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North Dakota Supreme Court Review

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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:

CIVIL LITIGATION – DECLARATORY JUDGMENT, INJUNCTIVE RELIEF AND PRELIMINARY INJUNCTION

Black Gold OilField Services, LLC v. City of Williston

In *Black Gold OilField Services, LLC v. City of Williston*,[1] Black Gold OilField Services, LLC ("Black Gold") appealed from an order vacating a temporary restraining order and denying its request to preliminarily enjoin

1. 2016 ND 30, 875 N.W.2d 515.

the City of Williston ("Williston") and the Williston City Commission ("City Commission") from enforcing a decision to close Black Gold's temporary workforce housing facility during the pendency of Black Gold's lawsuit against Williston and the City Commission.[2]

Black Gold owned the Black Gold Williston Lodge, a temporary workforce housing facility commonly known as a man camp.[3] The man camp housed Bakken oilfield workers and was located outside Williston city limits.[4] The man camp began operating in March 2011, under a temporary use permit issued by Williams County.[5] In February 2013, Williston annexed about 4888 acres of land in Williams County, including the land of the man camps.[6] In September 2013, Williston adopted a resolution to extend permits issued by Williams County for workforce housing facilities, including the man cap in issue; however, the facilities had to comply with Williston's zoning, building, and fire codes.[7]

Black Gold received notification in December 2013 that it must install a fire protection sprinkler system.[8] Although Black Gold requested a 180-day extension, Williston granted Black Gold a one-year extension.[9] In June 2014, Willison again notified Black Gold that the man camp must install the sprinkler system by December 2014.[10] In November 2014, Black Gold was in contact with the Williston Fire Department regarding the installation of the sprinkler system.[11] The fire inspector informed Black Gold that the installation of the sprinklers would be finished in February 2015.[12]

In January 2015, a meeting was held in which the City Commission considered issues about the fire sprinkler systems at these workforce housing facilities.[13] The meeting minutes stated that Black Gold did not comply with the City Codes, that Black Gold was given adequate time to comply with the codes, and that Black Gold failed to meet the rules and regulations.[14] The City Commission held a subsequent meeting in February

2. *Black Gold OilField Services, LLC*, ¶ 1, 875 N.W.2d at 517.
3. *Id.* ¶ 2.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Black Gold OilField Services, LLC*, ¶ 4, 875 N.W.2d at 518.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* ¶ 5.
14. *Black Gold OilField Services, LLC*, ¶ 5, 875 N.W.2d at 518-19.

2015,[15] and by this time, the sprinkler system was installed and the facility passed the fire inspection.[16] Ultimately, however, Williston informed Black Gold that all tenants were required to vacate the facility by May 1, 2015, and that the structure must be removed by September 2, 2015.[17]

Subsequently, Black Gold filed a complaint against Williston and the City Commission for a declaratory judgment and to prohibit enforcement of the decision.[18] Black Gold's allegations were as follows:

> Commissioner Cymbaluk was a real estate agent and property manager in Williston and had a financial interest in closing Black Gold's housing facility. Black Gold alleged that Williston's decision violated Black Gold's state and federal constitutional rights to due process because the decision was arbitrary, capricious, and unreasonable; that Black Gold had insufficient time and opportunity to comply with fire and building codes after the annexation; that Black Gold was not provided notice and an opportunity to appear at the January 13, 2015 City Commission meeting; and that there was no basis for the decision not to extend the special use permit after the sprinklers were installed. Black Gold also alleged the City Commission lacked jurisdiction because the Williston building officer has exclusive jurisdiction under Williston's zoning ordinances to enforce Williston's building and fire codes after appropriate notice and opportunity to correct violations.[19]

Black Gold's complaint sought declaratory relief, injunctive relief, and a writ of prohibition to prevent Williston from implementing its decision.[20] Additionally, Black Gold immediately sought a temporary restraining order to prevent Williston from closing the man camp pending the lawsuit.[21] The district court initially granted the temporary restraining order; however, after Williston responded, the court vacated the temporary restraining order and denied Black Gold's request for preliminary injunction of Williston's decision.[22] The district court found that Black Gold received adequate time to comply with Williston's requirements, that Black Gold was afforded the

15. *Id.* ¶ 6, 875 N.W.2d at 519.
16. *Id.*
17. *Id.*
18. *Id.* ¶ 7.
19. *Id.* at 519-20.
20. *Black Gold OilField Services, LLC*, ¶ 17, 875 N.W.2d at 523.
21. *Id.* ¶ 8, 875 N.W.2d at 520.
22. *Id.*

opportunity to present its arguments as to why it failed to comply, and that Williston acted within its authority.[23] Black Gold appealed.[24]

The North Dakota Supreme Court initially considered the district court's order denying Black Gold's request for preliminary injunction.[25] Section 28-27-02 of the North Dakota Century Code provides the statutory criteria for appealability.[26] The order must have met one of the statutory criteria to prevent dismissal.[27] If the order was appealable, it must have also complied with Rule 54(b) of the North Dakota Rules of Civil Procedure.[28] An order vacating or dissolving a temporary restraining order after notice and a hearing is an appealable order under §§ 28–27–02(3) and (7).[29] In this case, however, there was no Rule 54(b) order.[30] The Court stated that "[a]lthough we cannot consider this matter as an appeal because there is no Rule 54(b) certification, we conclude the issues in this case about Black Gold's request for interim relief affect fundamental interests of the litigants."[31] The Court considered Black Gold's appeal as a request to exercise its supervisory jurisdiction and considered the issues raised by Black Gold on the merits.[32]

A district court's discretion to grant or deny a preliminary injunction is based on the following factors: (1) substantial probability of succeeding on the merits; (2) irreparable injury; (3) harm to other interested parties; and (4) effect on public interest.[33] Additionally, the Court stated "[a district court's] determination will not be disturbed absent an abuse of discretion."[34] A district court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner.[35] Black Gold provided three arguments as to why it had a substantial probability of succeeding on the merits.

First, Black Gold argued that it would succeed on the merits because Williston's decision was arbitrary, capricious, and unreasonable.[36] Black

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23. *Id.*
24. *Id.*
25. *Id.* ¶ 9.
26. *Black Gold OilField Services, LLC*, ¶ 9, 875 N.W.2d at 520 (citing N.D. CENT. CODE § 28-27-02 (2016)).
27. *Id.*
28. *Id.*
29. *Id.* ¶ 10, 875 N.W.2d at 521.
30. *Id.*
31. *Id.*
32. *Black Gold OilField Services, LLC*, ¶ 12, 875 N.W.2d at 521.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* ¶ 13.

Gold claimed that Williston had no rational reason to order the closure of the man camp because it had been in compliance since February 2015.[37] The Court found that the district court did not abuse its discretion because Black Gold's argument did not challenge the validity of the enactment of any zoning ordinance, Williston had authority to consider the extension of the special use permit, Black Gold admitted it failed to perform an act the law required, and more importantly, it failed to demonstrate how an appeal to the district court was not an adequate legal remedy to resolve this claim.[38] Black Gold's second argument was that it had a substantial probability of succeeding on the merits because Williston's decision violated Black Gold's due process rights.[39] It argued a due process violation on grounds that Commissioner Cymbaluk's ("Cymbaluk") participation in the decision established bias which resulted in an unfair decision.[40]

The court looked to § 44-04-22, which provided a statutory standard for assessing potential disqualifications of city commissioners.[41] The commissioner's conduct must have been a direct and substantial personal or pecuniary interest.[42] In support of the motion to vacate the temporary restraining order, Williston submitted an affidavit of Cymbaluk,[43] the relevant parts of which stated:

> 14. On January 13, 2015, the City Commission took action on Black Gold and ATCO workforce housing facilities extension of their temporary permit.
>
> 15. The City Commission *unanimously* voted to NOT extend their permit due to their failures to comply with the requirements laid by the City and Resolution # 13–127, in particular their failure to install a fire sprinkler system on or before December 31, 2014.
>
> 16. On January 15, 2015, two days after the City Commission took action on Black Gold's temporary housing permit extension, I was contacted by Chris, a representative of Calfrac Well Services, Corp., regarding the action the City took on January 13, 2015.

37. *Id.*
38. *Black Gold OilField Services, LLC*, ¶ 17, 875 N.W.2d at 523.
39. *Id.* ¶ 18.
40. *Id.*
41. *Id.* ¶ 20 (citing N.D. CENT. CODE § 44-04-22 (2016)).
42. *Id.* ¶ 21, 875 N.W.2d at 524.
43. *Id.* ¶ 23.

> 17. I was originally not available when the representative contacted me by phone, so I returned the phone call shortly after he left a message requesting I return his call.
>
> 18. When I spoke with Calfrac's representative I relayed only the information that [was] already available to the public regarding the City Commission's decision not to extend Black Gold's temporary housing permit. This information was not only public, as the January 13, 2015, City Commission meeting was open to the public, but the Williston Herald also published an article on the City Commission's action regarding Black Gold's facility on January 14, 2015.
>
> 19. Further, Black Gold has attempted to assert I have a financial incentive to contact Black Gold's customers since I am a licensed real estate broker in Williston, North Dakota, as tenants of Black Gold would move into apartments or homes managed by Basin Brokers.
>
> 20. I have no interest, individually or otherwise, in any residential apartments.
>
> 21. As a shareholder of Basin Brokers, Inc., Basin Brokers does not and has not managed any residential apartments, or otherwise.
>
> 22. The only residential management Basin Brokers has undertaken and is undertaking is a single family condominium . . . and the reason why Basin Brokers agreed to undertake the management of this property is a real estate agent for Basin Brokers listed the property and it failed to sell by the fall of 2013. The owner of the property asked if Basin Brokers could lease it on her behalf as she did not want it to lie vacant during the winter and Basin Brokers agreed to do so. The term of the lease is for November 1, 2013 until May 30, 2015.[44]

Black Gold argued that Cymbaluk had a direct financial incentive to close the man camp.[45] The Court found that these were conclusory assertions and that Black Gold did not offer evidence to rebut Cymbaluk or prove that Cymbaluk had any direct and substantial pecuniary or financial interest in closing the man camps.[46] The Court also concluded that the

44. *Black Gold OilField Services, LLC*, ¶ 23, 875 N.W.2d at 525-26.
45. *Id.* ¶ 24, 875 N.W.2d at 526.
46. *Id.*

district court did not abuse its discretion in denying a preliminary injunction on this issue.[47]

Finally, Black Gold argued that it had a substantial probability of succeeding on the merits because Williston's decision violated zoning ordinances.[48] Black Gold claimed that Williston acted beyond its authority because only the building office was authorized to enforce zoning ordinances.[49] The Court reasoned that Black Gold's argument was rejected because Williston's actions were not enforcing an existing zoning ordinance; instead, Williston's actions constituted a vote not to take further action to extend Black Gold's permit.[50] The district court did not abuse its discretion in denying a preliminary injunction on this issue.[51] Hence, the Court held that Black Gold failed to establish a substantial probability of succeeding on the merits of its lawsuit against Williston and the City Commission. Therefore, the district court did not abuse its discretion, and the request for a supervisory writ was denied.[52]

47. *Id*.
48. *Id*.
49. *Id*. ¶ 25.
50. *Black Gold OilField Services, LLC*, ¶ 26, 875 N.W.2d at 526.
51. *Id*.
52. *Id*. ¶ 27.

