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:

CRIMINAL LAW – BOUNDS OF CONSENT TO VEHICLE SEARCH 698

PREMISES LIABILITY – NATURAL ACCUMULATION RULE 700

NEGLIGENCE – INJURY TO INDEPENDENT CONTRACTOR 704

WARRANTLESS HOME ENTRIES - HOT PURSUIT AND EXIGENT CIRCUMSTANCES 707

CRIMINAL LAW - ISSUANCE OF SUPERVISORY WRIT TO PREVENT RISK ASSESSMENT IN ABSENCE OF CONVICTION 711

WILL CONTEST – JUDGMENT ON MULTIPLE CLAIMS 714

COSTS AND FEES – PREVAILING PARTY ENTITLED TO COSTS UNDIMINISHED BY HIS FAULT 717

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CRIMINAL LAW – BOUNDS OF CONSENT TO VEHICLE SEARCH

State v. Gietzen

In *State v. Gietzen*, the North Dakota Supreme Court assessed whether the district court's decision to suppress evidence found in a backpack during a vehicle search was an error as a matter of law.[1] A vehicle was stopped by a Bismarck police officer for a routine traffic violation; Matthew Gietzen ("Gietzen") was the passenger.[2] During the stop, the driver consented to a search of the vehicle without any limitations on her consent.[3] During the search, the officer found a small bag locked with a padlock; the officer bypassed the lock and found controlled substances in the bag.[4] Gietzen was then charged "with possession of controlled substances and drug paraphernalia."[5]

At trial, Gietzen moved to suppress the evidence found in the bag contending that he did not consent to the search of his bag, and the driver's consent did not include search of his bag.[6] The district court granted Gietzen's motion to suppress because "the driver's consent did not apply to the small locked bag because the men's items with it in the backpack made it unreasonable to believe the female driver had authority to consent to a search of the locked bag and Gietzen did not consent."[7] The State appealed.[8]

The State's right to appeal is restricted by Section 29-28-07 of the North Dakota Century Code.[9] The appeal filed by the State, however, failed to explain "the relevance of the suppressed evidence and merely paraphrased the language of N.D.C.C. § 29-28-07(5)"; despite this, the North Dakota Supreme Court considered the State's appeal.[10]

The Fourth Amendment of the United States Constitution and Article I, Section 8 of the North Dakota Constitution "prohibit unreasonable searches and seizures."[11] "Consent is an exception to the warrant requirement and is evaluated under the totality of the circumstances."[12] Here, the State argued

1. 2024 ND 5, ¶ 3, 1 N.W.3d 923, 924.
2. *Id.* ¶ 2.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* ¶ 3.
7. *Id.*
8. *Id.*
9. *Id.* ¶ 4 (citing N.D. CENT. CODE § 29-08-07(5)) ("The State may appeal from an order suppressing evidence if the notice of appeal is 'accompanied by a statement of the prosecuting attorney asserting that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.'").
10. *Id.* ¶ 5.
11. *Id.* ¶ 6.
12. *Id.* (citing State v. Morin, 2012 ND 75, ¶ 7, 815 N.W.2d 229, 232).

"the driver had apparent authority over the backpack, making her unrestricted consent to search the vehicle sufficient to allow the search of all its contents, including the backpack."[13] However, the district court disagreed deeming it unreasonable to believe the female driver had authority to consent to search of the locked bag given the men's items in the backpack.[14]

After determining the driver did not have capacity to give consent for the search of Gietzen's belongings, the Supreme Court determined if Gietzen provided adequate consent.[15] The district court found the officer knew the bag belonged to Gietzen and should have obtained Gietzen's consent prior to its search.[16] The district court further found the officer failed to obtain the requisite affirmative consent to search the locked bag.[17] According to the Supreme Court, it is the officer's burden, not the defendant's burden, to obtain affirmative consent before search of the locked bag.[18] Therefore, the North Dakota Supreme Court affirmed the district court's order granting Gietzen's motion to suppress because it found sufficient competent evidence supporting the district court's findings and its decision was not contrary to the manifest weight of the evidence.[19]

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13. *Id.* ¶ 8.
14. *Id.* ¶ 11.
15. *Id.* ¶ 12 (alteration in original) (quoting State v. Daniels, 2014 ND 124, ¶ 20, 848 N.W.2d 670, 675-76) ("[T]o sustain a finding of consent, the State must show affirmative conduct by the person alleged to have consented that is consistent with the giving of consent, rather than merely showing that the person took no affirmative actions to stop the police from [searching].").
16. *Id.* ¶ 11.
17. *Id*. ¶ 13.
18. *Id*.
19. *Id.* ¶¶ 13, 15.

PREMISES LIABILITY – NATURAL ACCUMULATION RULE

Papenhausen v. ConocoPhillips Co.

In *Papenhausen v. ConocoPhillips Co.*, the North Dakota Supreme Court analyzed the natural accumulation rule in North Dakota, particularly as it applies to rural areas.[20] The United States District Court for the District of North Dakota certified two questions regarding North Dakota's natural accumulation rule to the North Dakota Supreme Court.[21] The first question before the court was "whether the accumulation rule extends to an oil well site in a rural area" to which the court answered yes.[22] The second question addressed by the court was if the rule would still apply if "it conceals a condition substantially more dangerous than one normally associated with ice and snow" to which the court answered no.[23] The opinion was written by Justice Tufte, with Justices Jensen, Crothers, McEvers, and Bahr joining.[24]

David Papenhausen's ("Papenhausen") foot fell through a hole that was hidden by ice and snow causing his injury.[25] The event occurred at a rural well site that was owned and operated by ConocoPhillips Company and Burlington Resources Oil & Gas ("Defendants").[26] Papenhausen brought suit against Defendants for negligence and premises liability, alleging Defendants failed to safely maintain the site.[27] Defendants argued, based on testimony from Papenhausen in which he stated he would have seen the hole but-for the snow and ice, that the natural accumulation rule applies and therefore shields Defendants from liability.[28] Papenhausen disagreed, arguing the natural accumulation rule does not apply to rural areas, and if it did, it should not apply in a situation where the snow and ice hides a dangerous condition.[29] The Supreme Court agreed to answer the certified questions as presented from the United States District Court, because it had not previously addressed either question.[30]

