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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:

CONSTITUTIONAL LAW – FOURTH AMENDMENT – SEARCHES AND MOTIONS TO SUPPRESS

State v. Schmidt

In *State v. Schmidt*,[1] Deven Schmidt ("Schmidt") appealed from district court orders deferring imposition of sentence after he conditionally pled guilty to possession of drug paraphernalia and conspiracy to deliver a controlled substance.[2] On appeal, Schmidt argued that the district court erred in denying his motions to suppress evidence that was obtained in violation of his rights against unreasonable searches and seizures.[3] The North Dakota Supreme Court affirmed, "concluding the district court properly denied Schmidt's motion to suppress evidence."[4]

In March 2014, a law enforcement officer served a bench warrant on Schmidt's roommate, Devin Lavallie ("Lavallie").[5] Schmidt answered the door, informed the officer that Lavallie was sleeping, and let the officer enter the residence.[6] The officer executed the bench warrant on Lavallie and subsequently arrested him.[7] During the arrest, the officer observed drug paraphernalia in Lavallie's room.[8] Lavallie was handcuffed and placed in the living room while the officer handcuffed Schmidt.[9] The officer testified that Schmidt was detained for safety purposes and for further investigation.[10] The officer observed paraphernalia in the living room,[11] and then obtained consent from Schmidt and Lavallie to search the rest of the residence where the officers found paraphernalia in Schmidt's bedroom.[12]

Schmidt was charged with possession of drug paraphernalia.[13] He moved to suppress the evidence, alleging the officer did not have authority or consent to enter the residence to execute the bench warrant on Lavallie.[14] The district court suppressed evidence obtained from the search, and the

1. 2016 ND 187, 885 N.W.2d 65.
2. *Schmidt*, ¶ 1, 885 N.W.2d at 68.
3. *Id.*
4. *Id.*
5. *Id.* ¶ 2.
6. *Id.*
7. *Id.*
8. *Schmidt*, ¶ 2, 885 N.W.2d at 68.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* ¶ 3.
13. *Id.* ¶ 4.
14. *Schmidt*, ¶ 4, 885 N.W.2d at 68.

State appealed.[15] The North Dakota Supreme Court reversed the district court's suppression order in *State v. Schmidt*,[16] finding that the officer had legal authority to execute the bench warrant on Lavallie.[17] The Court then remanded the case.[18] On remand, Schmidt moved to suppress evidence on grounds that the officer violated his Fourth Amendment rights.[19] Schmidt based this argument on the facts that the officer opened his bedroom door, removed him from his room and that he was coerced into consenting an additional search.[20] The district court denied Schmidt's motion to suppress.[21] Schmidt entered conditional guilty pleas.[22] Subsequently, Schmidt appealed from both orders deferring imposition of sentence.[23]

On appeal, Schmidt argued that his Fourth Amendment[24] rights had been violated.[25] Specifically, he argued that he was illegally detained.[26] The standard of review for a district court's determination on a motion to suppress is well settled:

> When reviewing a district court's ruling on a motion to suppress evidence, this Court defers to a trial court's findings of fact, and conflicts in testimony are resolved in favor of affirmance because we recognize the trial court is in a superior position to assess the credibility of witnesses and weigh evidence. "A district court's findings of fact on a motion to suppress will not be reversed if there is sufficient competent evidence fairly capable of supporting the court's findings, and the decision is not contrary to the manifest weight of the evidence." "Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law."[27]

Schmidt further argued that the officer should have left the residence after locating Lavallie.[28] The district court rejected that argument finding

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15. *Id*.
16. 2015 ND 134, ¶ 11, 864 N.W.2d 265 [hereinafter Schmidt I].
17. *Schmidt*, ¶ 5, 885 N.W.2d at 68.
18. *Id*.
19. *Id*. ¶ 6.
20. *Id*.
21. *Id*.
22. *Id*.
23. *Schmidt*, ¶ 6, 885 N.W.2d at 68.
24. The Fourth Amendment of the United States Constitution and Article I, Section 8 of the North Dakota Constitution protect individuals from unreasonable searches and seizures.
25. *Schmidt,* ¶ 9, 885 N.W.2d at 69.
26. *Id*.
27. *Id*. ¶ 7 (citing to Schmidt I (citation omitted)).
28. *Id*. ¶ 11.

that he "was detained and handcuffed for officer safety after evidence of illegal activity was discovered."[29] Moreover, law enforcement officers may, in appropriate circumstances and in an appropriate manner, detain an individual for investigative purposes when there is no probable cause to make an arrest if a reasonable and articulable suspicion exists that criminal activity is afoot.[30] Additionally, in *Michigan v. Summers*,[31] the United States Supreme Court held that officers executing a search warrant have authority to "detain the occupants of the premises while a proper search is conducted."[32]

In affirming the district court's decision, the North Dakota Supreme Court concluded that based on the totality of the circumstances, the search and detention of Schmidt was reasonable.[33] The detention was based on evidence found in plain view, the officers had reason to believe Schmidt was a resident of the home, intrusion into his room was minimal, and while in the residence, the officer formed reasonable suspicion of criminal activity.[34] Furthermore, suppression was not warranted because Schmidt gave consent to the search.[35]

Schmidt then argued that his consent was not voluntarily made.[36] Warrantless searches inside a person's residence are presumptively unreasonable, unless it falls under an exception to the warrant requirement.[37] Consent is an exception to the warrant requirement.[38] "A district court must 'determine whether the consent was voluntary under the totality of the circumstances.'"[39] The factors the North Dakota Supreme Court considered in determining whether Schmidt's consent was voluntary were as follows:

> (1) the characteristics and condition of the accused at the time of the consent, including age, sex, race, education level, physical or mental condition, and prior experience with police; and (2) the details of the setting in which the consent was obtained, including the duration and conditions of detention, police attitude toward the

29. *Id.*
30. *Id.* at 70 (citing Terry v. Ohio, 392 U.S. 1, 31 (1968)).
31. 452 U.S. 692, 101 S. Ct. 2587 (1981).
32. *Schmidt*, ¶ 15, 885 N.W.2d at 72 (citing Michigan v. Summers, 452 U.S. 692, 705 (1981)).
33. *Id.* ¶ 19, 885 N.W.2d at 73.
34. *Id.* ¶¶ 16-18, 885 N.W.2d at 72-73.
35. *Id.* ¶ 20, 855 N.W.2d at 73.
36. *Id.* ¶ 21, 855 N.W.2d at 73-73.
37. *Id.* ¶ 15, 885 N.W.2d at 72.
38. *Schmidt*, ¶ 23, 855 N.W.2d at 74.
39. *Id.* (citing State v. Hayes, 2012 ND 9, ¶ 38, 809 N.W.2d 309, 313).

> defendant, and the diverse pressures that sap the accused's powers of resistance or self control.[40]

Schmidt admitted that he signed the consent form; however, that alone is not enough to determine voluntariness of the consent.[41] The Court also looked at Schmidt's behavior, characteristics, and condition. The Court recognized that he was stressed, nervous, calm, not combative and cooperated with law enforcement.[42] Although Schmidt was detained and not free to leave, the court concluded that his content was not coerced.[43] The Court found that the officers made legal entry into the residence, they observed paraphernalia in plain view which gave rise to reasonable suspicion that criminal activity was afoot, the officer legally arrested both Lavallie and Schmidt, and no search of the home was conducted prior to obtaining consent.[44] "Given [the court's] deferential standard of review of a district court's finding of voluntary consent, based on the totality of the circumstances, [the Court] conclude[s] sufficient competent evidence supports the district court's finding, and its finding is not contrary to the manifest weight of the evidence."[45]

40. *Id.* ¶ 24 (quoting State v. Haibeck, 2004 ND 163, ¶ 21, 685 N.W.2d 512, 519).
41. *Id.* ¶ 25.
42. *Id.* ¶ 26.
43. *Id.* ¶ 27, 855 N.W.2d at 75.
44. *Schmidt*, ¶ 27, 855 N.W.2d at 75.
45. *Id.* ¶ 32, 855 N.W.2d at 76.

