North Dakota Law Review

Volume 93 | Number 1 Article 8

1-1-2018

North Dakota Supreme Court Review

North Dakota Law Review Associate Editors

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:

* The North Dakota Law Review Board of 2017–2018 would like to thank three of our Associate Editors, Ethan Lee, Maggie Spezzano, and Shelbe Simmons, for their hard work in writing this North Dakota Supreme Court Review.

ADMINISTRATIVE LAW AND PROCEDURE – PLAIN MEANING PRECLUDES ORDINARY MEANING

Industrial Contractors, Inc. v. Taylor

In *Industrial Contractors, Inc. v. Taylor*,[1] Industrial Contractors, Inc. ("ICI") appealed a judgment from the Burleigh County District Court affirming a decision by an independent administrative law judge ("ALJ") that determined Leonard Taylor's ("Taylor") employment as an electrician with ICI was not "seasonal employment."[2] ICI argued that the ALJ incorrectly interpreted North Dakota Century Code § 65-01-02(5)'s use of the term "seasonal employment."[3] The North Dakota Supreme Court reversed and remanded the case.[4] The Court agreed with ICI that the ALJ misapplied § 65-01-02(5) and that the ALJ's decision was not based upon a preponderance of the evidence.[5]

ICI provided contract construction services for industrial clients.[6] It hired employees for projects by sending referral requests to local unions, such as the Western North Dakota International Brotherhood of Electrical Worker, Local Union 714 ("the Union").[7] ICI and the Union entered into a Collective Bargaining Agreement, under which ICI could transfer union members between projects.[8] According to the Union's business manager, Randy Bartsch, ICI moved employees between projects based on the need for workers.[9] According to ICI's safety and risk manager, Tyler Svihovec ("Svihovec"), calling union halls for employees was part of ICI's hiring process.[10] Svihovec testified that the "vast majority" of employees hired in that manner were laid off when the project was completed and was "somewhat atypical" for ICI to transfer an employee to another job.[11]

ICI hired Taylor on March 9, 2014, after the Union referred Taylor for a job as an electrician.[12] However, Taylor and ICI disagreed about the length of Taylor's employment.[13] According to Taylor, his referral with ICI

1. 2017 ND 183, 899 N.W.2d 680.
2. *Taylor*, ¶ 1, 899 N.W.2d at 681.
3. *Id.*, 899 N.W.2d at 681-82.
4. *Id.*, 899 N.W.2d at 682.
5. *Id.*
6. *Id.* ¶ 2.
7. *Id.*
8. *Taylor*, ¶ 2, 899 N.W.2d at 682.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* ¶ 3.
13. *Id.*

was permanent, but ICI stated that it only hired Taylor for the project that was scheduled to end May 16, 2014.[14] Svihovec stated that ICI hired Taylor to temporarily work at a power plant, which was not a project that customarily operated throughout the entire year.[15] Two days after being hired, Taylor was injured while working at the power plant.[16]

After sustaining the injury, Taylor submitted a claim to Workforce Safety and Insurance ("WSI").[17] WSI determined that Taylor was a seasonal employee for purposes of North Dakota Century Code § 65-01-02(5).[18] Therefore, WSI accepted liability for Taylor's injuries.[19] WSI based its decision on the fact that Taylor's job as an electrician was subject to layoffs and was only temporary due to an estimated completion date of May 16, 2014.[20]

After WSI's decision, Taylor requested a formal hearing from an independent administrative law judge ("ALJ"), who determined that Taylor's employment was not seasonal, thereby reversing WSI's decision.[21] The ALJ based its decision on the fact that electricians hired by ICI worked for indefinite periods, meaning that they were "not permanent" employees and they were not "seasonal employees" for purposes of § 65-01-02(5).[22] The ALJ found that ICI employed Taylor to do electrical work at the power plant based on a regular referral and Taylor's employment would last until ICI would not need him.[23] Subsequently, WSI petitioned for reconsideration from the ALJ, which the ALJ denied, and the Burleigh County District Court affirmed the ALJ's decision.[24] ICI, subsequently, appealed the district court's holding.[25]

On appeal to the North Dakota Supreme Court, ICI and WSI made three arguments.[26] First, they argued the ALJ misapplied the legal standard for seasonal employment and should have determined Taylor's job was seasonal employment under § 65-01-02(5).[27] Second, they argued that the ALJ failed to take notice of ICI's customary practice, admitting that under the

14. *Taylor*, ¶ 3, 899 N.W.2d at 682.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* ¶ 4.
19. *Id.*
20. *Taylor*, ¶ 4, 899 N.W.2d at 682.
21. *Id.* ¶ 5.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*, ¶ 6.
26. *Taylor*, ¶ 9, 899 N.W.2d at 683.
27. *Id.*

collective bargaining agreement ICI could have – although not customary – transferred electricians such as Taylor, to other projects.[28] Finally, ICI argued the ALJ's decision conflicted with similar precedent.[29]

The North Dakota Supreme Court summed up the issue as being a question of statutory interpretation.[30] The Court looked to North Dakota Century Code § 65-01-02(27)[31] for the legislature's definition of "seasonal employment."[32] Section 65-01-02(27) reads "'[s]easonal employment' includes occupations that are not permanent or that do not customarily operate throughout the entire year. Seasonal employment is determined by what is customary with respect to the employer at the time of injury."[33] To interpret the statutory definition, the Court took a piecemeal approach and looked at the first and second sentences separately.[34]

Relying on a textual approach, the Court reasoned that the statutory definition indicated the legislature's intent to include occupations that were performed during different times of the year.[35] The first indication that the legislature did not intend to limit the definition of "seasonal employment" to one specific time of the year was its use of the phrase "includes."[36] The term "includes" enlarged the plain meaning of the statute, making the statutory definition non-exhaustive.[37] Therefore, the legislature meant for "seasonal employment" to "*include*[] occupations that are not permanent or that do not customarily operate throughout the entire year."[38] Based on the plain meaning of § 65-01-02(27), the Court found the statutory definition to be usable, but analyzed the ordinary meaning of "seasonal employment," seemingly as a formality.[39]

---

28. *Id*.
29. *Id*.
30. *Id*. ¶ 10.
31. N.D. CENT. CODE § 65-01-02(28) (2017).
32. *See Taylor*, ¶ 12, 899 N.W.2d at 684.
33. N.D. CENT. CODE § 65-01-02(28).
34. *See generally Taylor*, ¶ 13, 899 N.W.2d at 684.
35. *Id*. ¶ 16, 899 N.W.2d at 685.
36. *Id*. ¶ 17.
37. *Id*.
38. *Id*. (citing *In re* Estate of Elken, 2007 ND 107, ¶ 8, 735 N.W.2d 842; Amerada Hess Corp. v. State, 2005 ND 155, ¶ 13, 704 N.W.2d 8; Hilton v. N.D. Educ. Ass'n, 2002 ND 209, ¶ 12, 655 N.W.2d 60; Matter of Estate of Leier, 524 N.W.2d 106, 110 (N.D. 1994); Americana Healthcare Ctr. v. N.D. Dep't of Human Serv., 510 N.W.2d 592, 594 (N.D. 1994); State v. Vermilya, 423 N.W.2d 153, 154-55 (N.D. 1988); Lucke v. Lucke, 300 N.W.2d 231, 234 (N.D. 1980); *see also* NORTH DAKOTA LEGISLATIVE DRAFTING MANUAL 91 (2017) ("[a]n exhaustive definition uses the word means while a partial listing uses the word includes[;] … '[i]ncludes' is not a term of limitation") (emphasis added).
39. *Id*.

Also within the first sentence of § 65-01-02(27), the Court pointed out the statutory definition's use of the term "or."[40] The word "or" is nestled between two conditions of employment that indicate that it is seasonal.[41] The two explicit conditions for "seasonal employment" are that the employment: (1) is not permanent *or* (2) does not customarily operate throughout the year.[42] Therefore, the first alternative demonstrates non-permanent employment, and the second alternative demonstrates the limitations on the time of year.[43]

The Court then turned to the second sentence of § 65-01-02(27), which stated, "[s]easonal employment is determined by what is customary with respect to the employer at the time of injury."[44] The Court relied on several facts surrounding Taylor's employment to determine whether the second sentence of the statutory definition had been satisfied.[45] The Court relied on the fact that the ALJ found that "generally" ICI's management decides the manpower that will be needed at each project, which union halls will be contacted to find referrals, which referrals to hire for which projects, and the expected duration of the project.[46] Svihovec stated that "most of" ICI's electricians are hired in the spring and fall during the power plant project and that "all" electricians are hired for specific projects and then laid off.[47] The Court recognized that Svihovec's testimony established ICI's custom, thereby satisfying § 65-01-02(27)'s definition of "seasonal employment" under the second sentence of the statute.[48] The record established that ICI hired 719 electricians from 2010 to 2015.[49] Out of the 719, only 9 were transferred to another project.[50] The Court found that 9 out of 719 was too low of a number to establish that transferring electricians was the custom for ICI as required by § 65-01-02(27).[51]

Even though the text of § 65-01-02(27) was able to provide a complete answer for the North Dakota Supreme Court to resolve the issue, the Court then looked to the ordinary meaning of "seasonal employment" as a formal-