The North Dakota Supreme Court first addressed whether the natural accumulation rule extended to rural areas.[31] The court explained the natural

20. 2024 ND 40, 4 N.W.3d 246.
21. *Id.* ¶ 1.
22. *Id.* ¶¶ 1-2.
23. *Id.*
24. *Id.* ¶ 35.
25. *Id.* ¶ 3.
26. *Id.*
27. *Id.* ¶¶ 3-4.
28. *Id.* ¶ 4.
29. *Id.*
30. *Id.* ¶¶ 6-7.
31. *Id.* ¶ 8.

accumulation rule in North Dakota posits that landowners are generally not liable for negligence for injuries that result from natural accumulations of snow and ice.[32] The rule is connected to the threshold question of a negligence claim: whether a duty exists. [33] The rationale for the rule, as explained by the court, is that it is unreasonable to impose liability for such accumulations given the climatic conditions prevalent in the region.[34] The Supreme Court relied on its precedent in *Green v. Mid Dakota Clinic*, where it highlighted that the mere presence of snow and ice does not establish negligence.[35] The North Dakota Supreme Court previously held in 2004, absent an action from a party that creates an unreasonably dangerous condition, that it would be unduly burdensome and unreasonable to hold such a party liable.[36] The Supreme Court addressed Papenhausen's argument that it had previously abrogated the natural accumulation rule, stating that the rule was not abandoned.[37] The court examined a string of cases beginning with *Makeeff v. City of Bismarck*, where it held there was an exception to the natural accumulation rule for stairs that are attached or adjacent to a building.[38] Following *Makeeff*, the court held in *Wotzka v. Minndakota Ltd. Partnership* that it was reasonable to anticipate that a slippery shower could cause harm as it is open and obvious–again this case did not disregard the natural accumulation rule.[39] When applying this rationale to rural areas, the Supreme Court confirmed the natural accumulation rule extends to rural or remote sites.[40] The North Dakota Supreme Court based this holding on the unreasonable nature of the expectation that landowners would monitor and maintain remote properties.[41] The Supreme Court emphasized that the burdensome nature of constantly clearing snow and ice in vast rural areas justifies the rule's application.[42] Therefore, liability is removed from the owner or operator so long as it results from naturally accumulating snow or ice.[43] The Supreme Court held the natural accumulation rule applied to this case, and answered affirmatively regarding the first certified question.[44]

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32. *Id.* ¶ 9.
33. *Id.* ¶ 10 (citing Gunville v. United States, 985 F. Supp. 2d 1101, 1108 (D.S.D. 2013)).
34. *Id.* ¶ 11 (quoting Fast v. State, 2004 ND 111, ¶ 12, 680 N.W.2d 265, 270).
35. *Id.* ¶ 9 (quoting Green v. Mid Dakota Clinic, 2004 ND 12, ¶ 8, 673 N.W.2d 257, 260).
36. *Id.* ¶ 11 (quoting *Fast*, 2004 ND 111, ¶ 12, 680 N.W.2d 265, 270).
37. *Id.* ¶ 12 (citing Makeeff v. City of Bismarck, 2005 ND 60, 693 N.W.2d 639).
38. *Id.* ¶ 14.
39. *Id.* ¶ 15 (citing Wotzka v. Minndakota Ltd. P'ship, 2013 ND 99, ¶ 16, 831 N.W.2d 722, 728).
40. *Id.* ¶ 17.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* ¶ 18.

The North Dakota Supreme Court then turned to the second question: whether an exception to the natural accumulation rule exists for concealed dangerous conditions.[45] Papenhausen argued the unreasonably dangerous condition was the result of negligent management of the site that was hidden but not caused by the ice and snow.[46] While affirming the rule's applicability, the court carved out an important exception.[47] It held that if snow and ice conceal a condition substantially more dangerous than what is normally associated with snow and ice, the natural accumulation rule does not preclude liability.[48] This decision aligns with the reasonableness standard, acknowledging landowners have a duty to address hazards that are not merely natural accumulations but are exacerbated by underlying dangerous conditions.[49] This exception draws from broader principles of premises liability, where landowners must ensure their property is reasonably safe.[50] As noted in *Wotzka*, the Supreme Court recognized that the presence of a substantially dangerous condition that is concealed, thereby increases the risk of harm, imposing a duty on the landowner to mitigate such risks.[51] The North Dakota Supreme Court completed its analysis by addressing *Mikula v. Tailors*, an Ohio Supreme Court case, as requested by the United States District Court for the District of North Dakota.[52] In *Mikula*, the Ohio Supreme Court held that a deep hole in a parking lot filled or covered by snow is a condition the property owner must know about through reasonable care, and the owner must recognize that snow covering such a hole presents a significantly more dangerous condition than typical snow hazards.[53] An invitee cannot be expected to foresee this concealed danger and thus cannot be required to protect themselves from it.[54]

In *Mikula*, the Ohio Supreme Court found that failure by the owner to address this condition constitutes actionable negligence.[55] There is also an exception to the natural accumulation rule in Ohio when a property owner has notice of the danger, or has superior knowledge of the existing danger, allows the owner to be found liable.[56] The North Dakota Supreme Court

45. *Id.* ¶ 19.
46. *Id.* ¶¶ 20-21.
47. *Id.* ¶ 25.
48. *Id.*
49. *Id.* ¶¶ 23-24.
50. *Id.* ¶ 30.
51. *Id.* ¶ 23 (quoting *Wotzka*, 2013 ND 99, ¶ 16, 831 N.W.2d 722, 728).
52. *Id.* ¶ 26 (citing Mikula v. Tailors, 763 N.E.2d 316 (Ohio 1970)).
53. *Id.* (quoting *Mikula*, 263 N.E.2d at 322).
54. *Id.* (quoting *Mikula*, 263 N.E.2d at 322).
55. *Id.* (quoting *Mikula*, 263 N.E.2d at 322).
56. *Id.* ¶ 28 (quoting Crossman v. Smith Clinic, 2010-Ohio-3552, ¶ 11).