CONSTITUTIONAL LAW—JUDGMENT—APPEAL AND ERROR—ZONING AND PLANNING

Ferguson v. City of Fargo

Ferguson v. City of Fargo involved owners of unplatted property adjacent to a river bringing a declaratory judgment action against the city, seeking declaration that an ordinance relating to construction on property located near rivers violated equal protection because it treated platted and unplatted property differently.[46] The district court declared the ordinance unconstitutional as it applied to the owners, Edward and Lavonna Ferguson ("Fergusons"), and others similarly situated.[47] The City of Fargo ("Fargo") appealed.[48] The North Dakota Supreme Court reversed, holding that the ordinance did not violate equal protection.[49]

In May 2012, after historic flooding, Fargo enacted Ordinance 4818 (the "Ordinance").[50] The Ordinance prohibited construction within certain setback areas of the Red, Wild Rice, and Sheyenne Rivers.[51] Fargo's stated primary purpose in enacting the ordinance was to limit or prevent new construction within setback areas near river banks and drains to protect citizens, private property, and city infrastructure from Red River Valley floodwaters.[52]

With respect to the ordinance's exceptions to the prohibition on construction, it created a distinction between platted property (property that has been subdivide into blocks and lots) and unplatted property (property that has not been subdivided).[53] Under the ordinance, owners of vacant property platted before the ordinance's effective date could apply for a waiver from the construction prohibition.[54] Owners of unplatted property could not apply for a waiver.[55]

The Fergusons owned approximately six acres of unplatted property adjacent to the Sheyenne River that is partially within the ordinance's setback areas.[56] After the ordinance went into effect, the Fergusons

46. 2016 ND 194, 886 N.W.2d 557.
47. *Id.* ¶ 5, 886 N.W.2d at 558.
48. *Id.* ¶ 1.
49. *Id.*
50. *Id.* ¶ 2.
51. *Id.*
52. *Ferguson*, ¶ 2, 886 N.W.2d at 558.
53. *Id.* ¶ 3, 886 N.W.2d at 558-59.
54. *Id.* at 559.
55. *Id.*
56. *Id.* ¶ 4.

requested a waiver seeking to develop their property into multiple single-family duplexes.[57] Fargo denied the request because the property was not platted.[58]

The Fergusons brought a declaratory judgment action against Fargo.[59] The Fergusons asked the district court to declare that the ordinance violated the equal protection clauses of the North Dakota Constitution and the United States Constitution because it treated platted and unplatted property differently.[60] Fargo argued that its distinction between platted and unplatted property was rationally related to a legitimate government interest in limiting new construction on property subject to flooding, and was therefore, not in violation of the equal protection clauses.[61]

The district court found in favor of the Fergusons.[62] It found that the ordinance treated platted and unplatted property differently.[63] The court noted that "[p]latting does not change the character of the land at issue" and "[w]hether land is platted or unplatted does not make it more or less likely to be subject to slumping or flooding."[64] The court concluded that the ordinance's distinction between platted and unplatted property was not rationally related to Fargo's interest in preventing new construction on river bank lands subject to soil instability or flooding and the management of waiver requests.[65] The court declared the ordinance unconstitutional as applied to the Fergusons and others similarly situated.[66] Fargo appealed the judgment declaring the ordinance unconstitutional.[67]

The North Dakota Supreme Court reversed.[68] The Court explained that "[t]he equal protection clause does not forbid classifications, but prevents 'government decision-makers from treating differently persons who are in all relevant respects alike.'"[69] Agreeing with Fargo, the Court held that the ordinance, in making a distinction between platted and unplatted property, did not violate equal protection because it was rationally related to the

57. *Id.*
58. *Ferguson*, ¶ 4, 886 N.W.2d at 559.
59. *Id.* ¶ 5.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Ferguson*, ¶ 5, 886 N.W.2d at 559.
65. *Id.*
66. *Id.*
67. *Id.* ¶ 1, 886 N.W.2d at 558.
68. *Id.* ¶ 16, 886 N.W.2d at 563.
69. *Id.* ¶ 9, 886 N.W.2d at 560 (quoting Hamich, Inc. v. State ex rel. Clayburgh, 1997 ND 110, ¶ 31, 564 N.W.2d 640, 647).

legitimate government interest of limiting new construction on property subject to flooding.[70] The Court noted Fargo had distinguished platted from unplatted property near rivers because there were a finite number of vacant platted properties, and developers and owners had shown an intent to build in the future by completing platting process or purchasing platted property.[71]

Justice Crothers dissented from the majority, arguing that denial of a right on the sole basis that the land was not platted before May 2012, stripped away property owners' ability to ever request a waiver from the building restrictions.[72] Their property is "frozen in time. But platted property is not."[73] As differing treatment is based solely on whether the land was platted in 2012, the Court must consider whether platting land before May 2012 advances the governmental interests.[74] Justice Crothers argued it did not.[75] "While the owner/developer's investment of time and money may correlate to Fargo's potential liability for halting all development of platted land," it provided "no rational basis for permitting waivers in platted land and preventing waivers in land that was unplatted in May of 2012."[76]

70. *Ferguson*, ¶ 1, 886 N.W.2d at 558.
71. *Id.* ¶ 13, 886 N.W.2d at 563.
72. *Id.* ¶ 20, 886 N.W.2d at 564 (Crothers, J., dissenting).
73. *Id.*
74. *Id.* ¶ 21.
75. *Id.*
76. *Ferguson*, ¶ 25, 886 N.W.2d at 564-65.

CORPORATIONS AND BUSINESS ORGANIZATIONS—SERVICE OF PROCESS

Monster Heavy Haulers, LLC v. Goliath Energy Services, LLC

In *Monster Heavy Haulers, LLC v. Goliath Energy Services, LLC*, Goliath Energy Services, LLC, ("Goliath") and George Satterfield ("Satterfield") challenged district court orders denying their motions to vacate default judgments entered against them in favor of Monster Heavy Hauler, LLC, ("Monster") and Rossco Crane and Rigging, Inc. ("Rossco").[77] The North Dakota Supreme Court held that (1) signed return receipts for service by certified mail raised a rebuttable presumption of valid service of process;[78] and (2) unchallenged allegations in complaints were sufficient to provide basis for piercing the corporate veil.[79]

The litigants in this case are in the business of oil field construction, trucking, and rigging.[80] Goliath is a limited liability company with its principal place of business located in Grand Junction, Colorado.[81] Satterfield was Goliath's president and Karl Troestler ("Troestler") was its chief financial officer.[82] Both Rossco, and later Monster, sued Goliath, Troestler, and Satterfield to collect payment of outstanding balances owed for services provided to Goliath.[83] Rossco sought $95,243.80 plus interest, and Monster sought $226,431.35 plus interest.[84]

Rossco commenced its action by service of its Summons and Complaint through certified mail in November 2014.[85] Goliath, Satterfield, and Troestler were each served at three separate addresses, two in Grand Junction and one in Alexander, ND.[86] The three return receipts from Alexander were signed by "Larry Adams" and "J. Leigh," who marked the "Agent" boxes on the receipts.[87] The six return receipts from the Grand Junction addresses were signed by "Sherry Bley," who did not mark either

77. 2016 ND 176, ¶ 1, 883 N.W.2d 917, 919.
78. *Monster Heavy Haulers*, ¶ 20, 883 N.W.2d at 926.
79. *Id.* ¶ 27, 883 N.W.2d at 928.
80. *Id.* ¶ 2, 883 N.W.2d at 919.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Monster Heavy Haulers*, ¶ 2, 883 N.W.2d at 919.
85. *Id.* ¶ 3.
86. *Id.*
87. *Id.*

the "Agent" or "Addressee" boxes.[88] The defendants did not file answer to Rossco's Complaint.[89]

Rossco filed a motion for default judgment on January 6, 2015.[90] Satterfield then phoned Rossco's attorney on January 16, 2015, to request copies of Rossco's Summons and Complaint and default judgment motion be emailed to him.[91] Rossco's attorney sent Satterfield a test email to confirm his email address, and Satterfield also requested the documents be emailed to a Colorado attorney.[92] On January 20, 2015, Satterfield sent an email to Rossco's attorney, the Colorado attorney, and the North Dakota attorney representing Goliath and Satterfield in these appeals stating he had talked to Rossco's manager and "they have agreed to stand down and work with me."[93] On January 21, 2015, Rossco's attorney emailed Satterfield and copied the Colorado and North Dakota attorneys informing Satterfield that the judge had signed the order for default judgment, but that Rossco's attorney would not prepare a judgment at that time, due to negotiations between the parties.[94]

Then, on January 29, 2015, Rossco's attorney sent an email to Satterfield informing him that he also represented Monster and that Monster had filed a well and pipeline lien in Billings County, ND for a debt owed by Goliath.[95] Satterfield asked Monster's tell the North Dakota lawyer about that lien, but the North Dakota attorney told Monster's attorney "[a]t this time you can communicate directly with Goliath. I will let you know if that changes."[96] On February 23, 2015, Satterfield emailed Monster's attorney to ask if Monster's position had changed after Satterfield spoke with Monster's general manager.[97] The negotiations between the parties ultimately failed.[98]

Monster commenced its action by service of its Summons and Complaint through certified mail in March 2015. Goliath, Satterfield, and Troestler were each served at the same address in Grand Junction.[99] Two return receipts for Satterfield and Troestler were signed by "Sherry Bley,"

88. *Id*.
89. *Id*.
90. *Monster Heavy Haulers*, ¶ 4, 883 N.W.2d at 919.
91. *Id*.
92. *Id*. at 919-20.
93. *Id*. at 920.
94. *Id*.
95. *Id*. ¶ 5.
96. *Monster Heavy Haulers*, ¶ 5, 883 N.W.2d at 920.
97. *Id*.
98. *Id*.
99. *Id*. ¶ 6.

who indicated actual delivery occurred at a different Grand Junction address.[100] Neither the "Agent" nor "Addressee" boxes were marked. The defendants never filed answers to the Monster Complaint.[101]

Monster obtained a judgment on June 9, 2015, for $240,107.23, because of the defendant's failure to respond to Monster's motion for default judgment.[102] On July 29, 2015, Rossco advised its attorney that negotiations had also failed with the defendants.[103] Default judgment was entered against the defendants in favor of Rossco for $97,233.04 on August 3, 2015.[104]

