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North Dakota Supreme Court Review

North Dakota Law Review Associate Editors

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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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ARBITRATION CLAUSES – DIFFERENCES IN PARTNERSHIP AGREEMENTS AND OPERATING AGREEMENTS

Kramlich v. Hale

In *Kramlich v. Hale*,¹ both parties, Gary and Glory Kramlich and Robert and Susan Hale, appealed an order to submit their disputes to arbitration from the district court.² The North Dakota Supreme Court determined that arbitration was in error where one contract between the parties did not explicitly approve for arbitration, even though a related contract provided for binding arbitration, if the arbitration provision applies only to issues arising from the one contract.³

In Minot, North Dakota, Somerset–Minot, LLC operated an assisted living facility, which was owned by Somerset Court Partnership.⁴ The Kramlichs and the Hales were members of that partnership.⁵ Gary Kramlich and Robert Hale were members of that Limited Liability Corporation (“LLC”), but Glory Kramlich and Susan Hale were not members.⁶ The operating agreement for the LLC contained an arbitration clause, but the partnership agreement for the partnership did not.⁷

Several issues arose between the Hales and the Kramlichs, coming from both the partnership agreement and the operating agreement. Beginning with the Hales’ attempt to buy the Kramlichs’ interest in both Somerset–Minot, LLC and Somerset Court Partnership.⁸ Thereafter, the Kramlichs denied the offers and brought this action.⁹ The Kramlichs brought the lawsuit against the Hales, the partnership, the LLC, and other entities, who were not parties to this appeal.¹⁰ The Kramlichs’ complaint alleged breach of contract, fraud and misrepresentation, “attempt at purchase,” embezzlement and fraud, “failure of equal distribution,” “misrepresentation in corporate documents,” among other claims.¹¹

Based on the broad arbitration provision in the LLC operating agreement, Ward County District Judge, Douglas L. Mattson, dismissed the ac-

1. 2017 ND 204, 901 N.W.2d 72.

2. *Kramlich*, ¶ 1, 901 N.W.2d at 74.

3. *Id.* ¶ 14, 901 N.W.2d at 78.

4. *Id.* ¶ 2, 901 N.W.2d at 74.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Kramlich*, ¶ 3, 901 N.W.2d at 74.

9. *Id.*

10. *Id.*

11. *Id.*

tion and ordered the parties to submit their disputes to arbitration.¹² The district court found that the complaint was not clear.¹³ The plaintiffs did not clearly identify which defendant had violated which claim.¹⁴ Furthermore, Judge Mattson found that the arbitration provision as binding because of North Dakota's strong policy of favoring the arbitration process.¹⁵ Accordingly, Judge Mattson held that arbitration was appropriate to sort out the issues that arose from both the LLC and the partnership.¹⁶

This case presented an issue of first impression for the North Dakota Supreme Court; namely, "whether an arbitration clause in one agreement may be applied to disputes arising under another agreement that lacks an arbitration clause" ¹⁷ On appeal, the Kramlichs argued that because the partnership agreement did not contain an arbitration provision, the law did not support the district court's determination that arbitration was appropriate for issues arising from the partnership agreement.¹⁸ The Court noted that several jurisdictions already had an answer for the question the Court was answering: Colorado,¹⁹ Florida,²⁰ Kansas,²¹ New Mexico,²² Oklahoma,²³ the Second Circuit,²⁴ the Tenth Circuit,²⁵ the Eleventh Circuit,²⁶ and a treatise pointing the court to conclude that in this instance, the arbitration provision applies to issues arising out of both related agreements.²⁷ However, the North Dakota Supreme Court recognized that North Dakota already had the foundation to answer such an issue.²⁸ The Court recognized

12. *Id.* ¶ 4. The operating agreement stated that "Any dispute, claim, or controversy arising out of or relating to this agreement or the breach thereof shall be settled by arbitration in accordance with the then current rules of the American Arbitration Association." *Id.*

13. *Id.* ¶ 5, 901 N.W.2d at 75.

14. *Kramlich*, ¶ 5, 901 N.W.2d at 75.

15. *Id.*

16. *Id.*

17. *Id.* ¶ 8.

18. *Id.* ¶ 6.

19. *Breaker v. Corrosion Control Corp.*, 23 P.3d 1278, 1281 (Colo. Ct. App. 2001).

20. *Teel v. Aaron's, Inc.*, No. 3:14-cv-640-J-32PDB, 2015 WL 1346846, at *5 (Dist. Ct. M.D. Fla. Mar. 24, 2015).

21. *Consol. Brokers Ins. Servs., Inc. v. Pan-Am. Assurance Co., Inc.*, 427 F. Supp. 2d 1074, 1083 (D. Kan. 2006).

22. *Santa Fe Tech., Inc. v. Argus Networks, Inc.*, 131 N.M. 772, 42 P.3d 1221 (N.M. Ct. App. 2001).

23. *Wilkinson v. Dean Witter Reynolds, Inc.*, 933 P.2d 878, 879 (Okla. 1997).

24. *Assoc. Brick Mason Contractors of Greater New York, Inc. v. Harrington*, 820 F.2d 31, 35-36 (2d Cir. 1987).

25. *ARW Expl. Corp. v. Aguirre*, 45 F.3d 1455, 1458 (10th Cir. 1995).

26. *Blinco v. Green Tree Serv., LLC*, 400 F.3d 1308, 1310 (11th Cir. 2005); *Seaboard Coast Line R.R. Co. v. Trailer Train Co.*, 690 F.2d 1343, 1345, 1350 (11th Cir. 1982).

27. 4 THOMAS H. OEHMKE, *COMMERCIAL ARBITRATION* § 140:3 (3d ed. 2016).

28. *Kramlich*, ¶ 13, 901 N.W.2d at 77 (citing *26th Street Hosp., LLP v. Real Builders, Inc.*, 2016 ND 95, ¶ 27, 879 N.W.2d 437, 447) ("Background principles of state contract law control

that North Dakota law acknowledged “a strong state and federal policy favoring the arbitration process, and . . . resolve[s] any doubts concerning the scope of arbitrable issues in favor of arbitration when there is a broad arbitration clause and no limitations or exclusions.”²⁹

Even though the North Dakota Supreme Court agreed with Judge Mattson that the issues arising out of the partnership agreement and the operating agreement were interrelated, the Court placed more emphasis on the “this agreement” language of the operating agreement than the district court.³⁰ The Court’s reasoning was distinguishable from the broad provision in *26th Street Hosp., LLP v. Real Builders, Inc.*³¹ because even though the Somerset–Minot, LLC operating agreement was found to be broad by the district court, the plain meaning did not support expanding its language to encompass other contracts.³² Furthermore, the Somerset Court Partnership agreement was executed almost fourteen months after the operating agreement was executed.³³ Therefore, there was no argument that could be sustained claiming that the two contracts arose from the same agreement.³⁴ Finally, Glory Kramlich and Susan Hale were not parties to the operating agreement, but were parties to the partnership agreement.³⁵ Therefore, the parties to each contract were not identical and did not support a finding that the arbitration provision should be binding on individuals who did not agree to be bound by such a provision.³⁶ Accordingly, the North Dakota Supreme Court held that the district court erred as a matter of law when it ordered arbitration of the issues arising from the partnership agreement.³⁷

The North Dakota Supreme Court also addressed the issue of which law applied to the arbitration provision.³⁸ North Dakota usually allows for the judiciary to decide whether an issue is one for arbitration.³⁹ In this case, however, the operating agreement required arbitration to be conducted un-

the interpretation of the scope of an arbitration agreement, including who is bound by the agreement.”).

29. *Id.* (quoting *Real Builders*, ¶ 21, 879 N.W.2d 437); see also *Schwarz v. Gierke*, 2010 ND 166, ¶ 11, 788 N.W.2d 302, 306.

