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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 significant decisions rendered by the North Dakota Supreme Court. The purpose of the Review is to identify cases of first impression, cases of significantly altered earlier interpretations of North Dakota law, and other noteworthy cases. As a special project, Associate Editors assist in researching and writing the Review.[1] The following topics are included in the Review:

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AUTOMOBILES—ADMINISTRATIVE LAW AND PROCEDURE—STATUTES

Kroschel v. Levi

In *Kroschel v. Levi,*[2] Kroschel appealed from the suspension of her driving privileges.[3] She claimed that the arresting officer, as an employee of the North Dakota State University ("NDSU") Police Department, did not have jurisdiction to arrest her off-campus.[4] The North Dakota Supreme Court found the district court holding erroneous and reversed based on four statutes.[5] The court held that NDSU officers do not have jurisdiction to arrest persons outside the NDSU campus under sections 40-20-05 and 15-10-17(2) of the North Dakota Century Code ("Century Code").[6] The court also held that section 44-08-24 only allows temporary assistance and exchanging of officers.[7] Lastly, the court concluded that section 54-40.3 did not authorize the agreement granting Haskell concurrent jurisdiction.[8]

The arresting officer, Haskell, believed he was acting under authority granted by a Memorandum of Understanding ("MOU").[9] This was an agreement between the Fargo and NDSU Police Departments, which stated that Haskell had city-wide jurisdiction.[10] The MOU was signed by the NDSU President of Business and Finance, the Director of University Policy and Safety of NDSU, the Fargo Interim Police Chief, and Fargo's Mayor.[11]

The hearing officer found the MOU valid under sections 40-20-05 and 15-10-17(2) of the Century Code.[12] The district court disagreed, finding that the officer had authority under section 44-08-24(1) of the Century Code but not under the statutes relied on by the hearing officer.[13] The district court also addressed section 54-40.3-04, stating that this section was

2. 2015 ND 185, 866 N.W.2d 109.
3. *Kroschel,* ¶ 1, 866 N.W.2d at 111.
4. *Id*.
5. *Id.* ¶ 37, 866 N.W.2d at 121.
6. *Id.* ¶ 36.
7. *Id.*
8. *Id.*
9. *Id.* ¶ 3, 866 N.W.2d at 111.
10. *Id*.
11. *Id*.
12. *Id*. ¶¶ 8-11, 866 N.W.2d at 113, 114.
13. *Id*. ¶ 5, 866 N.W.2d at 112.

inapplicable because it only authorized agreements made between North Dakota and another state.[14] The North Dakota Supreme Court noted that it will not affirm the district court if "the order is not in accordance with the law."[15] The North Dakota Supreme Court analyzed the four statutes involved in the previous decisions to determine its holding.[16]

First, the court reviewed the hearing officer's interpretation of section 40-20-05.[17] Although the hearing officer read the statute to allow the chief of police to give their officers jurisdiction throughout Fargo, the North Dakota Supreme Court highlighted that this authority may only be granted under the chief's supervision.[18] Since Officer Haskell was not under the supervision of the Fargo Police Department, the court found section 40-20-05 did not give him authority.[19]

Second, the court referenced section 15-10-17(2)[20] under which the administrative hearing found authority for the board of higher education to approve concurrent jurisdiction.[21] However, the statute limits this power so that the board of higher education may only authorize concurrent jurisdiction "*at its institutions*."[22] The court found this language as clear evidence that the board may not authorize jurisdiction off-campus.[23] Therefore, the arrest was also not authorized under section 15-10-17.[24]

Third, the supreme court reviewed section 44-08-24(1) of the Century Code,[25] which the district court determined to authorize Haskell to make the arrest of Kroschel.[26] This statute grants the assistance and exchange of peace officers among criminal justice agencies in North Dakota on a

14. *Id*.

15. N.D. CENT. CODE § 28-32-46 (2013).

16. *Kroschel*, ¶ 5, 866 N.W.2d at 112.

17. *Id*. ¶ 8, 866 N.W.2d at 113 (citing N.D. CENT. CODE § 40-20-05 (2013)).

18. *Id*.

19. *Id*. ¶ 10, 866 N.W.2d at 114.

20. The statute stipulates the powers of the board of higher education, including the power to "authorize the employment of law enforcement officers having concurrent jurisdiction with other law enforcement officers to enforce laws and regulations at its institutions." N.D. CENT. CODE § 15-10-17 (2013).

21. *Kroschel*, ¶ 12, 866 N.W.2d at 114.

22. *Id*.

23. *Id*.

24. *Id*. ¶ 33, 866 N.W.2d at 120.

25. "Any appointive or elective agency or office of peace officers, as defined in § 12-63-01, may establish policies and procedures or enter agreements with other agencies and offices and a state or local criminal justice agency of this state may establish policies and procedures or enter agreements with other criminal justice agencies of this state to: (a) assist other state and local criminal justice agencies; and (b) exchange the criminal justice agency's peace officers with peace officers of another criminal agency on a temporary basis." N.D. CENT. CODE § 44-08-24(1) (2013).

26. *Kroschel*, ¶ 13, 866 N.W.2d at 114.

temporary basis.[27] The district court determined that the term "on a temporary basis" referenced the exchange of officers but did not apply to the assistance of intrastate officers.[28] Kroschel argued that the term "on a temporary basis" is intended to apply to both the assisting and the exchanging of officers.[29]

The court settled this dispute by using the rule of interpretation directing the court to read related statutes together and attempt to find a common meaning among them.[30] The court referenced section 44-08-20, which also authorized "additional powers of peace assistance in a particular . . . violation of law."[31] Subsection 3 of this statute clarifies that this assistance may only be given upon request and only for a non-continual basis.[32] Another similar statute construes "assistance" as temporary.[33] The North Dakota Supreme Court found the statutes as evidence that the legislature intended to make assistance of criminal justice agencies to be temporary only, [34] and therefore section 44-08-24(1) did not give Haskell authority.[35]

Fourth, the North Dakota Supreme Court reviewed the district court's analysis of section 54-40.3-04.[36] The court found that the district court erred in concluding that the statute required the agencies to be interstate to form an agreement.[37] The court noted that section 54-40.3-01 clarifies that a political subdivision may enter into an agreement with another political subdivision of this state.[38] Therefore, the statute does authorize intrastate agreements between political subdivisions.[39]

The document was signed by a political subdivision and the NDSU Police Department, an institutional subdivision, as required under 54-40.3-04.[40] However, the section also requires a signature by the governing body.[41] Therefore, the MOU needed to be signed by the board of higher

27. *Id.* ¶ 15, 866 N.W.2d at 115.
28. *Id.* ¶ 16.
29. *Id.*
30. Martin v. Stutsman Cty. Soc. Servs., 2005 ND 117, ¶ 13, 698 N.W.2d 278, 281.
31. *Kroschel*, ¶ 19, 866 N.W.2d at 115-16.
32. *Id.*
33. State v. Demars, 2007 ND 145, ¶ 10, 738 N.W.2d 486, 489.
34. *Kroschel*, ¶ 21, 866 N.W.2d at 116-17.
35. *Id.* ¶ 19, 866 N.W.2d at 116.
36. *Id.* ¶ 27, 866 N.W.2d at 118.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* ¶ 28.
41. *Id.*

education and the attorney general.[42] Since the attorney general did not sign the MOU, the document was deficient and did not authorize officer Haskell to arrest Kroschel.[43]

Since the four statutes evaluated by the lower courts failed to give authority, the North Dakota Supreme Court reversed the district court's holding.[44] Kroschel urged the court to grant her attorney's fees.[45] The court found that, in order for the court to award Kroschel attorney fees, she must prove that the Department acted without substantial justification.[46] Century Code section 28-32-50 provides that substantial justification must be proven by showing the officer was "justified to a degree that could satisfy a reasonable person."[47] Since both the hearing officer and the district court found a reasonable basis in law and fact that the officer had authority, substantial basis was satisfied here.[48]

42. N.D. CENT. CODE § 54-40.3-01(2) (2013).
43. *Kroschel*, ¶ 32, 866 N.W.2d at 120.
44. *Id*. ¶ 36, 866 N.W.2d at 121.
45. *Id*. ¶ 34, 866 N.W.2d at 120.
46. *Id*.
47. *Id*. ¶ 35.
48. *Id*. at 121.

AUTOMOBILES—CONSTITUTIONAL LAW—SEARCHES AND SEIZURES

Beylund v. Levi

Beylund v. Levi,[49] presented a question of first impression as to whether the criminal refusal statute violates the Fourth Amendment under the doctrine of unconstitutional conditions.[50] Beylund appealed from a district court judgment, which affirmed the Department of Transportation decision to suspend Beylund's driving privileges for two years.[51] The North Dakota Supreme Court affirmed the district court decision, finding that the criminal refusal statute did not violate the Fourth Amendment under the unconstitutional conditions doctrine.[52]

After being read the implied consent advisory, Beylund consented to a chemical blood test.[53] The test revealed an alcohol concentration of 0.250 g/100ml.[54] Beylund argued the chemical test was an unconstitutional warrantless search and the implied consent law violates the unconstitutional conditions doctrine.[55] The North Dakota Supreme Court reviewed the decision de novo as required for constitutional challenges.[56] The presumption of constitutionality must be rebutted beyond a reasonable doubt in order for the statute to be found invalid.[57]

"A person may not drive . . . if . . . that individual refuses to submit to a chemical test . . . to determine the alcohol concentration . . . in the individual's blood, breath, or urine."[58] The refusal to submit to such test is "punishable in the same manner as driving under the influence" under Century Code section 39-20-01.[59] Since the chemical test is a search under the Fourth Amendment, the court determined whether the implied consent law is an unconstitutional condition.[60]

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49. 2015 ND 18, 859 N.W.2d. 403.
50. *Beylund*, ¶ 1, 859 N.W.2d. at 406.
51. *Id.*
52. *Id.*
53. *Id.* ¶ 3, 859 N.W.2d. at 406.
54. *Id.*
55. *Id.* ¶ 5. Beylund also argued the criminal refusal statute violates the Fourth Amendment or article I, section 8 of the North Dakota Constitution, which the court dismissed based on rationale given in *State v. Birchfield,* 2015 ND 6, 858 N.W.2d 302. *Beylund*, ¶ 1, 859 N.W.2d. at 406.
56. *Beylund*, ¶ 8, 859 N.W.2d. at 407.
57. *Id.* ¶ 17, 859 N.W.2d. at 409.
58. *Id.* at 410. (citing N.D. CENT. CODE § 39-08-01 (2013))
59. *Id.*
60. *Id.*

The unconstitutional condition doctrine provides that ordinarily the "government may not grant a benefit conditioned on the surrender of a constitutional right even if the government may withhold the benefit altogether."[61] The government may impose conditions on the right so long as those conditions are reasonable.[62] The court agreed with the Minnesota Supreme Court in finding that "in order to proceed with a claim of unconstitutional conditions, the defendant must show the criminal refusal statute authorizes an unconstitutional search."[63] The court then referred to its analysis in *State v. Birchfield*[64] to determine the statute's reasonableness through the balancing test.[65] The governmental interest in lowering drunk driving rates is significant.[66] Also, the implied consent laws protect against suspicionless requests for chemical tests.[67]

The court noted that the unconstitutional conditions doctrine invalidates laws only if the condition is not significantly relevant to the governmental interest.[68] The criminal refusal statute satisfies this standard because it deters drunken driving, induces drivers to take the test, and removes drunk drivers from the road.[69] Finally, the court determined that the state interest is related to the privilege of driving, making the implied consent laws reasonable.[70] The court urged that the driver may avoid harsher punishment by refusing to submit to the chemical test and also that a driver's expectation of privacy is lowered while driving a vehicle.[71] For these reasons, the court affirmed that district court judgment having determined the statute was not unconstitutional[72] under the unconstitutional conditions doctrine.[73]

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61. *Id*. ¶ 18. (citing 16A Am. Jur. 2d *Constitutional Law* § 411 (2009) & Supp. 2014)).