40. *Taylor*, ¶ 18, 899 N.W.2d at 685-86.
41. *Id*., 899 N.W.2d at 686.
42. *Id*. (emphasis added).
43. *Id*. ¶ 19.
44. *Id*.
45. *Id*.
46. *Taylor*, ¶ 26, 899 N.W.2d at 687.
47. *Id*.
48. *Id*.
49. *Id*. ¶ 27.
50. *Id*.
51. *Id*.

ity.[52] The ordinary meaning (as opposed to the plain meaning) of "seasonal employment" required the occupation to be carried out only during a certain time of the year.[53] The Court found the ordinary meaning of the adjective "seasonal" in *Merriam-Webster's Collegiate Dictionary*,[54] and found that "seasonal" relates to the seasons of the year.[55] Using the same dictionary, the Court found that the ordinary meaning of "employment" was "the state of being employed or occupation by which a person earns a living."[56] However, the Court found an ambiguity with the word "occupation," but again using the same dictionary, found that the ordinary meaning of "occupation" was "the usual or principal business of one's life, especially as a means of earning a living, or a vocation."[57] Finally, the majority looked to *Black's Law Dictionary*,[58] and found that another meaning of "seasonal employment" was "[a]n occupation possible only during limited parts of the year, such as a summer-camp counselor, a baseball-park vendor, or a shopping-mall Santa."[59]

As the North Dakota Supreme Court did with § 65-01-02(27), it found that the meaning within the two dictionaries was plain and found that "the meaning of 'seasonal employment' in workers' compensation laws generally refers to occupations carried on only during certain seasons or portions of the year and does not include occupations that can be carried on throughout the entire year."[60] The Court then reassured its finding with the fact that other jurisdictions have used the same ordinary meaning when applied to various occupations.[61]

---

52. *Taylor*, ¶ 13, 899 N.W.2d at 684.

53. *Id.* ¶ 14, 899 N.W.2d at 685.

54. 1120 (11th ed. 2005).

55. *Taylor*, ¶ 13, 899 N.W.2d at 684.

56. *Id.*

57. *Id.*

58. 605 (9th ed. 2009).

59. *Taylor*, ¶ 13 899 N.W.2d at 684-85.

60. *Id.* ¶ 14, 899 N.W.2d at 685 (citing Annot., *What is "Seasonal" Employment Within Provisions of Workmen's Compensation Act*, 93 ALR 308 (1934)).

61. *Id.* ¶ 15. For example, Arizona courts have stated that "seasonal employment" means occupations that are engaged in only during certain times of the year, unlike timber cutting, *see* Pettis v. Indus. Comm'n of Ariz., 372 P.2d 72, 74-75 (Ariz. 1962), or ballet dancing, *see* Wozniak v. Indus. Comm'n of Ariz., 359 P.3d 1014, 1018-20 (Ariz. Ct. App. 2015). Minnesota courts have similarly held that "seasonal employment" means occupations that do not customarily operate throughout the year because of their inherent nature or the local climate, unlike employment at a part-time moving company, *see* Rogers v. Cedar Van Lines, Inc., 281 N.W.2d 669, 671-72 (Minn. 1979), but the case was remanded for turkey production employees, *see In re* Application of Land O' Lakes Creameries, Inc., 68 N.W.2d 256, 259-61 (Minn. 1955). The majority also looked to other jurisdictions which held that coal delivery is not seasonal employment, Hogsett v. Cinek Coal & Feed Co., 255 N.W. 546, 547-48 (Neb. 1934), logging is not seasonal employment, Murillo v. Payroll Express, 901 P.2d 751, 759-60 (N.M. Ct. App. 1995), dishwashing is not seasonal employment, Froehly v. T.M. Harton Co., 139 A. 727, 729-30 (Pa. 1927), running for a judgeship

Based on North Dakota Supreme Court's textual interpretation of § 65-01-02(27), the Court held that the ALJ failed to apply the plain meaning of § 65-01-02(5) to ICI's employment of electricians.[62] The Court also reasoned the ALJ's interpretation of the statute did not give effect to every word in the legislature's statutory definition.[63] Accordingly, the Court found that WSI had applied the statute correctly when it determined Taylor's employment was "seasonal employment."[64]

Even though deference is shown to an agency's statutory interpretation, there was no such deference for the ALJ's legal conclusions.[65] In deciding that Taylor was not a seasonal employee, the ALJ relied on the referral request form statement that a position for fourteen or less days was temporary.[66] This statement was viewed as dispositive by the ALJ, whereas the request form used "regular" employees for other positions.[67] The Court recognized that a time limitation was not imposed by § 65-01-02(5), Taylor was a regular employee, but not a permanent employee, and was scheduled to work until May 16, 2014.[68]

Because the ALJ's determination that Taylor's employment was not seasonal, the determination did not comply with either the first or second sentences of § 65-01-02(27), the Court reversed the ALJ's decision and remanded the case back to WSI to calculate Taylor's disability benefits under North Dakota Century Code § 65-01-02(5) and WSI's original order.[69]

However, the dissent by Justice Crothers came to exact opposite conclusions that the majority came to – simply, that the ALJ did not misapply the law and the ALJ's decision was supported by a preponderance of the evidence.[70] The dissent reasoned that the ALJ's interpretation of "seasonal employment" was consistent with both the plain and ordinary meaning of the phrase within § 65-01-02(27) as applied to the occupation of an electrician, based on the fact that ICI employed electricians regardless of the time of year.[71]

---

was not dependent on the particular season, Nilson v. Clay City., 534 N.W.2d 598, 601-02 (S.D. 1995), and threshing is seasonal employment and thus not continuous throughout the year, Meyer v. Roettele, 264 N.W. 191, 195 (S.D. 1935).

62. *Id.* ¶ 20, 899 N.W.2d at 686.

63. *Id.*

64. *Id.*, ¶ 21.

65. *Taylor*, ¶ 23, 899 N.W.2d at 686 (citing *In re* Juran and Moody, Inc., 2000 ND 136, ¶¶ 25-27, 613 N.W.2d 503).

66. *Id.* ¶ 25.

67. *Id.*

68. *Id.*

69. *Id.* ¶ 28, 899 N.W.2d at 687.

70. *Id.*, ¶ 30 (Crothers, J. dissenting).

71. *Taylor*, ¶ 38, 899 N.W.2d at 690 (Crothers, J. dissenting).

The dissent agreed with the majority that "[t]his case boil[ed] down to whether the ALJ erred in finding Taylor's employment was 'seasonal'" under North Dakota Century Code § 65-01-02(5) and looked to North Dakota Century Code § 65-01-02(27) for the legislature's definition of "seasonal employment."[72] However, where the majority took a piecemeal approach,[73] the dissent interpreted the statutory definition as a whole, concluding that "seasonal employment includes occupations that are not permanent and is determined by what is customary with respect to the employer's undertaking with that occupation at the time of the injury, as opposed to the employer's relationship with a particular individual."[74]

The dissent agreed with the majority that the term "includes" enlarged the plain meaning of the statute, and the statutory definition was not exhaustive.[75] Therefore, "seasonal employment" includes occupations that are temporary or that are not customarily performed throughout the entire year.[76] The dissent also agreed that the plain meaning was usable, but that plain meaning was not enough, because the non-exhaustive nature of the statute allows for judicial interpretation; therefore, the Court was free to add additional conditions that indicated a job was seasonal.[77] Regarding the majority's decision to interpret the two sentences of § 65-01-02(27) separately, the dissent read the two sentences of § 65-01-02(27) together and framed the issue as "whether the employment is 'seasonal,' and . . . customary for the employer regarding that particular occupation and not the particular employee."[78]

In regards to the second sentence of § 65-01-02(27), the dissent agreed with the majority by relying on the fact that the ALJ found that "generally" ICI's management decides the manpower, which union halls to contact, which referrals to hire, and the project's duration.[79] However, the dissent went further by also relying on the fact that change orders were often is-

72. *See id*., ¶ 31, 899 N.W.2d at 687 (Crothers, J. dissenting) (quoting N.D. CENT. CODE § 65-01-02(28) (2010)).

73. *See generally id*. ¶ 13, 899 N.W.2d at 684.

74. *Id*. ¶ 32, 899 N.W.2d at 687 (Crothers, J. dissenting).

75. *Id*. ¶ 33, 899 N.W.2d at 688 (Crothers, J. dissenting).

76. *Id*. ¶ 17, 899 N.W.2d at 685 (citing *In re* Estate of Elken, 2007 ND 107, ¶ 8, 735 N.W.2d 842; Amerada Hess Corp. v. State, 2005 ND 155, ¶ 13, 704 N.W.2d 8; Hilton v. N.D. Educ. Ass'n, 2002 ND 209, ¶ 12, 655 N.W.2d 60; Matter of Estate of Leier, 524 N.W.2d 106, 110 (N.D. 1994); Americana Healthcare Ctr. v. N.D. Dep't of Human Serv., 510 N.W.2d 592, 594 (N.D. 1994); State v. Vermilya, 423 N.W.2d 153, 154-55 (N.D. 1988); Lucke v. Lucke, 300 N.W.2d 231, 234 (N.D. 1980); *see also* NORTH DAKOTA LEGISLATIVE DRAFTING MANUAL 91 (2017) ("[a]n exhaustive definition uses the word means while a partial listing uses the word includes[;] … '[i]ncludes' is not a term of limitation") (emphasis added).