30. *Kramlich*, ¶ 14, 901 N.W.2d at 77 (the operating agreement stated that the arbitration provision applied to “[a]ny dispute, claim, or controversy arising out of or relating to *this agreement* or the breach thereof.” (Emphasis added.)).

31. 2016 ND 95, 879 N.W.2d 437.

32. *Kramlich*, ¶ 14, 901 N.W.2d at 78.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Kramlich*, ¶ 15, 901 N.W.2d at 78.

39. *Id.* (citing *Real Builders*, ¶ 23, 879 N.W.2d 437; *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 154 L.Ed.2d 491 (2002)).

der the rules of the American Arbitration Association.⁴⁰ The rules of the American Arbitration Association stated that the arbitrator had the authority to rule on such matters.⁴¹ Therefore, instead of the district judge deciding which issues were appropriate for arbitration, that determination was for the arbitrator to decide.⁴² After the arbitrator determines which issues arose from the operating agreement, the district court will decide the remaining issues.⁴³

The Kramlichs also argued that by ordering arbitration, the district court violated their right to a jury trial.⁴⁴ However, in North Dakota, an individual can waive her right to a jury trial.⁴⁵ By signing the operating agreement, Gary Kramlich waived his right to a jury trial, and Glory Kramlich waived her right to a jury trial by pursuing a claim under her husband's rights granted by the operating agreement.⁴⁶ Therefore, the Kramlichs' argument regarding their right to a jury trial was without merit.⁴⁷

In their cross-appeal, the Hales argued that the district court should have dismissed the lawsuit as moot because the Hales withdrew the offer to buy the Kramlichs' interest in the partnership and in the LLC.⁴⁸ Even though the general rule is that courts may adjudicate actual controversies before a court, no actual controversy exists if the issue has become moot.⁴⁹ In this case, the alleged causes of action were broad enough to survive the withdrawal of the offer.⁵⁰ Accordingly, the lawsuit was not moot.⁵¹

The North Dakota Supreme Court affirmed the district court where the district court ordered arbitration of the issues that arose from the Somerset–Minot, LLC's operating agreement, but reversed the district court's order for arbitration of the issues that arose from the Somerset Court Partnership agreement.⁵² Therefore, the North Dakota Supreme Court remanded the

40. *Id.*

41. *Id.* (quoting *Real Builders*, at ¶ 24).

42. *Id.*

43. *Id.* ¶ 16 (citing *Real Builders*, ¶¶ 5–6, 879 N.W.2d 437 (affirming stay of “anything that cannot be arbitrated . . . pending the ordered arbitration.”)).

44. *Kramlich*, ¶ 18, 901 N.W.2d at 78.

45. *Id.* ¶ 19; *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n, Inc.*, 384 F.3d 157, 164 (4th Cir. 2004) (“A party may, of course, waive the jury trial right by signing an agreement to arbitrate or by binding itself to arbitration as a nonsignatory through traditional principles of contract or agency law.”); *see also* Uniform Arbitration Act (2000) § 6 cmt. 7, 7 U.L.A. 30 (2009).

46. *Kramlich*, ¶ 19, 901 N.W.2d at 78.

47. *Id.*

48. *Id.* ¶ 20, 901 N.W.2d at 79.

49. *Id.* ¶ 21 (citing *Interest of W.O.*, 2004 ND 8, ¶ 10, 673 N.W.2d 264).

50. *Id.*

51. *Id.*

52. *Kramlich*, ¶ 22, 901 N.W.2d at 79.

case to the district court.⁵³ The North Dakota Supreme Court instructed the district court to wait until the arbitrator determined which issues arose from the operating agreement, and are therefore arbitrable, and which issues arose from the partnership agreement, and are not arbitrable.⁵⁴ The district court could then resolve the remaining issues.⁵⁵

53. *Id.* (citing *Real Builders*, ¶¶ 5–6, 879 N.W.2d 437; *Breaker*, 23 P.3d at 1286).

54. *Id.*

55. *Id.*

CONTRACTS— FORUM SELECTION CLAUSES & NON-COMPETE AGREEMENTS

Osborne v. Brown & Saenger, Inc.

In *Osborne v. Brown & Saenger, Inc.*,⁵⁶ Dawn Osborne (Osborne) appealed from a district court order granting Brown & Saenger, Inc.’s (Brown) motion to dismiss for improper venue.⁵⁷ The North Dakota Supreme Court reversed and remanded, holding that the forum-selection clause in the parties’ employment agreement violated North Dakota’s public policy against non-compete agreements, and held the non-compete clause unenforceable to the extent it limits Osborne from exercising a lawful business in North Dakota.⁵⁸

Brown is headquartered in South Dakota and operates as a foreign business corporation in North Dakota.⁵⁹ In 2011, Brown hired Osborne as a sales representative to sell office supplies to businesses.⁶⁰ Osborne signed yearly employment contracts with Brown,⁶¹ and in January 2017, Brown terminated Osborne.⁶²

Osborne sued Brown, “alleging retaliation, improper deductions, and breach of contract.”⁶³ Additionally, Osborne sought a declaratory judgment declaring the non-compete clause void and moved for a preliminary injunction to prevent Brown from enforcing the non-compete clause against her.⁶⁴ Brown moved to dismiss the action for improper venue arguing the forum-selection clause in the employment agreement was valid, thus, making a North Dakota court an improper venue.⁶⁵ The parties agreed Osborne’s 2015 Employment Agreement was the controlling contract in this action.⁶⁶

The district court agreed with Brown and granted the motion to dismiss, without ruling on the motion for preliminary injunction.⁶⁷ In addition to the present claim in North Dakota, Brown filed suit against Osborne in

56. 2017 ND 288, 904 N.W.2d 34.

57. *Id.* ¶ 1, 904 N.W.2d at 35.

58. *Id.*

59. *Id.* ¶ 2.

60. *Id.*

61. *Id.*

62. *Osborne*, ¶ 4, 904 N.W.2d at 36.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* ¶ 2, 904 N.W.2d at 35.

67. *Id.* ¶ 4, 904 N.W.2d at 36.

Minnehaha County, South Dakota, seeking a preliminary injunction to restrict Osborne's actions under the non-compete clause.⁶⁸

There are two clauses at issue in deciding Brown's motion to dismiss – the non-compete clause and the choice of forum clause.⁶⁹ The non-compete clause states, in relevant part:

[E]mployee agrees not to engage directly or indirectly, either personally or as an employee, associate, partner, or otherwise, or by means of any corporation or other legal entity, or otherwise, in any business in competition with Employer and, in addition, not to solicit customers of Employer for Employee's own benefit or for the benefit of any third party, during the term of employment and for a period of two (2) years from the last day of employment, within a 100 mile radius of employment location.⁷⁰

The second clause at issue is the "Choice of Law/Forum" clause.⁷¹ The clause provides:

The parties agree that this agreement is governed by the laws of the State of South Dakota and that the state circuit court situated in Minnehaha County, South Dakota, shall be the exclusive jurisdiction of any disputes relating to this Agreement.⁷²

The North Dakota Supreme Court has not previously addressed the standard of review of a district court's granting of Rule 12(b)(3)⁷³ motion on the basis of a forum-selection clause.⁷⁴ Because Rule 12 is derived from the Federal Rules of Civil Procedure, the Court viewed the federal interpretations of Rule 12(b)(3) as highly persuasive authority.⁷⁵ In adopting a *de novo* review, the Court noted that the Second, Fourth, Seventh, and Eleventh Circuits have determined *de novo* is the proper standard for reviewing a Rule 12(b)(3) motion to dismiss on the basis of a forum selection clause.⁷⁶

68. *Osborne*, ¶ 5, 904 N.W.2d at 37.