62. *Id*.

63. *Id*. ¶ 22, 859 N.W.2d. at 412. *(*citing State v. Netland, 762 N.W.2d 202, 212 (Minn. 2009)).

64. 2015 ND 6, 858 N.W.2d 302.

65. *Beylund,* ¶ 23, 859 N.W.2d. at 412.

66. *Id*.

67. *Id*.

68. *Id*. ¶ 25, 859 N.W.2d. at 413.

69. *Id*.

70. *Id*. ¶ 27, 859 N.W.2d. at 413-14.

71. *Id*. at 414.

72. At the time of writing, this case, along with *State v. Birchfield* and a Minnesota companion case, was on appeal to the Supreme Court of the United States with it being argued that these statutes were unconstitutional. *U.S. Supreme Court Hearing N.D. Cases on April 20*, N.D. SUP. CT., http://www ndcourts.gov/court/news/USSupremeCourtND 2016 htm.

73. *Beylund*, ¶ 30, 859 N.W.2d at 414.

CHILD SUPPORT—ADMINISTRATIVE LAW AND PROCEDURE—APPEAL AND ERROR

Schiele v. Schiele

In *Schiele v. Schiele,*[74] Bradley Schiele appealed from an amended divorce judgment, which required Bradley to pay child support for his child, C.B.S.[75] The court found that Bradley could not prove that his child support should be offset based on benefits C.B.S. was receiving from the government.[76] The court also held that the divorce judgment controlled to determine that Brenda has primary residential responsibility.[77] Consequently, the North Dakota Supreme Court affirmed the district court decision.[78]

After the divorce judgment, Brenda filed to have a court order Bradley to pay child support.[79] Although the child is autistic and lives at the Life Skills and Transition Center ("Center"), the district court approved, requiring that Bradley give $2,053 per month to Brenda as child support.[80] Bradley moved to amend this judgment on the basis that since the child lives with neither party, neither party should be considered to have primary residential responsibility of C.B.S.[81] The district court determined this motion to be untimely and unsupported by facts and accordingly denied the motion.[82] Bradley then appealed, stating that he has no obligation to pay child support while C.B.S is living at the Center and that his child support should be offset by C.B.S's benefits.[83]

The North Dakota Supreme Court noted that the standard of review for child support determinations is de novo for questions of law.[84] The court referred to the guidelines for child support under N.D. Administrative Code section 75-02-04.1.[85] Subsection 02(9) of that section provides that child support is appropriate when the parents do not live together.[86] The court

74. 2015 ND 169, 865 N.W.2d 433.
75. *Schiele*, ¶ 1, 865 N.W.2d at 435.
76. *Id.* ¶ 18, 865 N.W.2d at 438.
77. *Id.* ¶ 13, 865 N.W.2d at 439.
78. *Id.* ¶ 1, 865 N.W.2d at 435.
79. *Id.* ¶ 3, 865 N.W.2d at 435-36.
80. *Id.* ¶ 29, 865 N.W.2d at 441.
81. *Id.* ¶ 6, 865 N.W.2d at 436.
82. *Id.* ¶ 3, 865 N.W.2d at 435-36.
83. *Id.* ¶ 4, 865 N.W.2d at 436.
84. *Id.* ¶ 5.
85. *Id.* ¶ 8, 865 N.W.2d at 437 (citing N.D. ADMIN. CODE 75-02-04.1-02(9) (2015)).
86. *Id.*

found that under this statute child support is appropriate for the case at hand.[87]

On appeal, Bradley first argues that Brenda should not be considered the primary caregiver.[88] North Dakota legislation directs the court to consider the primary caregiver as the parent who acts as such more often than the other parent.[89] The court noted *Boumont v. Boumont*,[90] which held that "the divorce judgment's language controlled regardless of the parties' actual practices."[91] This was done to promote a bright line rule.[92] Therefore, because the divorce judgment gave Brenda primary residential responsibility of the parties' children, the supreme court concluded the district court correctly followed the divorce decree.[93]

Secondly, Bradley claims that his child support obligation should be offset by the benefits that C.B.S. receives from Medicaid and Supplemental Security Income.[94] He relied on N.D. Administrative Code section 75-02-04.1-02(11), which provides "[a] payment of children's benefits made to or on behalf of a child who is not living with the obligor must be credited as a payment toward the obligor's child support obligation."[95] He noted that these benefits include those resulting from the parent-child relationship but do not include payments from "public assistance programs that are means tested."[96] Bradley argued that the benefits C.B.S. receives are not "means tested"[97] but are a derivative of the parent-child relationship.[98] However, since he raised the issue for the first time on appeal, the court waived the claim.[99]

The court followed *Norberg v. Norberg*,[100] which held that child support obligations would not be offset by benefits that are not attributable to the obligor.[101] The court found no evidence that C.B.S.'s benefits were

87. *Id.*

88. *Id.* ¶ 6, 865 N.W.2d at 436.

89. A parent will be considered to have primary residential responsibility if he or she "acts as the primary caregiver on a regular basis for a proportion of time greater than the obligor." N.D. ADMIN. CODE § 75-02-04.1-01(9) (2015).

90. 2005 ND 20, 691 N.W.2d 278.

91. *Schiele,* ¶ 12, 865 N.W.2d at 438.

92. *Id*.

93. *Id*. ¶ 13.

94. *Id*. ¶ 14.

95. *Id*. ¶ 8, 865 N.W.2d at 437.

96. *Id*. (citing N.D. ADMIN. CODE § 75-02-04.1-01(3) (2015)).

97. The court defines means tested as benefits that are unrelated to income. *Id*. ¶ 18, 865 N.W.2d at 439.

98. *Id.*

99. *Id.* ¶ 16, 865 N.W.2d at 439.

100. 2014 ND 90, 845 N.W.2d 348.

101. *Schiele,* ¶ 17, 865 N.W.2d at 439.

attributable to Bradley.[102] Therefore, it affirmed the district court decision that Bradley's child support obligation will not be offset by the benefits C.B.S. receives.[103]

Justice McEvers concurred with the majority because the district court correctly followed the law, although the justice agreed with the logic of the dissent.[104] McEvers noted that the presumption that the amount of child support is correct may be rebutted if the party can show that the child support agency's criteria prove that the amount is incorrect.[105] However, Justice McEvers states that none of the child support agency criteria apply to the facts of this case.[106] Justice McEvers also noted that *Bergman v. Bergman*[107] cannot be followed because the guiding authority has changed since the case was decided.[108] The North Dakota legislature narrowed the criteria for rebutting the presumptive amount, making it exclusive.[109] McEvers determined the change of law to be a clear indication that North Dakota intended the rebuttable presumption to be narrow.[110] As a result, the rebuttable presumption cannot be applied to the case at hand.[111]

Justice Sandstrom dissented from the majority.[112] Justice Sandstrom finds a rebuttable presumption appropriate because "neither parent is in fact supporting the child."[113] Sandstrom noted that the child support guidelines "assume that one parent acts as a primary caregiver."[114] Since that is not the case here, Sandstrom found the result to be incorrect.[115] Further, Sandstrom noted that above all, the interpretation of the statutes must be reasonable.[116] The justice found it unreasonable to require a parent to pay $2,053 in child support when the recipient is paying $200–$300 in actual support of the child.[117] Therefore, he would reverse the district court.[118]

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102. *Id.*
103. *Id.* ¶ 19
104. *Id.* ¶ 22, 865 N.W.2d at 440 (McEvers, J., concurring).
105. *Id.* ¶ 23 (citing N.D. CENT. CODE § 14-09-09.7(4) (2013)).
106. *Id.*
107. 486 N.W.2d 243 (N.D. 1992).
108. *Schiele,* ¶ 24, 865 N.W.2d at 440.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* ¶ 27, 865 N.W.2d at 441 (Sandstrom, J., dissenting).
113. *Id.* ¶ 31.
114. *Id.* ¶ 33, 865 N.W.2d at 442 (citing N.D. ADMIN. CODE 75-02-04.1-02(1) (2015)).
115. *Id.*
116. *Id.* ¶ 34 (citing N.D. CENT. CODE § 31-11-05(33) (2013)).
117. *Id.* ¶¶ 28-29, 865 N.W.2d at 441.
118. *Id.* ¶ 34, 865 N.W.2d at 442.

CONSTITUTIONAL LAW—AUTOMOBILES—SEARCHES AND SEIZURES

State v. Birchfield

In *State v. Birchfield,*[119] Danny Birchfield appealed from a criminal judgment for refusing to submit to a chemical test to determine the alcohol concentration in his blood.[120] Birchfield argued on appeal that North Dakota's criminal refusal statute is unconstitutional under the Fourth Amendment and article 1, section 8 of the North Dakota Constitution.[121] The North Dakota Supreme Court affirmed the district court criminal judgment, finding that the criminal refusal statute does not violate rights under the Fourth Amendment or the North Dakota Constitution.[122]

Challenges of constitutionality are fully reviewable on appeal.[123] All enacted statutes are presumed to be constitutional, requiring that the challenging party must clearly demonstrate that the statute contravenes the constitution.[124] This strong presumption requires the invalidity of the statute to be proven beyond a reasonable doubt by the challenging party.[125] The statute that Birchfield challenged was the criminal refusal provision which states, "A person may not drive . . . if . . . that individual refuses to submit to a chemical test . . . to determine the alcohol concentration . . . in the individual's blood, breath, or urine."[126]

The court recognized that driving is not a constitutional right and may be "subject to reasonable control by the State under its police power."[127] The chemical test to which Birchfield refused may only be administered after the individual is arrested.[128] A person may refuse the chemical testing, but refusal is "a crime punishable in the same manner as driving under the influence."[129] Chemical tests to determine a person's blood alcohol concentration are considered searches for purposes of the Fourth Amendment, which protects the individual from unreasonable searches and seizures.[130]

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119. 2015 ND 6, 858 N.W.2d 302.
120. *Birchfield,* ¶ 1, 858 N.W.2d at 303.
121. *Id.* ¶ 3.
122. *Id.* ¶ 1.
123. *Id.* ¶ 5.
124. *Id.* ¶ 5, 858 N.W.2d at 303-04.
125. *Id.* at 304.
126. *Id.* ¶ 7. (citing N.D. CENT. CODE § 39-08-01 (2013)).
127. *Id.* ¶ 6.
128. *Id.*
129. *Id.* ¶ 7 (citing N.D. CENT. CODE § 39-20-01 (2013)).
130. *Id.* ¶ 8.