CONSTITUTIONAL LAW – RIGHT TO A SPEEDY TRIAL

City of Grand Forks v. Gale

In *City of Grand Forks v. Gale*,[53] Jason Gale ("Gale") appealed from a criminal judgment in which a jury found him guilty of driving under the influence.[54] Gale argued that he was convicted and sentenced in violation of his state and federal constitutional rights to a speedy trial.[55] The North Dakota Supreme Court reversed the criminal judgment, finding that Gale's right to a speedy trial was violated.[56]

Gale was cited for driving under the influence on April 20, 1995.[57] His attorney, Henry Rowe, requested that Gale sign a "limited power of attorney."[58] The power of attorney authorized Howe to appear in court on Gale's behalf.[59] A sentencing hearing was scheduled for June 21, 1995.[60] The court mailed three notices of hearing requiring Gale to appear personally.[61] Gale failed to appear at the sentencing hearing. As a result, an arrest warrant was issued.[62] No subsequent action was taken until March 5, 2015, when Gale filed a motion to recall the arrest warrant.[63] Consequently, the City of Grand Forks ("the City") filed an amended information.[64] Gale filed a motion to dismiss on grounds that the City violated Gale's right to a speedy trial.[65] Gale argued that he was unaware of the pending case, that he was unaware of the active warrant, that his attorney told him the case was closed, and that all fines had been paid.[66] Gale asserted that the City did not prosecute his case for twenty years despite the fact that during that time, he had been in and out of court for unrelated legal matters.[67]

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53. 2016 ND 58, 876 N.W.2d 701.
54. *Id.* ¶ 1, 876 N.W.2d at 704.
55. *Id.* ¶ 4, 876 N.W.2d at 705.
56. *Id.* ¶ 23, 876 N.W.2d at 710.
57. *Id.* ¶ 2, 876 N.W.2d at 704.
58. *Id.*
59. *Gale*, ¶ 2, 876 N.W.2d at 704.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* ¶ 3.
64. *Id.*
65. *Gale*, ¶ 3, 876 N.W.2d at 704.
66. *Id.*
67. *Id.*

A jury trial was held on July 7, 2015.[68] The arresting officer was the only witness to testify.[69] Due to the twenty-year delay, most of the officer's testimony was based on the report he had written after the arrest.[70] Furthermore, no blood-alcohol test evidence was admitted and Gale was found guilty.[71]

The Sixth Amendment to the United States Constitution and Article 1, Section 12 of the North Dakota Constitution guarantee criminal defendants the right to a speedy trial.[72] The United States Supreme Court developed a four-factor test to determine whether the right to a speedy trial has been violated: (1) the length of the delay, (2) the reason for the delay, (3) the accused's assertion of his right to a speedy trial, and (4) the prejudice to the accused.[73]

The North Dakota Supreme Court first looked at the length of the delay, which must be long enough to be presumptively prejudicial.[74] Here, the length of the delay was twenty years, which is clearly longer than the time required to try a DUI case.[75] The prosecution even conceded to this factor,[76] which resulted in this factor heavily weighing in favor of Gales.[77]

The North Dakota Supreme Court next looked to second factor, which is the reason for the delay. "A defendant has no duty to bring himself to trial; the state has that duty. . . . However, if the defendant causes the delay, this factor weighs against him."[78] The City argued that Gale caused the delay because he received three notices which made him aware of the sentencing hearing.[79] Gale asserted that he was unaware that he had to appear, as he signed a power of attorney authorizing his attorney to appear in court on his behalf.[80] Further, Gale claimed that his attorney told him the case was closed.[81] The North Dakota Supreme Court found that this factor weighed in favor of Gale because the City ceased prosecution after Gale failed to appear.[82] "The prosecutor and the court have an affirmative

68. *Id.* ¶ 4.
69. *Id.*
70. *Id.* at 705.
71. *Gale*, ¶ 4, 876 N.W.2d at 705.
72. U.S. CONST. amend. VI; *see also* N.D. CONST. art. 1, § 12.
73. *Gale*, ¶ 5, 876 N.W.2d at 705 (quoting Barker v. Wingo, 407 U.S. 514, 521 (1972)).
74. *Id.* ¶ 9.
75. *Id.* ¶ 10, 876 N.W.2d at 706.
76. *Id.*
77. *Id.*
78. *Id.* ¶ 11.
79. *Gale*, ¶ 12, 876 N.W.2d at 706.
80. *Id.*
81. *Id.*
82. *Id.* ¶ 16, 876 N.W.2d at 708.

constitutional obligation to try the defendant in a timely manner, and this duty requires a good faith, diligent effort to bring him to trial quickly. . . . This factor 'weighs against the State if the State is negligent by not diligently pursuing prosecution.'"[83]

The third factor the North Dakota Supreme Court looked at was whether the accused asserted his right to a speedy trial. A defendant's knowledge of a pending case is important.[84] The Court reasoned that because Gale was aware of the pending case, but did not assert his right to a speedy trial until twenty years later, this factor favored the City.[85] Finally, the North Dakota Supreme Court considered the last factor, which was prejudice to the defendant. The United States Supreme Court has instructed courts to asses this factor in light of the following elements, which highlight what the right to a speedy trial was meant to do: (1) prevent oppressive pretrial incarceration; (2) minimize anxiety and concern of the accused; and (3) limit the possibility that the defense will be impaired.[86] The first element, prevention of oppressive pretrial incarceration, was not applicable in this case, as Gale was not incarcerated prior to trial.[87] The second factor, minimization of the accused's anxiety and concern, was also insignificant because Gale asserted that he was unaware of the pending case while it was delayed.[88] Gale did not claim he experienced any anxiety or concern until the charge was brought to light twenty years later.[89]

The last factor, impairment of the accused's defense, was relevant because Gale claimed his defense was significantly impaired.[90] He asserted that his efforts to cross-examine the arresting officer, who was the only witness at trial, were hampered because the officer did not remember anything about the incident that was not included in the arrest report, which was prepared for the purpose of prosecuting Gale.[91] Gale stated "[t]here can be no effective cross-examination of a witness who remembers little to nothing outside his report."[92] The City also argued that its case was prejudiced: it was unable to utilize blood-test results because of foundation issues, and thus, "was left to prosecute a case based on an officer who had

83. *Id.* (quoting State v. Moran, 2006 ND 62, ¶ 10, 711 N.W.2d 915).
84. *Id.* ¶ 17.
85. *Gale*, ¶ 17, 876 N.W.2d at 708.
86. *Id.* ¶ 18, 876 N.W.2d at 708-09.
87. *Id.* at 709.
88. *Id.*
89. *Id.*
90. *Id.* ¶ 19.
91. *Gale*, ¶ 19, 876 N.W.2d at 709.
92. *Id.*

very little specific recollection of the event and was relying primarily on a report he had prepared twenty years earlier."[93] The City maintained that it was not negligent in its prosecution, and it argued that Gale was required to show actual prejudice—something it asserted Gale had not done.[94] The Court found that the City failed to diligently pursue the case; therefore, the prosecution was negligent.[95] The Court also concluded that Gale was entitled to a presumption of prejudice.[96] Three of the four factors weighed in Gale's favor. As a result, Gale's right to a speedy trial was violated.[97]

93. *Id*.
94. *Id*.
95. *Id*. ¶ 21, 876 N.W.2d at 709-10.
96. *Id*. ¶ 22, 876 N.W.2d at 710.
97. *Gale*, ¶ 23, 876 N.W.2d at 710.

CONVERSION AND FRAUDULENT TRANSFER—REMEDIES—AMOUNT OF DAMAGES

PHI Financial Services, Inc. v. Johnston Law Office, P.C.