69. *Id.* ¶ 3., 904 N.W.2d at 35-36.

70. *Id.* at 36.

71. *Id.*

72. *Id.*

73. N.D. R. CIV. P. 12(b)(3).

74. *Osborne*, ¶ 6, 904 N.W.2d at 36.

75. *Id.*

76. *Id.* ¶ 7, 904 N.W.2d at 36-37.

Osborne argued the district court erred in granting Brown’s motion to dismiss for improper venue because the selection of a foreign forum would be unreasonable and the forum-selection clause is unenforceable under North Dakota law.⁷⁷ Where the parties have agreed in writing that an action may only be brought in another state and it is brought in a court of this state, the court will only dismiss the action if it is unfair or unreasonable to enforce the agreement.⁷⁸ Moreover, a forum-selection clause “may be set aside if enforcement would contravene a strong public policy of the forum in which suit is brought.”⁷⁹

Osborne argued that enforcing the forum-selection clause would allow Brown to violate North Dakota’s strong public policy against non-compete agreements.⁸⁰ The North Dakota Supreme Court looked to § 9-08-06 which provided a statutory standard for non-compete agreements.⁸¹ The Century Code provides, in relevant part: “Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void”⁸² Further, it was Osborne’s contention that a South Dakota court would apply its own law, generally permitting non-compete agreements, allowing Brown to circumvent Section § 9-08-06 while utilizing the forum selection clause.⁸³

In determining that enforcing the forum-selection clause would permit § 9-08-06 to be circumvented, the Court noted that the employment contract had a choice-of-law provision requiring South Dakota law to be used.⁸⁴ Since South Dakota law permits limited covenants-not-to-compete, the Court noted a 2012 case in which the Minnehaha County Circuit Court in South Dakota granted Brown a preliminary injunction against another of its former North Dakota employees, essentially circumventing § 9-08-06.⁸⁵ As North Dakota case law demonstrates a strong public policy against non-compete agreements, the Court held covenants-not-to-compete against public policy.⁸⁶

77. *Id.* ¶ 8, 904 N.W.2d at 37.

78. *Id.* ¶ 9 (citations omitted).

79. *Id.* (citing *Servewell Plumbing, LLC v. Federal Ins. Co.*, 439 F.3d 786, 790 (8th Cir. 2006) (quotations omitted)).

80. *Osborne*, ¶ 10, 904 N.W.2d at 37.

81. *Id.*

82. N.D. CENT. CODE § 9-08-06.

83. *Osborne*, ¶ 11, 904 N.W.2d at 37.

84. *Id.* ¶ 12.

85. *Id.* at 37-38.

86. *Id.* ¶ 13, 904 N.W.2d at 38.

Furthermore, § 28-04.1-03(5) “prevents enforcement of a forum-selection clause if enforcement would be unfair or unreasonable”⁸⁷ In determining enforcement of the forum-selection clause would be unfair and unreasonable, the Court reasoned enforcement would “facilitate enforcement of the non-compete clause in a foreign court to restrain competition” by North Dakota people in the state of North Dakota.⁸⁸ Further, “another state’s forum applying that state’s law to the non-compete clause would violate North Dakota’s public policy against non-compete agreements.”⁸⁹ Thus, the Court determined the forum-selection clause is “unenforceable because the non-compete clause is unenforceable.”⁹⁰

Because North Dakota has an interest in protecting its strong public policy against non-compete agreements from evasion, the Court held the Choice of Law/Forum clause unenforceable.⁹¹ In addition, the Court held that the non-compete clause is unenforceable under § 9-08-06 to the extent it limits Osborne from exercising a lawful profession, trade, or business in North Dakota.⁹² In holding the two clauses unenforceable, the Court reversed the district court’s order granting Brown’s motion to dismiss and remanded for further proceedings.⁹³

87. *Id.* ¶ 14.

88. *Id.*

89. *Osborne*, ¶ 14, 904 N.W.2d at 38.

90. *Id.*

91. *Id.*

92. *Id.* ¶ 16, 904 N.W.2d at 39.

93. *Id.* ¶ 17.

EVIDENCE – STATE’S USE OF AN INDEPENDENT EXPERT
APPOINTED UNDER N.D.C.C. § 25-03.3-12 ON BEHALF OF THE
RESPONDENT

In the Matter of Gomez

*In the Matter of Gomez*⁹⁴, Joshua Gomez appealed an order of civil commitment after the court determined he was a sexually dangerous individual.⁹⁵ In this matter of first impression, Gomez argued it was an error to allow the State to call an expert appointed on his behalf as a witness.⁹⁶ Ultimately, the North Dakota Supreme Court affirmed the district court order because Gomez failed to object to the production of expert testimony reports.⁹⁷

On July 13, 2015, North Dakota sought to have Gomez committed as a sexually dangerous individual.⁹⁸ On July 16, 2015, the district court ordered the North Dakota State Hospital to evaluate Gomez.⁹⁹ In addition, Gomez, an indigent party, requested an independent examination.¹⁰⁰ After confirming that Gomez was indigent, the district court appointed Dr. Stacey Benson as an independent examiner.¹⁰¹ In December of 2016, a district court treatment hearing was held and testimony was heard from the following people: Dr. Benson, the North Dakota State Hospital evaluator, two private evaluators retained by Gomez, and Gomez himself.¹⁰²

Throughout the discovery process, the State requested that Gomez produce “[a]ny and all reports and tests used by an independent examiner.”¹⁰³ However, Gomez did not produce a copy of the report or any other information prepared by Dr. Benson.¹⁰⁴ More importantly, Gomez did not assert any objection to the discovery request.¹⁰⁵ Prior to the hearing, Gomez filed the reports prepared by his private evaluators and the State filed the report of the North Dakota State Hospital evaluator.¹⁰⁶ Notably, Mr. Gomez did

94. 2018 ND 16, 906 N.W.2d 87.

95. *Gomez*, ¶ 1, 906 N.W.2d at 89.

96. *Id.*

97. *Id.*

98. *Id.* ¶ 2.

99. *Id.*

100. *Id.*

101. *Gomez*, ¶ 2, 906 N.W.2d at 89.

102. *Id.*

103. *Id.* ¶ 3.

104. *Id.*

105. *Id.*

106. *Id.* ¶ 4.

not file the report of the independent examiner appointed on his behalf, Dr. Benson.¹⁰⁷

Subsequently, the State sought an order for release of Dr. Benson's report.¹⁰⁸ The district court ordered Dr. Benson to release her report, and it was subsequently filed with the district court.¹⁰⁹ At the hearing, the State called Dr. Benson as a witness.¹¹⁰ Gomez objected, arguing the State was prohibited from calling Dr. Benson as a witness pursuant to N.D.R.Civ.P. 26(b)(4)(B).¹¹¹ Additionally, Gomez noted Dr. Benson was appointed pursuant to N.D.C.C. § 25-03.3-12 and argued that the statute gives him the option to either call or not call an independent examiner.¹¹² Nonetheless, the district court ordered Dr. Benson to testify, concluding N.D.C.C. § 25-03.3-13 allows for any expert testimony or report to be admissible.¹¹³

Dr. Benson diagnosed Gomez with antisocial personality disorder and noted he had a high risk of reoffending.¹¹⁴ Similarly, the State Hospital evaluator and one of Gomez's private evaluators¹¹⁵ concluded Gomez suffered from antisocial personality disorder.¹¹⁶ One of Gomez's private evaluators testified that Gomez omitted some information during his evaluation which would have changed his opinion regarding Gomez's likelihood to reoffend.¹¹⁷ The other private evaluator Gomez hired, testified he did not believe Gomez had antisocial personality disorder and that the State failed to meet its burden.¹¹⁸

On March 29, 2017, the district court entered judgment stating that Gomez must be committed after determining Gomez was a sexually dangerous individual.¹¹⁹ Gomez appealed the district court's order, arguing that the district court erred by ordering Dr. Benson to testify.¹²⁰

Sexually dangerous individual commitment proceedings are civil proceedings, and, thus, the North Dakota Rules of Civil Procedure govern.¹²¹

107. *Gomez*, ¶ 4, 906 N.W.2d at 89.

