

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, an Associate Editor assisted in researching and writing the Review.* The following topics are included in the Review:

PROTECTION OF ENDANGERED PERSONS – DISORDERLY CONDUCT AND BREACH OF THE PEACE	490
RIGHT OF REVIEW – PAYMENT OF OR ON JUDGMENT.....	492
MUNICIPAL CORPORATIONS – CONFIRMATION OR REVISION OF ASSESSMENT BY COURT	494
CRIMINAL LAW – SUBSTANTIVE USE OF STATEMENTS CORROBORATING OR IMPEACHING TESTIMONY	498

* The North Dakota Law Review would like to thank Associate Editor Sapir Sela for writing the North Dakota Supreme Court Review.

PROTECTION OF ENDANGERED PERSONS – DISORDERLY
CONDUCT AND BREACH OF THE PEACE

Rekow v. Durham

In *Rekow v. Durham*, the North Dakota Supreme Court assessed whether the district court abused its discretion in granting a restraining order.¹ Susan Durham (“Durheim”) appealed a disorderly conduct restraining order issued by the district court against her.²

The dispute originated from Brandon Rekow (“Rekow”) allegedly failing to pay for gravel he purchased from Durham’s husband.³ Durham visited Rekow’s home to collect payment for the unpaid gravel.⁴ An argument ensued, and Rekow asked Durham to leave his property multiple times.⁵ Durham ultimately left.⁶

On January 18, 2022, Rekow filed a petition for a disorderly conduct restraining order against Durham under North Dakota Century Code Section 12.1-31.2-01.⁷ The district court conducted a hearing on February 22, 2022, and both parties presented their accounts of the argument.⁸ The parties accused each other of swearing and name-calling, which Rekow acknowledged but Durham denied.⁹

The district court granted Rekow’s petition for a one-year disorderly conduct restraining order against Durham based on her intrusive and unwanted actions that occurred on Rekow’s property.¹⁰ The court found that Durham’s failure to leave immediately after being requested, engaging in an argument, and causing a disturbance adversely affected Rekow’s safety, security, and privacy.¹¹ Durham appealed the decision, claiming that the court’s findings were insufficient to support the restraining order.¹²

The North Dakota Supreme Court reviews a district court’s disorderly conduct restraining order decision for abuse of discretion.¹³ The court will reverse such a decision if the district court “acts in an arbitrary, unreasonable,

1. 2022 ND 177, ¶ 6, 980 N.W.2d 917, 918.

2. *Id.* ¶ 1.

3. *Id.* ¶ 2.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* ¶ 3.

11. *Id.*

12. *Id.* ¶¶ 4-5.

13. *Id.* ¶ 6.

or unconscionable manner, . . . misinterprets or misapplies the law, or when” the court reaches an outcome unsupported by a “rational mental process leading to a reasoned determination.”¹⁴

The court may grant a disorderly conduct restraining order when the petitioner demonstrates reasonable grounds that the respondent engaged in “intrusive or unwanted acts, words, or gestures intended to adversely affect the safety, security, or privacy of another person.”¹⁵ The petitioner must allege specific facts or threats, rather than vague generalities, to support the order in which subjective fear alone is insufficient.¹⁶

In this case, the North Dakota Supreme Court held that the district court’s findings did not support granting the disorderly conduct restraining order against Durham.¹⁷ The district court failed to adequately address Durham’s intent, a crucial element.¹⁸ While the district court acknowledged that Rekow asked Durham to leave his property, it did not explain how her failure to do so immediately, and the mutual yelling, affected Rekow’s safety, security, or privacy.¹⁹ The district court also did not establish that Durham intended her conduct to have such impact.²⁰ Rekow’s testimony lacked specificity regarding how Durham’s actions affected him beyond feeling threatened with a lawsuit.²¹

The district court’s conclusory findings—failure to make findings concerning Durham’s intent and the lack of specificity showing how Durham’s conduct adversely affected Rekow’s safety, security, or privacy—did not satisfy the requirements of North Dakota Century Code Section 12.1-31.2-01.²² Thus, the North Dakota Supreme Court held that the district court abused its discretion in issuing the disorderly conduct restraining order and reversed.²³

14. *Id.*

15. *Id.* ¶ 7 (quoting N.D. CENT. CODE § 12.1-31.2-01(1)).

16. *Id.* (citing *Cusey v. Nagel*, 2005 ND 84, ¶ 7, 695 N.W.2d 697, 701); *see also Williams v. Spilovoy*, 536 N.W.2d 383, 385 (N.D. 1995).

17. *Rekow*, 2022 ND 177, ¶ 9, 980 N.W.2d 917, 920.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* ¶ 2.