77. *Taylor*, ¶ 33, 899 N.W.2d at 688 (Crothers, J. dissenting).

78. *Id*. ¶ 36, 899 N.W.2d at 689 (Crothers, J. dissenting).

79. *Id*. ¶ 37.

sued, which created additional work and extended employment.[80] Lastly, the dissent relied on the fact that this evidence was not provided to WSI.[81]

The dissent also had differing views regarding Svihovec's statement that "most of" ICI's electricians are hired in the spring and fall during the power plant project and that "all" electricians are hired for specific projects and then laid off.[82] Unlike the majority who focused on the second sentence in isolation, the dissent focused on the fact that ICI hired electricians throughout the year, and that electricians were employed during every month of the year in one way or another.[83] The dissent also relied on ICI records that indicated electricians stayed "year round, year after year, through the transfer process."[84] The dissent also noted that ICI was able to hire and utilize electricians during any season of the year.[85] Lastly, the dissent relied on the fact that this evidence was not provided to WSI.[86]

The dissent also diverged from the majority in regards to the record which established that out of the 719 electricians that were hired by ICI, only 9 were transferred to another project.[87] Unlike the majority who found that only nine electricians were transferred, the dissent read the evidence differently, instead of 9 people being transferred, it found that "multiple" people were transferred and the documents cited to 9 transfer incidences as merely an example of the number of employees transferred, rather than as an exhaustive list that the majority presumptively understood.[88] The dissent relied on the fact that this evidence was provided to the ALJ, but was not provided to WSI.[89] The dissent determined that the weight of the evidence supported the ALJ's finding that ICI's electricians generally operated throughout the year, regardless of the season.[90]

Even though the text of § 65-01-02(27) was able to provide a complete answer for the North Dakota Supreme Court to resolve the issue, the dissent looked at the ordinary meaning as a second required step in the analysis, unlike the majority who looked to the ordinary meaning as a mere formality.[91] Like the majority, the dissent agreed that the ordinary meaning of

80. *Id.*
81. *Id.*
82. *Id.* ¶ 26, 899 N.W.2d at 687.
83. *Taylor*, ¶ 37, 899 N.W.2d at 689 (Crothers, J. dissenting).
84. *Id.*, 899 N.W.2d at 690 (Crothers, J. dissenting).
85. *Id.*, 899 N.W.2d at 689 (Crothers, J. dissenting).
86. *Id.*
87. *Id.* ¶ 27, 899 N.W.2d at 687.
88. *Id.* ¶ 37, 899 N.W.2d at 689 (Crothers, J. dissenting) ("*See, e.g.* Ex. 38, Employee Nos. 61713, 61006, 61038, 61714, 61847, 61257, 61054, 61067 and 61026.").
89. *Taylor*, ¶ 37, 899 N.W.2d at 890 (Crothers, J. dissenting).
90. *Id.*
91. *Id.* ¶ 13, 899 N.W.2d at 684.

"seasonal employment" required the occupation to be carried out only during a certain time of the year.[92] But where the majority looked to dictionaries, the dissent relied on a treatise on the issue that stated "the inherent seasonal nature of the employment that controls, not the claimant's seasonal connection with it."[93] The dissent also relied on *Froehly v. T.M. Harton Co.*,[94] in which the Pennsylvania Supreme Court held dishwashing was not seasonal employment even though the position was at a summer amusement park.[95] Interestingly, even though the dissent was not satisfied with the plain meaning of the North Dakota legislature's definition of "seasonal employment," it seemingly had no reservations about relying on the Pennsylvania Supreme Court's extrinsic definition.[96] In *Froehly*, the Pennsylvania Supreme Court looked to the Century Dictionary to determine that the word "seasonal":

> [I]s formed from the substantive "season," plus the adjective suffix "al," meaning "of the kind of" and "pertaining to," thus making "season," a word pertaining to a season or a specific part of a year; hence it may be said that a seasonal occupation is an employment pertaining to, or of that kind of, labor exclusively performed at specific seasons or periods of the year.[97]

In *Froehly*, the court went on to differentiate the words "causal" and "intermittent" from "seasonal" by referencing that the first two words are similar in that they can be done at any time of the year, but "seasonal" is reliant upon the very season of the year in which that occupation can be performed.[98] The *Froehly* court further stressed that seasonal occupations are contrasted with occupations that can be carried out at any time of the year, such as dishwashing.[99] The court stated:

> [Dishwashing] may be, as in the present case, carried on at a summer resort for merely three months in the year . . . Appellant here confuses the character of work . . . performed by claimant, with the

92. *Id.* ¶ 36, 899 N.W.2d at 689 (Crothers, J. dissenting).
93. *Id.* ¶ 35, 899 N.W.2d at 688 (Crothers, J. dissenting) (citing 8 Larson's Workers' Compensation Law § 93.02[3][b]).
94. Froehly v. T.M. Harton Co., 139 A. 727, 729-30 (Pa. 1927).
95. *Taylor*, ¶ 35, 899 N.W.2d at 688 (Crothers, J. dissenting).
96. *Id.*
97. *T.M. Harton Co.*, 139 A. at 729 (Pa. 1927).
98. *Id.* at 730.
99. *Id.*

> seasonal period during which the amusement park remained open to the public."[100]

Therefore, Justice Crothers' dissent would have affirmed the ALJ's judgment.[101] The dissent found that the ALJ did not misinterpret § 65-01-02(27), and thus, did not misapply § 65-01-02(5) to the facts surrounding Taylor's employment as an electrician.[102] In part, based on the facts that ICI's employment of electricians was not customarily dependent on the season of the year.[103]

CONSTITUTIONAL LAW: MUNICIPAL CORPORATIONS – CITY'S MISSTATED SCOPE OF DISTRICT IMPROVEMENTS IN A NOTICE TO LANDOWNERS DOES NOT VIOLATE LANDOWNER'S DUE PROCESS RIGHTS

Paving District v. City of Minot

In *Paving District v. City of Minot*,[104] Appellant landowners sued the City of Minot ("City").[105] The landowners claimed that the City gave them improper notice for improvements in a paving district, and thus, the City's assessments to the landowners' properties for proposed street improvements were invalid.[106] The Ward County District Court granted summary judgement in favor of the City and dismissed the landowners' complaint.[107] Additionally, the district court concluded that the landowners were barred from bringing the action because they failed to appeal or commence the action within the thirty-day time limit under N.D.C.C. § 40-22-43.[108] The North Dakota Supreme Court affirmed, holding that § 40-22-43 is a statute of repose.[109] The Court reasoned the statute of repose meant that the thirty-day time limit began to run when city council adopted its resolution awarding sale of warrants to finance the improvements.[110] Thus, the Court held the

100. *Id.*
101. *Taylor*, ¶ 38, 899 N.W.2d at 690 (Crothers, J. dissenting).
102. *Id.*
103. *Id.*
104. 2017 ND 176, 898 N.W.2d 418.
105. *Paving District*, ¶ 8, 898 N.W.2d at 421.
106. *Id.* ¶ 1, 898 N.W.2d at 422.
107. *Id.* ¶ 10.
108. *Id.*; N.D. CENT. CODE § 40-22-43 (2017).
109. *Id.* ¶ 15, 898 N.W.2d at 423.; BLACK'S LAW DICTIONARY 1423 (7th ed. 1999) (defining a statute of repose as a "statute that bars a suit a fixed number of years after the defendant acts in some way . . . even if this period ends before the plaintiff has suffered any injury).
110. *Id.* ¶ 16.

thirty-day time limit under N.D.C.C. § 40-22-43 precluded the landowners' claim.[111] Further, the Court held that the landowners failed to establish that the assessment proceedings violated the Due Process Clause or any other constitutional limitation.[112]

The landowners made three arguments on appeal.[113] First, the landowners argued that the City violated the statutory notice requirement of N.D.C.C. § 40-22-15.[114] Second, the landowners argued that the city violated the Due Process Clause because defects in their notice resulted in the City's failure to provide substantial and correct notice as required under the United States Constitution.[115] Third, the landowners argued that the thirty-day time limit of N.D.C.C. § 40-22-43, did not apply because the proceedings violated the North Dakota Constitution's Gift Clause Provision.[116] Ultimately, on July 12, 2017, the North Dakota Supreme Court disagreed with all three of the landowners' arguments.[117] The Court held that the City did not violate any constitutional limitation or restriction, the landowners' claim was barred by the thirty-day time limit, and the proceedings did not violate North Dakota's Constitution's Gift Clause.[118]

On October 1, 2012, the City Council of Minot approved Resolution No. 3109, which declared the necessary improvement of Paving District No. 476.[119] The resolution provided which landowners would be specially assessed for the improvements to the district and that those landowners would have thirty days to file written protests.[120] The resolution further explained that if a landowner chose to file a written protest within thirty days, the city would hold a hearing to hear protests.[121] A few days after the City approved the resolution, on October 5, 2012, the City sent letters to property owners about the creation of the paving district and the proposed street improvements.[122] The letters explained the improvements as follows, "an urban street section from 2nd St to 10th St consisting of storm sewer, curb and gutter, asphalt paving, and street lighting."[123] Additionally, the letters