108. *Id.* ¶ 5.

109. *Id.*

110. *Id.* ¶ 6.

111. *Id.* ¶ 6 (noting N.D.R.Civ.P. 26(b)(4)(B) limits the scope of discovery for experts retained for the purpose of trial preparation and who are not intended to be called as a witness.).

112. *Id.*

113. *Gomez*, ¶ 6, 906 N.W.2d at 90.

114. *Id.* ¶ 7.

115. *Id.* (noting Gomez's privately retained evaluator diagnosed Gomez with some mild substance use disorders.).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Gomez*, ¶ 8, 906 N.W.2d at 90.

120. *Id.* ¶¶ 8-9.

121. *Id.* ¶ 10 (citing *Matter of Hehn*, 2015 ND 218, ¶ 17, 868 N.W.2d 551).

The district court has discretion when admitting expert testimony, and the North Dakota Supreme Court will not reverse a decision absent an abuse of discretion.¹²² “An abuse of discretion occurs when the district court is unreasonable, arbitrary, or unconscionable in rendering its decision.”¹²³ Gomez argued the plain language of N.D.C.C. § 25-03.3-12 precluded the State from calling an expert who was appointed by the court on behalf of the respondent.¹²⁴ The review of a district court’s interpretation of a statute is de novo.¹²⁵ N.D.C.C. § 25-03.3-12 provides that “the court shall appoint a qualified expert to perform an examination or participate in the commitment proceedings on the respondent’s behalf.”¹²⁶

The North Dakota Supreme Court has previously held an indigent respondent does not have the right to select his/her own independent expert under N.D.C.C. § 25-03.3-12.¹²⁷ However, it was an issue of first impression before the North Dakota Supreme Court whether an independent expert appointed pursuant to N.D.C.C. § 25-03.3-12 should be treated like a privately retained expert or like a court-appointed expert.¹²⁸ Gomez argued an examiner appointed under N.D.C.C. § 25-03.3-12 should be treated as a private expert and subject to the disclosure limitations of N.D.R.Civ.P. 26(b)(4)(B).¹²⁹ Specifically, the North Dakota Rules of Civil Procedure limit the scope of discovery for experts prepared for trial preparation and those not intended to be called to testify.¹³⁰

The North Dakota Supreme Court agreed with Gomez in that an independent examiner appointed under N.D.C.C. § 25-03.3-12 should be treated as a private examiner retained by the respondent.¹³¹ Specifically, N.D.C.C. § 25-03.3-12 provides the respondent an opportunity to retain their own expert, or if they are indigent, the court shall appoint an expert to balance out North Dakota commitment proceedings which requires the district court to order an expert evaluation.¹³² Notably absent from N.D.C.C. § 25-03.3-12

122. *Id.* (citing *Rittenour v. Gibson*, 2003 ND 14, ¶ 29, 656 N.W.2d 691).

123. *Id.* (quoting *Rittenour*, ¶ 13, 656 N.W.2d at 695).

124. *Id.* ¶ 11.

125. *Gomez*, ¶ 11, 906 N.W.2d at 90 (citing *Matter of G.R.H.*, 2011 ND 21, ¶ 13, 793 N.W.2d 460).

126. *Id.* ¶ 11, at 91 (quoting N.D. CENT. CODE § 25-03.3-12).

127. *Id.* ¶ 12 (citing N.D. CENT. CODE § 25-03.3-12; *Matter of Loy*, 2015 ND 92, ¶ 13, 862 N.W.2d 500).

128. *Id.*

129. *Id.*

130. *Id.*; N.D. R. CIV. P. 26(b)(4)(B).

131. *Gomez*, ¶ 12, 906 N.W.2d. at 91.

132. *Id.* ¶ 13.

is any language that compels the disclosure of an indigent respondent's expert.¹³³

The district court concluded N.D.C.C. § 25-03.3-13 allows all expert reports to be admitted into evidence, relying on the language "any testimony and reports of an expert who conducted an examination are admissible."¹³⁴ However, the North Dakota Supreme Court reasoned that this language is meant to avoid the effects of hearsay.¹³⁵ The North Dakota Supreme Court stated that construing the language of N.D.C.C. § 25-03.3-13 in this way would be inconsistent with N.D.C.C. § 25-03.3-12, which allows a respondent to retain or have appointed their own expert to perform an evaluation, and N.D.R.Civ.P. 26(b)(4)(B), which allows the retention of experts for the purpose of trial preparation, but not for testimonial purposes.¹³⁶ Thus, the North Dakota Supreme Court ultimately concluded "N.D.C.C. § 25-03.3-13 does not eliminate a respondent's right to retain an expert for the purpose of trial and potentially be subject to the discovery limitations provided in N.D.R.Civ.P. 26(b)(4)(B)."¹³⁷

Nonetheless, the North Dakota Supreme Court affirmed the district court decision, stating that Gomez waived his ability to prevent Dr. Benson from testifying because Gomez failed to object to the State's discovery request.¹³⁸ Specifically, the State demanded Gomez produce "any and all reports used by any independent examiner."¹³⁹ A request for the production of documents is governed by N.D.R.Civ.P. 34.¹⁴⁰ Moreover, under N.D.R.Civ.P. 34, Gomez was required to object to any demand that he produce any document.¹⁴¹ Thus, the North Dakota Supreme Court noted that "the failure to serve an objection to an interrogatory or request for production within the thirty-day period prescribed by Rules 33 and 34 constitutes a waiver."¹⁴²

Gomez also argued that his non-disclosure was effectively an objection.¹⁴³ However, the North Dakota Supreme Court disagreed, stating that

133. *Id.* ¶ 14.

134. *Id.* ¶ 15 (quoting N.D. CENT. CODE § 25-03.3-13).

135. *Id.*

136. *Id.* ¶ 15, 906 N.W.2d at 92 (citing N.D. CENT. CODE § 25-03.3-13; N.D. R. CIV. P. 26(b)(4)(B)).

137. *Gomez*, ¶ 16, 906 N.W.2d at 92 (citing N.D. CENT. CODE § 25-03.3-13; N.D. R. CIV. P. 26(b)(4)(B)).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* (citing N.D. R. CIV. P. 26(b)(4)(B)).

142. *Id.* (quoting *Voracheck v. Citizens State Bank of Lankin*, 421 N.W.2d 45, 52 (N.D. 1988)).

143. *Gomez*, ¶ 17, 906 N.W.2d at 92.

N.D.R.Civ. P. 34(b)(2)(B) requires a timely objection and N.D.R.Civ. P. 26 requires a party to take affirmative action when claiming information is privileged.¹⁴⁴ Here, Gomez failed to timely object and failed to comply with the requirements of N.D.R.Civ.P. 26.¹⁴⁵ Therefore, the North Dakota Supreme Court held that Gomez ultimately waived his objection to the admission of Dr. Benson's testimony and the district court's order was affirmed.¹⁴⁶

144. *Id.* (citing N.D. R. Civ. P. 26(b)(5)(A)).