After Monster moved to compel answers to interrogatories in aid of judgment and execution, the North Dakota attorney filed a Notice of Appearance on behalf of Goliath and Satterfield.[105] On November 23, 2015, Goliath and Satterfield filed motions to vacate the default judgments obtained by both Monster and Rossco.[106] Goliath and Satterfield argued that (1) service of process was insufficient, and (2) Monster and Rossco had failed to present adequate proof to pierce Goliath's corporate veil and hold Satterfield personally liable for the debts of Goliath.[107] The district court denied both motions on February 2, 2016, finding the service of Summons and Complaint were properly effectuated on the defendants and that the defendants failed to timely respond to the motions for default judgment.[108] The district court also found Goliath and Satterfield's defense of insufficiency of process was effectively waived by the defendants deliberate failure to timely raise it.[109] Goliath and Satterfield appealed the district court judgment to the North Dakota Supreme Court.[110]

Goliath and Satterfield argued the district court erred in denying their motions to vacate the default judgments against them under North Dakota Rules of Civil Procedure ("N.D.R.Civ.P.") 60(b).[111] Goliath and Satterfield

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100. *Id*.
101. *Id*.
102. *Monster Heavy Haulers*, ¶ 7, 883 N.W.2d at 920.
103. *Id*.
104. *Id*.
105. *Id*. ¶ 8.
106. *Id*.
107. *Id*.
108. *Monster Heavy Haulers*, ¶ 8, 883 N.W.2d at 920-21.
109. *Id*. at 921.
110. *Id*.
111. *Id*. ¶ 9; N.D. R. CIV. P. § 60(b) (2017) states in relevant part:

"On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with

were required to show the district court abused its discretion in entering the default judgments against them,[112] which occurs when a court acts in an arbitrary, unreasonable, or unconscionable manner.[113] To prove abuse of discretion, Goliath and Satterfield bore the burden of establishing sufficient grounds for disturbing the finality of the judgment.[114] The Court also noted that Goliath's and Satterfield's own errors may not constitute proper grounds for relief from a default judgment.[115] To rule a default as void or valid, a district court must have subject-matter jurisdiction and personal jurisdiction over the parties.[116]

Goliath and Satterfield argued the default judgments against them were void for lack of personal jurisdiction, because Monster and Rossco did not prove the individuals who accepted service of the Summons and Complaints were authorized to do so on their behalf.[117] Personal jurisdiction is acquired by service of process in compliance with N.D. R. CIV. P. 4.[118] The Court noted that a sheriff's return of service of process creates a rebuttable presumption that service was actually made, which shifts the burden to the defendant to prove the service was not properly effectuated.[119] There is also a disputable presumption that a letter duly directed and mailed was received in the regular course of the mail.[120] North Dakota statutory law is similar to the federal common law "mailbox

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reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); . . . or (6) any other reason that justifies relief."

112. *Monster Heavy Haulers*, ¶ 10, 883 N.W.2d at 921 (quoting Shull v. Walcker, 2009 ND 142, ¶¶ 13-14, 770 N.W.2d 274, 279).

113. *Id.* (citing US Bank Nat'l Ass'n v. Arnold, 2001 ND 130, ¶ 21, 631 N.W.2d 150, 155).

114. *Id.* (citing Follman v. Upper Valley Special Educ. Unit, 2000 ND 72, ¶ 10, 609 N.W.2d 90, 93).

115. *Id.* (citing Beaudoin v. South Texas Blood & Tissue Center, 2005 ND 120, ¶ 40, 699 N.W.2d 421, 435-36).

116. *Id.* ¶ 11, 883 N.W.2d at 921-22 (citing Alliance Pipeline L.P. v. Smith, 2013 ND 117, ¶ 18, 833 N.W.2d 464, 471).

117. *Id.* ¶ 12, 883 N.W.2d at 922.

118. *Monster Heavy Haulers*, ¶¶ 13-14, 883 N.W.2d at 922-23; N.D. R. CIV. P. § 4 (2017) states in relevant part:

> "Service must be made on a domestic or foreign corporation or on a partnership or other unincorporated association, by: (i) delivering a copy of the summons to an officer, director, superintendent or managing or general agent, or partner, or associate, or to an agent authorized by appointment or by law to receive service of process on its behalf, or to one who acted as an agent for the defendant with respect to the matter on which the plaintiff's claim is based and who was an agent of the defendant at the time of service . . . (iii) any form of mail or third-party commercial delivery addressed to any of the foregoing persons and requiring a signed receipt and resulting in delivery to that person."

119. *Monster Heavy Haulers*, ¶ 14, 883 N.W.2d at 923 (citing Farm Credit Bank v. Stedman, 449 N.W.2d 562, 564 (N.D. 1989)).

120. *Id.* ¶ 15 (citing First Bank v. Neset, 1997 ND 4, ¶ 18, 559 N.W.2d 211, 214).

rule,"[121] which provides that "the proper and timely mailing of a document raises a rebuttable presumption that the document has been received by the addressee in the usual time."[122] The Court noted that many jurisdictions have adopted rebuttable presumptions regarding certified mail for the purpose of service of process,[123] and stated that "a rebuttable presumption of valid process arises when a return receipt for certified mail is signed, and that the signator, if not the addressee, will be presumed to have acted as the agent of the addressee authorized to accept service in the absence of proof to the contrary."[124]

The Court found that Goliath's and Satterfield's position that Monster and Rossco did not have personal jurisdiction over them was flawed for four reasons: (1) a sheriff's return creates a rebuttable presumption that service was validly effected, and certified mail is also an authorized method for valid service;[125] (2) "Larry Adams" and "J. Leigh" marked the "Agent" boxes in the receipts, giving them presumptive agency status;[126] (3) the burden to prove that the signators were not authorized to accept service of process was on Goliath and Satterfield, and they did not meet that burden;[127] and (4) Goliath and Satterfield had knowledge of both underlying collection actions, including the default judgment motions, and they had the burden of establishing sufficient grounds for disturbing the finality of the judgments under N.D.R.Civ.P. 60(b), which they failed to do.[128]

As such, the Court reasoned the signed return receipts for certified mail raised a rebuttable presumption of valid service of process.[129] Monster and Rossco presented evidence of valid service, and Goliath and Satterfield failed to present anything to rebut that evidence.[130] Further, Goliath and Satterfield did not even claim the signators were unauthorized to accept service on their behalf.[131] As such, the Court held the district court did not err in ruling service of process was sufficient and the court thus had

121. Schikore v. Bank America Supplemental Retirement Plan, 269 F.3d 956, 961 (9th Cir. 2001).

122. *Monster Heavy Haulers*, ¶ 15, 883 N.W.2d at 923 (quoting *Schikore*, 269 F.3d at 961).

123. *Id.* ¶ 16, 883 N.W.2d at 923-24 (citing Federal Deposit Ins. Corp. v. Schaffer, 731 F.2d 1134, 1137 (4th Cir. 1984)).

124. *Id.* ¶ 17, 883 N.W.2d at 924.

125. *Id.*

126. *Id.*

127. *Id.* at 925.

128. *Monster Heavy Haulers*, ¶ 18, 883 N.W.2d at 925.

129. *Id.* ¶ 19, 883 N.W.2d at 926.

130. *Id.*

131. *Id.*

personal jurisdiction over Goliath and Satterfield in the collection actions.[132]

Satterfield next argued the district court erred in refusing to grant him relief from the default judgments because piercing the corporate veil requires "proof" before he could be found personally liable for the judgments.[133] To determine whether the corporate veil should be pierced, the Court considers the factors laid out in *Coughlin Constr. Co., Inc. v. Nu-Tec Indus., Inc.*,[134] which include:

> insufficient capitalization for the purposes of the corporate undertaking, failure to observe corporate formalities, nonpayment of dividends, insolvency of the debtor corporation at the time of the transaction in question, siphoning of funds by the dominant shareholder, nonfunctioning of other officers and directors, absence of corporate records, and the existence of the corporation as merely a façade for individual dealings.[135]

An element of injustice, inequity, or fundamental unfairness must also be present to properly pierce the corporate veil.[136]

In their default judgments motions, Monster and Rossco submitted affidavits of proof in which they stated they had personal knowledge of the facts contained in their Complaints. Among other things, the Complaints alleged "George Satterfield was President of Goliath . . . Karl Troestler was Chief Financial Officer of Goliath . . . [Goliath and Troestler] comingled corporation funds, failed to follow corporation formalities and was [sic] undercapitalized."[137] The Court reasoned those allegations constituted relevant factors for piercing the corporate veil and placed Satterfield and Troestler on notice that Monster and Rossco were seeking to pierce the corporate veil. As such, the Court held that those allegations, sworn to by the plaintiffs and unchallenged by Satterfield, are sufficient to provide the basis for piercing the corporate veil in the default judgment proceedings.[138] The Court held that the district court did not abuse its discretion in denying

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132. *Id.* ¶ 20.

133. *Id.* ¶ 21.

134. 2008 ND 163, ¶ 20, 755 N.W.2d 867.

135. *Monster Heavy Haulers*, ¶ 23, 883 N.W.2d at 926-27 (quoting Hilzendager v. Skwarok, 335 N.W.2d 768, 774 (N.D. 1983)).

136. *Id.* ¶ 21, 883 N.W.2d at 927 (citing Jablonsky v. Klemm, 377 N.W.2d 560, 564 (N.D. 1985)).

137. *Id.* ¶ 25.

138. *Id.* ¶ 26.

the motions for relief from the defaults judgment and affirmed its decision.[139]

139. *Id.* ¶ 27.