The court cited *Missouri v. McNeely*,[131] which held that the dissipation of alcohol in the bloodstream would not justify a per se warrantless blood test.[132] The decision was based in part on the fact that all fifty states have adopted implied consent laws that allow for evidence to be secured without a warrantless search.[133] The North Dakota Supreme Court subsequently held that the implied consent laws do not coerce or render consent involuntary since the individual is presented with a choice.[134]

Based on these findings, the court noted that the statute must be reasonable to maintain its validity.[135] It was a question of first impression in North Dakota if the criminal refusal statute violates the Fourth Amendment.[136] Birchfield cited no case that struck down criminal refusal statutes.[137] In fact, the court found that the statutes have survived Fourth Amendment challenges in other states.[138]

The court determined the reasonableness of the Fourth Amendment infringement by "balancing the promotion of legitimate governmental interests with the intrusion on an individual's privacy."[139] It found the governmental interest to be compelling since decreasing drunk driving is a valid public concern.[140] Further, the intrusion upon the individual's privacy is minimal based on the driver's lowered expectation of privacy when driving a vehicle.[141] Also, the court acknowledged that the driver may avoid "enhanced penalties for being highly intoxicated" if he or she chooses to refuse to the chemical testing.[142] The court found this analysis sufficient to prove that the criminal refusal statutes were reasonable and therefore constitutional under the Fourth Amendment and article 1, section 8 of the North Dakota Constitution.[143]

131. 133 S. Ct. 1552 (2013).
132. *McNeely*, 133 S.Ct. at 1568.
133. *Birchfield,* ¶ 10, 858 N.W.2d at 306.
134. *Id.* ¶ 11.
135. *Id.*
136. *Id.*
137. *Id.* ¶ 12.
138. *Id.*
139. *Id.* ¶ 17, 858 N.W.2d at 309.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* ¶ 19, 858 N.W.2d at 310. At the time of writing, this case, along with *Beylund v. Levi* and a Minnesota companion case, was on appeal to the Supreme Court of the United States with it being argued that these statutes were unconstitutional. *U.S. Supreme Court Hearing N.D. Cases on April 20*, N.D. SUP. CT., http://www ndcourts.gov/court/news/USSupremeCourtND 2016 htm.

LANDLORD AND TENANT—CONTRACTS—ESTOPPEL

Savre v. Santoyo

In *Savre v. Santoyo*,[144] Savre leased two parcels of land from Santoyo for the purpose of running his auto repair business.[145] The lease was signed on June 15, 2008, for a two-year term with a mid-lease rent increase.[146] Around the time of the rent increase, the parties entered into a "Lease to Purchase Option Agreement," which would allow Savre to lease the two parcels for a period of time and then purchase the property if certain conditions were met.[147] The agreement, signed July 15, 2009, specified the option term, a notice requirement, a purchase price, an exclusivity of option clause, a financing disclaimer, remedies upon default, and a modification clause.[148] The lease stated that monthly rent payments were due on the first of each month, but Savre was frequently late.[149] Santoyo accepted the late payments and did not indicate to Savre in writing any intent to terminate the lease on that basis.[150]

In preparation for purchasing the property, Savre set up JDDS, LLC, to use as a financing entity; however, Savre did not attempt to assign, convey, delegate, or transfer the purchase option to JDDS.[151] Savre gave notice to Santoyo of his intent to purchase the property on December 21, 2012, and February 27, 2013, with no response from Santoyo.[152] After Santoyo refused to sell him the property, Savre stopped making monthly payments, and Santoyo initiated eviction proceedings.[153] The district court granted the eviction, entering judgment against Savre for unpaid rent and Santoyo's costs and disbursements.[154] By the end of June 2013, Savre vacated the property, began leasing from someone else, and brought this lawsuit against Santoyo.[155] Savre argues that Santoyo was unjustly enriched by breaking the option agreement, but Santoyo denied the allegations and counterclaimed for damages to the property upon eviction.[156] The district court found Santoyo breached the option purchase agreement, awarding

144. 2015 ND 170, 865 N.W.2d 419.
145. *Savre*,¶ 1, 865 N.W.2d at 421.
146. *Id.* ¶ 2.
147. *Id.* ¶ 3.
148. *Id* at 422-23.
149. *Id.* ¶ 4, 865 N.W.2d at 423.
150. *Id.*
151. *Id.* ¶ 5.
152. *Id.*
153. *Id.* ¶ 6.
154. *Id.*
155. *Id.*
156. *Id.*

Savre $31,996 in damages for overpayments under the lease agreement but denied any additional lost profits damages.[157] The court also dismissed Santoyo's counterclaim for failing to meet his burden of proof.[158]

General contract rules also apply to leases. Therefore, the goal of contract interpretation is to determine the parties' intent, from the written language alone if possible.[159] The appellate court independently examines the contract, but whether a party has breached is a finding of fact subject to the clearly erroneous standard.[160] A breach occurs when there is nonperformance of a contractual duty when it is due.[161]

First, Santoyo argues that the district court should not have concluded Santoyo had a duty to sell to a third party with no rights and not even in existence at the time of the agreement.[162] Alternatively, Santoyo states that neither Savre nor JDDS ever had sufficient financing to complete the transaction.[163] The court disagreed, however, finding that it was Savre alone who paid extra payments under the lease and exercised the purchase option in December 2012 and February 2013.[164] Since the agreement did not require financing to be in place for Savre to finalize the purchase, Savre had completely performed under the contract until Santoyo failed to respond in any way to Savre's notice.[165] Since Savre exercised the option and made no effort to transfer or convey the option to JDDS, Savre fully performed, and the district court did not err in finding Santoyo's lack of response as a breach of the agreement.[166]

Second, Santoyo argues that the district court was incorrect in finding that he had waived strict compliance to the option agreement's terms by his conduct even though the agreement required any waiver to be in writing.[167] Normally, strict compliance is required for purchase option contracts, but a waiver of contractual rights is possible.[168] A waiver can be established by either express agreement or via inference from acts or conduct, such as an unexplained delay in enforcing contractual rights or accepting performance different than expected under the contract.[169] The court looked to *Corbin*

157. *Id.* ¶ 7.
158. *Id.*
159. *Id.* ¶ 10, 865 N.W.2d at 424.
160. *Id.* ¶ 11.
161. *Id.*
162. *Id.* ¶¶ 9, 12.
163. *Id.* ¶ 13, 865 N.W.2d at 425.
164. *Id.* ¶ 17, 865 N.W.2d at 425-26.
165. *Id.* ¶ 18, 865 N.W.2d at 426.
166. *Id.*
167. *Id.* ¶ 19.
168. *Id.* ¶ 20.
169. *Id.* ¶ 21.

on Contracts section 40 to note that in option contracts, a requirement for timely payments may be waived by acceptance of a delayed payment without any further action.[170] This waiver may operate even in the presence of a non-waiver provision in the contract.[171] Since Santoyo accepted the increased rent payments, the North Dakota Supreme Court held that the district court did not err in finding that Santoyo had waived strict compliance with the option agreement.[172]

Lastly, Santoyo argues that the district court failed to make sufficient findings of fact when it dismissed his counterclaim for damages to the property.[173] Under Rule 52(a)(1) of the North Dakota Rules of Civil Procedure, a district court making findings of fact without a jury must state conclusions of fact and law separately to allow the appellate court to understand the ruling.[174] Santoyo contends that a tremendous amount of photographs and other evidence of the damage were introduced at trial and that Savre himself agrees that some of the damage was caused by him.[175] The supreme court agreed with Santoyo that the district court should have provided a better factual basis for its ruling.[176] Specifically, the court's opinion noted that Savre himself agreed with some of the damages, and therefore, the district court's findings of fact dismissing the counterclaim do not sufficiently address it.[177] Therefore, the court reversed as to this part and remanded the case for further proceedings.[178]

170. *Id.*
171. *Id.* at 427.
172. *Id.* ¶ 25, 865 N.W.2d at 428.
173. *Id.* ¶ 26.
174. *Id.* ¶ 27.
175. *Id.* ¶ 28.
176. *Id.* ¶ 31, 865 N.W.2d at 429. After dismissing Savre's claims for lost business profits as speculative, the district court's ruling only said, "The same is true for the damages Santoyo claimed. In addition, the Court does not find the testimony offered by Santoyo in support of the claim for damages to be credible." *Id.* ¶ 30.
177. *Id.* ¶ 31.
178. *Id.* ¶ 32.

CONTRACTS LAW—REMEDIES—AMOUNT OF DAMAGES

Peterbilt of Fargo, Inc. v. Red River Trucking, LLC

In *Peterbilt of Fargo, Inc. v. Red River Trucking, LLC*,[179] Red River Trucking ("Red River") brought a totaled truck to Peterbilt of Fargo ("Peterbilt") for repairs.[180] Red River's insurance company paid out the value of the truck at $22,500, but Red River decided to keep the truck with a salvaged title and repair it for $37,505.65 in cash upon completion.[181] Although Peterbilt began repairing the truck, Peterbilt stopped repairs on March 23, 2011, after Red River failed to pay a Peterbilt affiliate, Allstate Peterbilt group, and due to the relative cost of the repairs compared with the value of the truck.[182] Peterbilt already had put $31,346.65 in repairs into the truck, which was supposed to be completed by May 1, 2011.[183] Peterbilt told Red River in March 2011 that no more repairs would be completed until Red River paid half of the estimated repairs.[184] Peterbilt also offered to release the truck upon payment of repairs made through that date.[185] Red River declined to follow either option, and Peterbilt retained possession of the truck.[186]

Peterbilt sued Red River for the value of the completed repairs under a repairman's lien.[187] Red River denied Peterbilt had a valid lien and counterclaimed for lost profits alleging Peterbilt breached the repair contract.[188] Peterbilt replied, saying that Red River failed to mitigate its damages.[189] The district court found that Peterbilt had a valid repairman's lien that entitled them to $31,346.65, which they could foreclose on via the sale of the truck.[190] However, the district court also found that Peterbilt breached the repair contract when the truck was not repaired by May 1, 2011.[191] The court also concluded that Red River failed to mitigate its damages for the breach since Red River had another truck available which could have been repaired.[192] Therefore, the district court dismissed all of

179. 2015 ND 140, 864 N.W.2d 276.
180. *Peterbilt of Fargo*, ¶ 2, 864 N.W.2d 278.
181. *Id.*
182. *Id.* ¶ 3.
183. *Id.* ¶¶ 2-3, 864 N.W.2d at 278-79.
184. *Id.* ¶ 3, 864 N.W.2d at 279.
185. *Id.*
186. *Id.*
187. *Id.* ¶ 4.
188. *Id.*
189. *Id.*
190. *Id.* ¶ 5.
191. *Id.*
192. *Id.*

Red River's $201,564 in claims of lost profits except for $390.66, which the court found was caused by the two-month delay from Peterbilt's breach of contract.[193]

Red River moved to amend the ruling, arguing that the damages should have been $39,042.63 instead of $390.66, but the motion was denied.[194] On May 9, 2014, Peterbilt submitted a proposed amended judgment of $34,842.21 due to the remaining necessary repairs plus costs, which the district court entered on May 13, 2014, and served on Red River on May 14, 2014.[195] Red River appealed on July 7, 2014, and the truck was sold at a sheriff's sale on July 15, 2014.[196]