PHI Financial Services, Inc. v. Johnston Law Office, P.C., involved a secured creditor bringing action against a debtor's law firm seeking to recover funds under theories of conversion and fraudulent transfer.[98] The district court entered judgment in favor of the creditor, PHI Financial Services, Inc. ("PHI").[99] Johnston Law Office, P.C. ("Johnston") appealed, and the North Dakota Supreme Court affirmed in part, reversed in part, and remanded, holding that (1) the firm was not liable for allegedly fraudulent transfer of funds to debtor's father; (2) the firm was entitled only to funds representing services performed for debtor; (3) creditor perfected its security interests in governmental agricultural payments; and (4) the firm was subject to prejudgment interest on wrongly-retained attorney fees on date that funds were placed in office business account.[100]

In 2007, Thomas and Mari Grabanski and John and Dawn Keely formed the Grabanski Land Partnership ("GLP") for the purpose of purchasing farmland in Texas.[101] They later formed G & K Farms ("G & K"), a North Dakota general partnership, also for the purpose of purchasing Texas farmland.[102] G & K was insured under the Supplemental Revenue Assistance Payments Program ("SURE"), which was administered by the United States Department of Agriculture.[103] In 2007 and 2008, Choice Financial Group ("Choice") made a series of loans to G & K, totaling more than $6.75 million.[104] In the security agreements between G & K and Choice, G & K agreed to, among other things, grant Choice a security interest in government and insurance payments.[105] In 2008, PHI loaned $6.6 million to G & K, and, in return, G & K granted security agreements to PHI, which included ". . .all state or federal farm program payments. . . ."[106]

G & K suffered $2.5 million in losses during 2008, but continued to plant crops in 2009; therefore, the Keeley's withdrew from G & K early

98. 2016 ND 20, 874 N.W.2d 910.
99. *Id.* ¶ 6, 874 N.W.2d at 914.
100. *Id.* ¶ 1, 874 N.W.2d. at 912.
101. *Id.* ¶ 2.
102. *Id.*
103. *Id.*
104. *PHI Financial Services, Inc.*, ¶ 3, 874 N.W.2d at 912.
105. *Id.* at 913.
106. *Id.* ¶ 4.

that year.[107] The Grabanskis then formed Texas Family Farms ("TXX") to farm the property.[108] The Grabanskis eventually defaulted on all loans provided to their farming business entities and retained representation from Johnston.[109] Numerous lawsuits were filed against the Grabanskis and their various business entities, and in March 2011, PHI obtained a judgment of $7.5 million against the Grabanskis and G & K.[110]

In October 2011, G & K received Supplemental Revenue Assistance Payments Program ("SURE") payments of $328,168 from the federal government.[111] Johnston advised the Grabanskis not to deposit the SURE payments into G & K's North Dakota bank account to shield the deposit from the amounts owed to Choice or other potential North Dakota creditors.[112] As such, the Grabanskis deposited the SURE amounts into a new bank account in Texas.[113] The Grabanskis then transferred $170,400 of the SURE payment from the Texas bank account to Johnston's trust account through two transactions, for the purposes of paying attorney's fees and to send money to Tom Grabanski's father, to indemnify him for monies paid on behalf of G & K the previous year.[114]

PHI brought action against Johnston, later adding Choice, seeking to recover $170,400 on theories of conversion and fraudulent transfer.[115] The district court held that PHI's security interest in the SURE payments held priority over Choice's interest, and PHI was entitled to any money sent to Grabanski's father from the SURE payments.[116] The district court also found the Grabanski's payment of $150,000 to Johnston for legal services was fraudulent, but allowed Johnston to retain reasonably equivalent value for services rendered of $35,000.[117] A judgment awarding $167,203.24 plus interest was entered in favor of PHI.[118]

Questions regarding actual or constructive fraudulent transfer are questions of fact, subject to the clearly erroneous standard of review.[119]

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107. *Id.* ¶ 5.
108. *Id.*
109. *Id.*
110. *PHI Financial Services, Inc.*, ¶ 5, 874 N.W.2d at 913.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 914.
115. *Id.* ¶ 6.
116. *PHI Financial Services, Inc.*, ¶ 6, 874 N.W.2d at 914.
117. *Id.*
118. *Id.*
119. Farstveet v. Rudolph *ex rel.* Eileen Rudolph Estate, 2000 ND 189, ¶ 20, 630 N.W.2d 24, 31.

Johnston argued the district court erred in voiding the $24,225.37 it transferred from its law office trust to Grabanski's father.[120] The North Dakota Supreme Court found that Johnston held the $24,225.37 for the sole purpose of fulfilling an instruction to make the funds available to someone else.[121] The Court further found that district court erred as a matter of law in holding Johnston liable for the transfer of $24,225.37 to Grabanski's father.[122]

Johnston further argued the district court erred in voiding a "major portion" of the $145,774.63 payment for attorney fees and legal services after finding Johnston was a good-faith transferee which had provided reasonably equivalent value for the transfer under North Dakota Century Code § 13-02.1-08(1).[123] The Supreme Court agreed the $35,000 the district court granted to Johnston constituted the reasonable value of work Johnston provided the Grabanskis.[124]

In its cross-appeal, PHI argued the district court erred in finding Johnston provided any value to G & K because G & K was defunct before legal representation occurred.[125] Whether reasonably equivalent value has been received in exchange for a transfer is a question of fact subject to the clearly erroneous standard of review.[126] The Court found PHI did not provide evidence to establish that $35,000 was an unreasonable amount of attorney fees for Johnston's work on behalf of Grabanski.[127]

Johnston next argued that the district court erred in holding PHI was not barred by res judicata[128] from pursuing Uniform Commercial Code Article 9 remedies to collect the funds after it had obtained a money judgment against the Grabanskis and G & K in federal court.[129] The North Dakota Supreme Court disagreed with Johnston for two reasons. The first reason was that a creditor may obtain a money judgment on the debt owed and foreclose on collateral in one or more proceedings so long as there is no

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120. *PHI Financial Services, Inc.*, ¶ 11, 874 N.W.2d. at 915.

121. *Id.* ¶ 17, 874 N.W.2d at 917.

122. *Id.*

123. N.D. CENT. CODE § 13-02.1-08(1) (2016) ("A transfer or obligation is not voidable under subdivision a of subsection 1 of section 13-02.1-04 against a person that took in good faith and for a reasonably equivalent value given the debtor or against any subsequent transferee or obligee").

124. *Id.* ¶ 22, 874 N.W.2d at 918.

125. *Id.* ¶ 21.

126. *See* Four Season's Healthcare Ctr., Inc. v. Linderkamp, 2013 ND 159, ¶ 20, 837 N.W.2d 147.

127. *PHI Financial Services, Inc.*, ¶ 22, 874 N.W.2d. at 918.

128. *Res Judicata*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("An issue that has been definitively settled by judicial decision").

129. *PHI Financial Services*, ¶ 24, 874 N.W.2d. at 917.

double recovery.[130] The second reason was that Johnston failed to acknowledge that the SURE payment was received by G & K after judgment was entered in the federal court action, and that the causes of action were not split.[131]

The North Dakota Supreme Court further concluded Johnston was incorrect in arguing that PHI failed to perfect its security interest in the SURE payments transferred to the law firm.[132] The Court reasoned that Johnston's argument that the crops or their proceeds needed to be properly perfected was incorrect; rather, the government payments should have been properly perfected, as they were.[133]

Johnston next argued that the district court erred in calculating prejudgment interest beginning on the dates G & K transferred the funds to the law firm rather than the date PHI filed its complaint to the North Dakota Supreme Court.[134] The Court ruled that the district court erred in awarding prejudgment interest from the dates the SURE funds were transferred from G & K to Johnston, and held that Johnston could only be liable for prejudgment interest from the date the funds, designated as attorney fees, were removed from the Johnston law office trust account and placed in the office business account.[135]

Choice then argued the district court erred in ruling PHI's security interest had priority over Choice's security interest,[136] because PHI did not perfect its security interest by filing a financing statement in the state of Texas listing its interest in the crops as "farm products."[137] The North Dakota Supreme Court found that the crops themselves, or their proceeds, were not the collateral at issue, and that the governmental SURE payments did not qualify as "farm products," but rather as "contract rights, accounts or general intangibles."[138] Because PHI had filed its financing statement covering the SURE payments in North Dakota before Choice, the Court held PHI's security interest had priority over Choice's security interest, and the district court did not err in its ruling.[139]

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130. *See* Prod. Credit Ass'n of Mandan v. Obrigewitch, 443 N.W.2d 923, 926 (N.D. 1989); *see also* N. D. CENT. CODE § 41-09-98(3) (2016) which states "[t]he rights under subsections 1 and 2 are cumulative and may be exercised simultaneously."

131. *PHI Financial Services, Inc.*, ¶ 26, 874 N.W.2d. at 919.

132. *See id.* ¶¶ 27-30, 874 N.W.2d. at 919-20.

133. *Id.* ¶ 30, 874 N.W.2d. at 920.

134. *Id.* ¶ 31.

135. *Id.* ¶ 33, 874 N.W.2d. at 920-21.

136. *Id.* ¶ 35, 874 N.W.2d at 921.

137. *PHI Financial Services, Inc.*, ¶ 36, 874 N.W.2d. at 921.

138. *Id.* ¶¶ 36-37.

139. *Id.* ¶¶ 40-41, 874 N.W.2d at 922.

Justice Sandstrom dissented from the majority.[140] He disagreed with the portion of the majority that exonerated Johnston for its role in the fraudulent transfer of $20,400 from G & K to Grabanski's father.[141] Justice Sandstrom noted that because Johnston placed the money in its trust account before transferring it to Grabanski's father, the transaction constituted the type of fraudulent transfer that "is precisely the sort of insider transaction the statute[142] is intended to prevent."[143]

140. *Id.* ¶ 45, 874 N.W.2d at 922-23 (Sandstrom, J. dissenting).
141. *Id.*
142. N.D. CENT. CODE § 13-02.1-08 (2016).
143. *PHI Financial Services, Inc.*, ¶ 45, 874 N.W.2d at 923.

CRIMINAL LAW – CIVIL COMMITMENTS – SEXUALLY DANGEROUS INDIVIDUALS

County State's Attorney v. Johnson (*In re Johnson*)

In *County State's Attorney v. Johnson*,[144] Jeremy Johnson ("Johnson") appealed a district court order continuing his commitment as a sexually dangerous individual.[145] The North Dakota Supreme Court reversed the district court's order after concluding that the district court's findings were insufficient.[146]

In 2012, the state committed Johnson to the state hospital as a sexually dangerous individual.[147] The North Dakota Supreme Court upheld Johnson's initial commitment in *Interest of Johnson*.[148] When Johnson petitioned the district court for discharge, it continued his commitment, finding that he was a sexually dangerous individual.[149] Johnson appealed and, upon hearing his case, the North Dakota Supreme Court remanded his case for further fact findings regarding whether he had serious difficulty controlling his behavior.[150] On remand, the district court reviewed the record, made additional findings, and continued Johnson's commitment.[151] Johnson filed a timely appeal.[152]

The standard of review for civil commitment of sexually dangerous individuals, set forth in *Johnson*, required the North Dakota Supreme Court to affirm the district court's order denying a discharge petition unless it was "induced by an erroneous view of the law" or the Court "is firmly convinced it is not supported by clear and convincing evidence."[153] The Court also explained that it gave "great deference to the trial court's credibility determinations of expert witnesses" because the trial court was "the best credibility evaluator in cases of conflicting testimony. . . . "[154]

To prove a committed individual remains a sexually dangerous individual, the state bears the burden to prove, by clear and convincing evidence, the three following statutory elements:

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144. 2016 ND 29, 876 N.W.2d 25.
145. *Id.* ¶ 1, 876 N.W.2d at 26.
146. *Id.*
147. *Id.* ¶ 2.
148. *Id.*; 2013 ND 146, 835 N.W.2d 806.
149. *In re Johnson*, 2016 ND 29, ¶ 2, 876 N.W.2d at 26.
150. *Id.*; 2015 ND 71, 861 N.W.2d 484.
151. *In re Johnson*, 2015 ND 71, ¶ 9, 861 N.W.2d 484, 487.
152. *In re Johnson*, 2016 ND 29, ¶ 2, 876 N.W.2d at 26.
153. *In re Johnson*, 2015 ND 71, ¶¶ 4-5, 861 N.W.2d 484, 486 (quoting *Matter of Wolff*, 2011 ND 76, ¶ 5, 796 N.W.2d 644, 646).
154. *In re Johnson*, 2016 ND 29, ¶ 3, 876 N.W.2d at 27.