CRIMINAL LAW—AUTOMOBILES—ARREST

State v. Adan

State v. Adan, involved a continued detention of a vehicle during a traffic stop until a K-9 unit arrived.[140] Defendants Abdullahi Ahmed Adan ("Adan") and Semereab Haile Tesfaye ("Tesfaye") each entered conditional guilty pleas in district court for possession of a controlled substance with intent to manufacture or deliver, following denial of their motions to suppress evidence gathered as a result of the continued detention.[141] Defendants appealed the denial of their motions to suppress evidence.[142] The North Dakota Supreme Court affirmed, holding that the continued detention was supported by reasonable suspicion under the totality of the circumstances.[143]

On the day of the arrest, Officer Steven Clark observed a car that appeared to weave in its lane and noticed that the vehicle was from out of state.[144] Officer Clark turned around to follow it.[145] From several car lengths behind, Officer Clark saw the driver reach into the backseat of the vehicle and appear to place something like a blanket over something in the backseat.[146] Officer Clark pulled up next to the vehicle and observed the driver with his hands at ten and two on the wheel, staring intently forward, and a passenger who appeared to be sleeping.[147] Officer Clark observed the driver moving the corner of his mouth, as if he were trying to hide his conversation with the passenger.[148] However, not seeing any traffic infractions, Officer Clark stopped following the vehicle.[149]

Officer Clark relayed his suspicions to Officer Steve Edwards, who then located the vehicle.[150] Officer Edwards observed the vehicle speeding and following too close to the vehicle in front of it.[151] Based on these traffic violations, Officer Edwards initiated a traffic stop,[152] during which Officer Edwards observed a blanket covering about half of the backseat, an

140. 2016 ND 215, 886 N.W.2d 841.
141. *Id.* ¶ 1, 886 N.W.2d at 842-43.
142. *Id.*
143. *Id.* at 843.
144. *Id.* ¶ 2.
145. *Id.*
146. *Adan*, ¶ 2, 886 N.W.2d at 843.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* ¶ 3.
151. *Id.*
152. *Adan*, ¶ 3, 886 N.W.2d at 843.

air freshener, a bottle of Ozone scent spray, eye drops, and an energy drink in the vehicle.[153]

Adan, the driver, and Tesfaye, the passenger, both acted nervously.[154] When Officer Edwards questioned Adan and Tesfaye individually about their trip, they gave conflicting stories.[155] Tesfaye was unable to recall the name of the passenger they had dropped off, even though they allegedly rode with him for a couple of days.[156] A records check indicated that Tesfaye had recently been put on probation for possession of methamphetamine.[157] After the traffic stop, Officer Edwards issued Adan a warning.[158] Adan then agreed to answer a few more questions about their trip.[159] Officer Edwards later asked for permission to search the vehicle and have a dog walk around it.[160] Adan did not consent.[161] Officer Edwards called dispatch to send a K-9 to his location.[162] Forty-five minutes later, a K-9 arrived and signaled the presence of narcotics.[163] A search of the vehicle revealed over two pounds of marijuana.[164]

Whether the facts support a finding of reasonable articulable suspicion in the context of an investigative stop is a question of law, and thus, is fully reviewable by the North Dakota Supreme Court.[165] When the original purpose of a traffic stop is complete, the officer must have a reasonable suspicion that criminal activity is afoot to continue the detention.[166] Any further detention, without reasonable suspicion, violates the traffic offender's Fourth Amendment rights against unreasonable searches and seizures.[167]

On appeal, Adan and Tesfaye argued that after they were given a written warning for their driving conduct, Officer Edwards lacked a reasonable suspicion that criminal activity was afoot to continue to detain them.[168] When deciding whether reasonable suspicion exists, the Court

153. *Id.* ¶ 4.
154. *Id.* ¶¶ 5-6.
155. *Id.*
156. *Id.* ¶ 6.
157. *Id.* ¶ 7.
158. *Adan*, ¶ 8, 886 N.W.2d at 844.
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Adan*, ¶ 8, 886 N.W.2d at 844.
165. *Id.* ¶ 9 (citing State v. Fields, 2003 ND 81, ¶ 6, 662 N.W.2d 242, 245).
166. *Id.* ¶ 11.
167. *Id.*
168. *Id.* ¶ 13, 886 N.W.2d at 845.

looks at the totality of the circumstances.[169] Information obtained by one officer may be used by another to establish reasonable suspicion if the first officer conveyed the information to the second officer.[170]

Tesfaye argued that innocent conduct, such as possession of eye drops, energy drinks, and driving a rental vehicle, cannot be used to establish reasonable suspicion.[171] The Court disagreed, noting that while such conduct in isolation is not inherently suspicious, it looks at the totality of the circumstances to determine if reasonable suspicion exists.[172] Therefore, considering the totality of the circumstances, including (1) Adan and Tesfaye both acting nervous, (2) they told Officer Edwards conflicting stories about the trip, (3) Tesfaye did not know the name of the passenger they dropped off, (4) the vehicle contained masking agents, eye drops, and an energy drink, (5) Tesfaye had recently been put on probation for possession of methamphetamine, and (6) the vehicle was a rental, the Court concluded there was reasonable suspicion that Adan and Tesfaye were engaged in criminal activity.[173] Thus, their continued detention until a K–9 unit arrived was lawful.[174]

Justice McEvers concurred with the majority, and wrote separately, stating that while each individual item noted by law enforcement alone would not be sufficient to form reasonable suspicion, the amalgamation of the items does.[175] She further stated that the dissent incorrectly applied the the totality of the circumstances test when it attempted to limit what factors could be considered.[176]

Justice Crothers also concurred with the majority, and wrote separately, noting that while the totality of the circumstances provided reasonable suspicion of criminal activity, there remained a question as to whether the duration of the detention was reasonable.[177] He was troubled by the defendants' forty-five-minute detention and questioned whether that duration of seizure violates the Fourth Amendment.[178]

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169. *Id.* ¶ 12, 886 N.W.2d at 844.

170. *Adan*, ¶ 12, 866 N.W.2d at 844 (citing Ell v. Dir., Dep't of Trans., 2016 ND 164, ¶ 10, 883 N.W.2d 464, 468).

171. *Id.* ¶ 27, 866 N.W.2d at 847.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* ¶ 30 (McEvers, J., concurring).

176. *Adan*, ¶ 32, 866 N.W.2d at 848 (McEvers, J., concurring).

177. *Id.* ¶¶ 41-42 (Crothers, J., concurring).

178. *Id.* ¶¶ 43-45, 886 N.W.2d at 850-51.

Justice Kapsner dissented from the majority.[179] She argued that a finding of reasonable suspicion should not be created "based upon piling up of innocuous facts."[180] She further stated that what Officer Edwards articulated as bases for his suspicion were not reasonable, such that the stop should not have continued.[181]

179. *Id.* ¶ 51, 886 N.W.2d at 852 (Kapsner, J., dissenting).
180. *Id.* ¶ 59, 886 N.W.2d at 853.
181. *Id.* ¶ 62, 886 N.W.2d at 854.

CRIMINAL LAW—CONSTITUTIONAL LAW—AUTOMOBILES—ARREST

State v. Patrick

State v. Patrick involved a criminal defendant's motion to suppress evidence seized after a traffic stop.[182] The district court granted defendant Alexander Patrick's ("Patrick") motion to suppress.[183] The State appealed, and the North Dakota Supreme Court reversed and remanded, holding that the officer's mistaken belief that the statute prohibited operating a vehicle with more than four illuminated front-facing lights was objectively reasonable, such that the stop of vehicle with six front-facing lights was supported by reasonable suspicion.[184]

A police officer stopped Patrick's vehicle after observing it had two head lamps and four fog lights that were noticeably brighter than others on the road.[185] The officer initiated the stop on the mistaken belief that a statute prohibited operating a vehicle with more than four illuminated front-facing lights.[186] The officer testified he believed Patrick was in violation of the statute by having six front facing lights that were noticeably brighter than others on the road.[187] The statute, North Dakota Century Code ("N.D. Cent. Code") § 39-21-25(2), states:

> Whenever a motor vehicle equipped with headlamps . . . is also equipped with any [] other lamp[s] on the front thereof projecting a beam of intensity greater than three hundred candlepower, not more than a total of four of any such lamps on the front of a vehicle may be lighted. . . .[188]

The stop led to a search of the vehicle, revealing drugs and a loaded handgun.[189] Patrick moved to suppress the evidence obtained in the search.[190] He argued that the traffic stop was invalid because the term "candlepower" in N.D. Cent. Code § 39-21-25(2) was unconstitutionally vague.[191] The district court suppressed the evidence on the grounds that the

182. 2016 ND 209, 886 N.W.2d 681.
183. *Id.* ¶ 4, 886 N.W.2d at 682.
184. *Id.* ¶ 10, 886 N.W.2d at 684.
185. *Id.* ¶ 2, 886 N.W.2d at 682.
186. *Id.*
187. *Id.*
188. *Patrick*, ¶ 3, 886 N.W.2d at 682 (quoting N.D. CENT. CODE § 39-21-25(2) (2017)).
189. *Id.*
190. *Id.*
191. *Id.*

statute the officer relied on was unconstitutionally vague.[192] The State appealed.[193]

Justice Crothers wrote for a unanimous Court. The validity of the officer's stop turned on whether reasonable suspicion existed at the time of the traffic stop to believe Patrick was in violation of the statute.[194] The Court found that the officer had reasonable suspicion, and, as such, the stop was valid, and the evidence should not have been suppressed.[195]