The Supreme Court of North Dakota first examined whether Red River's appeal was timely or moot.[197] First, the court notes that the appeal was timely because it was within sixty days of the May 14, 2014, notice of entry of the amended judgment.[198] The court considered Peterbilt's request to amend the judgment as a timely motion under the North Dakota Rule of Civil Procedure 59, and therefore Red River had a full sixty days from the time when it was served with notice of the entry of the amended judgment.[199] Second, the court determined that Red River's appeal is not moot due to the sheriff's sale of the truck because the fundamental issue in their appeal is the amount of damages, not the status of the truck.[200]

Next, the supreme court examined whether the district court properly measured the damages.[201] In North Dakota, section 32-03-09 of the Century Code describes the measure of damages for a breach of contract as "the amount which will compensate the party aggrieved for all the detriment proximately caused thereby or which in the ordinary course of things would be likely to result therefrom."[202] The damages must be clearly ascertainable in both their nature and origin.[203] Furthermore, an injured party has a duty to mitigate the damages if he can do so with reasonable

193. *Id.*
194. *Id.* ¶ 6.
195. *Id.* ¶ 7.
196. *Id.* at 280.
197. *Id.* ¶ 8.
198. *Id.* ¶ 11.
199. *Id.*
200. *Id.* ¶ 14, 864 N.W.2d at 281.
201. *Id.* ¶ 15. A trial court's decisions related to the amount of damages is a finding of fact subject to the clearly erroneous standard, which may occur if it is induced by an erroneous view of the law, if no evidence exists to support it, or if the appellate court has a definite and firm conviction that a mistake has been made after examining the entire record. *Id.* ¶ 16. However, the appellate court gives due regard to the trial court, and findings of fact are adequate if they give a basis for the determination. *Id.*
202. *Id.* ¶ 17.
203. *Id.*

exertion or trifling expense and can only recover damages for things which he could not have avoided with reasonable effort.[204]

First, Red River's attempts to argue that Peterbilt had the burden to show Red River did not mitigate its damages.[205] Additionally, Red River argues that it should be presumptively reasonable for the nonbreaching party to refuse to deal with the breaching party.[206] The court dismissed these claims as being new issues brought only on appeal. [207]

Second, the court reviews whether enough evidence exists to show that Red River failed to mitigate its damages, finding that the district court did not err by holding that Red River could have taken reasonable efforts to repair one of its two trucks in July 2011.[208] Red River received a check for $41,000 in July 2011, which could have been used to repair a truck at that time, but instead Red River made the business decision to let the truck sit idle until February 2013.[209] Since Red River could reasonably have used the money to repair the truck in July 2011, damages after that time are not appropriate.[210]

Lastly, Red River argues that the district court erroneously based the lost profits calculation on one year of maintenance costs rather than a three-year average.[211] The court declined the invitation to reweigh the evidence after finding that the district court's damages calculation was within the range of evidence presented at trial.[212]

204. *Id.* ¶ 18.
205. *Id.* ¶¶ 19-20, 864 N.W.2d at 282.
206. *Id.*
207. *Id.* ¶ 22.
208. *Id.* ¶¶ 24-25, 864 N.W.2d at 283-84.
209. *Id.* ¶ 24, 864 N.W.2d at 283.
210. *Id.* ¶ 25, 864 N.W.2d at 284.
211. *Id.* ¶ 27.
212. *Id.* ¶ 30.

CRIMINAL LAW—EVIDENCE—HEARSAY IN GENERAL

State v. Guttormson

In *State v. Guttormson*,[213] Guttormson argued that his Sixth Amendment right of confrontation had been violated after a jury found him guilty of refusing to submit to an onsite screening test.[214] The arresting officer did not testify at Guttormson's trial, but another officer on the scene testified instead as to the arresting officer's actions.[215]

Specifically, Guttormson first argues that an arresting officer for a crime of refusal to submit to an onsite screening test must have formed an opinion that the defendant's body contained alcohol.[216] Guttormson believes that if the jury is allowed to infer the police officer's opinion through circumstantial evidence, his Sixth Amendment right of confrontation had been violated.[217] Secondly, Guttormson suggests, similar to the blood alcohol analyst in *Bullcoming v. New Mexico*,[218] that the admission of the officer's squad car video and the non-arresting officer's testimony with regard to the implied consent advisory violates his Sixth Amendment right of confrontation.[219]

The Confrontation Clause of the Sixth Amendment states that the accused in criminal prosecutions shall enjoy the right to be confronted with the witnesses against him.[220] The Confrontation Clause prohibits testimonial hearsay, a specific type of statement offered to prove the truth of the matter asserted.[221] If a statement is offered to show that it was spoken, it is not offered for the truth of the matter asserted and cannot be hearsay.[222] A testimonial statement has not been specifically defined by the United States Supreme Court but arises in ex parte in-court testimony, extrajudicial statements made in formalized materials, and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[223]

213. 2015 ND 235, 869 N.W.2d 737.
214. *Guttormson*, ¶ 1, 869 N.W.2d at 739.
215. *Id.*
216. *Id.* ¶ 4, 869 N.W.2d at 740.
217. *Id.*
218. 131 S.Ct. 2705 (2011).
219. *Guttormson*, ¶ 4, 869 N.W.2d at 740.
220. *Id.* ¶ 5.
221. *Id.*
222. *Id.* ¶ 7, 869 N.W.2d at 741.
223. *Id.* ¶ 6, 869 N.W.2d at 740-41.

Justice Sandstrom's majority opinion notes that the non-arresting officer's testimony regarding the arresting officer's recitation of the implied consent advisory and the breath test request were only introduced to verify that the verbal act occurred.[224] The evidence that the advisory was given was not offered to prove as true the statements within the advisory.[225]

Guttormson's second argument that the silent video and non-arresting officer's testimony constitute surrogate evidence forbidden by *Bullcoming* was also rejected by the court.[226] In *Bullcoming*, a forensic report analyst, familiar with the testing process, testified in place of the actual analyst who had tested the defendant's blood in a felony DUI case.[227] The North Dakota Supreme Court distinguished *Bullcoming* because Guttormson's situation involved a police officer who had participated and observed in all relevant portions of the encounter.[228] Furthermore, the court notes that the silent squad car video is not testimonial in nature because it is not intended as an assertive statement.[229] To be a statement, nonverbal conduct must be intended as an assertion, and nonassertive conduct is not a statement and therefore not hearsay.[230] Instead, the arresting officer's actions in the video, such as activating the overhead lights, pointing across the street, gesturing toward the defendant, and arresting Guttormson, were offered as circumstantial evidence of the arresting officer's opinion and conduct.[231]

Lastly, Guttormson argued that the evidence was not sufficient to support a conviction for a refusal to submit to an onsite screening test because the arresting officer's opinion could not be inferred from the circumstantial evidence.[232] In affirming the district court opinion that sufficient evidence existed, the Supreme Court of North Dakota pointed to the fact that the silent video showed the defendant's car driving on the center line immediately preceding the stop.[233] Furthermore, the non-arresting officer's testimony as to the defendant's poor balance, swaying, and difficulty in standing allowed the jury to infer the presence of a traffic violation and alcohol consumption via circumstantial evidence.[234] Since the supreme court rejected all of Guttormson's arguments, the court found that

224. *Id.* ¶ 9, 869 N.W.2d at 741.
225. *Id.*
226. *Id.* ¶ 10, 869 N.W.2d at 741-42.
227. *Id.* (citing Bullcoming v. New Mexico, 131 S. Ct. 2705, 2709 (2011)).
228. *Id.* ¶ 11, 869 N.W.2d at 742.
229. *Id.* ¶ 13, 869 N.W.2d at 743.
230. *Id.* at 742-43.
231. *Id.* ¶ 14, 869 N.W.2d at 743.
232. *Id.* ¶ 15.
233. *Id.* ¶ 19, 869 N.W.2d at 744.
234. *Id.* ¶ 20.

Guttormson's Sixth Amendment right of confrontation was not violated and sufficient evidence existed to convict him.[235]

Chief Justice VandeWalle and Justice McEvers each concurred specially with the decision in this case. The Chief Justice noted that he "believe[s] it is injudicious to not call the arresting officer as a witness . . . if that officer is available."[236] In cases similar to this, a significant risk exists that the non-arresting officer on the witness stand will be asked a question for which the answer would violate the Confrontation Clause.[237] The case will be likely to either fail on appeal if the question is answered or fail in the district court if the objection is sustained.[238]

Justice McEvers, on the other hand, disagreed with the Chief Justice's characterization of not calling the arresting officer as a witness as "injudicious."[239] Instead, Justice McEvers emphasized prosecutorial discretion in selecting witnesses.[240] Additionally, the justice was concerned about the case's jury instructions, which required a showing of the reason for the stop and that the officer formed an opinion that the defendant's body contains alcohol.[241] Since section 39-08-01 of the Century Code, the driving under the influence statute, does not make the lawfulness of the stop an element of the crime, the lawfulness of the stop should not be an element of the crime of refusing to submit to an onsite screening test.[242]

235. *Id.* ¶ 22, 869 N.W.2d at 745. The court actually remanded the judgment to the district court to correct the judgment since Guttormson was originally convicted under the wrong law and should have been convicted under section 39-08-01(1)(e)(3) of the Century Code. *Id.*

236. *Id.* ¶ 24 (VandeWalle, C.J., concurring).

237. *Id.*

238. *Id.*

239. *Id.* ¶ 27, 869 N.W.2d at 745-46 (McEvers, J., concurring).

240. *Id.*

241. *Id.* ¶ 28, 869 N.W.2d at 746.

242. *Id.* ¶ 29.