111. *Paving District*, ¶ 16, 898 N.W.2d at 423.
112. *Id*. ¶ 27, 898 N.W.2d at 426.
113. *Id*. ¶ 12, 898 N.W.2d at 422. (The landowners included: Paving District 476 Group, SPCM LLC; Hudye Group LP; and Northern Plains Apartments LLC.)
114. *Id*.
115. *Id*.
116. *Id*.
117. *Paving District,* ¶ 27, 898 N.W.2d at 426.
118. *Id*.
119. *Id*. ¶ 4, 898 N.W.2d at 421. (The Paving District is located on 36th Avenue Northeast.)
120. *Id*.
121. *Id*.
122. *Id*.
123. *Paving District*, ¶ 4, 898 N.W.2d at 421.

explained that the City would attribute the costs for the project to each property owner proportionately, and the costs would not exceed the benefits the property owners would get from the improvements.[124] The letter advised the property owners that they had thirty days to protest the improvements and that a public hearing would be held on December 3, 2012.[125] After the December 3, 2012 public hearing, the City Council adopted Resolution 3250 on November 4, 2013, awarding the sale of warrants to finance the improvements.[126]

On June 7, 2015, the Minot Daily News published a "Notice of Costs, Benefits, Assessments and Date of Public Hearing for the Paving District."[127] Included in this notice were maps of the special assessment district and the amount of the proposed assessment for each property.[128] Several property owners attended and raised concerns at a July 6, 2015, meeting.[129] The property owners expressed concern about a change in the scope of the area being improved and about paying for improvements to properties outside city limits.[130] The city engineer explained that the district was created and always "indicated it was going to 13th Street Northeast, but a mistake was made when notices were sent out stating improvements went to 10th Street Northeast."[131] Because of this mistake, the city engineer explained that the scope of the project did not increase.[132] In fact, the cost estimates in the notices included improvements to 13th Street Northeast.[133] As a result, notices were not sent again with the corrected information because the costs remained the same.[134] Ultimately, at this meeting, the City Council approved the special assessment commission report for the paving district.[135]

Nearly two years after the City awarded the sale of warrants to finance the improvements, on October 28, 2015, the landowners sued the City, seeking a judgment declaring the assessments invalid.[136] Further, the landowners asked the Ward County District Court to "hold the assessments in

124. *Id*.
125. *Id*.
126. *Id*. ¶¶ 4-5.
127. *Id*. ¶ 6, 898 N.W.2d at 421.
128. *Id*.
129. *Paving District*, ¶ 7, 898 N.W.2d at 421.
130. *Id*.
131. *Id*.
132. *Id*.
133. *Id*.
134. *Id*.
135. *Paving District*, ¶ 7, 898 N.W.2d at 421.
136. *Id*. ¶ 8.

abeyance[137] until [the City] did not include the area between 10th and 13th Street."[138] The landowners further sought the district court's enjoinment of the City from certifying future assessments.[139] Lastly, the landowners claimed that the invalid notice amounted to a violation of the Due Process Clause of the United States Constitution.[140] In response, the City moved to dismiss the complaint and argued that the landowners failed to meet jurisdictional time limitations under N.D.C.C. §§ 40-22-43, 40-26-01, and 28-34-01.[141] The City further argued that the landowner's constitutional claims were barred by *Serenko v. City of Wilton*.[142] In favor of the City, the district court granted summary judgement and dismissed the complaint.[143] The district court reasoned that the landowners could not sue the City because the thirty-day time limit under N.D.C.C. § 40-22-43 had passed.[144] The landowners appealed to the North Dakota Supreme Court.[145] The Supreme Court addressed all three of the landowner's arguments in turn.[146]

First, the Court addressed the landowners' argument that the City violated the statutory notice requirement of N.D.C.C. § 40-22-15.[147] Section 40-22-15 partly provides, "[t]he resolution must refer intelligibly to the engineer's report and include a map of the municipality showing the proposed improvement districts."[148] The landowners argued that the City's mistake in the notice regarding the extent of the proposed improvement violated § 40-22-15.[149] The Court held that the action was barred by N.D.C.C. § 40-22-43's thirty-day time limit.[150] Section 40-22-43 provides, "no action shall be commenced . . . in the courts of this state . . . unless commenced within thirty days of the adoption of the resolution of the governing board awarding the sale of warrants to finance the improvement."[151] The Court explained that § 40-22-43 is a statute of repose for actions based on defects and irregularities in proceedings under N.D.C.C. § 40-22, which governs

137. Merriam-Webster defines "in abeyance" as "a state of temporary inactivity – suspension." https://www.merriam-webster.com/dictionary/abeyance.

138. *Paving District*, ¶ 8, 898 N.W.2d at 421.

139. *Id.*

140. *Id.*; U.S. CONT. amd. XIV (2017).

141. *Paving District*, ¶ 9, 898 N.W.2d at 422.

142. *Id.*, Serenko v. City of Wilton, 1999 ND 88, 593 N.W.2d 368 (holding there is no constitutional right to notice when a city initially decides to construct an improvement).

143. *Paving District*, ¶ 10, 898 N.W.2d at 422.

144. *Id.*

145. *Id.*

146. *Id.* ¶ 12.

147. *Id.* ¶ 13.

148. *Id.*; N.D. CENT. CODE § 40-22-43 (2017).

149. *Paving Distric*t, ¶ 13, 898 N.W.2d at 423.

150. *Id.* ¶ 16.

151. *Id.* ¶ 15.

the creation of the improvement district.[152] The court reasoned that the landowners' complaint involved the creation of an improvement district because they sought to invalidate the assessments, due to the City's failure to comply with the notice requirements under N.D.C.C. § 40-22-15.[153] Additionally, the Court explained that the thirty-day time limit began when the City adopted the resolution.[154] Thus, the Court held that since the time limit began when the City adopted the resolution, the landowners' complaint came too late and was barred by the thirty-day time limit.[155] Since the landowners' claim was refuted by the time limit, the Court did not evaluate whether the mistake violated the notice requirement of § 40-22-15.[156]

Second, the Court addressed the landowners' argument that the City violated the Due Process Clause because defects in their notice resulted in the City's failure to provide substantial and correct notice as required under the U.S. Constitution.[157] The Fourteenth Amendment of the United States Constitution, states that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ."[158] The North Dakota Supreme Court case, *Serenko v. City of Wilton*, interpreted N.D.C.C. § 40-22-43 and addressed a claim that a defect in a notice of the creation of an assessment district constituted a violation of constitutional due process rights.[159] In *Serenko*, the Court found no due process violation and that such action was barred by the thirty-day time limit under § 40-22-43.[160] The Court held that there is no constitutional right to notice when a city initially decides to construct an improvement, but there still must be notice and an opportunity to be heard at some point before the individual assessment becomes final.[161] The Court explained that § 40-22-15 provides more for landowners in terms of notice than the United States Constitution's notice requirements.[162] Thus, the Court came to three conclusions.[163] First, the Court held that § 40-22-15 provides only a statutory right to notice of the resolution.[164] Second, the Court held that a violation of the statutory right to notice did not

152. *Id.*
153. *Id.*
154. *Id.*
155. Paving District, ¶ 16, 898 N.W.2d at 423.
156. *Id.* ¶ 14.
157. *Id.* ¶ 17.
158. *Id.* ¶ 18, 898 N.W.2d at 423-424; N.D. CONST. art. I Sec. 12 (stating, "No person shall . . . be deprived of life, liberty of property without due process of law.").
159. *Paving District,* ¶ 19, 898 N.W.2d at 424.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*

give rise to a due process violation.[165] Last, the Court held that the action was barred by the thirty-day time limit.[166]

In applying *Serenko* to this case, the Court came to three conclusions.[167] First, there is no constitutional right to notice when a municipality initially decides to construct an improvement.[168] Second, the creation of an improvement district and the making of the improvement alone does not deprive an individual of personal or property rights.[169] Third, even though state law provides it, the landowners do not have a constitutional right to notice and an opportunity to be heard.[170] Ultimately, the Court held that if there was a violation, it was statutory in nature and thus, there was no constitutional violation.[171]

Third, the Court addressed the landowners' argument that the thirty-day time limit of N.D.C.C. § 40-22-43 did not apply because the proceedings violated the North Dakota Constitution's Gift Clause Provision.[172] The landowners argued that the City improperly gifted some of the property owners because they received a benefit of the improvement and were not required to pay any assessment.[173] The Gift Clause is found in article X, section 18 of the North Dakota Constitution and states, "[N]either the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individuals, association or corporation . . . ."[174] In applying the principles of statutory construction to interpret the meaning of the Gift Clause, the Court held that the paving district was for a public purpose, and thus, the City did not violate the Gift Clause.[175] The Court explained that the plain language of the provision "explicitly allows a city to make internal improvements."[176] Internal improvements include projects on public road and highways.[177] Furthermore, the provisional restriction of loans, credits, and donations "does not apply to legislation for the making of internal improvements."[178] Since the paving project related to public improvement, the Court held that "the gift clause simply does not