Where an officer makes a mistake of law, the "mistake may provide the reasonable suspicion justifying a traffic stop only when objectively reasonable. . . ."[196] The Court found that the officer's mistaken belief was objectively reasonable, giving the officer the reasonable suspicion necessary to justify the traffic stop.[197] The statute prohibited lighting more than four additional front-facing lamps at one time when the beam of light is greater than 300 candlepower.[198] The officer testified he believed Patrick was in violation of the statute by having six front-facing lights that were noticeably brighter than others on the road.[199] This evidence, the Court reasoned, supported a reasonable suspicion to believe Patrick was in violation of the statute.[200]

The district court suppressed the evidence on the ground that the statute the officer relied on was unconstitutionally vague.[201] The Court held that this was improper.[202] The validity of the stop did not turn on the constitutionality of the statute, but on whether reasonable suspicion existed at the time of the traffic stop to believe Patrick was in violation of the statute.[203] As the officer had reasonable suspicion to believe Patrick was in violation of the statute, the stop was valid.[204] Thus, the district court erred in suppressing evidence obtained as a result of the stop.[205] Accordingly, the Court reversed the district court order suppressing evidence and remanded for further proceedings.[206]

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192. *Id.* ¶ 4.
193. *Id.*
194. *Patrick*, ¶ 5, 886 N.W.2d at 682.
195. *Id.* ¶ 10, 886 N.W.2d at 684.
196. *Id.* ¶ 9 (quoting State v. Hirschkorn, 2016 ND 117, ¶ 14, 881 N.W.2d 244, 248-49).
197. *Id.* ¶ 10.
198. *Id.*
199. *Id.*
200. *Patrick*, ¶ 10, 886 N.W.2d at 684.
201. *Id.* ¶ 1, 886 N.W.2d at 682.
202. *See id.* ¶¶ 6-8, 886 N.W.2d at 683.
203. *Id.* ¶ 8.
204. *See id.* ¶¶ 8-10, 886 N.W.2d at 683-84.
205. *Id.* ¶ 10, 886 N.W.2d at 684.
206. *Patrick*, ¶ 12, 886 N.W.2d at 684.

CRIMINAL LAW – IMPLIED CONSENT AND SUSPENSION OF DRIVING PRIVILEGES

Koehly v. Levi

In *Koehly v. Levi*,[207] Koehly appealed a district court judgment affirming a North Dakota Department of Transportation ("DOT") hearing officer's order suspending his driving privileges for 180 days.[208] Koehly argued that the implied consent law, as to breath tests, violated the state and federal constitutions, he cured his refusal, and the police officers violated his limited right to counsel.[209] The North Dakota Supreme Court affirmed the judgment of the district court.[210]

Koehly was cited for driving under the influence in July 2015.[211] While at the police station, Koehly was placed in a holding room.[212] There, Koehly had his cell phone and proceeded to contact family and friends.[213] He made no attempt to contact an attorney.[214] The arresting officer asked Koehly to consent to a breath test, which Koehly did not answer and eventually refused the breath test.[215] Subsequently, Koehly requested a blood test instead of a breath test.[216] The officer denied the request.[217]

In August of 2015, the DOT held a hearing on whether Koehly's license should be suspended for his refusal of a chemical test.[218] The hearing officer found that Koehly refused the breath test.[219] Koehly unsuccessfully petitioned the DOT for reconsideration.[220] He appealed the agency's findings to the district court.[221] The district court affirmed the DOTs findings. Additionally, the court concluded that the arresting officer did not violate Koehly's right to counsel and the implied consent law

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207. 2016 ND 202, 886 N.W.2d 689.
208. *Koehly*, ¶ 1, 886 N.W.2d at 690.
209. *Id.*
210. *Id.*
211. *Id.* ¶ 2.
212. *Id.*
213. *Id.*
214. *Koehly*, ¶ 2, 886 N.W.2d at 690.
215. *Id.* ¶ 3.
216. *Id.*
217. *Id.*
218. *Id.* ¶ 4.
219. *Id.*
220. *Koehly*, ¶ 4, 886 N.W.2d at 691.
221. *Id.*

relating to breath tests was not unconstitutional.[222] Koehly then appealed the district court judgment to the North Dakota Supreme Court.[223]

Chapter 39-20 of the North Dakota Century Code ("N.D. Cent. Code") governs North Dakota implied consent law.[224] The chapter provides that the DOT may revoke the driving privileges of a person who refuses a breath test during a lawful arrest.[225] The parties agreed that Koehly initially refused a breath test.[226] Koehly, however, argued that he cured his earlier refusal by consenting to a breath test.[227] The first issue, which the Court reviewed *de novo*, was whether North Dakota's implied consent laws violated various federal and state constitutional provisions.[228] The second issue was whether police officers violated Koehly's limited right to counsel by placing him in a recorded and monitored room.[229] Finally, the third issue was whether Koehly cured his earlier refusal to consent to the chemical test.[230]

The Court rejected Koehly's first argument that his revocation violated various provisions of the federal and state constitutions.[231] Furthermore, North Dakota's implied consent law regarding breath tests was recently upheld by the United States Supreme Court.[232] In *Birchfield v. North Dakota*, the United States Supreme Court held that the U.S. Constitution permits breath tests as searches incident to lawful arrests for drunk driving.[233] Likewise, Koehly's second argument was also rejected.[234] In *Kuntz v. State Highway Commissioner*,[235] the North Dakota Supreme Court held N.D. Cent. Code § 29-05-20 "entitles an arrested individual to have a reasonable opportunity to consult with an attorney before deciding to take a chemical test."[236] This statutory right is a "limited" right and "must be

222. *Id.* ¶ 5.
223. *Id.*
224. *Id.* ¶ 7.
225. *Id.*
226. *Koehly*, ¶ 7, 886 N.W.2d at 691.
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.* ¶ 9.
232. *Koehly*, ¶ 9, 886 N.W.2d at 691 (citing Birchfield v. North Dakota, 136 S. Ct. 2160, 2183-85 (2016)).
233. *Birchfield*, 136 S. Ct. at 2185.
234. *Koehly*, ¶ 13, 886 N.W.2d at 692.
235. 405 N.W.2d 285, 289 (N.D. 1987).
236. *Id.*

balanced against the need for an accurate and timely chemical test."[237] Koehly argued police officers violated his limited right to counsel by placing him in a recorded and monitored room, which would have allowed officers to hear him speaking with his attorney.[238] "Because Koehly made no attempt to call a lawyer, [the Court did not decide] whether the right to counsel would be violated by placing a person in a recorded and monitored room while the person speaks with a lawyer."[239]

The final issue the Court addressed was whether a person cures an earlier refusal of a chemical test by conditionally consenting.[240] "Whether a person has cured an earlier refusal of a chemical test is determined by whether the person consented to the second request for a chemical test and whether the circumstances match the criteria outlined in *Lund v. Hjelle*:"[241]

> [W]e hold that where, as here, one who is arrested for driving while under the influence of intoxicating liquor first refuses to submit to a chemical test to determine the alcoholic content of his blood and later changes his mind and requests a chemical blood test, the subsequent consent to take the test cures the prior first refusal when the request to take the test is made within a reasonable time after the prior first refusal; when such a test administered upon the subsequent consent would still be accurate; when testing equipment or facilities are still readily available; when honoring a request for a test, following a prior first refusal, will result in no substantial inconvenience or expense to the police; and when the individual requesting the test has been in police custody and under observation for the whole time since his arrest.[242]

Additionally, the Administrative Agencies Practice Act,[243] governs [the Court's] review of an administrative decision to suspend or revoke a driver's license.[244] Under N.D. Cent. Code § 28-32-49, the Court reviews an appeal from a district court judgment in an administrative appeal in the same manner as provided under N.D. Cent. Code § 28-32-46, which

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237. *Koehly*, ¶ 12, 886 N.W.2d at 692 (citing City of Mandan v. Leno, 2000 ND 184, ¶ 9, 618 N.W.2d 161, 163).

238. *Id.*

239. *Id.* ¶ 13.

240. *Id.* ¶ 14.

241. *Id.*

242. *Id.* (citing Lund v. Hjelle, 224 N.W.2d 552, 557 (N.D. 1974)); *see also* Maisey v. N.D. Dep't of Transp., 2009 ND 191, ¶¶ 24-25, 775 N.W.2d 200, 208.

243. N.D. CENT. CODE. Ch. 28-32.

244. *Koehly*, ¶ 15, 886 N.W.2d at 693 (citing Erickson v. Dir., N.D. Dep't of Transp., 507 N.W.2d 537, 539 (N.D. 1993)).

requires a district court to affirm an order of an administrative agency unless it finds any of the following:

> 1. The order is not in accordance with the law.
>
> 2. The order is in violation of the constitutional rights of the appellant.
>
> 3. The provisions of this chapter have not been complied with in the proceedings before the agency.
>
> 4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
>
> 5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
>
> 6. The conclusions of law and order of the agency are not supported by its findings of fact.
>
> 7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
>
> 8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.[245]

The Court does not make independent findings of fact or substitute its own judgment for that of the agency, but rather determines only whether a reasoning mind reasonably could have concluded the findings reached were supported by the weight of the evidence from the entire record.[246] Additionally, the Court in *City of Bismarck v. Bullinger*,[247] said, "[a] conditional response to a request to submit to chemical testing can be interpreted either as consent or refusal, depending on the circumstances. The driver must suffer the consequences of an officer's reasonable interpretation of the driver's conditional response."[248]

In the present case, the Court found that a rational mind reasonably could have concluded Koehly did not cure his refusal.[249] Moreover, the record showed Koehly did condition his offer to cure.[250] "He stated he would take the breath test only if the officer stipulated in writing her refusal

245. *Id.*
246. *Id.* ¶ 16.
247. 2010 ND 15, ¶ 10, 777 N.W.2d 904, 907.
248. *Id.*
249. *Koehly*, ¶ 18, 886 N.W.2d at 694.
250. *Id.*

to allow him to take a blood test."[251] However, because Koehly did not unconditionally consent to the breath test, the Court held that a reasoning mind could have concluded he failed to consent to the test and therefore failed to cure his earlier refusal.[252]

251. *Id*.
252. *Id*.