CRIMINAL LAW—SEARCHES AND SEIZURES—PLAIN VIEW

State v. Zacher

In *State v. Zacher*,[243] Brett Zacher appealed from a district court order denying his motion to suppress evidence and a criminal judgment entered after a conditional guilty plea for being in possession of a controlled substance.[244] A Mandan police officer saw Zacher fail to stop at a sign on April 6, 2014.[245] The officer stopped Zacher after discovering that Zacher had a suspended license.[246]

After arresting Zacher for driving under suspension and placing him in the police vehicle, the officer informed Zacher of his *Miranda* rights and offered to move Zacher's vehicle so that it would not be towed.[247] Zacher gave the officer permission to move his car from the parking lot, and as the officer was moving it, he noticed the top portion of a small plastic bag between the driver's seat and middle console.[248] The officer could not see or identify the contents of the bag but was suspicious of it based on his experience.[249] The officer removed the bag and discovered it contained "very small pieces of paper."[250] The officer was unable to identify the contents, but another officer at the scene believed it contained LSD.[251] When asked, Zacher stated the contents were fake acid, but upon inspection at the police station, the officer confirmed that the bag contained LSD.[252] When confronted, Zacher confirmed the LSD was real.[253] Zacher was charged with possession of a controlled substance for which he conditionally pled guilty after the district court denied his motion to suppress.[254]

Zacher argues the plain view doctrine does not apply and the bag should not have been seized without a warrant.[255] When reviewing a ruling on a motion to suppress, the North Dakota Supreme Court defers to the district court's findings of fact and resolves any conflicts in testimony in favor of affirmance; the court will affirm if "there is sufficient competent

243. 2015 ND 208, 868 N.W.2d 847.
244. *Zacher*, ¶ 1, 868 N.W.2d at 848.
245. *Id.* ¶ 2.
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.* ¶ 3.
255. *Id.* ¶ 5, 868 N.W.2d at 848-49.

evidence fairly capable of supporting the court's findings, and the decision is not contrary to the manifest weight of the evidence."[256]

Under the Fourth Amendment to the United States Constitution, unreasonable searches and seizures are prohibited, and a strong preference for law enforcement officers to obtain warrants exists.[257] A warrantless search is not permissible, and any evidence obtained without a warrant must be suppressed unless a recognized exception applies.[258] The defendant has the initial burden to show the evidence should be suppressed, but the burden shifts to the state to show a recognized exception applies.[259]

The plain view exception states that "police officers may seize a clearly incriminating object without a warrant if the officers are lawfully in a position from which they view an object and the object's incriminating character is immediately apparent."[260] If contraband is left in open view from a lawful vantage point of a police officer, no expectation of privacy exists, and therefore no search as occurred.[261] Since the officer in this case had permission to enter the vehicle, the officer was in a lawful vantage point.[262] Therefore, the only remaining prong of the plain view exception is the question of whether the incriminating nature of the plastic bag was immediately apparent.[263]

Zacher argues that the incriminating nature was not immediately apparent because the contents were not visible to the officer until he removed it, a fact confirmed by the officer in testimony.[264] The State argues that officers do not need a "high degree of certainty as to the incriminating character of evidence" but instead only need probable cause to believe it is connected with criminal activity.[265]

The Supreme Court of North Dakota ultimately agreed with Zacher, finding that under *State v. Nickel*,[266] the object must not only be in plain view, but its incriminating character must also be immediately apparent.[267] Even if the object is in plain view, it may be subject to a search requiring probable cause if the object or area where it is located bears no relationship

256. *Id.* ¶ 6, 868 N.W.2d at 849.
257. *Id.* ¶ 7.
258. *Id.*
259. *Id.*
260. *Id.* ¶ 8.
261. *Id.*
262. *Id.* ¶ 9, 868 N.W.2d at 849-50.
263. *Id.* at 850.
264. *Id.*
265. *Id.* ¶ 10.
266. 2013 ND 155, 836 N.W.2d 405.
267. *Zacher*, ¶ 12, 868 N.W.2d at 851.

to the reason for the police presence there.[268] In this case, since the officer was unable to identify the contents of the plastic bag before removing it and was even unable to identify the illegality of the contents after removing it, the warrantless search violated the Fourth Amendment.[269] The court reversed the criminal judgment and held that the district court erred in denying the motion to suppress.[270]

268. *Id.* ¶ 12.
269. *Id.* ¶ 13.
270. *Id.* ¶¶ 13-14.

CRIMINAL LAW—SEARCHES AND SEIZURES—WARRANTLESS SEARCH

State v. Williams

In *State v. Williams*,[271] Williams sought review of a criminal judgment after he conditionally pleaded guilty to possession of marijuana with intent to deliver and drug paraphernalia.[272] Williams alleged the use of a drug-sniffing dog in a privately owned condominium hallway is a warrantless and illegal search of the condominium's curtilage.[273] The North Dakota Supreme Court disagreed, finding that the non-exclusive nature of the hallway pushed the area outside of the protection of the Fourth Amendment.[274]

The Fargo Police Department, acting on intelligence that marijuana was being sold out of Williams's residence, brought a drug-sniffing dog to investigate.[275] Williams lived in a four-plex condominium building surrounded by a fence with an open gate, and his individual residence opened into a hallway that could be accessed from outside the building via an unsecured common door.[276] The dog entered the hallway, sniffing the two doors present, but only alerted to the door to Williams's residence.[277] The dog handler testified that he could smell burnt marijuana upon entering the hallway.[278] The officers returned with a warrant to search the premises, leading to drug charges against Williams.[279] Williams conditionally pled guilty to both charges, but reserved the right to appeal after the court refused to suppress the evidence.[280]

In its decision, the North Dakota Supreme Court noted that the Fourth Amendment protects a home's curtilage from unreasonable searches and seizures.[281] The court defined curtilage as the "area near a dwelling, not necessarily enclosed, that generally includes buildings or other adjuncts used for domestic purposes."[282] The United States Supreme Court case *United States v. Dunn*[283] outlines the factors to consider when determining

271. 2015 ND 103, 862 N.W.2d 831.
272. *Williams*, ¶ 1, 862 N.W.2d at 832.
273. *Id.* ¶ 4, 862 N.W.2d at 833.
274. *Id.* ¶ 24, 862 N.W.2d at 837-38.
275. *Id.* ¶ 2, 862 N.W.2d at 832.
276. *Id.*
277. *Id.*
278. *Id.* at 832-33.
279. *Id.* ¶ 3, 862 N.W.2d at 833.
280. *Id.*
281. *Id.* ¶¶ 7, 9, 862 N.W.2d at 833-34.
282. *Id.* ¶ 9, 862 N.W.2d at 833.
283. 480 U.S. 294 (1987).

whether a particular area is a part of a home's curtilage.[284] The factors include the proximity of the home to the area, whether it is within an enclosure surrounding the home, how the space is used, and any steps taken to protect the area from observation by those passing by.[285] These factors are not meant to be mechanically applied but answer whether the area in question is "so intimately tied to the home itself" that it should be protected from unreasonable searches and seizures.[286] However, the court noted that the concept of curtilage is significantly modified when applied to a multi-family dwelling and proceeded to conduct a privacy analysis instead of relying strictly on the *Dunn* factors.[287]

If an expectation of privacy exists, the government must obtain a warrant before searching unless an exception applies.[288] A reasonable expectation of privacy occurs when the individual exhibits an actual, subjective expectation of privacy, and society recognizes that expectation as reasonable.[289] Reasonableness depends on whether the individual has a possessory interest in the searched location, whether the interest is exclusory, whether the individual takes precautions to maintain privacy, and whether the individual has a key.[290]

Williams argued that he had a reasonable expectation of privacy in the condominium hallway due to his possessory interest as a tenant in common with the other condominium owners, the presence of a fence around the property with the mailboxes outside the fence, and the placement of a plant in the hallway's window to limit visibility.[291] In particular, Williams relied on *Florida v. Jardines*,[292] a case in which the police conducted a dog sniff search of the front porch of a defendant's home.[293] The United States Supreme Court found that the front porch in *Jardines* was a classic example of curtilage based on property rights and declared the search invalid.[294]

The North Dakota Supreme Court looked to *State v. Nguyen*[295] for its privacy analysis, finding that a search does not occur unless the right to privacy is violated.[296] In *Nguyen*, North Dakota's highest court held that no

284. *Williams*, ¶ 9, 862 N.W.2d at 833-34.
285. *Id.*
286. *Id.* at 834.
287. *Id.* ¶¶ 11-12.
288. *Id.* ¶ 14, 862 N.W.2d at 834-35.
289. *Id.* at 835.
290. *Id.*
291. *Id.* ¶ 15.
292. 133 S. Ct. 1409 (2013).
293. *Williams*, ¶ 18, 862 N.W.2d at 835.
294. *Id.*
295. 2013 ND 252, 841 N.W.2d 676.
296. *Williams*, ¶ 14, 862 N.W.2d at 834.

expectation of privacy existed in the common hallway of a secured apartment building.[297] The *Nguyen* opinion distinguished *Jardines* because *Jardines* relied on the traditional consideration of a porch as curtilage.[298]

Ultimately, the court found Williams's property interest in the hallway non-exclusive.[299] The Eighth Circuit Court of Appeals has not directly applied *Jardines* since it was decided, and other courts have reached differing conclusions.[300] The North Dakota Supreme Court found that Williams's condominium building looked and functioned very similarly to an apartment building, such as in *Nguyen*, as opposed to a single-family dwelling such as in *Jardines*.[301] The court declined to overturn *Nguyen* and held that an individual's expectation of privacy is diminished in the common areas of a multi-family dwelling.[302] With a finding that the common hallway of the condominium was outside the curtilage of Williams's home and that Williams did not have a reasonable expectation of privacy in that area, the court affirmed the district court's denial of the motion to suppress the evidence.[303]

297. *Id.* ¶ 16, 862 N.W.2d at 835.
298. *Id.* ¶ 21, 862 N.W.2d at 837.
299. *Id.* ¶ 17, 862 N.W.2d at 835.
300. *Id.* ¶ 19, 862 N.W.2d at 836.
301. *Id.* ¶ 23, 862 N.W.2d at 837.
302. *Id.* ¶ 17, 862 N.W.2d at 835.
303. *Id.* ¶ 26, 862 N.W.2d at 838.

CRIMINAL LAW—STATUTES—PROSTITUTION

State v. Rufus

In *State v. Rufus*,[304] Galen Rufus appealed a criminal judgment that found him guilty of human trafficking.[305] His appeal challenged the sufficiency of evidence and the classification of his offense as a AA felony.[306] The North Dakota Supreme Court agreed with the district court findings and affirmed Rufus's conviction for human trafficking based on sufficient evidence.[307]

Rufus responded to a Craigslist advertisement under "personal > casual encounters" posted by "Chad Russo," persona for a Ward County Deputy Sheriff.[308] The advertisement stated that Russo's girlfriend "would be out of town for the weekend" and her daughter "wanted to make some money while her mother was gone."[309] During two Yahoo Messenger conversations, Russo disclosed to Rufus the girl was fourteen years old.[310] When Rufus asked if that was illegal, Russo acknowledged that fourteen was illegal but assured Rufus that he would keep it confidential.[311] Russo sent Rufus a fictitious picture of his girlfriend's alleged fourteen-year-old daughter.[312] The two men discussed pricing for specific sex acts, location, and time to meet.[313] They agreed to meet at 9 p.m. in a parking lot; Russo would bring the girl, and Rufus would bring two bags of marijuana in exchange for one hour with the girl.[314] Russo told Rufus to bring condoms if he wanted to have sex with the girl.[315]

When Rufus arrived at the agreed upon parking lot, he was arrested.[316] His vehicle contained marijuana, money, a cooler containing beer, one morphine pill, and one oxycodone pill.[317] Rufus was charged with human trafficking.[318] He waived his right to a jury trial.[319] In May 2014, at a bench trial, he was convicted of human trafficking, a class AA felony.[320]

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304. 2015 ND 212, 868 N.W.2d 534.
305. *Rufus*, ¶ 1, 868 N.W.2d at 536.
306. *Id.* ¶ 3, 868 N.W.2d at 537.
307. *Id.* ¶ 1, 868 N.W.2d at 536.
308. *Id.* ¶ 2, 868 N.W.2d at 536-37.
309. *Id.* at 537.
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.* ¶ 3.