22. *Id.* ¶ 9.

23. *Id.* ¶ 10.

RIGHT OF REVIEW – PAYMENT OF OR ON JUDGMENT

Feickert v. Feickert

In *Feickert v. Feickert*, the North Dakota Supreme Court analyzed whether a district court erred by denying Cheryl Feickert (“C. Feickert”) an offset to damages awarded to Ashley Feickert (“A. Feickert”) and erred by failing to consider C. Feickert’s unjust enrichment claim.²⁴

A. Feickert’s father died intestate in 1988 when she was a minor.²⁵ She inherited a one-fourth interest in an undivided real property from him.²⁶ C. Feickert, A. Feickert’s mother, became her conservator.²⁷

C. Feickert leased A. Feickert’s interest in the property “starting in April 1989, but failed to provide an accounting of the lease income until September 2020.”²⁸ A. Feickert initiated legal action against C. Feickert, alleging a breach of fiduciary duties.²⁹ C. Feickert raised various affirmative defenses, including unjust enrichment and estoppel.³⁰ After a bench trial, the district court found that C. Feickert breached her fiduciary duties and was ordered to pay over \$119,000 in damages.³¹ The court held that C. Feickert did not properly plead her counterclaim or provide legal authority to her offset damages request.³²

C. Feickert voluntarily paid 20,000 dollars against the judgment before filing a notice of appeal.³³ The North Dakota Supreme Court addressed C. Feickert’s ability to appeal in light of her partial satisfaction of the judgment.³⁴ A. Feickert argued that C. Feickert’s partial payment constituted a waiver of her right to appeal; however, C. Feickert argued that the 20,000 dollars was an undisputed amount.³⁵

Referencing caselaw, the North Dakota Supreme Court stated that a full “satisfaction of [a] judgment extinguishes the underlying claim.”³⁶ However, no rule existed for partial payment of undisputed amounts.³⁷ The North Dakota Supreme Court discussed *State ex rel. Storbakken v. Scott’s Electric*,

24. 2022 ND 210, ¶ 1, 982 N.W.2d 316, 317.

25. *Id.* ¶ 2.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* ¶ 3.

30. *Id.*

31. *Id.* ¶ 4.

32. *Id.*

33. *Id.* ¶ 5.

34. *Id.* ¶¶ 5-9.

35. *Id.* ¶ 5.

36. *Id.* ¶ 9.

37. *Id.* ¶ 6.

Inc., where the court held that payment of undisputed amounts cannot be appealed.³⁸ However, partial payment does not waive a party's ability to appeal unpaid disputed amounts.³⁹

As such, C. Feickert's partial satisfaction did not waive her right to appeal the disputed amount.⁴⁰ The North Dakota Supreme Court held that C. Feickert could not appeal the lower court's finding of breach of fiduciary duty because she had partially paid that judgment.⁴¹ However, she could still appeal the damages in excess of the undisputed 20,000 dollars.⁴²

Therefore, C. Feickert's claim, that the district court erred by failing to consider her unjust enrichment affirmative defense, was barred by her partial payment.⁴³ Still, the North Dakota Supreme Court considered whether C. Feickert pled an independent claim for unjust enrichment.⁴⁴

The North Dakota Supreme Court examined Rule 8(a) of the North Dakota Rules of Civil Procedure which requires pleadings that state a claim for relief to contain "a short and plain statement of the claim showing that the pleader is entitled to relief."⁴⁵ The court found that C. Feickert's answer did not comply with this requirement because the pleading failed to provide factual support for the unjust enrichment claim.⁴⁶ Accordingly, the North Dakota Supreme Court held that the district court did not err in determining that C. Feickert "failed to satisfy the minimal notice requirements of [Rule] 8(a)."⁴⁷

C. Feickert then asserted that the district court erred by not offsetting the damages awarded to A. Feickert with the amount she claimed A. Feickert was unjustly enriched.⁴⁸ The North Dakota Supreme Court reiterated that C. Feickert was not entitled to an offset because she did not properly plead a claim for unjust enrichment.⁴⁹ The North Dakota Supreme Court affirmed the district court's judgment for the aforementioned reasons.⁵⁰

38. 2014 ND 97, ¶ 8, 846 N.W.2d 327, 329.

39. *See id.*

40. Feickert v. Feickert, 2022 ND 210, ¶ 8, 982 N.W.2d 316, 317, 319.

41. *Id.*

42. *Id.*

43. *Id.* ¶¶ 10-11.

44. *Id.* ¶ 11.

45. *Id.* ¶ 12 (citing N.D.R.Civ.P. 8(a)).