145. *Id.*

146. *Id.*

EVIDENCE – USE OF WITNESS PRELIMINARY EXAMINATION
TESTIMONY AND PRIOR STATEMENTS MADE TO AN
OFFICER

State v. Azure

In *State v. Azure*,¹⁴⁷ Duane Azure, Sr. (“Azure”) appealed a criminal judgment entered after a jury found him guilty of aggravated assault.¹⁴⁸ Azure argued the district court had abused its discretion by admitting into evidence two prior statements of a State’s witness.¹⁴⁹ The North Dakota Supreme Court reversed the judgment of the district court because the district court abused its discretion in allowing Agent Allen Kluth (“Agent Kluth”) to testify about the prior statements made by the victim (“the victim”).¹⁵⁰

On April 20, 2014, a deputy was sent to Azure’s residence after receiving numerous calls.¹⁵¹ Upon arrival, the deputy discovered the victim lying on the floor.¹⁵² The deputy called an ambulance and the victim was transported to a local emergency room.¹⁵³ The victim explained to law enforcement and medical personnel that her injuries were caused by a fall.¹⁵⁴ However, approximately two weeks later, the victim contacted law enforcement and stated her injuries were not caused by a fall; instead she explained Azure assaulted her.¹⁵⁵ The victim was interviewed by Agent Kluth of the North Dakota Bureau of Criminal Investigation.¹⁵⁶ During this interview, the victim restated that Azure assaulted her and, moreover, that she was afraid to say anything at first.¹⁵⁷ Subsequently, Azure was charged with aggravated assault.¹⁵⁸

Azure called the victim as a witness for the preliminary hearing.¹⁵⁹ On direct examination, Azure questioned the victim on the different explanations she gave for her injuries.¹⁶⁰ The district court found probable cause

147. 2017 ND 195, 899 N.W.2d 294.

148. *Azure*, ¶ 1, 899 N.W.2d at 296.

149. *Id.*

150. *Id.*

151. *Id.* ¶ 2, 899 N.W.2d at 297.

152. *Id.*

153. *Id.*

154. *Azure*, ¶ 2, 899 N.W.2d at 297.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* ¶ 3.

160. *Azure*, ¶ 3, 899 N.W.2d at 297.

existed and set the case for trial.¹⁶¹ Before Azure's jury trial, the victim died from unrelated causes.¹⁶²

Due to the victim's death, the State moved to allow the following: (1) the victim's preliminary hearing testimony and (2) the victim's statements to Agent Kluth.¹⁶³ Despite Azure's objections, the district court granted the State's motion and the evidence was admitted.¹⁶⁴ Subsequently, a jury found Azure guilty of aggravated assault.¹⁶⁵ On appeal, Azure argued the district court erred in the following ways: (1) allowing the victim's preliminary hearing testimony into evidence at trial; (2) allowing Agent Kluth to testify about the victim's statements made in the hospital; and (3) denying his motion for judgment of acquittal.¹⁶⁶ Under the abuse of discretion standard, "A district court has broad discretion in evidentiary matters, and we will not overturn a district court's decision to admit or exclude evidence unless the court abused its discretion."¹⁶⁷ Therefore, the abuse of discretion standard applies when reviewing a district court's evidentiary rulings under the hearsay rule.¹⁶⁸

First, prior to Azure's trial, the State moved to allow the victim's preliminary hearing testimony under N.D.R.Ev. 804(b)(1) ("Rule 804").¹⁶⁹ Rule 804 sets out circumstances where hearsay evidence is allowed when the declarant is unavailable.¹⁷⁰ One of those circumstances arises when the testimony:

[W]as given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceedings or a different one; and is now offered against a party who had, or, in a civil case, whose predecessor in interest had, an opportunity and similar motive to develop it by direct, cross-, or redirect examination.¹⁷¹

Importantly, the North Dakota Supreme Court stated it is immaterial if the defendant had significantly less incentive to cross-examine the witness

161. *Id.*

162. *Id.*

163. *Id.* ¶ 4.

164. *Id.*

165. *Id.*

166. *Azure*, ¶ 5, 899 N.W.2d at 297.

167. *Id.* ¶ 6 (quoting *State v. Vandermeer*, 2014 ND 46, ¶ 6, 843 N.W.2d 686 (internal citations omitted)).

168. *Id.*

169. *Id.* ¶ 7.

170. *Id.* ¶ 8 (citing N.D. R. EVID. 804(b)(1)).

171. *Id.* at 597-98 (citing N.D. R. EVID. 804 (b)(1)).

at the preliminary examination, so long as the requirements of Rule 804 have been met.¹⁷² Essentially, Azure argued he did not have a similar motive.¹⁷³ Azure argued that at the preliminary hearing his motive was to establish the victim had fabricated her story in an effort to pursue a civil suit against him.¹⁷⁴

The North Dakota Supreme Court ruled Azure's questioning at the preliminary hearing was to discredit the victim by showing she made inconsistent statements and, moreover, to show that the victim has an ulterior motive.¹⁷⁵ The Court stated Azure had failed to show how his motivation to question the victim at trial, if she had, would have been different from his motive at the preliminary hearing.¹⁷⁶ Thus, the Court held that the district court did not abuse its discretion with regard to this argument.¹⁷⁷

The second argument discussed by the North Dakota Supreme Court was regarding Agent Kluth's testimony about the victim's statements to him.¹⁷⁸ The district court allowed the statements under Rule 801(d)(1)(B) ("Rule 801").¹⁷⁹ Under Rule 801, a statement is not hearsay if it meets the following conditions:

(1) the declarant testifies and is subject to cross-examination about a prior statement, and the statement: . . . (B) is consistent with the declarant's testimony and is offered; (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground.¹⁸⁰

The North Dakota Supreme Court framed this issue of first impression in the following way: whether the declarant must testify at the trial itself, before the declarant's prior consistent statements are admissible under Rule 801(d)(1)(B).¹⁸¹

172. *Azure*, ¶ 8, 899 N.W.2d at 298 (citing *State v. Garvey*, 283 N.W.2d 153, 156 (N.D. 1979)).

173. *Id.* ¶ 9.

174. *Id.*

175. *Id.* ¶ 11.

176. *Id.*

177. *Id.*

178. *Azure*, ¶ 12, 899 N.W.2d at 298.

179. *Id.* (citing N.D. R. EVID. 801(d)(1)(B)).

180. *Id.* (quoting N.D. R. EVID. 801(d)(1)(B)).

181. *Id.* ¶ 13, 899 N.W.2d at 299.

Due to the identical language of N.D.R.Ev. 801(d)(1)(B) and Fed. R. Evid. 801(d)(1)(B), the North Dakota Supreme Court considered federal precedence as persuasive.¹⁸² The North Dakota Supreme Court stated that the language of the rule indicates that the declarant's availability at trial is required.¹⁸³ Moreover, the North Dakota Supreme Court noted the majority of Federal Circuit Courts require that the declarant testify at trial.¹⁸⁴ Based on the circuit court decisions, the language of Rule 801(d)(1)(B), and the Advisory Committee Notes for the Federal Rules of Evidence, the North Dakota Supreme Court held that the declarant must testify at the trial for which it is being offered.¹⁸⁵ Because the victim did not testify during the trial, the North Dakota Supreme Court held that the district court abused its discretion in allowing Kluth to testify about statements the victim made.¹⁸⁶

Similarly, N.D.R.Ev. 801(d)(1) requires the opportunity to cross-examine the person who made the statement and this requirement cannot be satisfied by simply cross-examining someone who heard the statement.¹⁸⁷ Nonetheless, the Court emphasized that a district court's evidentiary error does not warrant a new trial if the error was harmless.¹⁸⁸ Therefore, the Court considered the entire record and decided in light of all the evidence that the error was so prejudicial to warrant a new trial.¹⁸⁹ The Court specifically reasoned that Agent Kluth's testimony was not merely cumulative and included substantially more information than the victim's preliminary hearing testimony.¹⁹⁰ Therefore, the North Dakota Supreme Court held that allowing Kluth's testimony was not harmless.¹⁹¹

Third, and finally, Azure argues the district court abused its discretion by denying his motion for acquittal.¹⁹² Azure argues his conviction should be reversed due to insufficient evidence.¹⁹³ The North Dakota Supreme Court noted:

182. *Id.* ¶ 14 (citing *State v. Randall*, 2002 ND 16, ¶ 5, 639 N.W.2d 439).