165. *Paving District*, ¶ 19, 898 N.W.2d at 424.
166. *Id.*
167. *Id.* ¶ 21.
168. *Id.*, 898 N.W.2d at 425.
169. *Id.*
170. *Id.*
171. *Paving District*, ¶ 21, 898 N.W.2d at 425.
172. *Id.* ¶ 22.
173. *Id.*
174. *Id.* ¶ 23.
175. *Id.* ¶ 25.
176. *Id.*
177. *Paving District*, ¶ 25, 898 N.W.2d at 425.
178. *Id.*; Northwestern Bell Tel. Co. v. Wentz, 103 N.W.2d 245, 253-54 (N.D. 1960).

encompass such claims."[179] Thereafter, the North Dakota Supreme Court affirmed the District Court, holding that the assessment proceedings did not violate the Due Process Clause and the landowners' action was barred by § 40-22-15's thirty-day time limit.[180]

Chief Justice VandeWalle concurred[181] in the judgement, expressing concern with the error in the notice and the fact that the City did not acknowledge the error until much later than the thirty-day time limit imposed on the landowners by § 40-22-43.[182] In explaining that his concern was not enough to provide a remedy for the landowners, Chief Justice VandeWalle provided clarification as to what the Court meant by classifying § 40-22-43 as a statute of repose.[183] Chief Justice VandeWalle explained that a statute of repose is designed to "bar[] a suit a fixed number of years after the defendant acts in some way . . . even if this period ends before the plaintiff has suffered any injury."[184] Thus, since § 40-22-43 is a statute of repose, the landowners were barred from bringing this claim before they became aware of the mistake in the City's notice. Furthermore, Chief Justice VandeWalle compared a statute of repose with a statute of limitation by explaining that, "If § 40-22-43 were a statute of limitation, the time for bringing an action to contest the proceeding might be held to run from the time the [landowners] were notified or otherwise discovered the error in the notice."[185] Thus, with § 40-22-43 the legislature barred the landowners from a remedy before they knew they needed a remedy.[186] Ultimately, the Court could not impose a remedy for such error because the authority lies with the legislature.[187]

CRIMINAL LAW – RIGHT TO A SPEEDY TRIAL

State v. Gibson

In *State v. Gibson*,[188] Steven Gibson ("Gibson") appealed from a criminal judgment entered upon his conditional guilty plea after the district court

179. Paving District, ¶ 25, 898 N.W.2d at 425.
180. *Id.* ¶ 27, 898 N.W.2d at 426.
181. Justice Crothers joined Chief Justice VandeWalle's concurrence.
182. *Paving District*, ¶ 30, 898 N.W.2d at 426.
183. *Id.*
184. *Id.*; BLACK'S LAW DICTIONARY 1423 (7th ed. 1999).
185. *Paving District*, ¶ 30. 898 N.W.2d at 426; *see* Iverson v. Lancaster, 158 N.W.2d 507 (N.D. 1968).
186. Paving District, ¶ 30, 885 N.W.2d at 426.
187. *Id.*
188. 2017 ND 15, 889 N.W.2d 852.

rejected his claim that the State violated his right to a speedy trial.[189] The North Dakota Supreme Court held that under North Dakota Century Code § 29-19-02, the ninety-day period for a speedy trial begins when the district court and the state's attorney receive the request for a speedy trial.[190] The Court also held that the eleven-day delay by the North Dakota Department of Corrections and Rehabilitation ("the DOC") in sending the request was not sufficient to indicate a violation of Gibson's right to a speedy trail.[191]

On October 2, 2015, Gibson submitted the request for a speedy trial to the DOC.[192] On October 13, 2015, the Department mailed the request to the South Central Judicial District Court, Burleigh County, and the Burleigh County State's Attorney.[193] The district court received the request on October 15, 2015, thirteen days after Gibson submitted his request. The state's attorney received the request on October 16, 2015, fourteen days after the request was submitted to the DOC. Gibson's trial was set for January 6, 2016, which was ninety-six days after Gibson submitted his request and eighty-two days after the district court and state's attorney received the request.[194] Gibson argued that his right to a speedy trial was violated and moved to dismiss the charges.[195]

The issue of the case came down to the meaning of the term "elects" in North Dakota Century Code § 29-19-02.[196] The statute demands that "the trial to begin within ninety days of the date the party elects this right."[197] Gibson argued that he elected his right when he submitted the request to the DOC.[198] Specifically he argued that the district court should have scheduled his trial within ninety days of his request submission to the DOC, not within ninety days of the district court and state's attorney receiving the request.[199] The State argued, however, that Gibson elected his right when the district court and the state's attorney's office received the request.[200]

Agreeing with the State, the Court held that the defendant elected his right to a speedy trial when the district court and the state's attorney re-

189. *Gibson*, ¶ 1, 889 N.W.2d at 852-53.
190. *Id.*, 889 N.W.2d at 853.
191. *Id.* ¶ 7, 889 N.W.2d at 854.
192. *Id.* ¶ 3.
193. *Gibson*, ¶ 3, 889 N.W.2d at 853.
194. *Id.*
195. *Id.* ¶ 4.
196. *Id.*
197. N.D. CENT. CODE § 29-19-02 (2017).
198. *Gibson*, ¶ 4, 889 N.W.2d at 853.
199. *Id.* ¶ 5.
200. *Id.*

ceived the party's request.[201] Accordingly, the Court found that the state did not violate Gibson's right to a speedy trial.[202] Because there was no clear guidance on the issue from either the North Dakota Legislature or North Dakota Supreme Court precedence, the Court's reasoning was based on common law outside of the statute.[203] The two cases the Court looked to for guidance were *State v. Ripley*[204] and *State v. Moe*.[205]

Ripley was a question of interpretation regarding the Uniform Mandatory Disposition of Detainers Act ("the Detainers Act"), specifically § 29-33-03 of the North Dakota Century Code.[206] Similar to the statute at issue in *Gibson*, the statute in Ripley contained an ambiguous ninety-day provision.[207] The Court in *Ripley* found that "[t]he clear purpose of the Detainers Act is to require prompt disposition of criminal charges against inmates."[208] The Court also recognized the purpose of uniformity general to all uniform statutes.[209] Accordingly, the Court looked to Colorado,[210] Kansas,[211] and Missouri[212] for guidance.[213] Based on the other jurisdictions interpretation of the Detainers Act, the Court in *Ripley* held that the ninety-day provision began to run when the district court and the state's attorney received the request.[214]

In *Moe*, the applicable statute was the Interstate Agreement on Detainers ("the IAD"), codified under § 29-34-01 of the North Dakota Century Code.[215] The defendant was incarcerated in Colorado, but was charged with a crime in North Dakota, for an unrelated incident.[216] The defendant requested a speedy disposition on his detainer which was an ambiguous 180-day provision.[217] The officials in Colorado failed to send the request to the North Dakota officials or the North Dakota State's Attorney.[218] The Court in *Moe* looked to the United States Supreme Court's interpretation of the

201. *Id*.
202. *Id*.
203. *Id*., 889 N.W.2d at 853-54.
204. State v. Ripley, 548 N.W.2d 24 (N.D. 1996).
205. State v. Moe, 1998 ND 137, 581 N.W.2d 468.
206. *Ripley*, 548 N.W.2d at 26.
207. *Id*.
208. *Id*.
209. *Id*.
210. People v. Lopez, 587 P.2d 792, 795 (1978).
211. Pierson v. State, 502 P.2d 721, 726 (1972).
212. State ex rel. Kemp v. Hodge, 629 S.W.2d 353, 360 (Mo. 1982).
213. *Ripley*, 548 N.W.2d at 26.
214. *Id*. at 27.
215. *Moe*, ¶ 3, 581 N.W.2d at 470.
216. *Id*. ¶ 1, 581 N.W.2d at 469-70.
217. *Id*. ¶ 15, 581 N.W.2d at 472.
218. *Id*. ¶ 4, 581 N.W.2d at 470.

IAD which stated that the IAD's 180-day provision begins to run when "the request is actually delivered to officials of the state where charges are pending."[219] The Court in *Moe* subsequently held that because the North Dakota officials never received the request, the 180 days provision never began to run.[220]

In the present case, Gibson also argued that his charges should be dismissed because North Dakota Century Code § 29-33-02 requires the DOC to "forthwith"[221] a detainee's request for disposition of pending charges to the district court and state's attorney.[222] The Court drew attention to the ambiguity with the term "forthwith" in the statute. However, the Court found that of the fourteen days between the DOC receiving the request from Gibson and the prosecutor receiving the request from the DOC, eleven of those days were caused by delays within the DOC and three of those days were time the request spent traveling through the mail.[223] Gibson asked the Court to consider this statute, together with his request for a speedy trial, and find that the submission of the request to the DOC was intended by the legislature to indicate that receipt by the DOC was meant to begin the ninety-day countdown.[224] The Court disagreed with Gibson and refused to hold that they referred to the same right to a speedy trial.[225] However, the Court did hold that the fourteen day period was "prompt" and did not alter the start of the ninety days to which the State and Gibson were entitled.[226]

In addition, Chief Justice VandeWalle wrote a special concurrence.[227] He wanted to point out the importance of the DOC to forward mail "forthwith."[228] Chief Justice VandeWalle pointed out that the DOC has a duty, as a part of the state under the Sixth Amendment of the United States Consti-

---

219. *Id.* ¶ 16, 581 N.W.2d at 472.
220. *Id.* ¶ 17.
221. N.D. CENT. CODE § 29-33-02 (2017) states that:
> The request must be delivered to the warden or other official having custody of the prisoner, who shall *forthwith*: (1) Certify the term of commitment under which the prisoner is being held, the time already served on the sentence, the time remaining to be served, the good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole board relating to the prisoner; and (2) Send by registered or certified mail, return receipt requested, one copy of the request and certificate to the court and one copy to the prosecuting official to whom it is addressed. (emphasis added).