FAMILY LAW—CONSTITUTIONAL LAW—CHILD CUSTODY

Curtiss v. Curtiss

In *Curtiss v. Curtiss*,[253] Rebecca Curtiss ("Rebecca") moved to the district court to suspend her former husband, Spencer Curtiss's, ("Curtiss") parenting time of their children while he was incarcerated.[254] The district court granted Rebecca's motion to modify Spencer's parenting time and subsequently denied Spencer's motion to reconsider.[255] The North Dakota Supreme Court held the trial court failed to make adequate factual findings before modifying Spencer's parenting time, and remanded the case to the trial court with instructions to make specific fact findings.[256]

Spencer and Rebecca had two minor children and later divorced.[257] Spencer was awarded primary custody of the children by a district court in Kansas.[258] Spencer moved to North Dakota in 2009, and Rebecca moved to North Dakota in 2010.[259] In February 2011, Spencer was incarcerated at the North Dakota State Penitentiary and remains incarcerated.[260] Following Spencer's incarceration, Rebecca moved the North Dakota District Court to amend the divorce judgment to give her primary custody of the children.[261] Spencer agreed to give Rebecca primary custody, and the district court entered an Amended Judgment, which awarded Spencer supervised parenting time every other weekend at the state penitentiary.[262]

In July 2015, Spencer moved the district court to enforce the Amended Judgment, arguing Rebecca was failing to bring the children to visit him at the state penitentiary.[263] Rebecca then moved the district court to modify the Amended Judgment to suspend Spencer's parenting time entirely while he was incarcerated.[264] In support of her motion, Rebecca cited concerns that she and the children's therapist believed visits to the state penitentiary were harmful to the children.[265]

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253. 2016 ND 197, 886 N.W.2d 565.
254. *Curtiss*, ¶ 2, 886 N.W.2d at 567.
255. *Id.* ¶ 1.
256. *Id.*
257. *Id.* ¶ 2.
258. *Id.*
259. *Id.*
260. *Curtiss*, ¶ 2, 886 N.W.2d at 567.
261. *Id.*
262. *Id.*
263. *Id.* ¶ 4.
264. *Id.*
265. *Id.*

The district court scheduled a hearing to address the parties' motions.[266] The court allowed Spencer to participate in the hearing through the Interactive Video Network ("IVN"), but stated he was responsible for making the arrangements, noting the hearing would not be delayed if he failed to do so.[267] Spencer failed to appear via IVN at the December 4, 2015, hearing on the motions and the district court ruled in favor of Rebecca.[268]

On December 22, 2015, the district court entered a third Amended Judgment ordering that the children are not required to visit Spencer while he was incarcerated, but if they wished to visit, a counselor or therapist must be present to supervise.[269] The district court further ordered all communications of any kind between Spencer and the children to be supervised by a therapist.[270] Spencer moved the district court to reconsider, and the district court denied the motion.[271]

Spencer appealed to the North Dakota Supreme Court, arguing that (1) the district court did not have jurisdiction to amend the Kansas judgment; (2) the district court violated his constitutional rights by not issuing an order to the Department of Corrections demanding his appearance at the hearing; (3) the district court failed to make findings of fact that a material change in circumstances had been established to modify his parenting time; and (4) the district court erred by not scheduling a hearing and ruling on his motion.[272]

First, the North Dakota Supreme Court found the district court had personal jurisdiction over Spencer under North Dakota Rules of Civil Procedure ("N.D.R.Civ.P.") 4(b)(1).[273] Spencer was incarcerated in Burleigh County and, at the time of the case, he had already submitted to the jurisdiction of the district court by moving to enforce the existing order establishing parenting time.[274]

Second, the Court reasoned Spencer's constitutional rights violation argument was akin to a procedural due process argument.[275] Procedural

266. *Curtiss*, ¶ 4, 886 N.W.2d at 567.
267. *Id.*
268. *Id.*
269. *Id.* ¶ 5.
270. *Id.*
271. *Id.*
272. *Curtiss*, ¶ 6, 886 N.W.2d at 568.
273. N.D. R. CIV. P. § 4(b)(1) (2017) states: "[a] court of this state may exercise personal jurisdiction over a person found within, domiciled in, organized under the laws of, or maintaining a principal place of business in, this state as to any claim for relief."
274. *Curtiss*, ¶ 7, 886 N.W.2d at 568.
275. *Id.* ¶ 8.

due process requires fundamental fairness, which necessitates notice and a meaningful opportunity for a hearing.[276] Under North Dakota's jurisprudence, the right to appear at a hearing may be satisfied by appearance via telephone.[277] Though, the district court did not have a duty to ensure Spencer's presence at the hearing via telephone.[278] The North Dakota Supreme Court found that the district court made clear to Spencer that it was his responsibility to arrange communication through the Department of Corrections.[279] As such, the Court held the district court did not violate Spencer's constitutional rights by holding the December 4, 2015, meeting without him.[280]

Third, Spencer argued the district court failed to make adequate fact findings that the modification of his parenting time was due to a material change in circumstances.[281] Under North Dakota statutory law, the district court shall "grant such rights of parenting time as will enable the child to maintain a parent-child relationship that will be beneficial to the child, unless the court finds, after a hearing, that such rights of parenting time are likely to endanger the child's physical or emotional health."[282] To modify parenting time, Rebecca was required to demonstrate a material change in circumstances had occurred since entry of the previous parenting time order requiring her to bring the children to the state penitentiary to visit Spencer.[283] Parenting time for a parent without primary custody is presumed to be in the child's best interest and should only be withheld when it is likely to endanger a child's physical or emotional health.[284] The Court noted a district court may not rely solely upon the child's wishes regarding visitation[285] and that the danger to a child's physical or emotional health must be demonstrated in detail.[286]

The Court found that the district court made no findings on the record as to whether a material change in circumstances occurred, whether suspended visitation is necessary to protect the children, and whether modification of custody of the children was necessary to serve the best

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276. *Id.* (quoting St. Claire v. St. Claire, 2004 ND 39, ¶ 6, 675 N.W.2d 175, 177).
277. *Id.* at 569 (quoting *St. Claire*, ¶ 6, 675 N.W.2d at 175).
278. *St. Claire*, ¶ 6, 675 N.W.2d at 175.
279. *Curtiss*, ¶ 9, 886 N.W.2d at 569.
280. *Id.*
281. *Id.* ¶ 10.
282. *Id.* ¶ 11 (quoting N.D. CENT. CODE. § 14-05-22.2 (2017)).
283. *Id.* ¶ 12 (quoting Prchal v. Prchal, 2011 ND 62, ¶ 11, 795 N.W.2d 693, 697).
284. *Id.* (citing Hendrickson v. Hendrickson, 2000 ND 1, ¶ 21, 603 N.W.2d 896, 902).
285. *Curtiss*, ¶ 12, 886 N.W.2d at 570 (citing Votava v. Votava, 2015 ND 171, ¶ 15, 865 N.W.2d 821, 825).
286. *Id.* (citing *Hendrickson*, ¶ 21, 603 N.W.2d at 896).

interests of the children.[287] In its Order for Third Amended Judgment, the district court did not provide any explanation for the basis of its fact findings beyond stating "[h]aving heard the motion and supporting evidence, and having knowledge of the record in this matter . . ." before ruling that the children were no longer required to visit Spencer at the state penitentiary.[288] The district court's order denying Spencer's motion to reconsider was similarly lacking in explanation,[289] stating:

> The evidence in this matter was clear. The children of the parties are reluctant to visit their father in prison and have been working with a counselor concerning their relationship with their father. The order signed in December allows for contact by telephone call and letter if arranged through the counselor. Rebecca Curtiss has been reasonable in her response to the wish of the children concerning parenting time.
>
> The motion for reconsideration is DENIED.[290]

The North Dakota Supreme Court reasoned that the district court stating the children were reluctant to visit their father in prison and were working with a counselor was insufficient to constitute a showing of danger to the children's physical or emotional health.[291] Because of the district court's failure to either make and/or record sufficient findings of fact on the record, the Court found the order amending custody was clearly erroneous under N.D.R.Civ.P. 52(a)[292] and remanded the case to the district court with instructions to make specific findings.[293]

The Court also noted the district court failed to make findings regarding its reasoning as to why supervised parenting time by a therapist was necessary to protect the children.[294] Under *Marquette v. Marquette*,[295] "a restriction on visitation must be based on a preponderance of the evidence and be accompanied by a detailed demonstration of the physical or

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287. *Id.* ¶ 13.
288. *Id.* (quoting the district court's Order for Third Amended Judgment).
289. *Id.*
290. *Id.* (quoting the district court's Order Denying Motion for Reconsideration).
291. *Curtiss*, ¶ 13, 886 N.W.2d at 570-71.
292. N.D. R. CIV. P. § 52(a) (2017) states in relevant part:
> In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court.