183. *Id.* ¶ 17.

184. *Azure*, ¶ 18, 899 N.W.2d at 299-300 (citing *United States v. Frazier*, 469 F.3d 85, 88 (3d Cir. 2006); *Dillon v. Warden, Ross Correctional Inst.*, 541 Fed.Appx. 599, 605 (6th Cir. 2013); *United States v. Ruiz*, 249 F.3d 643, 647 (7th Cir. 2001); *United States v. Collicott*, 92 F.3d 973, 979 (9th Cir. 1996); *United States v. Piva*, 870 F.2d 753, 758 (1st Cir. 1989)).

185. *Id.* ¶ 19, 899 N.W.2d at 300.

186. *Id.* ¶ 20.

187. *Id.* ¶ 21.

188. *Id.* ¶ 22 (citing *City of Grafton v. Wosick*, 2013 ND 74, ¶ 12, 830 N.W.2d 550).

189. *Id.* (citing *State v. Doppler*, 2013 ND 54, ¶ 21, 828 N.W.2d 502; *State v. Leinen*, 1999 ND 138, ¶ 17, 598 N.W.2d 102).

190. *Azure*, ¶ 23, 899 N.W.2d at 300-01.

191. *Id.* ¶ 24, 899 N.W.2d at 301.

192. *Id.* ¶ 25.

193. *Id.*

[a] conviction rests upon insufficient evidence only when, after reviewing the evidence in the light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor, no rational fact finder could find the defendant guilty beyond a reasonable doubt.¹⁹⁴

Moreover, the defendant must show the evidence permits no reasonable inference of guilt.¹⁹⁵

Azure argued that without the victim testimony evidence mentioned and discussed earlier in this case, there was insufficient evidence to support the conviction.¹⁹⁶ However, as previously discussed, the victim's preliminary hearing testimony was admissible at trial.¹⁹⁷ Moreover, there was corroborating testimony from a doctor who testified that the victim's injuries were inconsistent with a fall.¹⁹⁸ Therefore, this evidence, viewed in the light most favorable to the prosecution, permitted a reasonable inference of guilt.¹⁹⁹ In conclusion, because the district court abused its discretion by allowing Kluth to testify regarding the victim's prior statements, and because it was not a harmless error, the North Dakota Supreme Court reversed the judgment and remanded for a new trial.²⁰⁰

194. *Id.* (citing *State v. Putney*, 2016 ND 59, ¶ 8, 877 N.W.2d 28 (internal citation omitted)).

195. *Id.* (citing *State v. Gonzalez*, 2000 ND 32, ¶ 14, 606 N.W.2d 873).

196. *Azure*, ¶ 27, 899 N.W.2d at 301.

197. *Id.*

198. *Id.* ¶ 28, 899 N.W.2d at 301-02.

199. *Id.* at 302.

200. *Id.* ¶ 29.

MINERAL RIGHTS & WATER LAW – CONSTITUTIONAL AND STATUTORY PROVISIONS

Wilkinson v. Board of University and School Lands

In *Wilkinson v. Board of University and School Lands*,²⁰¹ successors in interest to land appealed, and Statoil & Gap, LP (“Statoil”) and EOG Resources, Inc. (“EOG”) cross-appealed, from a district court order granting the Board of University and School Lands (“Board”) and State Engineer’s motion for summary judgment determining the Board owns certain property below the ordinary high watermark of the Missouri River.²⁰² The North Dakota Supreme Court reversed and remanded²⁰³ because the statute that governed mineral rights of land inundated by certain dams applied retroactively and the district court erroneously made findings on disputed facts.

The Wilkinsons previously acquired title to property located in Williams County.²⁰⁴ In 1958, the Wilkinsons conveyed surface rights to the property to the United States for construction and operation of the Garrison Dam and Reservoir, but reserved oil and gas rights in and under the property.²⁰⁵ In 2012, the Plaintiffs, as successors in interest to the Wilkinsons, brought an action to determine the ownership of the minerals in and under the property, alleging they own the mineral interests.²⁰⁶ The plaintiffs also sued Brigham Oil & Gas, LLP (“Brigham”) and EOG Resources, Inc. (“EOG”) to determine their rights, alleging Brigham received an oil and gas lease from the State and EOG from the plaintiffs.²⁰⁷ The plaintiffs filed an amended complaint adding Statoil Oil & Gas LP (“Statoil”) and XTO Energy, Inc. (“XTO”) as defendants alleging Statoil acquired Brigham and held an oil and gas lease from the Board.²⁰⁸ The plaintiffs sought injunctive relief and a declaration regarding the ownership of mineral interests in property, and alleged a takings claim, deprivation of constitutional rights, conversion, unjust enrichment, and civil conspiracy.²⁰⁹

In their motion for summary judgment, the Board and State Engineer (collectively “State”) argued that the State holds title to the bed of the Missouri River up to the current ordinary high watermark and that the disputed

201. 2017 ND 231, 903 N.W.2d 51.

202. *Wilkinson*, ¶ 1, 904 N.W.2d at 53.

203. *Id.* at 54.

204. *Id.* ¶ 2.

205. *Id.*

206. *Id.* ¶¶ 2-3.

207. *Id.* ¶ 3.

208. *Wilkinson*, ¶ 6, 904 N.W.2d at 54.

209. *Id.*

property is located below the current ordinary high watermark.²¹⁰ Further, the State argued the district court did not have subject matter jurisdiction because the plaintiffs did not exhaust their administrative remedies, no taking occurred, and that the plaintiffs' claim for deprivation of constitutional rights was improper.²¹¹ XTO joined the State's request that the court decide the State holds title to the disputed minerals.²¹²

In response to the State's motion for summary judgment, the Plaintiffs argued:

[The] property is not part of the State's sovereign lands, there was no navigable body of water on the property at the time of statehood, the surface property was purchased by the United States as part of the Garrison Project, the property was flooded by Lake Sakakawea, the property is located above the historical ordinary high watermark, and [that] they alleged sufficient facts to support their takings claim.²¹³

Statoil further argued that the property under Lake Sakakawea is not sovereign land owned by the State because the lake was man-made, it was not navigable at the time of statehood, and the property is located outside Lake Sakakawea and below the current ordinary high watermark of the Missouri River.²¹⁴

After the State Engineer intervened, the district court granted Board and Engineer's motion for summary judgment.²¹⁵ On appeal, the North Dakota Supreme Court considered four issues: whether the district court correctly determined ownership of the surface estate; whether the statute that governs mineral rights of land inundated by certain dams applied retroactively; whether successors were entitled to compensation if state-owned disputed minerals; and whether the district court made findings on disputed facts.²¹⁶

The first issue the Supreme Court of North Dakota discussed was the district's conclusion that the property interests in dispute are the sovereign land of the State.²¹⁷ As the Court noted, the district court decided owner-

210. *Id.* ¶ 7.

211. *Id.*

212. *Id.* ¶ 8, 903 N.W.2d at 55.

213. *Id.* at 54-55.

214. *Wilkinson*, ¶ 8, 903 N.W.2d at 55.

215. *Id.* ¶¶ 6, 9.

216. *Id.* ¶ 13, 903 N.W.2d at 56.