> (1) the individual has engaged in sexually predatory conduct, (2) the individual has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction, and (3) the individual's condition makes them likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others.[155]

Additionally, in order to satisfy substantive due process, the state must prove that "the committed individual has serious difficulty controlling his behavior."[156]

According to the Court, as a matter of law, the district court errs when its findings are insufficient or do not support its legal conclusions.[157] The North Dakota Supreme Court deferred to a district court's determination that an individual has serious difficulty controlling behavior when it is supported by specific findings demonstrating that difficulty.[158]

The Court listed several of its previous findings, which constituted serious difficulty controlling behavior, such as when an individual: (1) frequently assaulted staff and his peers,[159] (2) yelled profanities, (3) had an explosive temper, (4) refused to attend treatment, (5) acted in a sexual manner with a peer,[160] (6) engaged in a sexual relationship with a peer, (7) stated he would take advantage of a minor if he knew he would not get caught, (8) would use drugs if they were offered to him, or (9) would provide oral sex if someone came to his door and wanted it.[161]

The Court clarified that it will find error if the district court cannot support its determination that an individual had difficulty controlling his behavior with specific factual findings.[162] As support, the Court cited

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155. *Id.* (quoting *In re Johnson*, 2015 ND 71, ¶ 5, 861 N.W.2d 484, 486).

156. *Id.* (citing *Matter of Wolff*, 2011 ND 76, ¶ 7, 796 N.W.2d 644, 647). The Court continues:

> We construe the definition of a sexually dangerous individual to mean that proof of a nexus between the requisite disorder and dangerousness encompasses proof that the disorder involves serious difficulty in controlling behavior and suffices to distinguish a dangerous sexual offender whose disorder subjects him to civil commitment from the dangerous but typical recidivist in the ordinary criminal case.

See also Kansas v. Crane, 534 U.S. 407 (2002).

157. *In re Johnson*, 2016 ND 29, ¶ 4, 876 N.W.2d at 27 (citing *In re R.A.S.*, 2008 ND 185, ¶ 8, 756 N.W.2d 771, 773).

158. *Id.* ¶ 5, 876 N.W.2d at 28.

159. *Id.* (citing *In re G.L.D.*, 2011 ND 52, ¶ 7, 795 N.W.2d 346, 349-50).

160. *Id.* (citing *Wolff* ¶ 9, 796 N.W.2d 648).

161. *Id.* (citing *In re M.D.*, 2012 ND 261, ¶ 10, 825 N.W.2d 838, 842).

162. *Id.* ¶ 6.

Midgett[163] and Johnson's 2015 appeal.[164] In 2015, the Court found error when the district court "merely analyzed Johnson's criminal history but 'did not specifically state the facts upon which it relied, nor did it make specific findings on whether Johnson has serious difficulty in controlling his behavior.'"[165]

Johnson asserted that the district court erred when it failed, yet again, to make sufficient findings that he had serious difficulty controlling his behavior.[166] The North Dakota Supreme Court agreed with Johnson.[167] The State insisted the district court's finding that Johnson's inadequate progression in treatment was sufficient to show Johnson had serious difficulty controlling his behavior.[168] While the North Dakota Supreme Court agreed that subpar progress in treatment "may indicate serious difficulty controlling behavior," it "decline[d] to infer that one equals the other."[169]

The Court reasoned that "lack of progress in treatment *alone* is insufficient to meet this requirement for commitment."[170] The Court decided that the State had not met its statutory or constitutional burden because "the district court made *no* findings relating to Johnson's present inability to control his behavior."[171] As a result, the North Dakota Supreme Court found an error of law because, on remand for the specific purpose, the district court still did not find Johnson had serious difficulty controlling his behavior, yet it continued his commitment.[172] Therefore, the Court reversed the district court's order and directed Johnson be released from civil commitment.[173]

Justice Dale V. Sandstrom dissented because "[he] would have affirmed on the last appeal" and would again "affirm here."[174]

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163. *In re Johnson*, 2016 ND 29, ¶ 6, 876 N.W.2d at 28 (citing *In re Midgett*, 2009 ND 106, ¶ 9, 766 N.W.2d 717, 720: "[t]he district court did not specifically state the facts upon which it relied or even make a finding on whether Midgett had serious difficulty in controlling his behavior.").

164. *In re Johnson*, 2015 ND 71, ¶ 9, 861 N.W.2d 484, 487.

165. *In re Johnson*, 2016 ND 29, ¶ 6, 876 N.W.2d at 28 (quoting *In re Johnson*, 2015 ND 71, 861 N.W.2d 484).

166. *Id.* ¶ 7.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* ¶ 8, 876 N.W.2d at 28 (emphasis in original).

171. *In re Johnson*, 2016 ND 29, ¶ 11, 876 N.W.2d at 29 (emphasis in original).

172. *Id.*

173. *Id.* ¶ 12.

174. *Id.* ¶¶ 14-15.

CRIMINAL LAW—CONSITUTIONAL LAW—SEARCHES AND SEIZURES

State v. Ballard

In *State v. Ballard*,[175] defendant Jeremy Ballard ("Ballard") entered a conditional guilty plea in district court for possession of methamphetamine and possession of drug paraphernalia, following denial of his motion to suppress evidence and to dismiss the charges against him.[176] Ballard argued the district court should have suppressed the evidence against him because it resulted from a probationary search of his home without suspicion and in violation of his constitutional rights.[177] In a divided opinion, the North Dakota Supreme Court held the suspicionless search of an unsupervised probationer's home was unreasonable under the Fourth Amendment of the United States Constitution.[178]

In October 2013, Ballard pleaded guilty to several misdemeanor drug crimes, and among other minor punishments, was sentenced to two years of unsupervised probation.[179] Relevant conditions of Ballard's probation included that he "submit to a search of his person, place and vehicle at the request of law enforcement without a warrant" and that he "submit to random drug-testing without a warrant or probable cause, including but not limited to, urine analysis."[180] In March 2014, a Divide County deputy sheriff saw Ballard driving a car with two passengers.[181] The deputy was aware Ballard and one of his passengers were on unsupervised probation and were subject to searches and random drug tests, and stopped Ballard's car.[182] The deputy testified that he stopped Ballard for the sole reason of performing a probation search and that he did not have any "reasonable articulabl[e] suspicion" of any drug-related or criminal activity when he made the stop.[183] When the deputy activated his emergency lights, Ballard pulled over in front of his residence, and the deputy asked Ballard to exit the vehicle so he could perform a pat-down and search of Ballard's vehicle.[184] Ballard agreed; yet, neither yielded contraband.[185]

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175. 2016 ND 8, 874 N.W.2d 61.
176. *Ballard*, ¶¶ 1, 4, 874 N.W.2d at 62.
177. *Id.* ¶ 4.
178. *Id.*
179. *Id.* ¶ 2.
180. *Id.*
181. *Ballard*, ¶ 3, 874 N.W.2d at 62.
182. *Id.*
183. *Id.* at 62-63.
184. *Id.* at 63.

The deputy then entered Ballard's residence without consent or a warrant.[186] The deputy searched Ballard's bedroom and found methamphetamine paraphernalia and a bag of crystal methamphetamine.[187] He then arrested Ballard, who was charged with possession of methamphetamine and possession of paraphernalia, both class C felonies.[188] At his hearing, Ballard's motion to suppress the evidence found in his bedroom was denied, and he entered a conditional guilty plea reserving the right to appeal the denial to suppress the evidence.[189]

Questions of law are fully reviewable.[190] "Whether a violation of the constitutional prohibition against unreasonable searches and seizures has occurred is a question of law."[191] When reviewing the constitutionality of probationary searches, the North Dakota Constitution provides the same protections as the United States Constitution:[192] the unsupervised probationer's liberty interests and expectation of privacy must be weighed against the state's interest in protecting its citizens.[193]

Prior to its analysis of the case, the North Dakota Supreme Court outlined the case law history regarding the legality of suspicionless, warrantless searches of probationers, which has recently and significantly developed in both North Dakota and the United States. In 1972, in *State v. Schlosser*,[194] the North Dakota Supreme Court held that evidence obtained during a warrantless probationary search of a supervised probationer was allowable.[195] The probationer's terms were similar to Ballard's in that he agreed to be searched without a warrant.[196] The Court reasoned the defendant's status as a probationer affected his rights under the Fourth Amendment such that he had a lesser expectation of liberty and privacy than a non-criminal citizen, and the state had an interest in facilitating his rehabilitation and guarding the public.[197] The *Schlosser* Court further weighed the reasonableness of the search in question with the criminality of

185. *Id.*
186. *Id.* ¶ 4.
187. *Ballard*, ¶ 4, 874 N.W.2d at 63.
188. *Id.*
189. *Id.* ¶ 5.
190. *Id.* ¶ 6 (citing State v. Adams, 2010 ND 184, ¶ 7, 788 N.W.2d 619, 622).
191. *Id.* at 63-64 (citing State v. Maurstad, 2002 ND 121, ¶ 11, 647 N.W.2d 688, 691).
192. *Id.* ¶ 8, 874 N.W.2d at 64.
193. *Ballard*, ¶ 9, 874 N.W.2d at 64.
194. 202 N.W.2d 136 (N.D. 1972).
195. *Ballard*, ¶ 11, 874 N.W.2d at 64.
196. *Id.*
197. *Id.* at 65.