293. *Curtiss*, ¶ 13, 886 N.W.2d at 571.
294. *Id.* ¶ 14.
295. Marquette v. Marquette, 2006 ND 154, ¶ 9, 719 N.W.2d 321, 324.

emotional harm likely to result from visitation."[296] Further, the district court record is unclear whether it considered each child separately or individually for either modification of custody or the necessity for professional supervision of parenting time.[297]

Spencer's final argument was that the district court erred by not holding a hearing on his motion to enforce the provision requiring the children to visit him while he was incarcerated.[298] The record reflects that the hearing for Spencer's motion was to be held at the same time as the hearing on Rebecca's motion to amend custody to allow the children to discontinue visitation while he was incarcerated on December 4, 2015.[299] However, at that hearing, there was no mention of Spencer's motion, nor was the district court's order mentioned.[300] Further confusing the issue, the judgment in favor of Rebecca's motion to amend custody stated Spencer's motion was resolved by the December 4, 2015, hearing.[301] Spencer raised that issue in his motion for reconsideration, but the record but did not reflect the district court's fact findings in support of its decision to deny reconsideration.[302] The North Dakota Supreme Court declined to decide whether the district court abused its discretion by denying Spencer's Motion to Reconsider because it had already determined to remand the case to the district court for further fact findings regarding its basis for amending custody.[303]

296. *Curtiss*, ¶ 14, 886 N.W.2d at 571 (citing *Marquette*, ¶ 9, 719 N.W.2d at 321).
297. *Id*.
298. *Id*.
299. *Id*.
300. *Id*.
301. *Id*.
302. *Curtiss*, ¶ 15, 886 N.W.2d at 571.
303. *Id*. ¶ 16.

FAMILY LAW – PRIMARY RESIDENTIAL RESPONSIBILITY OF CHILD – CHILD SUPPORT

Hildebrand v. Stolz

In *Hildebrand v. Stolz*,[304] former girlfriend, Hildebrand, filed a complaint requesting the partition of real property, primary residential responsibility of child, and child support from former boyfriend, Stolz.[305] The district court granted Hildebrand primary residential responsibility of the children, ordered Stolz to pay child support, and partitioned real property.[306] Stolz then moved to vacate the judgment, which was denied.[307] Stolz appealed.[308] The North Dakota Supreme Court affirmed the district court's finding that it did not abuse its discretion. However, the judgment incorrectly stated the matter came before the district court "on motion" and "as a stipulated divorce action," rather than as an action for partition of real property and for a determination of parental rights and responsibilities.[309]

Hildebrand and Stolz were never married but had three children together.[310] In Hildebrand's complaint, she requested the partition of their real property, primary residential responsibility of their three children, and child support payments from Stolz.[311] In Stolz's answer, he denied that Hildebrand was the proper person to have primary residential responsibility and sole decision making responsibilities of their children.[312]

A trial date was set for April 29, 2015.[313] Prior to trial, Stolz's attorney moved the court to allow her to withdrawal as counsel.[314] Before the withdrawal, Stolz stated that all correspondence was to be forwarded to him.[315] The motion to withdraw was granted on April 28, 2015, with the first day of trial to proceed on April 29, 2015.[316] Stolz was not present; however, trial proceeded and the court heard testimony and received exhibits from Hildebrand.[317] Hildebrand served the post-trial brief on Stoltz

304. 2016 ND 225, 888 N.W.2d 197.
305. *Id.* ¶ 1, 888 N.W.2d at 199.
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*
310. *Stolz*, ¶ 2, 888 N.W.2d at 199.
311. *Id.*
312. *Id.*
313. *Id.* ¶ 3.
314. *Id.*
315. *Id.*
316. *Stolz*, ¶ 4, 888 N.W.2d at 199.
317. *Id.*

on September 11, 2015, and on October 5, 2015, the district court issued its order.[318] The district court found Stolz in default for failing to appear at the trial, awarded primary residential responsibility to Hildebrand, required Stolz to make $761 per month in child support payments, and ordered the partition of real property held jointly by Hildebrand and Stolz.[319] Prior to the entry of judgement, Stolz hired a new attorney who filed a motion to vacate judgement on the grounds that Stolz was not aware of the trial date because his previous attorney never notified him of such date.[320] Hildebrand's reply to Stolz motion contained an affidavit from their daughter stating that Stolz was aware of the trial date.[321] "Relying on the affidavit from the parties' daughter, the district court found it was "more likely than not that [Stolz] was aware of the April 29, 2015 trial date."[322] Further, the court concluded that Stolz had an obligation to keep himself informed of his ongoing litigation.[323] The district court denied Stolz's motion to vacate and entered the judgment.[324] Stolz appealed.[325]

Stolz moved to vacate the district court's memorandum and order under North Dakota Rules of Civil Procedure ("N.D.R.Civ.P.") 60(b), which provides that a party may only move for relief from a "final judgment or order."[326] The memorandum and order was not a final judgment.[327] The district court, however, considered Stolz's motion under N.D.R.Civ.P. 60(b).[328] Because a consistent judgment was subsequently entered, the North Dakota Supreme Court considered Stolz's arguments in the context of N.D.R.Civ.P. 60(b).[329]

Stolz's argument on appeal is that the district court erred in denying his motion to vacate judgement.[330] The standard of review for a district court's determination on a motion to vacate is well settled:

> A motion to vacate lies with the "sound discretion of the trial court, and its decision whether to vacate the judgment will not be disturbed on appeal unless the court has abused its discretion." "A

318. *Id*.
319. *Id*.
320. *Id*. ¶ 5.
321. *Id*. at 200.
322. *Stolz*, ¶ 5, 888 N.W.2d at 200.
323. *Id*.
324. *Id*.
325. *Id*.
326. *Id*. ¶ 6.
327. *Id*.
328. *Stolz*, ¶ 6, 888 N.W.2d at 200.
329. *Id*.
330. *Id*. ¶ 7.

> district court abuses its discretion when it acts in an arbitrary, capricious, or unreasonable manner." "A trial court acts in an arbitrary, unreasonable, or unconscionable manner when its decision is not the product of a rational mental process by which the facts and law relied upon are stated and considered together for the purpose of achieving a reasoned and reasonable determination." "An abuse of discretion also occurs when a district court misinterprets or misapplies the law." A self-represented party should not be treated differently nor allowed any more or any less consideration than parties represented by counsel.[331]

Stolz argued that the district court misapplied the law in entering the default judgment. However, the North Dakota Supreme Court found that the district court found Stolz to be in "default" but did not enter and default judgment.[332] None of the procedural requirements for a default judgment after an appearance had been made were requested or applied.[333] Moreover, the district court heard testimony and took evidence. Because this was not a default judgment, the North Dakota Supreme Court declined Stolz's request "to apply remedial considerations applicable to default judgments."[334]

Stolz next argued that the district court erred in granting his previous attorney's motion to withdraw.[335] He based his argument on the fact that the motion to withdraw was granted one day before trial and the district court did not check to see if Stolz was aware of trial before granting the motion.[336] The Court was unable to find authority to support Stolz's positon and did not overturn the district court's decision granting the motion to withdraw.[337] Additionally, the motion to withdraw complied with the North Dakota Rules of Court 11.2 and 3.2 and N.D.R.Civ.P. 6(e)(1).[338] Furthermore, Stolz consented to the withdrawal.[339]

Stolz further argued that the district court erred in finding that he had notice of the trial date.[340] The district court's determination that Stolz knew

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331. *Id.* (internal citation omitted).
332. *Id.* ¶ 8.
333. *Id.*
334. *Stolz*, ¶ 9, 888 N.W.2d at 201.
335. *Id.* ¶ 10.
336. *Id.*
337. *Id.*
338. *Id.*
339. *Id.*
340. *Stolz*, ¶ 11, 888 N.W.2d at 202.

of the trial date is a finding of fact, which the North Dakota Supreme Court will not set aside unless it is clearly erroneous.[341]

> A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if the reviewing court, on the entire evidence, is left with a definite and firm conviction a mistake has been made. Under the clearly erroneous standard of review, we do not reweigh the evidence or reassess the credibility of witnesses[.][342]

Stolz based this argument on the fact that he never personally received notice of the trial date from the court, opposing counsel, or his attorney, and argued that "motions to vacate should be granted when the mistake or neglect is the fault of a third party."[343] The Court rejected this argument because Stolz failed to show that his failure to appear at the hearing was the mistake of his attorney.[344] The North Dakota Supreme Court found that the lower court "considered the affidavits in evidence, and was not clearly erroneous by finding Stolz had notice of the trial date based on his daughter's affidavit."[345] As a result, the lower court did not abuse its discretion in denying Stolz motion to vacate for mistake or excusable neglect under N.D.R.Civ.P. 60(b)(1).[346]

Next the court looked at N.D.R.Civ.P. 60(b)(6), which is a "catch-all" provision that allows a district court to grant relief from a judgment for 'any other reason that justifies relief.'[347] The Court rejected this argument as well, finding that in the district court's order denying Stolz's motion to vacate, "the district court stated '[e]ven if [Stolz] was not made aware by Ms. Nemec, he had an obligation as a self-represented party to apprise himself of the status of this litigation which has been ongoing since March 2012.'"[348] Therefore, the district court did not abuse its discretion in denying Stolz's motion to vacate under N.D.R.Civ.P. 60(b)(6) and in general.[349]

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341. *Id.* (citing N.D. R. CIV. P. 52(a) (2017)).
342. *Id.* (quoting Dronen v. Dronen, 2009 ND 70, ¶ 7, 764 N.W.2d 675, 681).
343. *Id.* ¶ 12.
344. *Id.*
345. *Id.* ¶ 14.
346. *Stolz*, ¶ 14, 888 N.W.2d at 202.
347. *Id.* ¶ 16, 888 N.W.2d at 203.
348. *Id.* ¶ 18.
349. *Id.* ¶¶ 18-19, 888 N.W.2d at 204.