ultimately stated that North Dakota need not adopt Ohio's exception, as concealment by snow is not covered within North Dakota's natural accumulation rule.[57] Instead, the concealment of snow or ice causes the focus to shift from openness to obviousness of the danger.[58] The North Dakota Supreme Court adopted the definition of "obvious" from the Second Restatement of Torts, that indicated "both the condition and risk are apparent to and would be recognized by a reasonable [person] exercising ordinary perception, intelligence, and judgment."[59] The Supreme Court explained that determining if a condition is "open and obvious" is typically a factual question for the trier of fact to decide unless only one conclusion is possible.[60] The North Dakota Supreme Court concluded by answering the second certified question in the negative, reasoning the concealment of an open and obvious danger by snow falls outside the scope of the natural accumulation rule.[61]

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57. *Id.* ¶ 30.
58. *Id.* ¶ 31.
59. *Id.* (quoting Restatement (Second) of Torts § 343A, Comment b (Am. L. Inst. 1965)).
60. *Id*. ¶ 32 (quoting Groleau v. Bjornson Oil Co., Inc., 2004 ND 55, ¶ 21, 676 N.W.2d 763, 770).
61. *Id.* ¶ 33.

NEGLIGENCE – INJURY TO INDEPENDENT CONTRACTOR

Schmidt v. Hess Corp.

In *Schmidt v. Hess Corp.*, the North Dakota Supreme Court analyzed whether Hess Corporation ("Hess") and Basin Safety ("Basin") owed William Schmidt ("Schmidt") a duty of care.[62] Hess and Basin sought summary judgment on Schmidt's negligence claim. Hess claimed it owed no duty of care to Schmidt because he was an independent contractor.[63] Basin also claimed it owed Schmidt no duty of care as it had no contractual agreement with Schmidt.[64] Schmidt argued that his independent contractor status was irrelevant due to the safety requirements Hess had in place on the job site.[65] Additionally, Schmidt argued Basin owed him a duty of care because Basin designed and installed the safety equipment that injured Schmidt.[66] The district court granted Basin and Hess summary judgment because Hess did not specify how to use the equipment and Basin did not provide training for the equipment or have control over the worksite.[67]

Schmidt was hired by Tesoro Logistics, a company providing crude oil hauling services.[68] In the agreement between Hess and Tesoro, it stated that Tesoro personnel were not considered agents or employees of Hess.[69] According to Schmidt, he was injured on a worksite owned and operated by Hess.[70] While on the worksite, Schmidt alleged he was required by Hess to use breathing air equipment that was installed on the worksite by Basin.[71] Schmidt alleged that he tripped and fell on the equipment, causing injuries to his arm and shoulder.[72] Schmidt asserted a general negligence claim against both parties, alleging they failed to:

> (1) provide Schmidt with a safe environment in which to work, equipped with safe respirator equipment;
>
> (2) ensure that all safety equipment was in proper working condition and ensuring that all safety measures and monitoring were

62. 2024 ND 72, 5 N.W.3d 787.
63. *Id*. ¶ 3.
64. *Id*.
65. *Id*.
66. *Id*.
67. *Id*. ¶ 6.
68. *Id*. ¶ 2.
69. *Id*.
70. *Id*.
71. *Id*.
72. *Id*.

> understood, available and utilized by all personnel employed by the defendants;
>
> (3) ensure the proper maintenance and training in the use of personal protective equipment as well as workers demonstrating proficiency in using PPE and in making sure on-site monitoring and detection systems were in use;
>
> (4) ensure that the Breathing Air system was designed, installed and procedures were in place that allowed workers to safely travel up and down the stairs;
>
> (5) ensure all tanks, lines, equipment, devices and objects were clear of hazardous materials; and
>
> (6) ensure all tanks, ladders, lines, equipment, devices and objects are up to industry standards and code.[73]

On appeal, the North Dakota Supreme Court reviews summary judgment de novo based on the entire record.[74] It will analyze the case to determine if there are genuine issues of material fact.[75] It will also review the evidence in the light most favorable to the nonmovant.[76] The Supreme Court believes summary judgment should "rarely . . . be granted in negligence cases."[77] However, whether a duty of care exists is a question of law to be determined by the court.[78]

The North Dakota Supreme Court stated that an employer is liable for injuries to an independent contractor caused by that contractor's negligence only if the employer has control over the worksite.[79] The employer is only liable if the injury occurs during an activity over which the employer has supervision or control.[80] An employer is not liable for an independent contractor's negligence if the employer has no supervision or control over the worksite.[81] The employer must have control over the "method, manner, and operative detail of the work" in such a way that the contractor is unable to freely do the work in the manner they wish.[82] The act of providing equipment

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73. *Id.*
74. *Id.* ¶ 5 (quoting Powell v. Statoil Oil & Gas LP, 2023 ND 235, ¶ 7, 999 N.W.2d 203, 206).
75. *Id.* (quoting *Powell*, 2023 ND 235, ¶ 7, 999 N.W.2d 203, 206).
76. *Id.* (quoting *Powell*, 2023 ND 235, ¶ 7, 999 N.W.2d 203, 206).
77. *Id.* ¶ 6 (quoting Doan v. City of Bismarck, 2001 ND 152, ¶ 9, 632 N.W.2d 815, 820).
78. *Id.* (citing *Doan*, 2001 ND 152, ¶ 12, 632 N.W.2d 815, 820).
79. *Id.* ¶ 8 (citing Madler v. McKenzie Cnty., 467 N.W.2d 709, 711 (N.D. 1991)).
80. *Id.* ¶ 9 (citing Devore v. Am. Eagle Energy Corp., 2020 ND 23, ¶ 14, 937 N.W.2d 503, 506).
81. *Id.* ¶ 8 (quoting Schlenk v. Northwestern Bell Telephone Co., Inc., 329 N.W.2d 605, 612 (N.D. 1983)).
82. *Id.* ¶ 9 (quoting Fleck v. ANG Coal Gasification Co., 522 N.W.2d 445, 448 (N.D. 1994)).

to a jobsite does not, itself, constitute control.[83] It is when the employer requires the equipment to be used a certain way that a duty of care arises.[84] The Supreme Court found there was a genuine dispute as to whether Hess retained control over the method, manner, and operation of the work.[85] Schmidt asserted that he used the handbook provided by Hess to understand how to use the equipment and followed the specified requirements.[86]