217. *Id.* ¶ 11, 903 N.W.2d at 55.

ship of the surface estate when it granted summary judgment, although the parties only requested the district court decide ownership of the mineral interests.²¹⁸ However, when declaratory relief is sought, anyone who has or claims any interest affected by the declaration must be made a party, and the declaration may not prejudice the rights of anyone not made a party to the proceeding.²¹⁹ Because the Wilkinsons conveyed the surface property to the United States in 1958, the United States appeared to have an interest in the property that would be affected by the district court's declaration that the State owned both the surface and minerals of the property.²²⁰ Thus, because the United States was not a party to this proceeding, the district court erred in determining ownership of the surface estate.²²¹

Next, the Court considered the district court's determination that the State owned the mineral interests at issue.²²² After the district court entered summary judgment and while this case was pending, Chapter 61-33.1²²³ was enacted into the North Dakota Century Code and governs mineral rights of land inundated by the Pick-Sloan Missouri Project dams.²²⁴ Generally, the Court will apply the law in effect when the cause of action arose; however, when a law is enacted or amended while an appeal is pending and it applies retroactively, courts will generally apply the new law.²²⁵ Although the proceedings in this case began in 2012, and the district court granted summary judgment in May 2016, the bill which enacted Chapter 61-33.1 states:

[The chapter] is retroactive to the date of closure of the Pick-Sloan Missouri basin project dams. The ordinary high water mark determination under this Act is retroactive and applies to all oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership.²²⁶

In determining that Chapter 61-33.1 applies retroactively, the Supreme Court of North Dakota remanded for consideration of whether Chapter 61-33.1 applies to the property in this matter since the district court did not

218. *Id.* ¶ 13.

219. *Id.* (quoting N.D. CENT. CODE § 32-23-11).

220. *Wilkinson*, ¶ 13, 903 N.W.2d at 56 (citing 43 U.S.C. §§ 1311, 1313).

221. *Id.* (citations omitted).

222. *Id.* ¶ 14.

223. *Id.*; N.D. CENT. CODE Ch. 61-33.1.

224. *Wilkinson*, ¶ 14, 903 N.W.2d at 56.

225. *Id.* ¶ 17 (citations omitted).

226. *Id.* ¶ 19 (citing 2017 N.D. Sess. Laws ch. 426, § 4).

have the opportunity to consider the statutory provisions when deciding ownership of the disputed minerals.²²⁷

The third issue the Court considered was whether the district court erred in determining the State's action did not violate the Takings Clauses of the Fifth Amendment to the United States Constitution and Article One, Section 16 of the North Dakota Constitution.²²⁸ As provided by both Constitutions, the State has the power to "take" or "damage" private property for public use if it compensates the owner for the taking or damage.²²⁹ Although the federal government compensated the plaintiffs for the surface property, they failed to compensate them for the mineral interests.²³⁰ The Supreme Court of North Dakota determined the district court erred in determining there was no taking simply because the plaintiffs were able to lease the mineral interests numerous times prior to the State claiming ownership.²³¹ In reversing and remanding this issue for prior consideration, the Court noted the district court must consider the issue on remand if it decides the State owns the disputed minerals.²³²

Finally, the Supreme Court of North Dakota considered whether the district court made findings on disputed factual issues as summary judgment is not appropriate if there are genuine issues of material fact.²³³ Because the parties disputed whether the property at issue was flooded because of the Garrison Project and part of Lake Sakakawea, the Supreme Court of North Dakota determined the district court erred in making findings on disputed facts and remanded for further proceedings.²³⁴

Because the district court could not determine the ownership of the surface estate²³⁵ and erroneously made findings on disputed facts²³⁶, the Court reversed and remanded for further proceedings.²³⁷ Additionally, because the statute the governed mineral rights of land inundated by certain dams applied retroactively, the district court must apply the statute to determine if the State owns the mineral rights²³⁸ and, if the State does own the mineral

227. *Id.* ¶¶ 19-20.

228. *Id.* ¶ 22.

229. *Id.* ¶ 22 (citing *Irwin v. City of Minot*, 2015 ND 60, ¶ 6, 860 N.W.2d 849).

230. *Wilkinson*, ¶ 22, 903 N.W.2d at 58.

231. *Id.* ¶ 24.

232. *Id.* ¶ 25, 903 N.W.2d at 59.

233. *Id.* ¶ 26.

234. *Id.* ¶ 28.

235. *Id.* ¶ 13, 903 N.W.2d at 56.

236. *Wilkinson*, ¶ 28, 903 N.W.2d at 59.

237. *Id.*

238. *Id.* ¶ 20, 903 N.W.2d at 58.

interests, whether the State's actions constituted a taking in violation of the North Dakota and United States Constitution.²³⁹

239. *Id.* ¶ 25, 903 N.W.2d at 59.

WARRANTLESS URINE TESTS – EXPANDING *BIRCHFIELD**State v. Helm*

In *State v. Helm*,²⁴⁰ Steven Helm (“Helm”) was charged with and prosecuted for refusing to submit to a warrantless urine test after being pulled over for driving under the influence.²⁴¹ The North Dakota Supreme Court held that Helm’s refusal to provide a urine sample could not result in a criminal conviction, because doing so was a violation of Helm’s Fourth Amendment rights under the United States Constitution to be free from unreasonable search and seizure.²⁴² In doing so, the North Dakota Supreme Court expanded the United States Supreme Court’s holding in *Birchfield v. North Dakota*²⁴³ to include warrantless urine tests as an unreasonable search under the Fourth Amendment.²⁴⁴ Therefore, a defendant in North Dakota cannot be criminally charged with failing to submit to a warrantless blood test, under *Birchfield*, or urine test, under *Helm*.²⁴⁵

In May 2016, Helm was pulled over for driving without headlights.²⁴⁶ During the stop, Helm was arrested for driving under the influence of a controlled substance.²⁴⁷ Helm refused to submit to a warrantless urine test incident to his lawful arrest.²⁴⁸ The State then charged Helm with refusing to submit to a chemical test.²⁴⁹ Subsequently, Helm’s motion to dismiss the refusal charge was granted by the District Court of Cass County.²⁵⁰ The district court found that the warrantless urine test was similar to the warrantless blood test that the United States Supreme Court found unconstitutional in *Birchfield*, and therefore Helm’s Fourth Amendment right had been violated.²⁵¹

After Helm’s arrest, the North Dakota Legislature amended Section 39-20-01(3)(a) of the North Dakota Century Code to comply with *Birchfield* by removing the blood test provision, but left the urine test provision intact.²⁵²

240. 2017 ND 207, 901 N.W.2d 57.

241. *Helm*, ¶ 2, 901 N.W.2d at 58.

242. *Id.* ¶ 16, 901 N.W.2d at 63.

243. 136 S. Ct. 2160 (2016) (in which the United States Supreme Court consolidated *State v. Birchfield*, 2015 ND 6, 858 N.W.2d 302; *Beylund v. Levi*, 2015 ND 18, 859 N.W.2d 403; and *State v. Bernard*, 859 N.W.2d 762 (Minn. 2015)).

244. *Helm*, ¶ 16, 901 N.W.2d at 63.

245. *Id.*

246. *Id.* ¶ 2, 901 N.W.2d at 58.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Helm*, ¶ 3, 901 N.W.2d at 58.

251. *Id.*

252. *Id.* ¶ 4, 901 N.W.2d at 58 n.1.