the defendant's conduct.[198] Then, in *State v. Perbix*,[199] the North Dakota Supreme Court expanded its decision in *Schlosser* by holding warrantless probation searches were valid under the Fourth Amendment if the searches: (1) contributed to rehabilitation; (2) were not used as subterfuge for criminal investigations; and (3) were performed in a reasonable manner.[200]

In 2001, in *United States v. Knights*,[201] the United States Supreme Court held a deputy's warrantless search of a probationer's home was constitutional when based on reasonable suspicion of unlawful activity.[202] Shortly after, in *State v. Maurstad*,[203] the North Dakota Supreme Court stated it would no longer analyze the alleged purpose of a probationary search to determine its validity, nor would it consider whether the search was conducted as a subterfuge for a criminal investigation; rather the Court would view the totality of the circumstances surrounding the search.[204] Then, the United States Supreme Court's decision in *Samson v. California*[205] expanded on the idea that there exists a spectrum of expectation of liberty and privacy regarding warrantless searches, such that probationers expect more privacy than parolees and parolees expect more privacy than prisoners.[206] The Court ultimately concluded that the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee.[207]

Most recently, in *State v. Gonzalez*,[208] a supervised probationer challenged the search of his cellphone.[209] The North Dakota Supreme Court held that under the totality of circumstances, when a warrantless search is authorized by a condition of probation and is supported by reasonable suspicion, it is valid and reasonable under the Fourth Amendment.[210]

Ballard was a case of first impression in North Dakota. Despite rigorous examination of previous case law regarding suspicionless searches of parolees and probationers, the North Dakota Supreme Court never had

198. *Id.*
199. 331 N.W.2d 14 (N.D. 1983).
200. *Ballard*, ¶ 14, 874 N.W.2d at 65.
201. 534 U.S. 112 (2001).
202. *Ballard*, ¶ 22, 874 N.W.2d at 67-68.
203. 2002 ND 121, 647 N.W.2d 688.
204. *Ballard*, ¶ 23, 874 N.W.2d at 68.
205. 547 U.S. 843, 848 (2006).
206. *Ballard*, ¶ 26, 874 N.W.2d at 69.
207. *Id.* ¶ 33, 874 N.W.2d at 70.
208. 2015 ND 106, ¶ 1, 862 N.W.2d 535, 538.
209. *Ballard*, ¶ 27, 874 N.W.2d at 69.
210. *Id.*

the opportunity to take into account state cases which analyzed the constitutionality of a suspicionless search agreed upon as a term of probation for an unsupervised probationer as the sole basis for a search producing evidence of criminal conduct. While acknowledging Ballard's status as an unsupervised probationer is a form of criminal sanction[211] which reasonably denies him some degree of liberty, the North Dakota Supreme Court recognized that penalties imposed on an unsupervised probationer, the least egregious category of American criminals, should restrict the smallest degree of such individual's liberties compared with more egregious classes of criminals.[212] The Court noted the stark contrast of the relatively light conditions of probation bestowed upon Ballard compared to the loss of liberty, required drug testing, and limited travel restraints placed upon the parolee in *Samson* and the supervised probationer in *Knights*.[213] As such, the North Dakota Supreme Court held the degree of freedom imposed by Ballard's parole conditions outweighed the governmental interest in his restriction in this case, and found the suspicionless search of his home unconstitutionally unreasonable.[214] The North Dakota Supreme Court reversed the district court's order to deny Ballard's motion to suppress evidence and remanded to allow Ballard to withdraw his guilty plea.[215]

Justice McEvers concurred with the majority, and wrote separately, stating the governmental interest in restricting a criminal on supervised probation is less than that of an unsupervised probationer, and that distinction should weigh into the reasonableness of a suspicionless search.[216] Justice McEvers further noted that when the search of Ballard's person and vehicle did not yield contraband, the deputy's suspicion should have dissipated and he should not have searched Ballard's home, making the search constitutionally unreasonable.[217]

Justice Sandstrom dissented, and argued the majority erroneously concluded that the United States Constitution requires reasonable suspicion for probation searches.[218] He further stated that even if reasonable suspicion was the proper standard, it was a question of law that should have

211. *Id.* ¶ 35, 874 N.W.2d at 70-71.
212. *Id.* ¶¶ 36-37.
213. *See id.* ¶¶ 38-40, 874 N.W.2d at 71-72.
214. *Id.* ¶ 41, 874 N.W.2d at 72.
215. *Ballard*, ¶ 42, 874 N.W.2d at 72.
216. *Id.* ¶¶ 43-44 (McEvers, J., concurring).
217. *Id.* ¶ 47, 874 N.W.2d at 73.
218. *Id.* ¶¶ 49-50 (Sandstrom, J., dissenting).

been reviewed de novo.[219] Justice Sandstrom would have affirmed the district court's decision based upon the reasonable suspicion he believed was created by Ballard's drug-related criminal history and his travel with another individual on probation for drug-related convictions.[220]

Justice Sandstrom noted the North Dakota Supreme Court has previously held that a search ". . . did not violate the Fourth Amendment because 'reasonable suspicion' is not required for a probationary search as long as the search is reasonable."[221] He acknowledged the United States Supreme Court has left open the question of whether the Fourth Amendment authorizes searching an individual simply because she is on probation, but stated the holding in *Samson* authorized such a search on a parolee solely for her condition of being on parole.[222] He also stated the Eighth Circuit Court of Appeals has been reluctant to decide whether the constitutionality of a warrantless probationary search requires individualized suspicion.[223] Justice Sandstrom also noted the significant variance among the states regarding the constitutional parameters of suspicionless probationary searches.[224] Justice Sandstrom believes the North Dakota Supreme Court has set rather concrete limits on an issue not yet substantially decided by higher courts' jurisprudence by explicitly holding that a suspicionless, warrantless search of an unsupervised probationer is prima facie unconstitutional.[225]

Justice Sandstrom, agreed with the majority that the constitutional bounds of warrantless searches on probationers are predicated on weighing the probationer's freedom of privacy with the state's interests to reduce recidivism and protect its citizens.[226] He noted, however, that the purpose of suspicionless searches is to deter probationers from the commission of crime and to aid them in rehabilitation.[227] Justice Sandstrom argued that the benefits of deterrence and rehabilitation are diminished in the majority's holding, because probationers will know they cannot be searched without reasonable suspicion and will be able to conceal their crimes, especially drug-related crimes, in the privacy of their homes or at times they know

219. *Id.* ¶ 51, 874 N.W.2d at 73-74.
220. *Id.* at 74.
221. State v. Smith, 1999 ND 9, ¶ 9, 589 N.W.2d 546.
222. *Ballard*, ¶ 58, 874 N.W.2d at 75.
223. *Id.* ¶ 61, 874 N.W.2d at 77.
224. *Id.* ¶ 60, 874 N.W.2d at 76.
225. *See id.* ¶¶ 54-61, 874 N.W.2d at 74-78.
226. *Id.* ¶ 62, 874 N.W.2d at 78.
227. *Id.* ¶ 64, 874 N.W.2d at 79.

will be undisturbed by probation or law enforcement officers.[228] Since Ballard was at a higher risk of recidivism, he argued that "... it is reasonable to conclude the exercise of the search clause contributed to the rehabilitation process regardless of whether Ballard's probation was deemed supervised or unsupervised."[229]

Continuing his analysis of the circumstances surrounding *Ballard*, Justice Sandstrom noted there was nothing in the record to indicate the search was conducted for an improper amount of time or that any property was damaged during the search.[230] Further, the search immediately followed the deputy stopping Ballard's vehicle, was confined to the bedroom Ballard identified as his own, and was not conducted in a harassing manner.[231] Justice Sandstrom concluded that the search in *Ballard* was reasonable and properly conducted.[232] He viewed the degree of personal liberty Ballard lost due to his probationary status more severely than the majority.

Chief Justice VandeWalle wrote a brief dissent agreeing with the majority of Justice Sandstrom's opinion.[233] The Chief Justice also noted that the conditions of Ballard's probation, as written, were vague and should not be written as such in future district court sentences.[234]

228. *Ballard*, ¶ 64, 874 N.W.2d at 79.
229. *Id.* ¶ 69, 874 N.W.2d at 81.
230. *Id.* ¶ 70.
231. *Id.*
232. *Id.* ¶ 75, 874 N.W.2d at 83.
233. *Id.* ¶¶ 80-81, 874 N.W.2d at 84-85 (Vande Walle, C. J., dissenting).
234. *Ballard*, ¶ 81, N.W.2d at 84.

CRIMINAL LAW – STATUTES – PROPER ADVISORY

State v. O'Connor

In *State v. O'Connor*,[235] the North Dakota Supreme Court affirmed the district court's suppression order because, after arresting Blaise O'Connor ("O'Connor") for driving under the influence of alcohol, the law enforcement officer failed to inform him of the complete implied consent advisory before administering the Intoxilyzer test.[236]

On May 24, 2015, a highway patrol officer stopped O'Connor for a defective taillight, [237] and suspected him of driving under the influence due to his slurred speech and bloodshot and watery eyes.[238] O'Connor admitted to consuming alcohol.[239] The officer requested O'Connor to perform field sobriety tests, allegedly recited a complete implied consent advisory, and asked O'Connor if he would submit to an onsite screening test.[240]

The State claimed the officer read the complete implied consent advisory, which O'Connor contested.[241] The implied consent advisory articulated in North Dakota Century Code § 39-20-14(3) related to screening tests and included the warning that "refusal to take the screening test is a crime."[242] Ultimately, O'Connor surrendered to the onsite screening test, which showed a blood alcohol level over the presumptive limit.[243]

The officer arrested O'Connor and drove him to the Cass County jail,[244] where the officer asked if O'Connor remembered the implied consent advisory previously read to him.[245] O'Connor answered, "yeah, I think so."[246] It was uncontested that the officer provided an incomplete implied consent advisory to O'Connor before he submitted to the Intoxilyzer test.[247] Specifically, the officer failed to advise O'Connor that

235. 2016 ND 72, 877 N.W.2d 312.
236. *Id.* ¶ 1, 877 N.W.2d at 313.
237. *Id.* ¶ 2.
238. *Id.*
239. *Id.*
240. *Id.*
241. *O'Connor*, ¶ 2, 877 N.W.2d at 313.
242. *Id.*
243. *Id.*
244. *Id.* ¶ 3.
245. *Id.*
246. *Id.*
247. *O'Connor*, ¶ 3, 877 N.W.2d at 313.