Although the district court determined Hess required the equipment but not its method of use, the North Dakota Supreme Court concluded this determination was in err.[87] Schmidt had evidence that Hess specified where equipment was and was not to be used, and the methods to fasten the equipment.[88] The Supreme Court therefore determined a material question of fact existed regarding the amount of control Hess had over the work site and equipment.[89]

Following this determination, the Supreme Court assessed Hess' argument that Schmidt's premise liability claim cannot be asserted by an independent contractor against an employer in North Dakota.[90] The North Dakota Supreme Court determined this argument was inapplicable because in the cases cited by Hess, the employer did not exercise any control over the worksite.[91] The Supreme Court noted that it has not expressly determined whether employers of an independent contractor are liable for injuries sustained under a premises liability theory.[92] Instead, the North Dakota Supreme Court determined there was insufficient evidence that Basin maintained any control over the workplace.[93] Therefore, the court reversed in part, finding a genuine issue of material fact regarding Hess's duty of care but affirmed in part that Basin Safety did not owe a duty of care.[94]

83. *Id.* ¶ 10.
84. *Id*. (quoting Kristianson v. Flying J Oil & Gas, 553 N.W.2d 186, 190 (N.D. 1996)).
85. *Id*. ¶ 12.
86. *Id*. ¶ 11.
87. *Id.* ¶ 12.
88. *Id*.
89. *Id*.
90. *Id*. ¶ 13.
91. *Id*. (citations omitted).
92. *Id*. ¶ 14.
93. *Id*. ¶ 21.
94. *Id.* ¶ 22.

WARRANTLESS HOME ENTRIES - HOT PURSUIT AND EXIGENT CIRCUMSTANCES

State v. Fuglesten

In *State v. Fuglesten*, the North Dakota Supreme Court addressed the issue of warrantless entry into a garage under the Fourth Amendment.[95] The main issue before the court was whether the officer's admission was justified under the exceptional circumstances provision.[96] On appeal to the Supreme Court, Fuglesten argued that "the entry [into his garage] . . . was not justified by hot pursuit and other exigent circumstances.[97] The North Dakota Supreme Court agreed, concluding the officer's entry without a warrant was not justified because the State failed to demonstrate the requisite exigent circumstances.[98] Consequently, the Supreme Court reversed the criminal judgment and remanded the case to allow Fuglesten to withdraw his guilty plea.[99]

The Defendant, Michael Fuglesten ("Fuglesten"), was charged with driving under the influence ("DUI") after law enforcement officers entered his garage without a warrant and arrested him.[100] The events began early one morning when a 911 caller reported a truck continuously driving by their house with loud music blaring.[101] An officer responded to the call, identified the vehicle as Fuglesten's, and noted Fuglesten's driver's license was suspended.[102] The officer parked in front of Fuglesten's house and observed the pickup truck driving into his garage.[103] Importantly, the officer did not attempt to conduct a traffic stop or initiate his overhead lights.[104] As the officer approached the garage on foot, he shined a spotlight inside and observed Fuglesten exiting the vehicle.[105] The officer asked Fuglesten "if he knew his license was suspended," to which Fuglesten responded affirmatively but claimed he did not drive.[106] The officer instructed Fuglesten to come over, but Fuglesten refused, stating he was in his house.[107] The officer entered the

95. 2024 ND 74, 5 N.W.3d 809.
96. *Id.* ¶ 1.
97. *Id.* ¶ 1.
98. *Id.*
99. *Id.*
100. *Id.* ¶¶ 2-5.
101. *Id.* ¶ 2.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* ¶ 3.
106. *Id.* ¶ 4.
107. *Id.*

garage, and told Fuglesten not to walk away.[108] Despite multiple requests for Fuglesten to step out of the garage, Fuglesten refused.[109] Eventually, Fuglesten was detained by another officer that entered the garage.[110]

Fuglesten filed a motion to suppress the evidence, arguing the officers unlawfully entered his residence without a warrant.[111] The State opposed the motion, and the district court denied it based on stipulated evidence, including a 911 recording and body camera footage from the arresting officer.[112] Fuglesten conditionally pled guilty to the DUI charge while reserving the right to appeal the suppression ruling.[113] The court examined whether the situation met the criteria for exigent circumstances and considered relevant precedent supporting warrantless entries under certain conditions, like risks of evidence destruction or threats to public safety. Finally, the court acknowledged the importance of balancing an individual's right to privacy against the needs of law enforcement to act swiftly in certain situations.[114]

On appeal, the North Dakota Supreme Court evaluated whether the warrantless entry was justified under the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution; both protect individuals against unreasonable searches and seizures.[115] "Fuglesten argue[d] exigent circumstances were required for officers to enter his garage without a warrant."[116] The Supreme Court began by referencing the standard of review for decisions on motions to suppress evidence.[117] It must defer to the district court's findings of fact and resolve conflicting testimony in favor of affirmance.[118] The decision to suppress evidence will be affirmed on appeal "if there is sufficient competent evidence . . . supporting the court's findings and the decision is not contrary to the manifest weight of the evidence."[119] However, the question of "whether law enforcement violated constitutional prohibitions against unreasonable search and seizure is a question of law."[120]

The North Dakota Supreme Court underscored the constitutional protections against unreasonable searches and seizures under the Fourth

108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* ¶ 5.
112. *Id.*
113. *Id.* ¶ 6.
114. *See id.* ¶¶ 9, 11.
115. *Id.* ¶ 9; *see also* U.S. CONST. amend. IV, § 8; N.D. CONST. art. I, § 8.
116. *Fuglesten*, 2024 ND 74, ¶ 11, 5 N.W.3d 809, 812.
117. *See id.* ¶ 8.
118. *Id.* (quoting State v. Krall, 2023 ND 8, ¶ 11, 984 N.W.2d 669, 673).
119. *Id.* (quoting *Krall*, 2023 ND 8, ¶ 11, 984 N.W.2d 669, 674).
120. *Id.* (quoting State v. Schmidt, 2016 ND 187, ¶ 8, 885 N.W.2d 65, 69).