222. *Gibson*, ¶ 7, 889 N.W.2d at 854.
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.* ¶ 10.
228. *Gibson*, ¶ 10, 889 N.W.2d at 854.

tution and Article I, section 12 of the North Dakota Constitution.[229] The Chief Justice's concurrence noted that the Court was unaware of the normal time that prisoners' letters were usually mailed by the DOC, but that its failure to be "forthwith" may result in a deprivation of the prisoners' rights.[230] In the present case, however, the Chief Justice found the eleven-day delay of receipt and dispatch of Gibson's request was not enough to demonstrate that it was not mailed "forthwith" and therefore, did not deprive Gibson of his right to a speedy trial.[231]

FAMILY LAW – CONTEMPT ORDERS – MAXIMUM LENGTH OF IMPRISONMENT

Nygaard v. Taylor

In *Nygaard v.* Taylor,[232] Appellant, Trisha Taylor ("Taylor"), appealed a Cass County District Court order denying Taylor's motion to quash contempt orders and Taylor's motion for her immediate release from incarceration.[233] The North Dakota Supreme Court reversed, holding that as a matter of first impression, Taylor could not be imprisoned longer than the statutory six-month limit, even though she continued to be in contempt of the court's order.[234] The district court found Taylor in contempt for violating multiple district court orders by refusing to return her minor children to their fathers, Aarion Nygaard ("Nygaard") and Terance Stanley ("Stanley").[235]

In 2007, Taylor and Stanley became parents to a child, and two years later, in 2009, they married.[236] In 2011, Taylor and Stanley divorced.[237] Although they never married, Taylor had a child with Nygaard in 2013.[238] Stanley and Nygaard had primary residential responsibility of their respective children, and Taylor had supervised visitation rights.[239] Taylor, Stanley, and Nygaard all resided in Fargo, North Dakota.[240] Since September of 2014, Stanley and Nygaard did not have contact with their children because

229. *Id.*
230. *Id.* ¶ 11, 889 N.W.2d at 855.
231. *Id.*
232. 2017 ND 206, 900 N.W.2d 834.
233. *Nygaard,* ¶ 1, 900 N.W.2d at 834.
234. *Id.* ¶¶ 12, 20, 900 N.W.2d at 836, 839.
235. *Id.* ¶ 3, 900 N.W.2d at 834.
236. *Id.* ¶ 2.
237. *Id.*
238. *Id.*
239. *Nygaard,* ¶ 2, 900 N.W.2d at 834.
240. *Id.*

Taylor fled with both of the minor children to the Cheyenne River Indian Reservation in South Dakota.[241]

The district court found Taylor in contempt for violating multiple district court orders by refusing to return her minor children to their respective fathers.[242] Taylor had been incarcerated in North Dakota since November of 2014, as she was arrested and pled guilty to parental kidnapping, a class C felony.[243] In November of 2015, shortly before Taylor was to be released on parole, the District Court issued interlocutory orders in the two custody cases finding Taylor in contempt for refusing to return the children to their respective fathers.[244] Upon Taylor's release, she was arrested for contempt.[245] Taylor remained incarcerated until the North Dakota Supreme Court decided this case.[246]

In January of 2016, the judicial referee disagreed with Taylor's argument that she was unable to return her children to their respective fathers.[247] Specifically, the referee found Taylor was "voluntarily electing to continue to withhold" the minor children.[248] In March of 2016, the judicial referee order confirmed the prior ruling, which ordered Taylor to "remain in custody until such time as she returns the minor child[ren] to" their respective fathers.[249] Next, in April of 2016, the District Court adopted and affirmed the judicial referee's orders, and Taylor did not appeal.[250] Six months later, in October of 2016, Taylor filed motions to quash the contempt orders and moved to be immediately released from prison.[251] Taylor argued that her imprisonment of over four hundred days for contempt exceeded the six-month limit imposed by N.D.C.C. § 27-10-01.4(1)(b).[252] Specifically, § 27-10-01.4(1)(b), limits imprisonment as a remedial sanction for continuing contempts to "extend for as long as the contemnor continues the contempt or six months, whichever is shorter."[253]

---

241. *Id.*
242. *Id.* ¶ 3.
243. *Id.*
244. *Id.* ¶ 4.
245. *Nygaard*, ¶ 4, 900 N.W.2d at 834.
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Nygaard*, ¶ 5, 900 N.W.2d at 835.
252. *Id.*; N.D. CENT. CODE. § 27-10-01.4(1)(b) (2017) states:
> A court may impose one or more of the following remedial sanctions: (b) Imprisonment if the contempt of court is of a type included in subdivision b, c, d, e, or f of subsection 1 of section 27-10-01.4. The imprisonment may extend for as long as the contemnor continues the contempt or six months, whichever is shorter.

253. *Nygaard*, ¶ 17, 900 N.W.2d at 838; N.D. CENT. CODE § 27-10-01.4(1)(b) (2017).

In addressing Taylor's appeal, the North Dakota Supreme Court conceptualized the issue as "whether Taylor is entitled to be released from confinement because she has served more than the six consecutive months in prison allowed under §27-10-01.4."[254] The Court explained that the issue was a question of first impression in this jurisdiction because the case involved "a district court's authority to incarcerate persons found to be in contempt of court indefinitely."[255] The Court considered the issue to be of "vital concern regarding matters of important public interest."[256]

The Court first looked to Wisconsin's contempt system for guidance.[257] The Court looked at the similarity between North Dakota and Wisconsin contempt statutes, as well as, the Wisconsin Supreme Court case, *Kenosha Unified School District No. 1 v. Kenosha Ed. Ass'n*.[258] Specifically, the Court explained that in addition to basing North Dakota contempt law on Wisconsin contempt law, the Wisconsin contempt statute § 785.04(1) is "substantially identical" to North Dakota's § 27-10-01.4(1).[259] The principles of Wisconsin's contempt statute § 785.04(1) were clarified in the *Kenoshsa* case.[260]

In *Kenosha*, the Wisconsin Supreme Court concluded that a fine imposed against a contemnor could not exceed the statutory maximum of $250.[261] With this analysis, the North Dakota Supreme Court determined that although courts, including the North Dakota Supreme Court, have recognized a courts' inherent contempt powers, those powers may be limited by the legislature.[262] The Court explained that such limitation exists in § 27-10-01.4(1)(b).[263] Specifically § 27-10-01.4(1)(b) limits imprisonment as a remedial sanction for continuing contempt to "extend for as long as the contemnor continues the contempt or six months, whichever is shorter."[264]

Next, the Court addressed Nygaard's and Stanley's reliance on subdivision (d) of § 27-10-01.4.[265] Nygaard and Stanley argued that imprisonment

254. *Nygaard*, ¶ 14, 900 N.W.2d at 837.
255. *Id.* ¶ 12, 900 N.W.2d at 836.
256. *Id.*
257. *Id.* ¶ 15, 900 N.W.2d at 837.
258. *Id.*; Kenosha Unified School Dist. No. 1 v. Kenosha Ed. Ass'n., 234 N.W.2d 311 (1975).
259. *Nygaard*, ¶ 15, 900 N.W.2d at 837; WIS. STAT. ANN. § 785.04(1) (West 2001).
260. *Nygaard*, ¶ 15, 900 N.W.2d at 837.
261. *Id.* ¶ 16.
262. *Id.* ¶ 17, 900 N.W.2d at 838.
263. *Id.*
264. *Id.*
265. *Id.* ¶ 18, 900 N.W.2d at 839; N.D. CENT. CODE. § 27-10-01.4(1)(d) (2017) ("A court may impose one or more of the following remedial sanctions: (d) An order designed to ensure compliance with a previous order of the court.").

could be extended beyond six months if the sanction is "designed to ensure compliance with a previous order of the court."[266] The Supreme Court rejected this argument explaining "[t]o read subdivision (d) as allowing imprisonment beyond six months would render the specific limitations in subdivision (b) superfluous."[267]

Lastly, the Court ruled out subdivision (e) as justifying Taylor's imprisonment for over six months.[268] The Supreme Court explained that subdivision (e) does not permit imprisonment beyond six months.[269] The legislature has also taken into account that courts may exercise inherent authority beyond the six-month limitation for imprisonment "if the court *expressly finds* that [the six-month limitation] would be ineffectual to terminate a continuing contempt."[270] However, the Court explained that neither the judicial referee orders nor any district court orders expressly found that imprisonment for six months under § 27-10-01.4(1)(b) would be ineffectual to terminate Taylor's continuing contempt.[271] Thus, the Court reasoned that without such express finding, Taylor could not be imprisoned for more than six months.[272]

Thus, the North Dakota Supreme Court reversed, holding that the judicial referee erred in denying Taylor's motion of immediate release from incarceration.[273]

FAMILY LAW – TERMINATION OF PARENTAL RIGHTS EQUALS A MATERIAL CHANGE IN CIRCUMSTANCES – GRANDPARENT HAS NO RIGHT TO VISIT GRANDCHILDREN AFTER A FATHER'S PARENTAL RIGHTS ARE TERMINATED

Kulbacki v. Michael

In *Kulbacki v. Michael*,[274] Amanda Kulbacki ("Kulbacki") appealed the Grand Forks County District Court's judgment, which denied Kulbacki's motion to terminate the visitation rights of her child's paternal

266. *Nygaard*, ¶ 17, 900 N.W.2d at 838; N.D. CENT CODE § 27-10-01.4(1)(d) (2017).