On appeal, Rufus argued that the evidence in his case was insufficient for the district court to find that he committed the crime of human trafficking.[321] To support this position, Rufus made four arguments.[322] First, he argued the court should review the facts and law of his case on a de novo standard.[323] Second, he contended the district court's findings were flawed.[324] Third, he claimed his actions did not meet the elements of human trafficking.[325] Fourth, he argued his actions also did not constitute an attempt to commit a crime.[326]

Addressing his first argument on the standard on which his appeal should be reviewed, the North Dakota Supreme Court stated their standard of review "does not vary depending on how much evidence in the form of testimony was presented to the district court, and we are not persuaded to adopt such an inconsistent, variable standard."[327] Rufus argued the de novo standard was appropriate because the court had available "all of the evidence in the record that was available to the district court."[328] The court disagreed and did not review the case de novo.[329]

Next, Rufus argued that the evidence did not support the district court findings.[330] Specifically, Rufus stated that he did not suggest trading marijuana for sexual services.[331] In his view, Russo made the suggestion.[332] Rufus also focused on the lack of condoms in his vehicle.[333] Russo told him to bring condoms if he wanted to have sex, and Rufus claims that the lack of condoms showed his lack of intent to have intercourse.[334] In response to this argument, the court relied on *State v. Steiger*[335] and *State v.*

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319. *Id.*
320. *Id.*
321. *Id.* ¶ 4.
322. *Id.*
323. *Id.*
324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.* ¶ 7, 868 N.W.2d at 538.
328. *Id.* ¶ 5, 868 N.W.2d at 537.
329. *Id.* ¶¶ 6-7, 868 N.W.2d at 538.
330. *Id.* ¶ 8.
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.*
335. 2002 ND 79, 644 N.W.2d 187. "Accordingly, this Court is not limited to the reasons a trial court gives for a finding of guilt. Instead, we consider the entire record to decide whether substantial evidence exists to support the conviction." *Steiger*, ¶ 8, 644 N.W.2d at 190.

Corman.[336] In criminal cases, the court does not have to consider if the district court findings are flawed because the court can review the entire record; thus, they dismissed this argument as well.[337]

In support of his third argument, Rufus made three claims of insufficient evidence to support his conviction.[338] He specifically argued that his actions of "making a date with a pimp to possibly have sex with an underage prostitute" did not support the elements of the crime of human trafficking.[339] Rufus claimed there was also insufficient evidence to show that he would have caused the girl to have sex with him.[340] Lastly, he argued the evidence was insufficient in regards to showing he had "completed a substantial step toward committing the crime of human trafficking or that he had the requisite intent to do so."[341]

To address the elements of human trafficking argument, the North Dakota Supreme Court relied on statutory interpretation principles.[342] The court has the authority to review statutes on appeal because it is a question of law.[343] The statutes at issue in this appeal were section 12.1-40-01(1)[344] and section 12.1-40-03(3), (5).[345] The district court found Rufus guilty of human trafficking because he "bargained with another adult for the sexual services of a fourteen-year-old girl, agreeing to exchange a quantity of marijuana for an hour with the . . . girl."[346]

The evidence showed that Rufus knew the girl's age and because sexual activities and prices were discussed, "he was purchasing her for sexual activity."[347] The district court further found that Rufus knew what he was doing was illegal and that he had taken a "substantial step toward attempting the crime of human trafficking" when he showed up at the parking lot with the agreed upon items.[348] Accordingly, the district court applied Century Code section 12.1-40-01(1)(b) to both the purchaser and

336. 2009 ND 85, 765 N.W.2d 530. "[W]e look to the evidence and reasonable inferences most favorable to the verdict to ascertain whether there is sufficient evidence to warrant a conviction." *Corman*, ¶ 8, 765 N.W.2d at 533.

337. *Rufus*, ¶ 10, 868 N.W.2d at 539.

338. *Id.* ¶ 11.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.* ¶ 12, 868 N.W.2d at 539-40.

343. State v. Brossart, 2015 ND 1, ¶ 23, 858 N.W.2d 275, 285.

344. N.D.CENT. CODE § 12.1-40-01(1) (2013) (providing when a person is guilty of human trafficking).

345. N.D.CENT. CODE § 12.1-40-03(3), (5) (2013) (defining human trafficking and sex trafficking respectively).

346. *Rufus*, ¶ 13, 868 N.W.2d at 540.

347. *Id.*

348. *Id.*

the supplier.[349] Rufus's position was that he attempted to obtain services from the girl, not the girl herself, failing to meet the "obtain" portion of section 12.1-40-01(1)(b).[350]

This case was the first time the North Dakota Supreme Court interpreted section 12.1-40-01(1), thus the court turned to federal precedent in *United States v. Jungers*[351] for guidance.[352] The defendants in *Jungers* had a similar set of facts to Rufus.[353] The Eighth Circuit applied 18 U.S.C. § 1591 in *Jungers* to both suppliers and purchasers of commercial sex.[354] Rufus did not dispute that section 12.1-40-01(1) of the Century Code applied to purchasers, but he remained adamant that he had not sought to obtain the girl herself.[355] Relying on the Eighth Circuit's reasoning in *Jungers* and accepted definitions of "obtain," the North Dakota Supreme Court disagreed.[356]

Rufus's fourth argument was that he did not attempt to commit a crime.[357] He relies on the argument that he was charged with the attempt of obtaining a girl, not criminal attempt.[358] The State argued that there was enough evidence to show that Rufus did take a substantial step in committing human trafficking, satisfying the statute and the precedent in *State v. Stensaker*[359] which Rufus relied on.[360] To be guilty of human trafficking, the North Dakota Supreme Court said the State had to provide evidence that Rufus "(1) acted with the kind of culpability required for commission of the crime of human trafficking and (2) intentionally engaged in conduct which constitutes a substantial step toward commission of human trafficking."[361] The court applied the culpability level of willfully to this statute.[362]

In applying the statutory meaning of "obtain" to the facts of this case, the court held that Rufus did have the requisite intent to commit human trafficking by inferring from his initial response to the Craigslist

349. *Id.*
350. *Id.* ¶ 14.
351. 702 F.3d 1066 (8th Cir. 2013).
352. *Rufus*, ¶ 16, 868 N.W.2d at 541.
353. *Id.* ¶ 17.
354. *Id.* ¶ 18, 868 N.W.2d at 541-42.
355. *Id.* ¶ 20, 868 N.W.2d at 542.
356. *Id.* at 542-43.
357. *Id.* ¶ 21, 868 N.W.2d at 543.
358. *Id.*
359. 2007 ND 6, 725 N.W.2d 883.
360. *Rufus*, ¶ 21, 868 N.W.2d at 542.
361. *Id.* ¶ 22.
362. *Id.*

advertisement.[363] The court further found downloading Yahoo Messenger, bartering over rates, agreeing to the transaction, and appearing at the agreed upon location with the agreed upon amount to exchange was sufficient evidence to show Rufus "willfully" committed the crime.[364] The court also found that there was sufficient evidence to show Rufus intentionally committed a substantial step towards completing the crime of human trafficking.[365] Finally, the court concluded that there was sufficient evidence to show Rufus knew the girl "would be subject to human trafficking by *causing* the fourteen-year-old girl to engage in sexual acts or sexual conduct."[366]

Rufus's final argument on appeal was for the court to reverse the classification of his human trafficking conviction as a class AA felony.[367] Rufus based this argument on the fact that he was never going to victimize a real person.[368] At the district court, he argued the lack of a real person should go to the severity of the charge.[369] The North Dakota Supreme Court felt bound by what the Legislative Assembly authorized and upheld the application of the offense classification authorized by Century Code section 12.1-40-01.[370] In conclusion, the court found sufficient evidence to support Rufus's conviction of human trafficking for attempting to obtain a fourteen-year-old girl when he knew she would be subject to human trafficking.[371]

363. *Id.* ¶ 23.
364. *Id.* at 543-44.
365. *Id.* ¶ 24, 868 N.W.2d at 544.
366. *Id.* ¶ 27.
367. *Id.* ¶ 29, 868 N.W.2d at 544-45.
368. *Id.*
369. *Id.* at 545.
370. *Id.* ¶ 31.
371. *Id.* ¶ 32. Since Rufus was charged, the North Dakota Legislative Assembly repealed chapter 12.1-40 of the Century Code and enacted chapter 12.1-41 to address some of the concerns of this case over charging purchasers as suppliers.

FAMILY LAW—DIVORCE—DISPOSITION OF PROPERTY

Feist v. Feist

In *Feist v. Feist*,[372] the North Dakota Supreme Court reviewed the district court's division of the parties' marital estate in the divorce judgment.[373] Thomas Feist appealed from the district court awarding all of the mineral interests to Cheryl Feist.[374] Cheryl Feist cross-appealed, contending that she should have been awarded attorney fees.[375] The North Dakota Supreme Court affirmed the divorce judgment, holding that the district court did not abuse its discretion when it divided the estate and awarded Cheryl all of the mineral interests.[376]

Since marital distribution is treated as a finding of fact, the court would reverse the lower court if it found the distribution to be "clearly erroneous."[377] North Dakota defines a holding to be clearly erroneous if "is induced by an erroneous view of the law, if there is no evidence to support it, or if, after reviewing all the evidence, [it is] left with a definite and firm conviction a mistake has been made."[378] The division of the marital estate must be equitable,[379] which is determined by first finding the property's total value.[380] The court will value the property as of the date of the trial using the *Ruff-Fischer* guidelines.[381]

The court noted that although the factors of the *Ruff-Fischer* guidelines favored neither party, the guidelines allow for discretion in evaluating other important circumstances. [382] The court acknowledged *van Oosting v. van Oosting*,[383] which held that the property's origin may be considered when dividing the marital estate.[384] This factor favors Cheryl because the mineral interests were acquired through Cheryl's inheritance from her parents.[385]

372. 2015 ND 98, 862 N.W.2d 817, 817.
373. *Feist*, ¶ 1, 862 N.W.2d at 819.
374. *Id.*
375. *Id.*
376. *Id.* ¶ 19, 862 N.W.2d at 823.
377. *Id.* ¶ 4, 862 N.W.2d at 820.
378. *Id.*
379. N.D. CENT. CODE § 14-05-24(1) (2013).
380. *Feist*, ¶ 6, 862 N.W.2d at 820.
381. *Id.*
382. *Id.* ¶ 11, 862 N.W.2d at 821.
383. 521 N.W.2d 93 (N.D. 1994)
384. *Feist*, ¶ 11, 862 N.W.2d at 821.
385. *Id.* ¶ 7, 862 N.W.2d at 820.

Thomas's argument on appeal was that the mineral interests may not be solely awarded to Cheryl because their valuation is too speculative.[386] He urged that the division of the marital estate would only be equitable if he received half of the future royalty payments from the mineral interests.[387] Thomas supported his contention with Cheryl's expert testimony, which noted that the valuation of future pricing is "subject to unknown and unpredictable market forces which cannot be determined with any level of certainty."[388]

The North Dakota Supreme Court determined that the valuation was not clearly erroneous and affirmed the distribution of the mineral interests.[389] The North Dakota Supreme Court also denied Cheryl's cross-appeals.[390] The court reasoned that, although Thomas spent a substantial amount of money during the divorce and also failed to maintain the home, the district court did not error when it distributed "the martial estate nearly equally between the parties."[391] The court also held that the district court did not abuse its discretion in refusing to award Cheryl attorney fees.[392]

386. *Id.* ¶ 8, 862 N.W.2d at 820-21.
387. *Id.*
388. *Id.* ¶ 13, 862 N.W.2d at 821-22.
389. *Id.* at 822.
390. *Id.* ¶ 19, 862 N.W.2d at 823.
391. *Id.* ¶ 15, 862 N.W.2d at 822.
392. *Id.* ¶ 18, 862 N.W.2d at 823.