Amendment of the United States Constitution and Article I Section 8, of the North Dakota Constitution.[121] "When an individual reasonably expects privacy in an area, the government . . . must obtain a search warrant unless the intrusion falls within a recognized exception to the warrant requirement."[122] Notably, individuals may have a reasonable expectation of privacy in their garages; this has been recognized in prior court decisions.[123] The Supreme Court also emphasized the consequences of a warrantless search when no exception exists.[124] Evidence discovered during such a search must be suppressed under the exclusionary rule.[125] In a motion to suppress, the burden initially falls on the person alleging a Fourth Amendment violation to establish a prima facie case of an illegal search or seizure.[126] However, once a prima facie case is established, the burden shifts to the State to justify its actions.[127] "Fuglesten argue[d] exigent circumstances were required for the officers[']" warrantless entry into his garage.[128] He also invoked the case of *Lange v. California*, that he contended abrogates the precedent set by *City of Bismarck v. Brekhus*.[129] *Brekhus* held that under certain circumstances, such as the immediate and continuous pursuit of a suspect, a warrantless entry into a garage could be justified.[130] However, *Lange* requires a specific finding of exigency on a case-by-case basis, dispelling the categorical approach to fleeing misdemeanors as exigent circumstances.[131]

The North Dakota Supreme Court then evaluated whether exigent circumstances existed in the present case.[132] The State argued such circumstances existed as officers had probable cause to believe Fuglesten committed the offense of driving under suspension and the potential destruction or dissipation of evidence related to driving under the influence of alcohol.[133] However, the Supreme Court found that evidence of exigent circumstances presented to the district court was lacking, as there was no indication

121. *Id.* ¶ 9.
122. *See id*. (quoting *Krall*, 2023 ND 8, ¶ 12, 984 N.W.2d 669, 674).
123. *Id*. (quoting City of Bismarck v. Brekhus, 2018 ND 84, ¶ 12, 908 N.W.2d 715, 719, *abrogated by* Lange v. California, 594 U.S. 295 (2021)).
124. *See generally id*. ¶ 10.
125. *Id*. (quoting State v. Williams, 2015 ND 103, ¶ 7, 862 N.W.2d 831, 833).
126. *Id.* (quoting State v. Steele, 2023 ND 220, ¶ 8, 997 N.W.2d 865, 868 (cleaned up)).
127. *Id.* (quoting *Steele*, 2023 ND 220, ¶ 8, 997 N.W.2d 865, 868).
128. *Id.* ¶ 11.
129. *Id.*; *see also Lange*, 594 U.S. 295 (2021); City of Bismarck v. Brekhus, 2018 ND 84, 908 N.W.2d 715, *abrogated by Lange*, 594 U.S. 295 (2021).
130. *Fuglesten*, 2024 ND 74, ¶ 12, 5 N.W.3d 809, 812 (citing *Brekhus*, 2018 ND 84, ¶ 27, 908 N.W.2d 715, 723).
131. *Id.* ¶ 13 (citing *Lange*, 594 U.S. at 308-09).
132. *Id.* ¶ 16.
133. *Id.* ¶¶ 17-18.

Fuglesten posed an imminent threat of violence or escape from the home.[134] Additionally, the Supreme Court noted the record did not show law enforcement lacked time to secure a warrant.[135] In sum, the North Dakota Supreme Court's detailed analysis outlines the legal standards governing warrantless searches, the constitutional protections against unreasonable searches and seizures, and the specific requirements for establishing exigent circumstances.[136] Ultimately, the court held the warrantless entry into Fuglesten's garage lacked exigent circumstances, rendering it illegal.[137] The North Dakota Supreme Court reversed and remanded Fuglesten's criminal judgment to provide him the opportunity to withdraw his guilty plea.[138]

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134. *Id*. ¶¶ 19-20.
135. *Id.* ¶ 20.
136. *See generally id*.
137. *Id.* ¶ 20.
138. *Id.* ¶ 21.

CRIMINAL LAW - ISSUANCE OF SUPERVISORY WRIT TO PREVENT RISK ASSESSMENT IN ABSENCE OF CONVICTION

State v. Thornton

In *State v. Thornton*, the North Dakota Supreme Court determined that the district court erroneously instructed the Department of Health and Human Services ("Department") and Dr. Hein-Kolo to perform a pre-plea risk assessment for the defendant in a criminal case.[139] Consequently, the Court exercised its supervisory jurisdiction and directed the district court to vacate the contempt order against the Department and Dr. Hein-Kolo.[140]

The dispute arose following the plea agreement between the State and Michael Brenum ("Defendant") in a criminal case.[141] The State agreed to recommend a sentence not exceeding the one specified in the Pre-Sentence Investigation ("PSI").[142] Nevertheless, the district court ordered Dr. Hein to conduct a risk assessment of the defendant based on the pre-plea PSI, that encompassed "the change of plea and sentencing hearing."[143] The Department and Dr. Hein-Kolo refused to conduct the risk assessment, reasoning the statute specifies it should only take place after the conviction.[144]

In response to the district court's order to appear and show cause for the Department's inability to conduct the risk assessment, the Department emphasized its exclusive authority to carry out the assessment.[145] It also noted that conducting the assessment prior to conviction would violate assessment guidelines.[146] However, the court concluded that it was within its authority to request a PSI prior to a plea and found the Department and Dr. Hein-Kolo in contempt for failing to complete the required risk assessment.[147]

The Department and Dr. Hein-Kolo petitioned the North Dakota Supreme Court to issue a supervisory writ because the issue was "not appealable and no adequate alternative remedy exists."[148] The North Dakota Supreme Court exercised its original jurisdiction and issued on its discretion the

139. 2024 ND 54, ¶¶ 1-2, 5 N.W.3d 547, 548–49.
140. *Id.* ¶ 1.
141. *Id.* ¶ 2.
142. *Id.*
143. *Id.*
144. *Id.* ¶¶ 3, 9.
145. *Id.* ¶ 4.
146. *Id.*
147. *Id.*
148. *Id.* ¶ 5.