267. *Nygaard*, ¶ 18, 900 N.W.2d at 839.

268. *Id.* ¶ 19; N.D. CENT. CODE. § 27-10-01.4(1)(d) (2017) ("A court may impose one or more of the following remedial sanctions: (e) A sanction other than the sanctions specified in subdivisions a through d if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt.")

269. *Nygaard*, ¶ 19, 900 N.W.2d at 839.

270. *Id.*

271. *Id.* ¶ 20.

272. *Id.*

273. *Id.* ¶ 21.

274. 2017 ND 184, 899 N.W.2d 643.

grandparents after the father's parental rights were terminated.[275] Kulbacki argued that the termination of the father's parental rights resulted in a material change in circumstances.[276] The North Dakota Supreme Court reversed and remanded part of the district court's judgment.[277]

In 2012, Amanda Kulbacki was pregnant when she divorced Nicholas Michael ("Michael").[278] Michael was incarcerated during the child's birth.[279] Michael and his mother, Shawn Coulter ("Coulter"), used § 14-09-05.1[280] of the North Dakota Century Code to request grandparent visitation after the child was born.[281] Subsequently, Kulbacki started the process to terminate Michael's parental rights in Maricopa County, Arizona because that is where she and the child resided.[282]

Upon review, the district court in Grand Forks County held in Coulter's favor.[283] Thus, Coulter was awarded unsupervised visitation for one-half hour each day Kulbacki visited Grand Forks, North Dakota.[284] The district court reasoned that Kulbacki failed to demonstrate that the child's best interests would be interfered with from limited grandparent visitation.[285] Kulbacki appealed that ruling to the North Dakota Supreme Court, which held the "district court improperly placed the burden on Kulbacki to show grandparent visitation was not in the child's best interests."[286] As a result, the Court remanded the issue to the district court with the burden switched to Coulter to demonstrate visitation was in the child's best interest and would not interfere with the parent-child relationship.[287]

Upon remand, the district court again awarded Coulter a thirty-minute visitation with her grandchild for each day Kulbacki visited Grand Forks,

---

275. *Kulbacki,* ¶ 1, 899 N.W.2d at 644.
276. *Id.* ¶ 8, 899 N.W.2d at 646.
277. *Id.* ¶ 18, 899 N.W.2d at 648.
278. *Id.* ¶ 2, 899 N.W.2d at 645.
279. *Id.*
280. N.D. CENT. CODE § 14-09-05.1(1)-(2) (2017) states:
> The grandparents and great-grandparents of an unmarried minor child may be granted reasonable visitation rights to the child by the district court upon a finding that visitation would be in the best interests of the child and would not interfere with the parent-child relationship. The court shall consider the amount of personal contact that has occurred between the grandparents or great-grandparents and the child and the child's parents.

281. *Kulbacki*, ¶ 2, 899 N.W.2d at 644-45.
282. *Id.*, 899 N.W.2d at 645.
283. *Id.* ¶ 3.
284. *Id.*
285. *Id.*
286. *Id.* (*quoting* Kulbacki v. Michael, 2014 ND 83, ¶ 10, 845 N.W.2d 625 (N.D. 2014)).
287. *Kulbacki*, ¶ 3, 899 N.W.2d at 645.

North Dakota.[288] Specifically, the ruling was held in Coulter's favor because the district court determined that Kulbacki had interfered with Coulter's attempts to have any type of contact with her grandchild.[289]

After the district court issued its second holding, the Arizona Superior Court terminated Michael's parental rights.[290] As a result, Kulbacki moved to terminate the grandparent visitation order.[291] Kulbacki argued that Coulter had no relationship with the child.[292] Specifically, Kulbacki stated that Coulter had not met the child and was not the child's legal grandparent.[293] Additionally, Kulbacki moved the district court to remove Michael's name from the child's birth certificate.[294] The district court ruled against Kulbacki because it found no material change in circumstances since the last ruling.[295] As a result, Kulbacki appealed to the North Dakota Supreme Court.[296]

First, in her appeal to the North Dakota Supreme Court, Kulbacki argued that the district court erred in deciding a material change in circumstances did not occur since the district court's second ruling.[297] Kulbacki believed a material change in circumstances existed due to Michael's parental rights being terminated.[298] As a result of Michael's terminated parental rights, Kulbacki argued that Coulter's visitation rights should also be terminated because she is not the child's legal grandparent.[299]

The Court used §14-09-05.1 of the North Dakota Century Code because it concerns a grandparent's right to visit a minor grandchild.[300] However, this section fails to address the modification of a grandparent's visitation with a minor grandchild.[301] Additionally, the North Dakota Supreme Court had not addressed this issue prior to hearing this case.[302] As a result, the Court looked to other jurisdictions for guidance and found that courts have analogized to the modification of parenting time when determining the

288. *Id.* ¶ 4.
289. *Id.*
290. *Id.* ¶ 5.
291. *Id.*
292. *Id.*
293. *Kulbacki*, ¶ 5, 899 N.W.2d at 645; *see also* N.D. CENT. CODE § 14-09-05.1 (2017).
294. *Kulbacki*, ¶ 5, 899 N.W.2d at 645.
295. *Id.*
296. *Id.* ¶ 1, 899 N.W.2d at 644.
297. *Id.* ¶ 6, 899 N.W.2d at 645.
298. *Id.* ¶¶ 6, 8, 899 N.W.2d at 645, 646.
299. *Id.* ¶ 6, 899 N.W.2d at 645.
300. *Kulbacki*, ¶ 7, 899 N.W.2d at 645.
301. *Id.*
302. *Id.*

modification of grandparent visitation.[303] The Court relied on *Bredeson v. Mackey*[304] and stated "[a] modification of parenting time requires material change in circumstances that has occurred since the prior order, and modification of the order is necessary to serve the child's best interests."[305] Accordingly, since the grandchild and Coulter have had no personal contact, the Court only needed to determine if a material change in circumstances had occurred.[306]

The North Dakota Supreme Court held that "the termination of a parent's rights is a material change in circumstances as a matter of law in a proceeding relating to the modification of grandparent visitation."[307] The Court reasoned, "a decree terminating parental rights severs all legal ties between the natural parent and the child."[308] Thus, the termination of Michael's parental rights meant that Coulter was no longer the child's legal grandparent.[309] Consequently, the Court overturned the district court's holding because a material change in circumstances had occurred.[310]

Next, the Court determined if Coulter could use the North Dakota Century Code's § 14-09-05.1(2) to establish a visitation right with her grandchild.[311] Section 14-09-05.1 states "[t]he court shall consider the amount of personal contact that has occurred between the grandparents or great-grandparents and the child and the child's parents.[312] Here the Court relied on *Troxel v. Granville*, which stated, "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[313] In this case, Coulter had never met her grandchild, had no contact with her grandchild, and Kulbacki did not want Coulter to have a relationship with her grandchild.[314] Consequently, Coulter lacked personal contact with the grandchild, which meant Coulter could not use § 14-09-05.1 to establish a right to visit her grandchild.[315]

---

303. *Id.*
304. 2014 ND 25, ¶ 6, 842 N.W.2d 860.
305. *Kulbacki*, ¶ 7, 899 N.W.2d at 645-46.
306. *Id.*
307. *Id.* ¶ 11, 899 N.W.2d at 647.
308. *Id.*
309. *Id.*
310. *Id.*
311. *Kulbacki*, ¶ 13, 899 N.W.2d at 647.
312. N.D. CENT. CODE § 14-09-05.1(2) (2017).
313. *Kulbacki*, ¶ 13, 899 N.W.2d at 647 (*quoting* Troxel v. Granville, 530 U.S. 57, 66 (2000).
314. *Id.* ¶ 13.
315. *Id.*

Lastly, the Court determined if the Grand Forks County District Court had jurisdiction to order the North Dakota Department of Vital Statistics to amend the child's birth certificate to reflect Michael's terminated parental rights.[316] Kulbacki argued that the district court erred when it determined it did not have jurisdiction to amend the birth certificate.[317] Kulbacki filed the Arizona order that terminated Michael's parental rights in Grand Forks County.[318] Section 28.20.1-02 of the North Dakota Century Code states that an order from another state filed under this section has "the same effect . . . as a judgment of a district court of any county of this state."[319] Thus, because the Arizona order was filed under § 28.20.1-02, the order became a North Dakota order.[320] Accordingly, Michael's parental rights were terminated when Kulbacki filed the order in North Dakota.[321]

Because Michaels' parental rights were terminated, the Court held the district court had proper subject matter jurisdiction, meaning that it had authority to determine the case.[322] Sections 23-02.1-25(1) and (3) of the North Dakota Century Code provided the district court's authority to amend a birth record if it follows governing statutes and regulations.[323] Thus, the Court remanded the amendment of the birth certificate to the district court.[324] Overall, the Court held that when a father loses his parental rights, his parents lose their right to visit the grandchild.[325]

---

316. *Id.* ¶ 14.