INDIANS—REAL PROPERTY—RIGHTS OF WAY AND EASEMENTS

Arrow Midstream Holdings, LLC v. 3 Bears Construction, LLC

In a contract dispute, the North Dakota Supreme Court reversed and remanded having concluded that the district court did have jurisdiction over the breach of contract and construction lien case between Arrow Midstream Holdings, LLC and Arrow Pipeline, LLC ("Arrow"), Tesla Enterprises, LLC ("Tesla"), and 3 Bears Construction, LLC ("3 Bears").[393]

Arrow had acquired a right-of-way easement over Indian Trust Land on the Fort Berthold Reservation from the Bureau of Indian Affairs.[394] Arrow then hired 3 Bears, a business in New Town owned by two members of the Three Affiliated Tribes, to be the general contractor for the construction of a pipeline on the easement.[395] 3 Bears in turn contracted with Tesla, a company based in Alaska, for materials and labor for the pipeline.[396]

Tesla filed a pipeline lien against Arrow over a dispute Tesala had with 3 Bears regarding work Tesla had completed but were not properly compensated for.[397] Arrow filed suit in district court disputing the pipeline lien, seeking indemnification, and claiming that 3 Bears had also breached its contract with Arrow.[398] In district court, 3 Bears moved to dismiss for lack of subject matter jurisdiction.[399] 3 Bears then filed a complaint against both Tesla and Arrow in Tribal Court seeking a declaration that the lien was invalid, alleging that Arrow breached its contract with 3 Bears, and requesting damages.[400] The district court concluded that their jurisdiction would infringe on Tribal sovereignty and Arrow and Tesla should have exhausted their tribal court remedies before coming to the district court.[401] The district court agreed with 3 Bears and dismissed the action without prejudice for lack of subject matter jurisdiction.[402]

On appeal, 3 Bears denied the North Dakota Supreme Court jurisdiction to hear the appeal because it was dismissed by the district court without prejudice.[403] Relying on *Winer v. Penny Enterprises*,[404] the

393. Arrow Midstream Holdings, LLC v. 3 Bears Construction, LLC, 2015 ND 302, ¶1, 873 N.W.2d 16, 17.
394. *Id.* ¶ 2, 873 N.W.2d at 18.
395. *Id.*
396. *Id.*
397. *Id.* ¶ 3.
398. *Id.*
399. *Id.*
400. *Id.*
401. *Id.* ¶ 4.
402. *Id.*
403. *Id.* ¶ 5.
404. 2004 ND 21, 674 N.W.2d 9.

supreme court concluded that the action was appealable.[405] Arrow argued that the Tribal Court had no jurisdiction to decide this case and contended the district court erred in concluding it lacked jurisdiction[406] The supreme court relied on *Strate v. A-1 Construction*,[407] which held that without congressional permission, Tribal Courts lack civil jurisdiction over nonmembers or non-Indians on reservations.[408] However, the court noted *Montana v. United States*[409] carved out two exceptions to this general rule.[410] The district court concluded that the first *Montana* exception of a consensual relationship did not apply to this case because 3 Bears is not a member of the tribe; rather, it is organized as a North Dakota company.[411] The North Dakota Supreme Court found that this decision was in-line with the precedent of *Airvator*.[412] For that reason, the court agreed with the district court that the first *Montana* exception of a consensual relationship did not apply to this case.[413]

The district court relied on the second *Montana* exception in determining it lacked jurisdiction over this dispute.[414] The district court specifically determined that the pipeline right-of-way easement was not "non-Indian fee land" and the dispute was over business activity, not land.[415] In response, Arrow relied on *Strate* to dispute this position.[416] The North Dakota Supreme Court held (1) granting rights-of-way over Indian lands is a congressional power, (2) the Tribe did not refuse the pipeline or reserve any rights to control the easement, and (3) relying on *Adams*[417] and *Red Wolf*,[418] the right-of-way that Arrow acquired was non-Indian fee land.[419]

To determine state court jurisdiction,[420] the court turned to *Williams v. Lee*,[421] also noting their own precedent: "state court jurisdiction is

405. *Arrow Midstream Holdings*, ¶ 7, 873 N.W.2d at 19.
406. *Id.* ¶ 8.
407. 520 U.S. 438 (1997).
408. *Arrow Midstream Holdings*, ¶ 12, 873 N.W.2d at 20.
409. 450 U.S. at 565-66.
410. *Arrow Midstream Holdings*, ¶ 12, 873 N.W.2d at 20.
411. *Id.* ¶ 13.
412. *Id.* ¶¶ 14-16, 873 N.W.2d at 21-22 (discussing Airvator, Inc. v. Turtle Mountain Mfg. Co., 329 N.W.2d 596 (N.D. 1983).
413. *Id.* ¶ 17, 873 N.W.2d at 21.
414. *Id.* ¶ 18.
415. *Id.* at 21-22.
416. *Id.* ¶ 19, 873 N.W.2d at 22.
417. Big Horn Cty. Elec. Coop, Inc. v. Adams, 219 F.3d 944 (9th Cir. 2000).
418. Burlington N. R.R. Co. v. Red Wolf, 196 F.3d 1059 (9th Cir. 1999).
419. *Id.* ¶¶ 21-24, 873 N.W.2d at 23-24.
420. *Id.* ¶ 19, 873 N.W.2d at 22-23.
421. 358 U.S. 217 (1959).

foreclosed if it is preempted by incompatible federal law or if it would undermine the right of reservation Indians to make their own laws and be ruled by them."[422] 3 Bears claimed they were properly under this precedent by relying on the Indian Reorganization Act of 1934, the Constitution of the Three Affiliated Tribes, the Tribal Employment Rights Ordinance, and the Fort Berthold Tribal Code.[423] The court noted that this gives the Tribe powers to form their own government but does not preempt the state district court from hearing this case.[424] The supreme court specified that this case pertained to the validity of a pipeline lien under state law and there was no Tribal law to address pipeline liens.[425] The court viewed this case as a matter of contractual dispute between non-members of the Tribe on non-Indian fee land.[426] For that reason, the court held the Tribal Court lacked jurisdiction and the district court, not being foreclosed by any federal law, had proper jurisdiction.[427]

The district court alternatively held that Arrow and Tesla should have exhausted their Tribal Court remedies before taking their case to state court.[428] 3 Bears supported that position by relying on various precedents.[429] The North Dakota Supreme Court rejected this argument and declined to address it because it was "either unnecessary to the decision or [ ] without merit."[430]

422. *Arrow Midstream Holdings*, ¶ 25, 873 N.W.2d at 24 (quoting McKenzie Cty. Soc. Servs. Bd. v. V.G., 392 N.W.2d 399, 401-02 (N.D. 1986)).
423. *Id.* ¶ 26, 873 N.W.2d at 24-25.
424. *Id.* ¶ 27, 873 N.W.2d at 25.
425. *Id.*
426. *Id.*
427. *Id.* ¶ 28.
428. *Id.* ¶ 29.
429. *Id.* ¶ 30.
430. *Id.* ¶ 31.

REAL PROPERTY LAW—DEEDS—AMOUNT OF CONVEYANCE

EOG Resources, Inc. v. Soo Line Railroad Co.

In *EOG Resources, Inc. v. Soo Line Railroad Co.*,[431] Soo Line appealed a summary judgment ruling holding that Soo Line does not own minerals under property in Mountrail County, quieting title to EOG Resources instead.[432] The district court held that seven private deeds did not convey a fee simple title to Soo Line's predecessor-in-interest, but only easements.[433] The North Dakota Supreme Court disagreed, holding that six of the seven deeds unambiguously granted fee simple title to the railroad and the seventh deed, while ambiguous, should be remanded for trial.[434]

EOG filed a quiet title action claiming an interest in the minerals in the disputed property.[435] Soo Line argued that a condemnation order and seven deeds executed in 1914, 1915, and 1916 by Henry Olson provided their predecessor in interest, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, with a fee simple title to the surface and minerals of the property.[436] The district court concluded that the condemnation order and the private deeds each granted Soo Line only an easement across the property via its predecessor-in-interest.[437] Although each deed's granting, warranty, and habendum clause language was consistent with a grant of fee simple, the deeds included the term "right of way" in the title which created uncertainty.[438] After examining other factors such as the size and shape of the interest, the purpose of the conveyance, a release from damages clause and extrinsic evidence, the district court quieted title to EOG Resources.[439]

Since the district court found in favor of EOG Resources on summary judgment, the North Dakota Supreme Court reviewed the decision de novo on the entire record, examining whether any genuine issues of material fact

431. 2015 ND 187, 867 N.W.2d 308.

432. *EOG Resources, Inc.*, ¶ 1, 867 N.W.2d at 311. Soo Line has subsequently leased the mineral rights to G-4, LLC, who was also a party to the litigation. *Id.*

433. *Id.*

434. *Id.* ¶ 46, 867 N.W.2d at 322.

435. *Id.* ¶ 3, 867 N.W.2d at 311.

436. *Id.* ¶ 4, 867 N.W.2d at 312. G-4 filed a separate answer and cross-claims requesting that the court quiet title in Soo Line based not only on the seven deeds but also under the March 2, 1899 Act of Congress. *Id.* ¶ 5. Subsequently in the litigation, the parties stipulated that the 1899 Act only provided the railroad with an easement, causing the court to dismiss G-4's claims regarding the 1899 Act. *Id.* ¶ 8.

437. *Id.* ¶ 12, 867 N.W.2d at 313.

438. *Id.*

439. *Id.*

existed.[440] Soo Line and G-4 did not appeal the district court's ruling with regard to the condemnation order but only the seven private deeds.[441]

In general, the court reviews deeds in the same way they interpret contracts.[442] The critical issue when interpreting a deed is ascertaining the grantor's intent, which should be ascertained from the writing alone if the deed is unambiguous.[443] A deed is ambiguous if "rational arguments can be made in support of contrary positions as to the meaning of the term, phrase, or clause in question."[444] If a deed is ambiguous, only then can a court consider extrinsic evidence regarding the intent of the parties.[445] Generally, if a deed is ambiguous and reasonable differences of opinion exist as to its interpretation, summary judgment is not appropriate.[446]

First, the North Dakota Supreme Court dismissed EOG Resource's comparison of *Lalim v. Williams County*[447] to this case. In *Lalim*, the North Dakota Supreme Court examined whether a county acquired a fee simple title or easement when purchasing land for highway purposes.[448] The court held that although the deed was "a warranty deed purporting to grant, bargain, sell and convey" "all that tract or parcel of land and real estate," only an easement was conveyed because the plat created ambiguity and a fee simple grant would have divided the grantor's land.[449] In distinguishing the case, the North Dakota Supreme Court noted that *Lalim* involved a deed between a private party and the government whereas the current case involved only private parties.[450] Furthermore, the deed language in *Lalim* was significantly different from the language in the seven private deeds in this case.[451]

Next, the court proceeded to examine each of the seven deeds, placing them into three groups.[452] The first group, containing five deeds, were entitled "WARRANTY DEED—RIGHT OF WAY" and stated that the grantors "do hereby, GRANT, BARGAIN, SELL and CONVEY" their