"supervisory writ[] rarely and cautiously . . . to rectify errors and prevent injustice . . . when no adequate alternative remedy exists."[149]

Risk assessment is the "initial phase" conducted by a qualified probation and parole officer to determine the likelihood of a person committing a similar offense in the future.[150] Following this initial phase, the Department of Health and Human Services must carry out the second process, that involves a "clinical interview, psychological testing, and verification through collateral information or psychophysiological testing, or both."[151] The Department is authorized by statute to approve conducting the second step of a risk assessment on an individual who has committed an offense.[152] To undergo a risk assessment, an individual must be convicted of the alleged crime; a mere charge does not determine guilt under the notion of presumption of innocence.[153] Therefore, a risk assessment of an individual committing an offense must follow only after adjudication through trial or an accepted guilty plea.[154]

The North Dakota Supreme Court held that the district court exceeded its authority by ordering the presentence investigation and mandating the Department conduct the second risk assessment process.[155] This decision was based on the interpretation that the term "committed an offense" carries substantive requirements within the context of the risk assessment process and cannot be superseded by the provision in Rule 32 that permits a PSI.[156] While the district court has discretion to order a PSI at any point, it is required to adhere to the "approved process" or wait until the substantive requirements are satisfied before compelling the Department to conduct the risk assessment.[157] Furthermore, the North Dakota Supreme Court granted a supervisory writ and vacated the district court's decision because the Department did not have an "adequate alternative remedy" as the Department and Dr. Hein-Kolo were held in a non-appealable contempt order by refusing to perform a risk assessment.[158]

Justice Bahr dissented from the majority's decision to issue a supervisory writ to the Department reasoning an adequate alternative remedy

149. *Id.* ¶ 6 (quoting Dep't of Hum. Servs. v. Schmidt, 2021 ND 137, ¶ 6, 962 N.W.2d 612, 615); *see also* N.D. CONST. art. VI, § 2; N.D. CENT. CODE § 27-02-04 (2023).

150. *Id.* ¶ 10 (citing N.D. CENT. CODE § 12.1-01-04(27)).

151. *Id.* (quoting N.D. CENT. CODE § 12.1-01-04(27)).

152. *Id.* (citing *Dep't of Hum. Servs.*, 2021 ND 137, ¶ 6, 962 N.W.2d 612, 615).

153. *Id.* ¶ 11 (citing N.D. CENT. CODE § 12.1-01-03(1)).

154. *Id.*

155. *Id.* ¶¶ 12-13.

156. *Id.* ¶ 13; *see also* N.D.R. Crim. P. 32(c)(1) ("The court may order a presentence investigation and report at any time.").

157. *Id.* (citing *Dep't Hum. Servs*., 2021 ND 137, ¶ 10, 962 N.W.2d 612, 615).

158. *Id.* ¶ 14.

existed.[159] Justice Bahr emphasized that the Supreme Court issues supervisory writs "'rarely and cautiously' . . . only in cases . . . 'where justice is threatened and no other remedy is adequate or allowed by law.'"[160] Since the Department promptly appealed, there was "an adequate alternative remedy to a supervisory writ" to review both the order to conduct a pre-plea risk assessment and the contempt order on appeal.[161] The cases referenced by the majority involved the issuance of supervisory writs for non-appealable orders to safeguard petitioners from disclosing privileged and protected confidential information.[162] In contrast, in this instance, the court issued the supervisory order for an appealable contempt order.[163] Furthermore, it was emphasized that the restriction on the State's appeal in criminal cases under Section 29-28-07 of the North Dakota Criminal Code did not apply, as both orders were being appealed by the Department, not the State.[164] Lastly, Bahr stated that expediency alone does not constitute sufficient grounds for the issuance of a supervisory writ.[165]

159. *Id.* ¶ 19 (Bahr, J., dissenting).

160. *Id.* (quoting *Dep't of Human Servs.*, 2021 ND 137, ¶ 6, 962 N.W.2d 612, 615; Grand Forks Herald v. Dist. Ct., 322 N.W.2d 850, 852 (N.D. 1982)).

161. *Id.* ¶¶ 20-21 (Bahr, J., dissenting), ¶ 20 (quoting N.D. CENT. CODE § 27-10-01.3(3) (1999) ("An Appeal may be taken to the supreme court from any order or judgment finding a person guilty of contempt. An order or judgment finding a person guilty of contempt is a final order or judgment for purposes of appeal."), ¶ 21 (quoting Peterson v. Schulz, 2017 ND 155, ¶ 10, 896 N.W.2d 916, 920) ("[M]ost non-appealable intermediate orders may be reviewed on an appeal from the final judgment or other final appealable order.").

162. *Id.* ¶ 22.

163. *Id.* ¶ 23.

164. *Id.* ¶ 24.

165. *Id.* ¶ 26.

WILL CONTEST – JUDGMENT ON MULTIPLE CLAIMS

In re Estate of Kish

In *In re Estate of Kish*, the North Dakota Supreme Court assessed whether the district court erred as a matter of law in invalidating two deeds executed by Susan Kish ("Susan").[166] The personal representative of Susan's Estate appealed an order partially granting summary judgment issued by the district court against the Estate.[167] The dispute originated from a 2015 will Susan made leaving the house to her then-husband, Michael Kish ("Michael").[168] At that time, Michael and Susan owned the house as joint tenants."[169] Later, Susan revoked the 2015 will and replaced it with a new will in 2020 that "executed a quit claim deed and a transfer on death deed intended to create a tenancy in common and leave [Susan's] share in the homestead to her children."[170] After Susan died, Michael contested the will executed in 2020, stating that it was "invalid because of lack of capacity, undue influence, and tortious interference with inheritance. Michael . . . moved for summary judgment, arguing the home and vehicles were held under a joint tenancy" and belong to him.[171]

The district court granted Michael's motion for partial summary judgment after finding both deeds invalid.[172] However, the district court denied his motion indicating the vehicles were owned under a joint tenancy as a matter of law.[173] The Estate's personal representative appealed the district court's order granting partial summary judgment to the North Dakota Supreme Court.[174] Before considering the merits of the appeal, the court had to establish jurisdiction.[175] The North Dakota Supreme Court explained there are two requirements for it to have appellate jurisdiction.[176] First, the order being appealed "must meet [the] statutory criteria for applicability."[177] Second, the court "generally will not consider an appeal of an order adjudicating