317. *Id.*

318. *Id.*

319. N.D. CENT. CODE § 28.20.1-02 (2017); *see also Kulbacki*, ¶ 14, 899 N.W.2d at 647.

320. *Kulbacki*, ¶ 15, 899 N.W.2d at 648.

321. *Id.*

322. *Id.* ¶ 17.

323. *Id.*; *see also* N.D. CENT. CODE § 23-02.1-25(1), (3) (2017) which states:

> A record registered under this chapter may be amended only in accordance with this chapter and regulations under this chapter adopted by the state department of health to protect the integrity and accuracy of vital records. … Upon receipt of a certified copy of a court order that is amending a birth, death, or fetal death record and upon request of such individual or the individual's parent, guardian, or legal representative, the state registrar shall amend the record as directed in the court order; however, if the state registrar has information to believe the facts of the court order are false or inaccurate, the state registrar shall provide the court and any known parties with the correct information.

324. *Kulbacki*, ¶ 17, 899 N.W.2d at 648 (allowing remand for Kulbacki to brief the authority regarding the termination of Michael's parental rights and amending the child's birth certificate).

325. *Id.* ¶1, 899 N.W.2d at 644.

GOVERNMENT - COUNTIES - INTERVENTION NEEDED BECAUSE OF GREAT PUBLIC INTEREST – COUNTY COMMISSIONERS AUTHORITY TO FIRE LOCAL SHERIFF'S DEPARTMENT EMPLOYEES

Schwartzenberger v. McKenzie County

In *Schwartzenberger v. McKenzie County*,[326] Gary Schwartzenberger ("Schwartzenberger ") appealed a district court judgment denying him a writ to prohibit the McKenzie County Board of County Commissioners ("Board") from taking disciplinary action up to and including termination against a sheriff's office deputy.[327] The North Dakota Supreme Court reversed, finding that the Board did not have the authority to discipline or terminate a sheriff's office deputy.[328]

In November 2014, Gary Schwartzenberger became the McKenzie County sheriff.[329] In May of 2016, a sheriff's office employee complained to the McKenzie County human resource director about bullying and retaliation that occurred within the sheriff's office.[330] The Board conducted an internal investigation of the sheriff's office by contracting with the Village Business Institute.[331] After the investigation results were received, the Board unanimously decided "'to take disciplinary action against Lt. Michael Schmitz up to and including termination, pending a response within 10 days, and a final determination by this board,' and to place Lt. Schmitz 'on administrative leave immediately and unpaid administrative leave beginning the October 16, 2016, payroll.'"[332] Additionally, the Board asked the acting state's attorney to prepare a motion for Schwartzenberger's removal by the governor.[333]

In response, Schwartzenberger asked the district court to prohibit the Board from taking additional actions on its motions because he believed the Board surpassed its jurisdiction and acted unlawfully.[334] The district court denied Schwartzenberger's writ of prohibition petition.[335] Specifically, the district court held that the Board had the power to investigate the sheriff's

326. 2017 ND 211, 901 N.W.2d 64.
327. *Schwartzenberger*. ¶ 1, 901 N.W.2d at 65.
328. *Id*.
329. *Id*. ¶ 2.
330. *Id*.
331. *Id*.
332. *Id*., 901 N.W.2d at 65-66.
333. *Schwartzenberger*, ¶ 2, 901 N.W.2d at 66.
334. *Id*. ¶ 3.
335. *Id*. ¶ 4.

office and ask the state's attorney to prepare a petition requesting the governor's removal of Sheriff Schwartzenberger.[336] Furthermore, the district court held disciplinary action against Lt. Schmitz was within the Board's authority.[337]

First, the North Dakota Supreme Court determined whether the issue regarding authority to discipline and terminate employees was moot.[338] The Board's position was that this issue was moot because Lt. Schmitz had already been terminated for unrelated reasons.[339] However, Schwartzenberger, acting in his official capacity as sheriff, claimed the issue was not moot because the Board surpassed its jurisdiction by meddling with the internal operations of the sheriff's office.[340]

The Court agreed with Schwartzenberger and held that the issue was not moot because it involved a great public interest in which intervention was needed between elected county commissioners and elected sheriffs.[341] Specifically, the Court reasoned that this issue was of great public interest because it involved public officials' power and authority.[342] The Court explained that this power and authority had the possibility of developing into a nonstop-cycle if it continued to evade review.[343] Here, the Court determined that although Lt. Schmitz no longer worked for the sheriff's office for unrelated reasons, this issue involving the Board's scope of authority to discipline and terminate employees was not moot.[344] The Court reasoned that the Board's scope of authority was interrelated and overlapped with the elected sheriff's authority.[345]

Next, the North Dakota Supreme Court determined whether the Board had the authority to discipline employees from a local sheriff's office.[346] Schwartzenberger argued that the disciplinary action taken by the Board, against his sheriff's office, was beyond the Board's authority.[347] In response, the Board argued that it had a duty to supervise county officers.[348]

336. *Id.*
337. *Id.*
338. *Id.* ¶¶ 5-8, 901 N.W.2d at 66-67.
339. *Schwartzenberger,* ¶ 5, 901 N.W.2d at 66.
340. *Id.*
341. *Id.* ¶ 8, 901 N.W. 2d at 67.
342. *Id.* ¶ 6.
343. *Id.*
344. *Id.* ¶ 7.
345. *Schwartzenberger,* ¶ 7, 901 N.W.2d at 67.
346. *Id.* ¶ 9, 901 N.W.2d at 67-68.
347. *Id.*
348. *Id.* ¶ 10, 901 N.W.2d at 68.

The Court ruled in favor of Schwartzenberger and held that the Board had no authority to discipline or fire local sheriff's office employees.[349]

The Court used the North Dakota Century Code § 11-11-11(1) and (2) to determine that the Board had the "authority to superintend the fiscal affairs of the county and to supervise the conduct of the respective county officers, including the sheriff."[350] Additionally, the Court used a North Dakota Attorney General's opinion as persuasive authority to reach its holding.[351] The Attorney General's opinion states that a board of county commissioners could not remove or restrict a county officer's power to terminate an employee hired by that officer.[352] In interpreting the natural language of the statue, the Attorney General's opinion reasoned that since the county officer has the power to appoint or hire employees, the county officer also has the power to fire said employees.[353] Thus, the Court held that the sheriff had the power to discipline his sheriff's office employees.[354]

Lastly, in holding that the Board lacked authority, the Court used persuasive authority from other jurisdictions that had similar statutes to determine powers of county boards and sheriffs.[355] In *Bd. of Cty. Comm'rs v. Neilander*, the Kansas Supreme Court held that the board can implement personal policies for county employees, but the sheriff holds the power to discipline employees.[356] Accordingly, the Court used the *Neilander* ruling as persuasive authority because it was consistent with the North Dakota Attorney General's opinion.[357] As a result, the Court reversed the district court's judgment and determined that the Board could not discipline or terminate a deputy in the Sheriff's office.[358]

Hence, the sheriff, not the Board, has the authority to discipline and terminate sheriff's office employees.[359] The Court reversed the district court's ruling because the district court misapplied the law in determining who has the authority to discipline and terminate sheriff's office employees.[360] As a result, that Court explained that Schwartzenberger should have

---

349. *Id.* ¶ 22, 901 N.W.2d at 71.

350. *Id.* ¶ 13, 901 N.W.2d at 69 (citing N.D. CENT. CODE § 11-11-11(1) and (2) (2017) ("The board of county commissioners: 1. Shall superintend the fiscal affairs of the county. 2. Shall supervise the conduct of the respective county officers.")).

351. *Schwartzenberger*, ¶ 17, 901 N.W.2d at 69-70.

352. *Id.* (citing N.D. Op. Att'y Gen. 1997-L-32).

353. *Id.*

354. *Id.* ¶ 20, 901 N.W.2d at 71.

355. *Id.* ¶ 18, 901 N.W.2d at 70.

356. *Id.*; *see* Bd. of Cty. Comm'rs v. Nielander, 62 P.3d 247, 251-54 (Kan. 2003).

357. *Schwartzenberger*, ¶ 20, 901 N.W.2d at 71.

358. *Id.* ¶ 23.

359. *Id.* ¶ 22.

360. *Id.* ¶ 23.

received a writ of prohibition, which would have prohibited the Board from having the power to terminate and discipline a sheriff's office employee.[361]

361. *Id.*, 901 N.W.2d at 71-72.