Section 39-08-01 made it a crime for a driver to refuse to submit to a law enforcement officer's request for a chemical test, which, pre-*Birchfield*, included blood, breath, or urine.²⁵³ Section 39-20-01 of the North Dakota Century Code houses North Dakota's implied consent statute, stating that by driving on a North Dakota highway, the driver consents to chemical testing.²⁵⁴ Section 39-20-01(3)(a) specifically authorized a law enforcement officer to determine which test would be appropriate to administer to the driver.²⁵⁵ This section also provided the authority to charge the refusing driver as though the driver had been driving under the influence.²⁵⁶

The State's argument on appeal was that the warrantless urine test was constitutional because it did not require the driver to expose his genitals.²⁵⁷ The State argued that by adopting a requirement that the driver's genitals not be exposed, the warrantless urine test would be categorically reasonable under the Fourth Amendment.²⁵⁸ However, the North Dakota Supreme Court was unpersuaded by this argument.²⁵⁹ Instead, the Court found that urine tests were searches under the Fourth Amendment.²⁶⁰ The Court further found that searches done without a warrant are *per se* unreasonable with only a few limited exceptions.²⁶¹

The North Dakota Supreme Court also noted that both *Helm* and *Birchfield* involved a search incident to a lawful arrest.²⁶² However, *Birchfield* was different from *Helm* because *Birchfield* explicitly dealt with blood tests, while *Helm* was a question of the validity of warrantless urine tests.²⁶³ The North Dakota Supreme Court found that *Birchfield* relied on three factors in assessing the intrusion of privacy that blood and breath tests present.²⁶⁴ The first factor *Birchfield* relied on was "the extent of the physical intrusion upon the individual to obtain the evidence."²⁶⁵ The second factor was "the extent to which the evidence could be preserved to provide addi-

253. *Id.* at 58.

254. *Id.*

255. *Id.*

256. *Helm*, ¶ 4, 901 N.W.2d at 59 (citing N.D. CENT. CODE 39-20-01(3)(a)).

257. *Id.* ¶ 5.

258. *Id.*

259. *Id.* ¶ 12, 901 N.W.2d at 61.

260. *Id.* ¶ 6, 901 N.W.2d at 59 (citing *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 613-17, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989)).

261. *Id.* (citing *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)).

262. *Helm*, ¶ 7, 901 N.W.2d at 59 (citing *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2174-85).

263. *Id.* at 60 (citing *Birchfield*, 136 S. Ct. at 2184-85).

264. *Id.* ¶ 8 (citing *Birchfield*, 136 S. Ct. at 2176-78).

265. *Id.* (citing *Birchfield*, 136 S. Ct. at 2176-78).

tional, unrelated private information.”²⁶⁶ The third factor was “the extent to which participation in the search would enhance the embarrassment of the arrest.”²⁶⁷

Based on those three factors, the United States Supreme Court in *Birchfield* reasoned that a breath test was not a significant privacy concern because once the test was completed, there was no sample left, and the only fact that could be determined about the driver was the driver's blood alcohol concentration; and further that a breath test did not enhance embarrassment beyond the embarrassment inherent in any arrest.²⁶⁸ Alternatively, the Court in *Birchfield* found that blood tests implicated privacy concerns, which rose to the level of a Fourth Amendment violation when administered without a warrant.²⁶⁹ Under the *Birchfield* three-factor analysis, the United States Supreme Court found that piercing the skin to extract part of a driver's body is significantly more intrusive than a breath test, and that a blood test can be preserved and can be used to reveal other private information beyond the necessary blood alcohol reading required for a conviction of driving under the influence.²⁷⁰

Finally, the North Dakota Supreme Court looked to Minnesota jurisprudence to address whether warrantless urine tests administered incidental to a lawful arrest were constitutional, specifically *State v. Thompson*,²⁷¹ which addressed the issue within the framework created by *Birchfield*.²⁷² The Minnesota Supreme Court in *Thompson* held that warrantless urine tests were unconstitutional as a search incident to a lawful arrest.²⁷³ Specifically, the court in *Thompson* found that a urine test was similar to a breath test regarding the physical intrusion on the driver's body.²⁷⁴ However, the *Thompson* Court also found that a urine test was similar to a blood test because both could be preserved and used to obtain facts about the driver beyond the necessary blood alcohol concentration.²⁷⁵ The *Thompson* Court also found that there was a significant privacy violation because of the embarrassment that a driver being observed “void[ing] directly into [a] bot-

266. *Id.* (citing *Birchfield*, 136 S. Ct. at 2176-78).

267. *Id.*

268. *Helm*, ¶ 8, 901 N.W.2d at 60 (citing *Birchfield*, 136 S. Ct. at 2176-78).

269. *Id.* (citing *Birchfield*, 136 S. Ct. at 2178).

270. *Id.* (citing *Birchfield*, 136 S. Ct. at 2178-79).

271. 886 N.W.2d 224, 230-33 (Minn. 2016), *cert. denied*, 137 S. Ct. 1338 (2017).

272. *Helm*, ¶ 10, 901 N.W.2d at 60.

273. *Id.* (citing *Thompson*, 886 N.W.2d at 230-33).

274. *Id.* (citing *Thompson*, 886 N.W.2d at 230).

275. *Id.* (citing *Thompson*, 886 N.W.2d at 230-31).

tle”²⁷⁶ could cause.²⁷⁷ Therefore, the *Thompson* Court held that a driver who refuses to submit to a warrantless urine test, although incident to a lawful arrest, could not be convicted for refusing to submit to a warrantless urine test.²⁷⁸

In *Helm*, the State argued that Helm was not under the influence of alcohol at the time of his arrest, making his case distinguishable from *Thompson*.²⁷⁹ Rather, the State contended that because Helm was under the influence of drugs, there was no less intrusive test than a urine test.²⁸⁰ Finally, the State argued that by adopting a categorical rule for urine collection not requiring a law enforcement officer to see the driver’s genitals, no Fourth Amendment violation would occur.²⁸¹ Ultimately, the North Dakota Supreme Court was not persuaded by the State’s final argument.²⁸²

Instead, the North Dakota Supreme Court found that the categorical approach favored by the State did not meet the minimum standards set out by the United States Supreme Court in *Skinner v. Railway Labor Executives’ Association*²⁸³ or *Notational Treasury Employees Union v. Von Raab*,²⁸⁴ because the State’s approach was a case-by-case analysis left to an officer’s discretion and lacked guidelines or instructions for officer’s visual observations.²⁸⁵ The North Dakota Supreme Court also found that the Fourth Amendment is not only concerned with the privacy concern associated with visual observation of a driver providing the urine sample, it is also concerned with the driver being forced to urinate in the presence of a law enforcement officer.²⁸⁶ Finally, the Court found that the State made no effort to explain how its categorical rule would alleviate the privacy concerns dealing with the preservation of the urine sample and the information that could be obtained from it.²⁸⁷ Therefore, the North Dakota Supreme Court declined to adopt the State’s proposed rule for urine testing incident to a lawful arrest.²⁸⁸

276. Bureau of Criminal Apprehension Forensic Sci. Lab., *Urine Collection Kit Instructions for Arresting Officer* (2011), <https://dps.mn.gov/divisions/bca/bca-divisions/forensic-science/Documents/Urine%20Specimen%20Collection%20Instructions.pdf>.

277. *Helm*, ¶ 10, 901 N.W.2d at 60-61 (citing *Thompson*, 886 N.W.2d at 231-32).

278. *Id.* ¶ 11, 901 N.W.2d at 61 (citing *Thompson*, 886 N.W.2d at 233-34).

279. *Id.* ¶ 12.

280. *Id.*

281. *Id.*

282. *Id.*

283. 489 U.S. 602, 621-24.

284. 489 U.S. 656, 661-62.

285. *Helm*, ¶ 15, 901 N.W.2d at 63.

286. *Id.*

287. *Id.* (citing *Thompson*, 886 N.W.2d at 231).

288. *Id.*

Ultimately, the North Dakota Supreme Court agreed with Minnesota Supreme Court precedent and upheld Helm's motion to dismiss.²⁸⁹ The Court specifically held that the government cannot prosecute a driver for refusing to submit to a warrantless urine test.²⁹⁰ Therefore, the district court did not err when it dismissed the charge against Helm for refusing to submit to a warrantless urine test.²⁹¹

289. *Id.* ¶ 16.

290. *Id.*

291. *Helm*, ¶ 16, 901 N.W.2d at 63.