166. 2024 ND 76, ¶ 1, 5 N.W.3d 814, 816-17.
167. *Id.*
168. *Id.* ¶ 2.
169. *Id.*
170. *Id.*
171. *Id.* ¶ 3.
172. *Id.* ¶ 4.
173. *Id.*
174. *Id.*
175. *Id.* ¶ 5 (citing *In re* Estate of Lindberg, 2024 ND 10, ¶ 6, 2 N.W.3d 220, 222).
176. *Id.* ¶ 6 (citing *In re* Estate of Ketterling, 2016 ND 190, ¶ 8, 885 N.W.2d 85, 87).
177. *Id.* (citing *In re* Estate of Ketterling, 2016 ND 190, ¶ 8, 885 N.W.2d 85, 87).

fewer than all claims or parties unless the requirements of N.D.R.Civ.P 54(b) are satisfied."[178]

The right to appeal a probate matter is governed by Section 28-27-02 of the North Dakota Century Code.[179] The Estate's personal representative argued the order was appealable under Sections 28-27-02(1) and (5).[180] In this unsupervised probate, "each proceeding before the court is independent of any other proceeding involving the same estate."[181] If the order as it related to the matter addressed is deemed final, it can still be appealed even where there are pending claims.[182] Appeal is permissible from an "order which involves the merits of an action or some part thereof."[183]

The North Dakota Supreme Court ultimately concluded the district court's order involves the merits of the action because "the order appears intended to be final in concluding the two deeds are invalid, and it resolves the homestead was owned jointly by Michael and Susan."[184] After determining it had jurisdiction to hear the appeal, the court queried whether the requirements of Rule 54(b) of the North Dakota Rules of Civil Procedure were satisfied.[185]

Rule 54(b) enforces the doctrine of piecemeal appeals.[186] The rule's purpose is to "'avoid injustice caused by unnecessary delay in adjudicating the separate claims' caused by piecemeal litigation."[187] For Rule 54 to operate as intended, the district court must make the initial determination to discover there is no reason for delay.[188] North Dakota precedent shows that courts lack

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178. *Id.* (emphasis added).

179. *Id.* ¶ 7.

180. *Id.* (A district court order may be brought to the Supreme Court if it is "(1) 'an order affecting a substantial right made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken' or (5) 'an order which involves the merits of an action or some part thereof.'") (quoting N.D. CENT CODE § 28-27-02(a)(1), (5)).

181. *Id.* ¶ 8 (quoting N.D. CENT. CODE § 30.1-1-07).

182. *Id.*

183. *Id.* ¶ 9 (quoting N.D. CENT. CODE § 28-27-02(5)).

184. *Id.*

185. *Id.* ¶ 10.

186. *Id.* ¶ 11 (citing City of West Fargo v. McAllister, 2021 ND 136, ¶ 7, 962 N.W.2d 591, 593).

187. *Id.* (citing Gast Constr. Co. v. Brighton P'ship, 422 N.W.2d 389, 390-91 (N.D. 1988); *see also* Berg v. Kremers, 154 N.W.2d 911, 913 (N.D. 1967) ("The rule discourages piecemeal disposal of multiple-claim litigation and permits appeals only from judgments determining all claims, except where the trial court for cogent reasons has expressly determined that there is no just reason for delay and expressly directs entry of judgment as to one of more but fewer than all the claims. The provisions of the rule are not only for the benefit of the litigants but also for the protection of the court against multiple appeals in a single action. The rule allows a certain amount of flexibility to the trial court in disposing of complicated multiple-claim litigation. It does not negate the right to appeal but whether an appeal from a piecemeal adjudication must wait final disposition is left to the district court's discretion.").

188. *Id.* ¶ 12.

appellate jurisdiction when "an appellant fails to obtain N.D.R.Civ.P. 54(b) certification when required."[189] Here, the North Dakota Supreme Court determined that since the parties did not seek Rule 54(b) certification, and the district court failed to refer to the Rule 54 or even consider the factors governing certification, it would be most appropriate for the district court to consider the issue in the first instance.[190]

The North Dakota Supreme Court indicated it historically exerts its authority to dismiss appeals that do not comply with the court rules; however, the rules do not extend or limit the appellate jurisdiction of the Supreme Court.[191] Following this analysis, the North Dakota Supreme Court remanded under Rule 35(a)(3)(B) of the North Dakota Rules of Appellate Procedure for the district court to determine whether Rule 54(b) certification was appropriate.[192]

189. *Id.* ¶ 14 (citations omitted).
190. *Id.* ¶ 12 (citing *McAllister*, 2021 ND 136, ¶ 8, 962 N.W.2d 591, 593).
191. *See id.* ¶ 15 (citations omitted).
192. *Id.* ¶ 16.

COSTS AND FEES – PREVAILING PARTY ENTITLED TO COSTS UNDIMINISHED BY HIS FAULT

Harris v. Oasis

In *Harris v. Oasis*, the North Dakota Supreme Court addressed the issues surrounding the determination of a prevailing party and the appropriate allocation of costs and disbursements in a negligence case.[193] This case arose from an explosion on an oil rig, which led to substantial injuries for Kyle Harris ("Harris").[194] The district court identified Harris as the prevailing party, and awarded him substantial costs and disbursements.[195] Oasis Petroleum, Inc. ("Oasis") appealed the district court's second amended judgment and order denying its motion to alter or amend the judgment.[196] In a unanimous decision written by Justice McEvers, the Supreme Court affirmed the district court's second amended judgment and order.[197]

The case began with the explosion of an oil rig operated by Oasis; Harris was employed by Frontier Pressure Testing, LLC ("Frontier").[198] Harris alleged he was injured in the November 2011 explosion.[199] Harris initiated the case against Oasis and several other parties, including Frontier, in 2015, asserting claims of negligence, gross negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress.[200] After dismissing the other parties from the action following its motion for summary judgment, the district court proceeded with the case against Oasis.[201] The 2022 jury trial resulted in a special verdict finding Oasis, Frontier, and Harris at fault and a proximate cause of the injuries sustained by Harris in the explosion.[202] The jury apportioned the fault of 15% to Oasis, 65% to Frontier, and 20% to Harris.[203] The jury awarded Harris damages with interest.[204] In July 2022, the district court issued an order for judgment, that applied Section 32-03.2-02 of the North Dakota Century Code, that led to a reduction of 85% of the total damages attributable to Frontier and Harris.[205] Harris then sought