46. *Id.* ¶ 14.

47. *Id.*

48. *Id.* ¶ 15.

49. *Id.*

50. *Id.* ¶ 16.

MUNICIPAL CORPORATIONS – CONFIRMATION OR REVISION OF
ASSESSMENT BY COURT*Senske Rentals, LLC v. City of Grand Forks*

Senske Rentals, LLC v. City of Grand Forks involved an appeal by Senske Rentals, LLC (“Senske Rentals”), of the district court’s order affirming the City of Grand Forks Special Assessment Commission’s (“Commission”) special assessment of Senske Rentals’ property.⁵¹

In February 2019, the City Council of Grand Forks (“City Council”) approved plans for a street improvement project.⁵² Senske Rentals owned property in a subdivision affected by the project that required infrastructure installation.⁵³ The city approved and created a special assessment district and commission for the project.⁵⁴ The project was estimated to cost 3.5 million dollars total.⁵⁵ Property owners were notified that they would have to pay between “\$0.98 and \$1.36 per square foot.”⁵⁶

The City Council held a public meeting to ask affected property owners for input on the project.⁵⁷ The owner of Senske Rentals, Jim Senske (“Senske”), supported the project.⁵⁸ However, during the bid process, the project bids were twenty-seven percent higher than the original estimate.⁵⁹ Owners were notified of the new “assessment range of \$1.57 to \$1.80 per square foot,” but no owners objected or commented.⁶⁰ In September 2021, the Commission held a public hearing, and Senske requested the Commission to reconsider the new range assessment amounts.⁶¹ The City Council reduced the assessment to 1.41 dollars per square foot, ultimately 3.7 percent higher than the original cost estimate.⁶²

A month later the Commission held another hearing explaining the assessment more in depth.⁶³ Senske’s attorney argued that the city did not fairly allocate costs and should be responsible for paying a larger portion of the project.⁶⁴ The City Council decided that the Commission’s “actions were

51. 2023 ND 55, ¶ 1, 988 N.W.2d 598, 600.

52. *Id.* ¶ 2.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* ¶ 3.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* ¶ 4.

62. *Id.*

63. *Id.* ¶ 5.

64. *Id.*

not arbitrary, capricious, or unreasonable.”⁶⁵ Senske appealed the City Council’s decision to the district court, which upheld the assessment.⁶⁶ Senske then appealed to the North Dakota Supreme Court.⁶⁷

Senske asked the North Dakota Supreme Court to take judicial notice of several published city documents related to the special assessment amount.⁶⁸ The court has discretion “whether to take judicial notice when no request was made in the trial court.”⁶⁹ The documents were not presented to the Commission or the lower court and were gathered nearly two years after the assessment.⁷⁰ The North Dakota Supreme Court declined to consider the documents.⁷¹

Senske argued that the Commission failed to comply with North Dakota Century Code Section 40-23-07 and acted arbitrarily or capriciously.⁷² The North Dakota Supreme Court noted that the separation of powers doctrine limits the scope of review of an appeal from a local governing body’s decision.⁷³

The North Dakota Supreme Court reviewed whether the Commission acted arbitrarily, capriciously, or unreasonably in determining the assessments.⁷⁴ Section 40-23-07 governs the Commission’s decisions regarding benefits and assessments.⁷⁵ To comply with this statute, three requirements must be satisfied: the Commission must determine the special benefit to each lot, the special assessment must be limited to the lot’s just portion of the total cost, and the special assessment must not exceed its determined benefit.⁷⁶

The North Dakota Supreme Court analyzed whether Section 40-23-07 was arbitrary, capricious, or legally unreasonable on its face.⁷⁷ The court emphasized earlier decisions that held the court does not substitute its judgment for that of the Commission unless there is evidence of discrimination.⁷⁸ In fact, a reviewing court may only reverse the decision of a local governing body’s action when there is “an absence of evidence or

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* ¶ 6.

69. *Id.* ¶ 7 (quoting *Workforce Safety & Ins. v. Oden*, 2020 ND 243, ¶ 56, 951 N.W.2d 187, 203).

70. *Id.* ¶ 8.

71. *Id.*

72. *Id.* ¶ 9 (citing N.D. CENT. CODE § 40-23-07 (2023)).

73. *Id.* ¶ 10 (citing N.D. CENT. CODE § 28-34-01 (2023)).

74. *Id.*

75. *Id.* ¶ 11.

76. *Id.* ¶ 12.

77. *Id.* ¶ 13.