ZONING AND PLANNING—MUNICIPAL CORPORATIONS

Dakota Outdoor Advertising, LLC v. City of Bismarck

In *Dakota Outdoor Advertising, LLC v. City of Bismarck*,[350] Dakota Outdoor Advertising, LLC ("Dakota"), appealed a district court order affirming the Bismarck Board of Commissioner's ("Board") decision affirming the Bismarck Planning and Zoning Commission's ("Commission") denial of an application for a special use permit.[351] The North Dakota Supreme Court affirmed the district court's ruling, holding that (1) Dakota's appeal from the district court order was not moot;[352] and (2) the Commission's decision to deny Dakota's application for a special use permit was not arbitrary, capricious, or unreasonable.[353]

Dakota entered into a lease with Boutrous Group ("Boutrous"), the owner of property in Bismarck, ND near the intersection of East Capitol Avenue and State Street, intending to erect a digital billboard on the property.[354] The City of Bismarck's Code of Ordinances ("Code") required Dakota to obtain a special use permit before it could erect the billboard because it would be located less than 300 feet from a residential property.[355] Dakota and Boutrous applied for the special use permit to the Commission and met with city staff on December 10, 2014, to present studies regarding issues of whether digital billboards create an unreasonable risk of driver distraction.[356] The Commission held a public hearing on the special use permit on January 28, 2015.[357] At the hearing, Dakota testified about the studies it presented to the Commission, and a police officer testified about the frequent accidents at the intersection.[358] The Commission then denied the application, by an eight-to-one vote.[359]

Dakota and Boutrous appealed the Commission's denial of the special use permit to the Board, and a hearing was held on the issue on March 24, 2015.[360] All parties were allowed to present evidence at the hearing, and the Board affirmed the Commission's decision to deny the special use

350. 2016 ND 210, 886 N.W.2d 670.
351. *Dakota Outdoor Advertising*, ¶ 1, 886 N.W.2d at 671.
352. *Id.* ¶ 9, 886 N.W.2d at 673.
353. *Id.* ¶ 15, 886 N.W.2d at 675.
354. *Id.* ¶ 2, 886 N.W.2d at 671.
355. *Id.*
356. *Id.* ¶ 3.
357. *Dakota Outdoor Advertising*, ¶ 3, 886 N.W.2d at 671.
358. *Id.*
359. *Id.*
360. *Id.* ¶ 4.

permit on March 30, 2015.[361] Dakota then appealed the Board's and Commission's decisions to the district court.[362] The district court ordered the appeal be dismissed without prejudice after the parties stipulated to dismissal.[363] Dakota and the Board presented briefs and a record, and the district court affirmed the Board's decision and entered judgment on February 22, 2016.[364]

Code ordinances regulating placement of digital billboards were changed since the district court entered judgment on the issue.[365] The ordinance governing siting of digital billboards[366] no longer includes a provision for obtaining a special use permit for a digital billboard at a distance of less than 300 feet.[367] The current provisions governing digital billboards would not permit Dakota to obtain a special use permit for the proposed site.[368]

The Board argues Dakota's appeal to the Supreme Court is moot because the City of Bismarck no longer permits special use permits for digital billboards less than 300 feet from a residential area.[369] At the time of Dakota's application to the Commission, obtaining a special use permit would have allowed Dakota to erect the billboard at a distance of 150 feet from a residential area.[370] By the time Dakota appealed to the Court, the 150 feet exception had been repealed, and special use permits no longer afforded an exception to the 300 feet rule.[371] The Board petitioned the Court to apply the current ordinance to the case, making it impossible to obtain a permit and thus rending its appeal moot.[372] The Court declined to

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361. *Id.*

362. *Id.* ¶ 5.

363. *Dakota Outdoor Advertising*, ¶5, 886 N.W.2d at 671-72.

364. *Id.* at 672.

365. *Id.* ¶ 6.

366. CITY OF BISMARCK, N.D., CODE OF ORDINANCES § 14-03-08(3)(b)(2) (2017) states in relevant part: "[a] site plan is submitted showing the overall dimensions of the sign, the location of the sign and any appurtenant features. The site plan shall be accompanied by a narrative description of operational elements of the sign including illumination and any electronic functions."

367. *Dakota Outdoor Advertising*, ¶ 6, 886 N.W.2d at 672.

368. *Id.*

369. *Id.* ¶ 7.

370. *Id.* (citing CITY OF BISMARCK, N.D., CODE OF ORDINANCES § 4-04-12(5) (repealed Mar. 8, 2016) stating in relevant part: "[d]igital billboards must be located at least three hundred (300) feet from any [residential zoning district] . . . [t]his distance may be reduced to one hundred fifty (150) feet in accordance with the following provisions [if] . . . [a] special use permit is approved by the Planning and Zoning Commission in accordance with the provisions of Section 14-03-08.").

371. *Dakota Outdoor Advertising*, ¶ 6, 886 N.W.2d at 672; *see* CITY OF BISMARCK, N.D., CODE OF ORDINANCES § 14-03-08 (2017).

372. *Id.*

do so, citing concerns about retroactively legislating a provision into the Code.[373] The Code states that "[n]o part of this code is retroactive unless it is expressly declared to be so."[374] No provision of the current Code relating to digital billboards contains such a provision regarding retroactive application.[375] Therefore, the Court held that Dakota's appeal was not moot.[376]

Dakota argued the Board's decision to deny a special use permit was arbitrary, capricious, and unreasonable, contending the studies they presented to the Commission and Board supported a grant of the special use permit.[377] Dakota further contends no evidence presented supported denial of the permit.[378] The principle of separation of powers precludes the Court from re-deciding issues decided by a local government body[379] and affords the Court a limited scope of review.[380] The Board's decision could only be overturned by a showing that it acted "arbitrarily, capriciously, or unreasonably in reaching its decision."[381] The arbitrary, capricious, or unreasonable standard is defined as follows:

> A decision is not arbitrary, capricious, or unreasonable if the exercise of discretion is the product of a rational mental process by which the facts and the law relied upon are considered together for the purpose of achieving a reasoned and reasonable interpretation.[382]

Dakota argued the Board failed to properly consider the studies it presented in support of approval of the special use permit.[383] The Court stated that the Board was under no obligation to accept the studies and that Dakota carried the burden of convincing the Board to accept the studies it presented.[384] The Board concluded the studies submitted were "at best, inconclusive" and failed to address the "cumulative effect of driving distractions."[385] The Board found the North Dakota Department of

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373. *Id*.
374. *Id*.; CITY OF BISMARCK, N.D., CODE OF ORDINANCES § 1-01-08 (2017).
375. *Dakota Outdoor Advertising*, ¶ 9, 886 N.W.2d at 673.
376. *Id*.
377. *Id*. ¶ 10.
378. *Id*.
379. *Id*.; *see* Hagerott v. Morton Cty. Bd. of Comm'rs, 2010 ND 32, ¶ 7, 778 N.W.2d 813, 817.
380. Tibert v. City of Minto, 2006 ND 189, ¶ 8, 720 N.W.2d 921, 924.
381. *Dakota Outdoor Advertising*, ¶ 10, 886 N.W.2d at 673.
382. Dahm v. Stark Cty. Bd. of Cty. Comm'rs, 2013 ND 241, ¶ 8, 841 N.W.2d 416, 420.
383. *Dakota Outdoor Advertising*, ¶ 12, 886 N.W.2d at 673.
384. *Id*.
385. *Id*. at 673-74

Transportation's report that the billboard was located at the seventh most dangerous intersection in the State of North Dakota and the second most dangerous intersection in the City of Bismarck more compelling than the studies submitted by Dakota.[386]

The Court reasoned the Board reached a reasonable decision in weighing the evidence presented by both parties to conclude the intersection was too dangerous to allow a special use permit for a digital billboard nearby under the Code provision governing special use permits in residential zones which states "'[t]he proposed use will not adversely affect the health and safety of the public and the workers and residents in the area' before a special use permit can be approved."[387] The Court concluded the Board's opinion that the digital billboard would pose a danger to the public was the product of a rational mental process in which the Commissioners exercised discretion.[388] Accordingly, the Court held the Board's decision to deny Dakota's application for a special use permit to erect a digital billboard less than 300 feet from a residential neighborhood at a dangerous intersection was not arbitrary, capricious, or unreasonable.[389]

386. *Id.* at 674.

387. *Id.* ¶ 13 (quoting CITY OF BISMARCK, N.D., CODE OF ORDINANCES § 14-03-08(1)(c)(2) (2017)).

388. *Id.* ¶ 14, 886 N.W.2d at 675.

389. *Dakota Outdoor Advertising*, ¶ 14, 886 N.W.2d at 675.