"refusal to take a chemical test 'is a crime punishable in the same manner as driving under the influence.'"[248]

Because the officer failed to provide a complete implied consent advisory after O'Connor was arrested and before he submitted to a chemical test, O'Connor moved to suppress the result of the Intoxilyzer test.[249] The district court granted O'Connor's motion to suppress, determining, "A plain language reading of the statutes does not allow the implied consent advisory for screening tests under § 39-20-14 to be a substitute for the implied consent advisory for chemical tests under § 39-20-01."[250] The court found that the officer failed to give O'Connor a complete and proper advisory after arrest and before submission to the chemical test.[251] Therefore, the court decided that "pursuant to § 39-20-01(3)(b), [O'Connor's] Intoxilyzer chemical test [was] not admissible and must be excluded from the[] proceedings."[252]

The State argued that the district court erred in granting O'Connor's motion to suppress.[253] The North Dakota Supreme Court articulated its well established[254] standard of review for motions to suppress evidence.[255] The implied consent requirements for the motor vehicle drivers in general are set forth in N.D. Cent. Code § 39-20-01.[256] Over one month before O'Connor's arrest, on April 15, 2015, the North Dakota Legislature passed an emergency amendment to N.D. Cent. Code § 39-20-01(3) to add subdivision b.[257] The district court reasoned, using a plain meaning

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248. *Id.* (citing N.D. CENT. CODE § 39-20-01(3)(a) (2016)).

249. *Id.* ¶ 4.

250. *Id.* at 313-14.

251. *Id.* at 314.

252. *Id.*

253. *O'Connor*, ¶ 5, 877 N.W.2d at 314.

254. State v. Boehm, 2014 ND 154, ¶ 8, 849 N.W.2d 239, 244.

255. *O'Connor*, ¶ 6, 877 N.W.2d at 314 (citing State v. Whitman, 2013 ND 183, ¶ 20, 838 N.W.2d 401, 406-07), stating:

> A trial court's findings of fact in preliminary proceedings of a criminal case will not be reversed if, after the conflicts in testimony are resolved in favor of affirmance, there is a sufficient competent evidence fairly capable of supporting the trial court's findings, and the decision is not contrary to the manifest weight of the evidence. We do not conduct a de novo review. We evaluate the evidence presented to see, based on the standard of review, if it supports the findings of fact.

256. *Id.* ¶ 7 (citing State v. Bauer, 2015 ND 132, ¶ 7, 863 N.W.2d 534, 536).

257. *Id.*; *see* 2015 N.D. SESS. LAWS CH. 268 § 9; currently, and at the time of O'Connor's arrest, N.D. CENT. CODE. § 39-20-01(3) (2016) provides:

> The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take the test to determine whether the individual is under the influence of alcohol or drugs; that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence; and that refusal of the individual to submit to the test directed by the law

analysis,[258] that since O'Connor was the "individual charged" and it was uncontested the officer failed to provide a complete implied consent advisory[259] before administering the Intoxilyzer chemical test, the results of said test were inadmissible in O'Connor's driving under the influence proceeding.[260]

The State presented two arguments intended to circumvent the plain language of the statute.[261] First, the State argued under *State v. Salter*,[262] that the district court erred when it failed to substitute the officer's onsite screening advisory for an incomplete advisory given after O'Connor's arrest and before administration of the chemical test.[263] The Supreme Court disagreed, asserting that to the extent the State's rationale under *Salter* applied, "it ha[d] been abrogated by the plain language of the 2015 amendment to N.D.C.C. § 39-20-01(3)."[264]

Second, the State argued that voluntary consent was an independent ground for admission of O'Connor's chemical test, and relied on three previous North Dakota Supreme Court cases.[265] These cases held that "the [N.D. Cent. Code § 39-20-01 provisions] do not apply if a person voluntarily submits to a chemical test under *Fourth Amendment* consent principles."[266] The Supreme Court also disagreed with this argument, for the same reason—"the voluntary consent holdings in Fossum, Hoffner[,] and Abrahamson have been abrogated by the plain language of the amended statute as well."[267]

> enforcement officer may result in a revocation for a minimum of one hundred eighty days and up to three years of the individual's driving privileges.
>
> A test administered under this section is not admissible in any criminal or administrative proceeding to determine a violation of section 39-08-01 or this chapter if the law enforcement officer fails to inform the individual charged as required under subdivision a.

258. *O'Connor*, ¶ 8, 877 N.W.2d at 314-15 (citing State v. Rufus, 2015 ¶ 15, 868 N.W.2d 534, 540) ("[W]ords of a statute are given their plain, ordinary, and commonly understood meaning unless a contrary intention plainly appears").

259. *Id.* Specifically, the officer failed to advise O'Connor before administering the test that refusal to submit to the chemical test is a crime that could result in the same punishment as driving under the influence.

260. *Id.*

261. *Id.* ¶ 9, 877 N.W.2d at 315.

262. 2008 ND 230, 758 N.W.2d 702.

263. *O'Connor*, ¶¶ 9-11, 877 N.W.2d at 315-16.

264. *Id.* ¶ 11, 877 N.W.2d at 315.

265. *Id.* ¶ 12, 877 N.W.2d at 316. The State cited the following three cases: Fossum v. N.D. Dept. of Transp., 2014 ND 47, 843 N.W.2d 282; City of Bismarck v. Hoffner, 379 N.W.2d 282 (N.D. 1985); and State v. Abrahamson, 328 N.W.2d 213 (N.D. 1982).

266. *O'Connor*, ¶ 12, 877 N.W.2d at 316 (emphasis added).

267. *Id.*

Finally, the Court dispelled the parties' contentions regarding the impact of the legislative history of 2015 for § 30-20-01(3)(b) reasoning that "the Legislature has clearly and unambiguously spoken . . . [it] has directed that a specific warning be provided to an arrested defendant before the results of a chemical test can be admitted in a criminal or administrative proceeding."[268] The Court reiterated further by stating that it offered "special deference to the Legislature" and that "adopting the State's arguments here would eviscerate the 2015 amendment to [N.D. Cent. Code] § 39-20-01(3)."[269]

After rejecting both of the State's arguments and explaining its deference to the Legislature, the Supreme Court found that the officer did not provide O'Connor a complete chemical test implied consent advisory after his arrest and before submission to the Intoxilyzer test.[270] Therefore, finding it did not err, the North Dakota Supreme Court affirmed the district court's suppression order.[271]

Chief Justice VandeWalle concurred specially, agreeing that the Legislature had established a bright line and the statutes left no room for the Court to engage in a legislative intent determination or whether a person was disadvantaged by an incorrect or incomplete advisory.[272]

268. *Id.* ¶ 12, 877 N.W.2d at 316-17.
269. *Id.* ¶¶ 13-14.
270. *Id.* ¶¶ 14-17, 877 N.W.2d at 317.
271. *Id.*
272. *O'Connor*, ¶¶ 18-19 (VandeWalle, C.J., concurring).

ENVIRONMENTAL LAW – STATUTORY RIGHTS OF ACTION – EXHAUSTION OF ADMINISTRATIVE REMEDIES

Vogel v. Marathon Oil Co.

In *Vogel v. Marathon Oil Co.*,[273] the North Dakota Supreme Court affirmed the trial court's judgment dismissing without prejudice the mineral interest owner's action against the oil company for damages for failure to pay royalties on flared gas.[274] Vogel, the mineral interest owner, alleged Marathon Oil Company flared gas produced from the well and that some of the gas flared was in violation of North Dakota Century Code § 38–08–06.4.[275]

Section 38-08-06.4 restricted the flaring of gas produced with crude oil from an oil well.[276] The statute provided for royalty payments to the mineral owners if an oil well was operated in violation of the specified restrictions.[277] It also authorized the industrial commission to enforce the section and to determine the amount of royalty payments to be paid.[278]

Vogel argued that her claims under § 38-08-06.4 should not have been dismissed because there was an implied private right of action for damages under the statute.[279] The Court disagreed.[280] In concluding that there was not an implied private right of action for damages under the statute, the Court noted three factors to be used in determining whether a private right of action should be implied under a statute:

> (1) [W]hether the plaintiff is one of the class for whose special benefit the statute was enacted; (2) whether there is an indication of legislative intent, explicit or implicit, either to create such remedy or to deny one; and (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff.[281]

As to the first factor, the Court concluded that Vogel "appear[ed] to be a member of the class for whose benefit the statute was enacted."[282] But the

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273. 2016 ND 104, 879 N.W.2d 471.
274. *Id.* ¶ 1, 879 N.W.2d at 474.
275. *Id.* ¶ 3, 879 N.W.2d at 474-75.
276. *Id.* ¶ 10, 879 N.W.2d at 476 (quoting N.D. CENT. CODE § 38-08-06.4 (2016)).
277. *Id.*
278. *Vogel*, ¶ 10, 879 N.W.2d at 476.
279. *Id.* ¶ 9.
280. *Id.* ¶ 21, 879 N.W.2d at 479.
281. *Id.* ¶ 12, 879 N.W.2d at 476 (citing Empower the Taxpayer v. Fong, 2012 ND 119, 817 N.W.2d 381).
282. *Id.* ¶ 13, 879 N.W.2d at 477.