78. *Id.*

reason as to amount to arbitrary, capricious, or unreasonable action.”⁷⁹ Therefore, a municipality has substantial discretion to determine assessments, costs, and benefits for an improvement district.⁸⁰

The North Dakota Supreme Court held “the Commission determined the benefit and the city made findings based on past practices, policies, and procedures.”⁸¹ While the record did not provide an exact formula for quantifying the benefits, the court presumes that benefit determination was consistent with applicable ordinances and policies unless proven otherwise.⁸²

Senske failed to demonstrate that the Commission’s benefit calculation did not comply with Section 40-23-07 because Senske did not make a specific argument against the Commission’s method.⁸³ Consequently, Senske failed to meet his burden, and the court upheld the Commission’s benefit determination.⁸⁴

Senske also challenged the Commission’s method of assessment.⁸⁵ “The Commission calculated the assessment amount by taking the cost of construction and dividing it by the square footage of the property and assessed it according to the lot frontage.”⁸⁶

The North Dakota Supreme Court acknowledged that this project’s complexity may differ from others, but the court has consistently “approved the use of formulas such as front footage area or value to determine the [assessments].”⁸⁷ The court rejected Senske’s argument that a simpler equation was required because “it is not [the court’s] function to reweigh the evidence.”⁸⁸ Rather, the court will only act if the landowners met their burden, “demonstrating the Commission acted arbitrarily, capriciously, or unreasonably.”⁸⁹

Senske additionally raised a constitutional takings claim, arguing that the special assessments equal the parcels’ improved value.⁹⁰ However, since this argument was not raised in the district court, the North Dakota Supreme Court could not consider it for the first time on appeal.⁹¹ The court reiterated its limited role in reviewing special assessments and emphasized the

79. *Id.* ¶ 14 (quoting *Holter v. City of Mandan*, 2020 ND 202, ¶ 12, 948 N.W.2d 858, 862).

80. *Id.* ¶ 14 (citing *Holter*, 2020 ND 202, ¶ 13, 948 N.W.2d 858).

81. *Id.* ¶ 15.

82. *Id.* ¶ 16.

83. *Id.*

84. *Id.*

85. *Id.* ¶ 17.

86. *Id.*

87. *Id.*

88. *Id.* (citing *Serenko v. City of Wilton*, 1999 ND 88, ¶ 23, 593 N.W.2d 368, 374).

89. *Id.* ¶¶ 17-18.

90. *Id.* ¶ 19.

91. *Id.* (citing *Spratt v. MDU Res. Grp., Inc.*, 2011 ND 94, ¶ 14, 797 N.W.2d 328, 333).

presumption of validity.⁹² Based on the foregoing analysis, the North Dakota Supreme Court affirmed the district court's order, upholding the Commission's assessments.⁹³

92. *Id.* ¶ 17.

93. *Id.* ¶ 20.

CRIMINAL LAW – SUBSTANTIVE USE OF STATEMENTS
CORROBORATING OR IMPEACHING TESTIMONY

State v. Yousif

In *State v. Yousif*, the North Dakota Supreme Court addressed Mohammed Yousif’s (“Yousif”) criminal judgment appeal after being found guilty of aggravated assault.⁹⁴ The central issue of the appeal was the district court’s decision to exclude a witness’s recorded statement.⁹⁵ The North Dakota Supreme Court affirmed the district court’s ruling, excluding the evidence.⁹⁶

On July 19, 2020, K.A. was shot while driving his vehicle and initially informed law enforcement that the shooter was an unknown male.⁹⁷ However, the investigation revealed that Yousif, in the back seat of K.A.’s vehicle, discharged the gun.⁹⁸ The bullet traveled through the driver’s seat, hit K.A. in the shoulder, and shattered the windshield.⁹⁹ After being released from the hospital, K.A. corrected his initial statement and said Yousif was the shooter.¹⁰⁰

At Yousif’s trial, K.A. addressed his prior inconsistent statement during his direct and cross-examination.¹⁰¹ Yousif’s defense counsel then attempted to offer a recording of K.A.’s initial statement to the police during cross-examination of the case agent.¹⁰² The State objected, arguing:

Under 613, extrinsic evidence which is what the audio would be, is not permissible unless the person or the inconsistent statements has been given the opportunity to admit or deny the statements. The extrinsic evidence is then used to impeach the individual and it is never received by the court, it has to be used when the witness is on the stand.¹⁰³

The defense argued they were offering the recording to show weight and credibility, but the lower court concluded that the defense was offering it to show inconsistency and credibility, not weight.¹⁰⁴ The district court held that

94. 2022 ND 234, ¶ 1, 982 N.W.2d 870, 871.