440. *Id.* ¶ 13.
441. *Id.* ¶ 14, 867 N.W.2d at 314.
442. *Id.* ¶ 15.
443. *Id.*
444. *Id.*
445. *Id.* ¶ 16.
446. *Id.*
447. 105 N.W.2d 339 (N.D. 1960).
448. *EOG Resources, Inc.*, ¶ 18, 867 N.W.2d at 314.
449. *Id.* ¶¶ 18-19, 867 N.W.2d at 314-15. The property in Lalim was depicted on a "right of way plat." *Id.* ¶ 19, 867 N.W.2d at 315.
450. *Id.* ¶ 20.
451. *Id.*
452. *Id.* ¶ 22, 867 N.W.2d at 316. The court could do this because all of the deeds are on pre-printed forms with similar provisions. *Id.* ¶ 21, 867 N.W.2d at 315.

interest to the Minneapolis, St. Paul & Sault Ste. Marie Railway Company.[453] The specific language of the granting clause is most important to determining the intent of the grantee, and a deed which conveys a piece of land generally indicates an intent to convey a fee simple title.[454] More specifically, a deed limiting the use of a parcel to railroad purposes may be considered an easement, while conveyances without additional limiting language are usually construed as passing a fee simple estate.[455]

Since the granting clause in this case does not limit the usage of the property, it appears that a fee simple interest was conveyed, a theory that the habendum and warranty clauses seem to support.[456] The warranty and habendum clauses do not limit the grant in any way, and similar clauses in other disputes have been found to illustrate an intent to convey a fee simple title.[457] The court dismissed EOG Resources' claim that the inclusion of "right of way" in the title suggests less than a fee simple because the term "right of way" has two meanings when used in railroad deeds.[458] While inclusion of "right of way" in the granting clause may indicate intent contrary to a fee simple, its inclusion in the title has not been held to be a significant factor.[459] The court also dismissed EOG Resources' claim that the liability release clause indicates intent to grant less than a fee simple because the release clause in this case relates to the property adjacent to the granted property which the grantor continued to own.[460] Since the language of the deeds unambiguously granted a fee simple title to the railroad, the court held no extrinsic evidence is permissible and reversed the district court judgment.[461]

The Larson deed was the only one in the second group considered by the court.[462] First, the court noted that the inclusion of a prior easement owned by the railroad in the Larson deed's property description supports the idea that a fee simple interest was intended to be granted.[463] The court also dismissed the idea that a release provision releasing the railroad from

453. *Id.* ¶ 22, 867 N.W.2d at 316.
454. *Id.* ¶ 24, 867 N.W.2d at 316-17.
455. *Id.* at 317.
456. *Id.* ¶¶ 25-26.
457. *Id.* ¶ 26, 867 N.W.2d at 317-18.
458. *Id.* ¶ 29, 867 N.W.2d at 318.
459. *Id.* The North Dakota Supreme Court also notes that the parties knew correct granting language for easements because they used it in the portion of the deed granting an easement for snow fences. *Id.* ¶ 30.
460. *Id.* ¶¶ 31-33, 867 N.W.2d at 319-20.
461. *Id.* ¶ 36, 867 N.W.2d at 320.
462. *Id.* ¶ 37.
463. *Id.* ¶ 39, 867 N.W.2d at 321.

all claims for any damages or trespass committed during the construction of the railway created any ambiguity in the deed.[464] Since no ambiguity existed, and the Larson deed contained the same granting, habendum and warranty clauses of the five leases above, the court held that the Larson deed conveyed a fee interest to the railroad.[465]

The final deed to be considered was the Faro deed, which contained the same granting, warranty, habendum, release, and snow fence clauses as the other six deeds, as well as the same title.[466] Although the deed on its face conveyed a fee simple, the property description is materially different than the others because it carved out an exception for the non-railway land lying on either side of the conveyance.[467] Similar to Lalim above, the size and shape of the conveyance created an ambiguity as to whether the intent was to convey an easement or fee simple estate.[468] Since it was ambiguous, extrinsic evidence may be allowed; however, the district court's inference that in 1914, 1915, and 1916, "mineral interests probably interested no one" was not allowed on a summary judgment motion.[469] Therefore, as to the Faro deed, the Supreme Court of North Dakota remanded it for further proceedings.[470]

Chief Justice Vandewalle concurred and dissented, agreeing with the majority that the Faro deed is ambiguous and that summary judgment should be reversed.[471] As to the other six deeds, Chief Justice Vandewalle believed that the majority and dissent both made good arguments and therefore would conclude that they were ambiguous and summary judgment regarding any deed was improper; the Chief Justice would remand the entire case regarding the other deeds for trial.[472]

Justice Sandstrom dissented with the majority opinion, primarily based on the historical context.[473] He notes that these deeds were meant to simply accomplish what was normally conducted through condemnation and federal appropriation, a result which normally only created an easement.[474] Justice Sandstrom argues that the property description of the Olson deed, which parallels the others, creates ambiguity because it describes "[a]ll that

464. *Id.* ¶ 40.
465. *Id.* ¶¶ 37-41, 867 N.W.2d at 320-21.
466. *Id.* ¶ 42, 867 N.W.2d at 321.
467. *Id.*
468. *Id.* ¶ 43.
469. *Id.* ¶ 44, 867 N.W.2d at 322.
470. *Id.* ¶ 46.
471. *Id.* ¶¶ 50-51, 867 N.W.2d at 323 (VandeWalle, C.J., concurring and dissenting).
472. *Id.*
473. *Id.* ¶¶ 54-57, 867 N.W.2d at 323-24 (Sandstrom, J., dissenting).
474. *Id.* ¶ 55, 867 N.W.2d at 323.

part" of the land and talks of the "railroad as the same is now located over and across."[475] Justice Sandstrom noted that once ambiguity is shown, the court should examine the context and notice that the purpose was undoubtedly to provide a right-of-way for the railroad.[476] Since the railroad could have taken only an easement by condemnation, Justice Sandstrom argued there was a question of fact that should have been resolved by trial.[477]

475. *Id.* ¶¶ 58-59, 867 N.W.2d at 324. He notes that this language should trump the boilerplate language of the deeds. *Id.*

476. *Id.* ¶¶ 62-63, 867 N.W.2d at 324-25.

477. *Id.* ¶ 68, 867 N.W.2d at 325.

REAL PROPERTY LAW—WATER RIGHTS—ACCRETION, BOUNDARIES, AND RIPARIAN RIGHTS

Norby v. Estate of Kuykendall

In *Norby v. Estate of Kuykendall*,[478] the Supreme Court of North Dakota reviewed an appeal by Rocky Norby after the district court quieted title to disputed property in James Kuykendall.[479] The 96 acres of disputed property is on the border between Montana and North Dakota in an area where the Yellowstone River generally divides the parties, with Norby in Montana and Kuykendall in North Dakota.[480]

Over time, the Yellowstone River has gradually moved east, eroding land from the east bank and depositing (accreting) land to its west bank.[481] At some point, the river moved into North Dakota, eventually leaving 96 acres of accreted land between the North Dakota-Montana border and the west bank of the river.[482] Neither party's deeds represent the river as the boundary of the property, except that deeds in the chain of conveyance for the Kuykendalls state the conveyance as "less parts eroded" by or into the river.[483] Although the Kuykendalls have paid the real estate taxes on the accreted land, the Norbys executed a quit claim deed conveying the land to Rocky Norby in 2005 and brought an action in 2012 to eject the Kuykendalls and quiet title in the Norbys.[484]

Norby argued in both the district court and supreme court that he owned the land through the doctrine of riparian accretions.[485] The Kuykendalls answered, claiming that the action was barred by the statute of limitations and laches.[486] The district court, ignoring the Kuykendalls' defenses, dismissed Norby's argument noting that Norby does not own title to land in North Dakota and cannot get property in the state by accretion.[487] Since the district court found in favor of the Kuykendalls on summary judgment, the North Dakota Supreme Court reviews the decision de novo on the entire record, examining whether any genuine issues of material fact exist.[488]

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478. 2015 ND 232, 869 N.W.2d 405.
479. *Norby*, ¶ 1, 869 N.W.2d at 406.
480. *Id.* ¶¶ 2-3.
481. *Id.* ¶ 4.
482. *Id.*
483. *Id.* ¶ 2.
484. *Id.* ¶¶ 4-5.
485. *Id.* ¶ 5.
486. *Id.*
487. *Id.* at 406-07.
488. *Id.* ¶ 7, 869 N.W.2d at 407.

The majority opinion for the North Dakota Supreme Court first notes that the border between Montana and North Dakota is fixed at the "twenty-seventh meridian of longitude west from Washington."[489] The opinion then goes on to describe the North Dakota statute regarding riparian rights.[490] However, the majority notes that the statute is essentially a restatement of the well-established common law rule governing riparian rights.[491]

At common law, the doctrines of accretion, dereliction, erosion, and avulsion apply where title to real property describes a boundary line as a body of water.[492] If the boundary line is fixed by a line without reference to a body of water, the grantee of a deed cannot claim accretions beyond the line.[493] The court notes that common sense supports the rule because riparian landowners are subject to the risk of losses and gains caused by the water.[494] Past decisions have stressed that landowners whose land is bounded by water may have riparian rights, but where land is bounded by government lines, the North Dakota riparian statute does not apply.[495]

Norby argues that since the deeds in the Kuykendalls' chain of title state the conveyance is "less parts eroded [by or into] the Yellowstone River," he deserves the 96 acres by accretion.[496] The court disagreed because Norby's own title does not include conveyance of any land in North Dakota, and any plaintiffs must rely on the strength of their own title in a quiet title action.[497] Secondly, the court noted that the deeds in the chain of title refer only to erosion as opposed to accretion, meaning that "[e]xcepting land eroding into the river from the grant of property in the Kuykendalls' deeds did not amount to a conveyance of accretions located in North Dakota to Norby."[498]

The court dismissed Norby's argument that their ruling runs contrary to the rule that riparian rights have no regard for artificial boundaries, again making reference to the fact that the property boundary in this case is fixed

489. *Id.* ¶ 8.

490. *Id.* The North Dakota statute says, "Where from natural causes land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank." N.D. CENT. CODE § 47-06-05 (2013).

491. *Norby*, ¶ 8, 869 N.W.2d at 407.

492. *Id.*

493. *Id.* ¶ 9, 869 N.W.2d at 408.

494. *Id.* ¶ 10.

495. *Id.* ¶ 11, 869 N.W.2d at 409-10.

496. *Id.* ¶ 12, 869 N.W.2d at 410.

497. *Id.*

498. *Id.*

without reference to water.[499] The majority affirmed the district court ruling granting property interests to the Kuykendalls.[500]

Justice Sandstrom concurred in the judgment but argued that the majority overemphasizes common law.[501] Instead, Justice Sandstrom would simply apply section 47-06-05 and the court's prior opinions in *Perry v. Erling*[502] and *Greeman v. Smith*[503] to limit the statute's application to property borders defined by the body of water.[504]

499. *Id.* ¶ 13, 869 N.W.2d at 410-11.
500. *Id.* ¶ 14, 869 N.W.2d at 411.
501. *Id.* ¶ 17 (Sandstrom, J., dissenting).
502. 132 N.W.2d 889 (N.D. 1965).
503. 138 N.W.2d 433 (N.D. 1965).
504. *Norby*, ¶ 19, 869 N.W.2d at 411.