not cite any medical evidence supported by objective medical findings," that supported the "determination that Sandberg's repetitive work activities did not merely trigger symptoms," but "substantially worsened the severity" of his condition.[469] The court was unable to resolve the ALJ's determination because it did not conform with the objective medical findings for compensable injuries in accordance with section 65-01-02(10).[470] Ultimately, the court reversed the judgement and remanded to the ALJ for findings in accordance with the stated statutory requirements.[471]

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463. *Id*. at ¶ 21.
464. *Id*. at ¶ 22.
465. *Id*. at ¶ 23.
466. *Id*.
467. *Id*. at ¶ 25.
468. *Id*.
469. *Id*.
470. *Id*. at ¶ 26.
471. *Id*. at ¶¶ 26-27.

CRIMINAL LAW—DRIVING UNDER THE INFLUENCE—BREATH TEST ADMISSIBILITY

State v. Blaskowski

In *State v. Blaskowski*,[472] Nicholas Blaskowski appealed a criminal judgment finding him guilty of driving under the influence in violation of section 39-08-01(1)(a) of the North Dakota Century Code.[473] Blaskowski argued the district court erred in admitting the results of his chemical breath test into evidence due to the States failure to establish the breath test was properly administered.[474] He contended because the state did not offer proof the device that was used was installed by a field inspector prior to its useit was improperly administered under section 39-20-07 of the North Dakota Century Code.[475]

On June 17, 2018, Blaskowski was stopped for speeding and was ultimately arrested for driving under the influence.[476] He consented to a chemical breath test through an Intoxilyzer 8000 device.[477] According to the breath test results, Blaskowski's blood alcohol content was over the legal limit, and he was charged with a DUI with a jury trial set for November 2018.[478] At trial Blaskowski objected to the Intoxilyzer Record and Checklist, arguing "the state did not establish the chemical breath test was fairly administered under [North Dakota Century Code] § 39-20-07 because the state" did not establish that the "device was installed by a field inspector prior to its use."[479] The district court overruled this objection, admitted the test results, and Blaskowski was found guilty.[480]

Whether a chemical test is "fairly administered is a question of admissibility left to the district court's discretion."[481] An evidentiary ruling is reviewed under an abuse of discretion standard.[482] Section 39-20-07(5) of the North Dakota Century Code eases the burden for the evidentiary foundation for chemical test results so long as four foundational elements are met, one of which requires the breath test to have been fairly administered.[483] In order

472. 2019 ND 192, 931 N.W.2d 226.
473. *Blaskowski*, 2019 ND 192, ¶ 1, 931 N.W.2d 226.
474. *Id.*
475. *Id.*
476. *Id.* at ¶ 2.
477. *Id.*
478. *Id.*
479. *Id.* at ¶ 3.
480. *Id.*
481. *Id.* at ¶ 4 (citing State v. Van Zomeren, 2016 ND 98, ¶ 8, 879 N.W.2d 449).
482. *Id.*
483. *Id.* at ¶ 5.

to meet this, "the state toxicologist has established approved methods for administering chemical breath tests."[484] The method for the device used on Blaskowski provides that the device "must be installed by a Field Inspector prior to use," this is what Blaskowski argued the state failed to establish.[485]

To avoid the use of expert testimony, the short cut provided by section 39-20-07 requires evidence must be established with scrupulous compliance with the approved method for administration of the chemical breath test.[486] If strict compliance is not followed with the approved method for administering the chemical test, the scientific accuracy of the test can only be established with expert testimony.[487] The court looked to *Ell v. Director*[488] which was a similar case. There, the results of the chemical breath test were looked at to see if the proper approved method for conducting the test was followed, including whether the device was installed by a field inspector prior to use.[489]

In *Ell*, although the Department was able to establish the location for inspection, the Department failed to establish the device was installed by a field supervisor.[490] Ultimately the court in *Ell*, held proper foundation for the Intoxilyzer test results was not laid, that the hearing officer misapplied the law, and admitting the breath test results was an abuse of discretion.[491]

Here, the record did not have any documentation that established the device was installed by a field inspector, nor was there expert testimony establishing the test was fairly administered.[492] Due to these factors and the lack of strict compliance, "the scientific accuracy of the test" could not be established.[493] The court concluded, "the district court misapplied the law and abused its discretion by admitting into evidence" the chemical breath test.[494] The court ultimately reversed the criminal judgment.[495]

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484. *Id.* at ¶ 6.
485. *Id.*
486. *Id.* at ¶ 7.
487. *Id.* (citing Ell v. Director, 2016 ND 164, ¶ 19, 883 N.W.2d 464).
488. 2016 ND 164, ¶ 19, 883 N.W.2d 464).
489. *Blaskowski*, 2019 ND 192, ¶ 8, 931 N.W.2d 226.
490. *Id.*
491. *Id.*
492. *Id.* at ¶ 10.
493. *Id.*
494. *Id.*
495. *Id.* at ¶ 11.