95. *Id.*; see also N.D.R.Ev. 613(b) (governing extrinsic evidence of a witness’s prior inconsistent statement).

96. *Yousif*, 2022 ND 234, ¶ 1, 982 N.W.2d 870, 871.

97. *Id.* ¶ 2.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* ¶ 3.

102. *Id.* ¶ 6.

103. *Id.*

104. *Id.*

the defense could not play the recording for the jury, but they could ask the case agent questions to point out consistencies and use the transcript to refresh the case agent's recollection.¹⁰⁵ Yousif appealed, "arugu[ing] the district court erred by excluding the recording of K.A.'s statement at trial."¹⁰⁶

The North Dakota Supreme Court held that "the [district] court properly exercised its broad discretion by excluding the recording."¹⁰⁷ The standard of review was abuse of discretion.¹⁰⁸ The court stated that a district court possesses broad discretion in evidentiary matters, only being overturned if such discretion was abused.¹⁰⁹ Abuse of discretion occurs when a court's decision is arbitrary, capricious, unreasonable, "or misinterprets or misapplies the law."¹¹⁰

The North Dakota Supreme Court agreed that North Dakota Rule of Evidence 613 governed K.A.'s inconsistent statement.¹¹¹ According to this rule, "[e]xtrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is allowed to explain or deny the statement, and an adverse party is allowed to examine the witness about it, or if justice requires it."¹¹² The North Dakota Supreme Court quoted its holding in *State v. Demery*, "[i]t is the established rule in this State that a prior inconsistent statement may be used to impeach a witness, but may not be used substantively in a criminal case as direct evidence of the facts contained in the statement unless the prior statement was made under oath."¹¹³

The North Dakota Supreme Court further observed that North Dakota's Rule 613 is based on its federal counterpart, Federal Rules of Evidence Rule 613.¹¹⁴ As such, the court found it appropriate to consider the "interpretation or construction of identical or similar language" by federal courts as persuasive authority.¹¹⁵ Further, the Rule states that a party seeking to introduce a prior inconsistent statement must generally confront the witness with the statement, affording them "an opportunity to explain or deny the inconsistency."¹¹⁶

While Federal Rule 613(b) provides the general requirement for the admissibility of extrinsic evidence, ultimately, the North Dakota Supreme

105. *Id.*

106. *Id.* ¶¶ 3-4.

107. *Id.* ¶ 4.

108. *Id.* ¶ 5 (citing *State v. Poulor*, 2019 ND 215, ¶ 14, 932 N.W.2d 534, 538).

109. *Id.*

110. *Id.*

111. *Id.* ¶ 7.

112. *Id.*

113. *Id.* (quoting *State v. Demery*, 331 N.W.2d 7, 11 (N.D. 1983)).

114. *Id.* ¶ 8; see FED. R. EVID. 613.

115. *Yousif*, 2022 ND 234, ¶ 8, 982 N.W.2d 870, 873 (quoting *State v. Helm*, 2020 ND 155, ¶ 6, 946 N.W.2d 503, 504).

116. *Id.*

Court noted, a trial court retains the broad discretion to exclude extrinsic evidence even if the rule's foundational elements are met.¹¹⁷ Quoting *United States v. Surdow*, the court held that a "trial court's broad discretion in controlling the mode and order of interrogating witnesses and presenting evidence permits it to exclude extrinsic impeachment evidence 'that was not revealed while the witness was on the stand,' or at least before the witness was permitted to leave the court."¹¹⁸

The North Dakota Supreme Court first acknowledged that the recording was admissible as extrinsic evidence of K.A.'s prior inconsistent statement under North Dakota Rule 613(b) because "K.A. was 'given an opportunity to explain or deny the statement' and the parties were 'given an opportunity to examine the witness about it.'"¹¹⁹ The court noted the defense's purpose in offering the recordings was to demonstrate how the case agent made determinations, not to show K.A.'s inconsistent statements.¹²⁰ The district court allowed counsel to use a transcript of the statements to cross-examine the case agent, which fulfilled the same purpose.¹²¹

Ultimately, the North Dakota Supreme Court affirmed the judgment, holding that "the district court properly exercised its broad discretion in controlling the mode and order of interrogating witnesses and presenting evidence." While the district court could have admitted the recording, it was not bound to do so merely because the elements of Rule 613 were met.¹²² "The court's decision to exclude the recording was rational; therefore, the court did not abuse its discretion."¹²³

117. *Id.* ¶ 10.

118. *Id.* (quoting *United States v. Surdow*, 121 Fed. Appx. 898, 899 (2d Cir. 2005)).

119. *Id.* ¶ 11 (quoting N.D.R.Ev. 613(b)).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*