"ultimate issue," according to the Court, was the second factor— whether the legislature intended, explicitly or implicitly, to create a remedy.[283] The statute's plain language did not indicate any legislative intent to provide a private right of action,[284] but the comprehensive regulatory scheme within the statute, the Court said, was strongly indicative that the legislature did not intent to provide any other remedies.[285] Because Vogel failed to establish that the legislature intended to create a private right of action for damages, the Court decided that it "need not address the third factor."[286] Thus, the Court concluded, there was not an implied private right of action for damages under § 38-08-06.4.[287]

Vogel also argued that the Environmental Law Enforcement Act ("ELEA") of 1975—N.D. Cent. Code § 32-40-02—provided her with a private right of action to enforce § 38-08-06.4, and, as such, the district court had erred in dismissing her claim.[288]

The ELEA provides a private right of action for persons aggrieved by alleged violations of state environmental statutes:

> [A]ny person . . . aggrieved by the violation of any environmental statute, rule, or regulation of this state may bring an action in the appropriate district court, either to enforce such statute, rule, or regulation, or to recover any damages that have occurred as a result of the violation, or for both such enforcement and damages. Such action may be brought against any person, state agency, or county, city, township, or other political subdivision allegedly engaged in such violation.[289]

An environmental statute is "any statute . . . for the protection of the air, water, and other natural resources, including land, minerals, and wildlife, from pollution, impairment, or destruction."[290] Vogel argued that § 38-08-06.4 was an environmental statute as defined by the ELEA.[291] The Court agreed given that oil and gas are generally classified as minerals.[292] But the Court continued:

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283. *Id.* ¶ 12.
284. *Vogel*, ¶ 14, 879 N.W.2d at 477.
285. *Id.* ¶¶ 14, 17.
286. *Id.* ¶ 21, 879 N.W.2d at 479.
287. *Id.*
288. *Id.* ¶ 22, 879 N.W.2d at 480.
289. *Id.* ¶ 23 (quoting N.D. CENT. CODE § 32–40–06 (2016)).
290. *Vogel*, ¶ 24, 879 N.W.2d at 480 (quoting N.D. CENT. CODE § 32–40–03(2) (2016)).
291. *Id.*
292. *Id.*

> Although the ELEA may provide a private right of action for a violation of 38–08–06.4, any remedies the ELEA provides are cumulative and do not replace statutory or common law remedies. . . . If a party is allowed to bring a judicial action for a violation of 38–08–06.4 before they pursue the administrative remedies provided by the statute, the ELEA will replace the statutory remedy.[293]

Because the statute provided an administrative remedy for the royalty owner to pursue in the case of a violation, the Court stated "*that* remedy must be pursued before pursuing a private action as an 'aggrieved person' under the ELEA."[294] The ELEA was available as a remedy only if the Industrial Commission failed or refused to act.[295] The Court also held that the remedy provided in § 38-08-06.4 replaced common law claims for royalties on flared gas.[296]

Chief Justice VandeWalle wrote a concurring opinion.[297] He agreed with the majority's "analysis of whether or not a statute requires exhaustion of administrative remedies and whether or not it creates a private cause of action,"[298] but expressed concern that the decision will be cited as the basis for the position that § 38–08–06.4 is the exclusive remedy for lessors.[299]

Justice Kapsner dissented.[300] She noted that the majority acknowledged that § 32-40-06 both authorizes a person aggrieved by the violation of an environmental statute to bring an action in district court, and that § 38-08-06.4 is an environmental statute as defined by the ELEA.[301] "However," she wrote, "the majority's holding eviscerates the ELEA by requiring an aggrieved person to first exhaust administrative remedies before bringing an action under the ELEA."[302] Justice Kapsner viewed this requirement as contrary to the plain language of the statute, which stated that the remedies provided by the chapter are to be cumulative and shall not replace statutory or common law remedies.[303] A cumulative remedy, she noted, is "[a] remedy available to a party in *addition* to another remedy that

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293. *Id.* ¶ 25, 879 N.W.2d at 481.
294. *Id.* ¶ 28, 879 N.W.2d at 481-82 (emphasis added).
295. *Id.*
296. *Vogel*, ¶ 34, 879 N.W.2d at 483.
297. *Id.* ¶ 44, 879 N.W.2d at 485.
298. *Id.* ¶ 45.
299. *Id.* ¶ 50, 879 N.W.2d at 486.
300. *Id.* ¶ 51.
301. *Id.* ¶ 53.
302. *Vogel*, ¶ 53, 879 N.W.2d at 486.
303. *Id.*

still remains in force."[304] Justice Kapsner also noted that the Court has held that cumulative remedies "are not identical and neither the pursuit of one of the available remedies *nor the failure to pursue one will bar an action on the other*."[305]

304. *Id*. ¶ 65, 879 N.W.2d at 489 (emphasis added).
305. *Id*. at 489-90.

FAMILY LAW – DIVORCE – EARNING CAPACITY

Stock v. Stock

In *Stock v. Stock*,[306] the North Dakota Supreme Court affirmed the district court's judgment awarding the wife permanent spousal support of $3,000 per month until the husband's child support obligation ended, at which time, the award would increase to $5,500 per month.[307]

Robert Stock ("Robert"), the husband, appealed the district court's judgment, arguing that the district court's award of permanent support, and the amount of support awarded, were clearly erroneous.[308]

Spousal support awards are findings of fact, which are not to be set aside on appeal unless clearly erroneous.[309] The Court noted the clearly erroneous standard it follows:

> A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after a review of the entire record, [the Supreme Court is] left with a definite and firm conviction a mistake has been made.[310]

Though the Court expressed a preference for rehabilitative support over permanent support, it noted that when there is a substantial disparity between the spouses' incomes, it may be appropriate to award indefinite permanent support to "maintain the disadvantaged spouse."[311] The Court stated that this may be true even where a spouse is capable of rehabilitation.[312] Thus, the Court concluded that Robert's argument was misplaced where he claimed that the permanent support award was clearly erroneous, because Tiffany Stock ("Tiffany") was young, healthy, and capable of rehabilitation.[313] In determining whether spousal support is appropriate, courts must look to the totality of the circumstances surrounding the parties.[314] Although a spouse's youth, health, and capability for rehabilitation favor rehabilitative support, the Court noted that such factors do not preclude a permanent support award.[315] The Court

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306. 2016 ND 1, 873 N.W.2d 38.
307. *Id.* ¶ 1, 873 N.W.2d at 41.
308. *Id.* ¶ 8, 873 N.W.2d at 42.
309. *Id.* at 42-43.
310. *Id.* (citing Krueger v. Krueger, 2008 ND 90, ¶ 7, 748 N.W.2d 671).
311. *Id.* ¶ 10, 873 N.W.2d at 43 (citing Fox v. Fox, 1999 ND 68, 592 N.W.2d 541).
312. *Stock*, ¶ 10, 873 N.W.2d at 43 (citing Riehl v. Riehl, 1999 ND 107, ¶ 18, 595 N.W.2d 10).
313. *Id.* ¶ 11.
314. *Id.*
315. *Id.*

reasoned that Tiffany had foregone employment prospects throughout the marriage to advance Robert's legal career by moving multiple times and caring for their children, resulting in a disparity of earning capacity.[316]

The Court also concluded that the amount of support awarded by the district court was not clearly erroneous.[317] In determining an appropriate support award, a court considers both the financial needs of the spouse seeking support and the ability of the other spouse to provide for such needs.[318] "An award amount is clearly erroneous where the amount unduly burdens the payor spouse by leaving the spouse in a nearly impossible financial position."[319] The Court was unpersuaded by Robert's argument that he is unable to pay the support.[320]

The Court reasoned that although the husband's child support and spousal support obligations exceeded his salaried pre-tax base pay, he could rely on his year-end bonus to cover the difference between his expenses and base pay.[321] Further, if his legal practice were to suffer making it difficult to pay the amount, he could ask a court to modify the support.[322] Therefore, the Court concluded that Robert was able to pay the spousal support.

Justice Sandstrom dissented, stating that under the clearly erroneous standard he had "a definite and firm conviction a mistake has been made here"; he urged that the "spousal support lottery . . . be addressed structurally by timely legislation."[323] He noted that the result in the case – Robert and Tiffany "yoked together," with Robert given the duty to pay spousal support for three times the length of the marriage, a payout of more than $2.5 million[324] – could have been different had the parties had a different judge, or the same judge on a different day.[325] He advocated a prompt reform of spousal support law in North Dakota.[326]

316. *Id.* ¶¶ 12-13, 873 N.W.2d at 43-44.
317. *Id.* ¶19, 873 N.W.2d at 46.
318. *Stock,* ¶ 18, 873 N.W.2d at 45.
319. *Id.*
320. *Id.* ¶ 19, 873 N.W.2d at 46.
321. *Id.* at 43.
322. *Id.*
323. *Id.* ¶ 43, 873 N.W.2d at 50 (Sandstrom, J., dissenting).
324. *Stock,* ¶ 35, 873 N.W.2d at 49.
325. *Id.* ¶ 37.
326. *Id.* ¶ 43, 873 N.W.2d at 50.

INSURANCE LAW – POLICY PROVISION DEFINITIONS

Nodak Mutual Insurance Company v. Koller

In *Nodak Mutual Insurance Company v. Koller*,[327] the North Dakota Supreme Court affirmed the district court's judgment.[328] The Court found that because Chase Koller ("Koller") was not a resident of Todd Anderson's household at the time of the accident, only the lower "step-down" policy limits of an automobile insurance policy were available in defense of a wrongful death lawsuit that resulted from a fatal accident involving Koller.[329]

When Koller allegedly lost control of an all-terrain vehicle, he and his girlfriend, Stephanie Nelson, were killed.[330] The registered owner of the vehicle was Becky Anderson, Koller's mother.[331] Nodak Mutual Insurance Company ("Nodak") issued the policy that covered the vehicle under the named insured, Todd Anderson, Koller's stepfather.[332] The policy provided up to $100,000 per incident for a "family member" of the proposed insured.[333] The policy defined a "family member" as "a person related to you by blood, marriage or adoption, including a ward or foster child, who is a resident of your household."[334] The "step-down" provision reduced the policy limits to $25,000 if the vehicle was driven by an insured who was not a "family member" of the named insured.[335]

Koller moved out of the Anderson's household in 2003, was not listed as a dependent on their tax returns since 2002, and was dropped as an authorized driver on Todd Anderson's Nodak automobile insurance policy in 2005.[336] In 2006, Koller moved to Grand Forks, North Dakota, where he intermittently lived and maintained a residence until the date of his death.[337] At the time of his death, Koller temporarily lived with his mother and stepfather, Becky and Todd Anderson at their home and worked in Griggs County.[338] According to testimony, Koller was in a serious relationship