193. 2024 ND 85, ¶¶ 1-2, 6 N.W.3d 611, 613.
194. *Id.* ¶ 2.
195. *Id.* ¶ 6.
196. *Id.* ¶ 7.
197. *Id.* ¶ 1.
198. *Id.* ¶ 2.
199. *Id.*
200. *Id.*
201. *Id.* ¶¶ 2, 4.
202. *Id.* ¶ 3.
203. *Id.*
204. *Id.*
205. *Id.* ¶ 4.

costs and disbursements as the prevailing party under special verdict, citing Section 28-26-06 of the North Dakota Century Code and Rule 54(e) of the North Dakota Rules of Civil Procedure.[206] Despite Oasis's objections to Harris's statement of costs and disbursements, the district court awarded Harris substantial costs and disbursements as the prevailing party. It relied on *Keller v. Vermeer Manufacturing Co.* in its decision, that held the prevailing party is entitled to costs and disbursements that are not diminished by the percentage of attributable negligence.[207] The court later entered a second amended judgment in Harris's favor, requiring a total amount of over one million dollars to be paid by Oasis.[208] Following the judgment, Oasis filed a motion with the district court to alter or amend the judgment citing Rule 59(j) of the North Dakota Rules of Civil Procedure.[209] Oasis argued that because Harris was found in the special verdict to be a more liable for his injuries than Oasis was individually, Harris should not be considered the prevailing party.[210] The district court denied the motion, and in October 2023, entered final judgment in favor of Harris.[211]

The Supreme Court first addressed the issue of whether the district court erred as a matter of law in finding Harris to be the prevailing party.[212] Its analysis focused on the interpretation of "prevailing party" under Section 28-26-06 of the North Dakota Century Code and the application of comparative fault principles under Section 32-03.2-02.[213] The North Dakota Supreme Court agreed with Oasis on several points of law. For instance, in a tort action, a party must be successful on its claims of negligence and proximate cause if the party is to be found the prevailing party.[214] The Supreme Court also agreed there can be occasions where there is no single prevailing party when more than one party prevails on some issues.[215] The North Dakota Supreme Court distinguished the instant case from *WFND*, finding Oasis did not prevail on a single claim at the district court level, whereas both parties in *WFND* prevailed on some claims.[216] It went on to reaffirm the precedent set in *Keller*.[217] The Supreme Court expanded on the prior analysis,

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206. *Id.* ¶ 5.
207. *Id.* ¶ 6; *see also* Keller v. Vermeer Mfg. Co., 360 N.W.2d 502, 509 (N.D. 1984).
208. *Harris*, 2024 ND 85, ¶ 6, 6 N.W.3d 611, 614.
209. *Id.* ¶ 7.
210. *Id.*
211. *Id.*
212. *Id.* ¶ 9.
213. *See id.* ¶¶ 9-18; *see also* N.D. CENT. CODE §§ 28-26-06, 32-03.2-02.
214. *Harris,* 2024 ND 85, ¶ 14, 6 N.W.3d 611, 615 (quoting Braunberger v. Interstate Eng'g, Inc., 2000 ND 45, ¶ 14, 607 N.W.2d 904, 908-09).
215. *Id.* (quoting WFND, LLC v. Fargo Marc, LLC, 2007 ND 67, ¶ 49, 730 N.W.2d 841, 858).
216. *Id.*
217. *Id.* ¶ 18.

explaining the modification of North Dakota's comparative fault statute following *Keller*, only eliminated the ability to recover damages for joint and several liability when more than one party is found to be at fault, but did not create a requirement that courts reduce awarded damages based on the parties' attributable fault.[218]

The Supreme Court emphasized the determination of a prevailing party is based on success on the merits of the main issue, not the percentage of fault or the amount of damages awarded.[219] The jury's finding that Oasis was at fault and a proximate cause of Harris's injuries, even if only 15%, established Harris as the prevailing party.[220] The North Dakota Supreme Court concluded the district court did not err as a matter of law when it found Harris to be the prevailing party and did not abuse its discretion to deny Oasis' motion.[221]

Finally, the North Dakota Supreme Court turned to the second question: whether the district court erred in its award of costs and disbursements that were not allocated in accordance with the percentage of fault attributed to Oasis.[222] The Supreme Court recognized that Oasis relied on *Kavadas v. Lorenzen*, a case where multiple defendants were found to be responsible for the plaintiffs' awards jointly and severally, and the court held that a district court had the discretion to award costs and disbursements based on the fault of each defendant.[223] Ultimately, the North Dakota Supreme Court was unpersuaded by Oasis' use of *Kavadas* noting it does not require a district court to reduce the costs awarded to the prevailing party based on the percentage of fault attributable, only giving the district court the discretion to do so among multiple defendants.[224] The Supreme Court asserted that *Kavadas* did not overrule *Keller*.[225] The North Dakota Supreme Court concluded that the district court did not abuse its discretion by accepting Harris's statement of costs and disbursements as the prevailing party.[226] Thus, the judgment and order of the district court were affirmed by Chief Justice Jensen, Justices Crothers, McEvers, Tufte, and Bahr.[227]

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218. *Id.*

219. *Id.* ("The main issue in the litigation was whether Oasis was negligent and a proximate cause of Harris's injuries. Oasis failed to successfully defend the merits of the main issue because the jury found Oasis was at fault for and a proximate cause of Harris's injuries . . . .").

220. *Id.*

221. *Id.*

222. *Id.* ¶ 19.

223. *Id.* ¶¶ 21-22; *see also* Kavadas v. Lorenzen, 448 N.W.2d 219, 224-25 (N.D. 1989).

224. *Harris*, 2024 ND 85, ¶¶ 21-22, 6 N.W.3d 611, 618.

225. *Id.* ¶ 23.

226. *Id.* ¶ 24.

227. *Id.* ¶¶ 25-26.