327. 2016 ND 43, 876 N.W.2d 451.
328. *Id.* ¶ 1, 876 N.W.2d at 452.
329. *Id.*
330. *Id.* ¶ 2
331. *Id.*
332. *Id.*
333. *Koller*, ¶ 2, 876 N.W.2d at 452.
334. *Id.*
335. *Id.*
336. *Id.* ¶ 3.
337. *Id.* at 453.
338. *Id.* ¶ 5.

with Stephanie Nelson and intended to move to Devils Lake to live with her at the end of the summer of 2011.[339]

Following the fatal accident, Becky Anderson, represented by an attorney hired by Nodak, prepared probate documents in Griggs County, because Koller was living and working in this county at the time of his death.[340] The district court determined Griggs County was the proper venue for probate.[341]

Seeking a declaration for liability of only the reduced step-down policy limits because Koller was not a resident of Todd Anderson's household, and, therefore not a family member of the insured, Nodak sued Becky Anderson in her capacity as Personal Representative to the Estate of Chase Koller, and Chris Kemp ("Kemp"), as guardian of C.K., and the heirs of Stephanie Nelson.[342]

Kemp filed an answer, cross-claim, and a third-party complaint asserting wrongful death against Becky Anderson in her capacity as the Personal Representative of Koller's Estate.[343] Kemp, claiming the family car doctrine, also asserted negligent entrustment against Todd and Becky Anderson individually.[344] Pursuant to North Dakota Rules of Civil Procedure Rule 21, the district court severed the wrongful death action from Nodak's declaratory action.[345]

When Kemp moved for summary judgment in the declaratory action, the district court granted his motion, determining Koller was a resident of the Andersons' household.[346] However, the district court vacated its order in Kemp's favor and scheduled a bench trial to assess the issue of whether Koller was a resident of Todd Anderson's household by applying the factors articulated in *Nodak Mutual Ins. Co. v. Bahr-Renner*.[347]

In *Bahr-Renner*, the North Dakota Supreme Court articulated the following factors to determine whether an individual is a resident of a named insured's household: (1) the intent of the parties; (2) the formality of the relationship; (3) permanence or transient nature; and (4) the age and self-sufficiency of the party in question.[348] District courts are not required

339. *Koller*, ¶ 5, 876 N.W.2d at 453.
340. *Id.* ¶ 6.
341. *Id.*
342. *Id.* ¶ 7.
343. *Id.*
344. *Id.*; *see* Close v. Ebertz, 1998 ND 167, 583 N.W.2d 794.
345. *Koller*, ¶ 7, 876 N.W.2d at 453.
346. *Id.*
347. *Id.* ¶ 8, 876 N.W.2d at 454.
348. Nodak Mutual Ins. Co. v. Bahr-Renner, 2014 ND 39, 842 N.W.2d 912 (2014); *Koller,* ¶ 11, 876 N.W.2d at 454-55.

to make a determination under each of these nonexclusive factors, rather they are to consider the totality of the circumstances on a case-by-case basis.[349] After considering the *Bahr-Renner* factors, the district court reversed its previous judgment, ruled in favor of Nodak, and found that Koller was not a resident of Todd Anderson's household.[350] Unless the district court's decision that Koller was not a resident of Todd Anderson's household is clearly erroneous, the North Dakota Supreme Court must affirm its decision.[351]

Kemp contested the district court's findings regarding each of the factors, even when the court weighed a factor in his favor.[352] The North Dakota Supreme Court analyzed Kemp's arguments by factor, yet affirmed each of the district court's findings.[353]

First, Kemp unsuccessfully argued that the district court failed to consider all relevant evidence of intent regarding the "intent of the parties."[354] Specifically, the court did not recognize that because Koller expressed plans to abandon his Grand Forks apartment, he was, therefore, a resident of the Todd Anderson household.[355]

The district court determined that the Andersons and Koller were not a family living together as defined in the policy for several reasons, including the testimony of Todd and Becky Anderson stating their belief that Koller's stay was temporary, while he worked at a nearby resort for the summer.[356] According to the record, after the summer, Koller planned to move to Devils Lake with serious girlfriend, Stephanie Nelson.[357] Job Service records show Nelson searched, presumably on behalf of Koller, for construction jobs in Devils Lake, where the two planned to live together temporarily with Nelson's mother.[358]

The court also considered Becky Anderson's testimony stating that Koller left his furnishings and numerous personal effects in Grand Forks and did not have a key to the Andersons' house.[359] The North Dakota

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349. *Koller*, ¶ 12, 876 N.W.2d at 455.

350. *Id.* ¶ 13.

351. *Id.* (citing N.D.R.Civ.P. 52(a)(6): "Findings of fact . . . whether based on oral or other evidence must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility").

352. *Id.* ¶¶ 14-33, 876 N.W.2d. at 455-59.

353. *Id.*

354. *Id.* ¶ 14, 876 N.W.2d at 455.

355. *Koller*, ¶ 14, 876 N.W.2d at 455.

356. *Id.* ¶ 15.

357. *Id.*

358. *Id.*

359. *Id.* ¶ 17, 876 N.W.2d at 456.

Supreme Court determined that "any intent by Koller to abandon the Grand Forks residence in favor of a possible move to Devils Lake was a future event not associated with making the Anderson home his residence" so the district court's intent of the parties' finding was not clearly erroneous.[360]

Next, Kemp challenged the district court's decision regarding the "formality of the relationship" factor even though it found Becky Anderson's relationship with Koller "could not be more formal, mother-son."[361] Specifically, Kemp argued the court failed to consider Koller's relationship with Todd Anderson and the Andersons' relationship with A.K., their grandchild.[362] However, the formality of the relationship analysis is between the "person in question" and the "other members of the named insured's household."[363] Therefore, the North Dakota Supreme Court invalidated Kemp's argument, reasoning that even if the district court failed to mention these ancillary relationships, the omission was insignificant because the district court found in Kemp's favor.[364]

Kemp also disagreed with the district court's conclusion regarding the "permanence or transient nature" factor, saying the court gave it undue weight by failing to make a determination regarding "the existence of another place of lodging" factor.[365] Kemp claimed the totality of the circumstances supports a conclusion that, at the time of his death, Koller was a resident of Todd Anderson's household.[366]

The North Dakota Supreme Court affirmed the district court's finding that Koller's stay in the Anderson's home was of a "transient" nature and "solely the result of Koller's loss of employment in Grand Forks."[367] The Court again cited several pertinent factors in verifying the district court's assessment, including the probate venue affidavit signed by Becky Anderson, Koller's serious relationship with Stephanie Nelson and planned move to Devils Lake to be with her, the fact that Koller was fully emancipated and not financially reliant upon his mother and stepfather, and the June 12, 2005, removal of Koller as a driver on Todd Anderson's insurance policy.[368]

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360. *Koller*, ¶ 17, 876 N.W.2d at 456.
361. *Id.* ¶¶ 19-20.
362. *Id.* ¶ 19.
363. *Id.*
364. *Id.* ¶¶ 21-22, 876 N.W.2d at 456-57.
365. *Id.* ¶ 23, 876 N.W.2d at 457.
366. *Koller*, ¶ 23, 876 N.W.2d at 457.
367. *Id.* ¶¶ 24-26.
368. *Id.* ¶¶ 24-25.

When it failed to make a determination regarding the "existence of another place of lodging" factor, Kemp argued that the district court erred.[369] Furthermore, Kemp argued that the totality of the circumstances surrounding this factor also supports a conclusion that Koller was a resident of the Todd Anderson household.[370] The Supreme Court acknowledged that while the district court did not make an express determination regarding another place of lodging, its decision was not clearly erroneous because it made findings relevant to the factor.[371] These relevant findings again include Becky Anderson's signed probate venue affidavit, and the facts that Koller did not take any furniture to the Anderson household, that Koller still continued to receive mail at his Grand Forks residence, and that Koller's North Dakota driver's license, death certificate, and obituaries listed his address as his Grand Forks residence.[372]

Kemp argued the district court erred in its decision regarding the "age and self-sufficiency" factor.[373] The North Dakota Supreme Court again verified that the district court's finding that Koller was self-sufficient was not clearly erroneous.[374] The Supreme Court found ample evidence in the record that supported the district court's finding, including the fact that Koller moved out of the Anderson home when he was eighteen, finished his education, joined the military, moved to Grand Forks, and had custody of his child.[375] The Court explained that "[w]hile Koller clearly benefitted by having a rent-free place to stay for himself and his child, it does not necessarily equate to a lack of self-sufficiency."[376]

Finally, Kemp argued the district court erred when it failed to establish Koller's residency, as a matter of law, in Griggs County, where his estate was probated.[377] The North Dakota Supreme Court reiterated that "technical notions of legal residence and domicile are not controlling."[378] The Court continued by explaining that even if the district court did factor the probate venue into its assessment, this fact is not determinative, as a matter of law.[379] Therefore, the district court did not err by failing to

369. *Id.* ¶ 27, 876 N.W.2d at 458.
370. *Id.*
371. *Id.* ¶¶ 27-30.
372. *Koller*, ¶¶ 27-30, 876 N.W.2d at 458.
373. *Id.* ¶ 31, 876 N.W.2d at 459.
374. *Id.* ¶¶ 31-33.
375. *Id.* ¶ 32.
376. *Id.*
377. *Id.*
378. *Koller*, ¶ 34, 876 N.W.2d at 459 (citing Nodak Mutual Ins. Co. v. Bahr-Renner, 2014 ND 39, ¶ 9, 842 N.W.2d 912 (2014)).
379. *Id.* ¶¶ 34-35.

conclude that Koller was not an Anderson household resident, simply because his estate was probated in Griggs County.[380]

The North Dakota Supreme Court articulated that, while it may not have drawn the same conclusions under de novo review, the clearly erroneous standard applicable in this case precluded the Court from reweighing evidence.[381] Having reviewed the entire record and analyzing the application of the *Bahr-Renner* factors, the North Dakota Supreme Court concluded that the district court's finding that Koller was not a resident of Todd Anderson's household for purposes of the policy were not clearly erroneous.[382] The North Dakota Supreme Court also concluded that the district court did not err when ruling that the lower "step-down" provision applied due to the finding that Koller was not a resident of Todd Anderson's household.[383]

380. *Id.* ¶ 34.
381. *Id.* ¶ 35.
382. *Id.*
383. *Id.*