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## North Dakota Supreme Court Review

North Dakota Law Review Associate Editors

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## NORTH DAKOTA SUPREME COURT REVIEW

The North Dakota Supreme Court Review summarizes 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.<sup>1</sup> The following topics are included in the Review:

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1. The North Dakota Law Review would like to thank our Associate Editors, Elizabeth Brainard and Sean Marrin, for their hard work in writing the North Dakota Supreme Court Review.

ATTORNEY AND CLIENT – RETAINING FEE – CLIENT’S FUNDS  
OR PROPERTY*Disciplinary Bd. of the Supreme Court v. Hoffman (In re Hoffman)*

In a *per curiam* opinion, the North Dakota Supreme Court concluded that an attorney violated the North Dakota Rules of Professional Conduct when failing to refund fees that had been paid under a non-refundable, minimum fee agreement to a client who had terminated services before the conclusion of the matter.<sup>2</sup> The facts are that Hoffman accepted employment in a criminal matter.<sup>3</sup> In the contract for legal services, Hoffman agreed to “defend the charges to dismissal, sentence or deferred imposition of sentence, including a jury trial. . . .”<sup>4</sup> The agreement included a non-refundable minimum fee of \$30,000, which was paid and placed in the attorney’s operating account.<sup>5</sup> Hoffman prepared for and appeared at a preliminary hearing; ultimately spending 25.8 hours on the case and turning down other clients.<sup>6</sup> Only one day after the preliminary hearing, the accused terminated Hoffman’s services and requested return of the unearned funds.<sup>7</sup> Hoffman refused, and the Disciplinary Board petitioned for discipline, alleging violations under the North Dakota Rules of Professional Conduct.<sup>8</sup> A hearing panel heard the case and recommended reprimand, return of unearned funds, and payment of the costs of the disciplinary hearing.<sup>9</sup> Hoffman objected.<sup>10</sup>

Upon review, the court determined that Hoffman did not violate North Dakota Rules of Professional Conduct Rule 1.5(a).<sup>11</sup> Using a totality of the circumstances analysis, it was observed the case involved serious, multiple felony charges, was taken over from another attorney, and Hoffman had voiced concerns the client was only changing attorneys to obtain a continuance of the preliminary hearing.<sup>12</sup> Furthermore, the attorney noted the client presented a difficult case and he would need to be compensated

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2. *Disciplinary Bd. of the Supreme Court v. Hoffman*, 2013 ND 137, ¶ 28, 834 N.W.2d 636.

3. *Id.* ¶ 2.

4. *Id.* ¶ 7.

5. *Id.* ¶ 2.

6. *Id.* ¶ 35.

7. *Id.* ¶ 3.

8. *Id.* ¶ 4. The Disciplinary Counsel alleged violation of N.D. R. PROF. CONDUCT R. 1.5(a), Fees; N.D. R. PROF. CONDUCT R. 1.15(a) and (c), Safekeeping Property; and N.D. R. PROF. CONDUCT R. 1.16(e), Declining or Terminating Representation. *Id.*

9. *Id.* ¶ 8.

10. *Id.* ¶ 4.

11. *Id.* ¶ 19.

12. *Id.* ¶ 18.

for his availability.<sup>13</sup> Finally, the court noted that both Hoffman and his expert testified the fee was reasonable in North Dakota; the expert even acknowledged it was “perhaps a little low.”<sup>14</sup> Accordingly, the fee was found to be reasonable.<sup>15</sup>

The court also determined that Hoffman did not violate North Dakota Rules of Professional Conduct Rule 1.15 by depositing the minimum fee in his operating account.<sup>16</sup> The court acknowledged the terms of the contract specified the \$30,000 was intended to be a non-refundable, minimum fee; thus, the fee became Hoffman’s property on payment, and the fee would not be held in a trust account.<sup>17</sup> Therefore, it was proper to deposit the fee in an operating account.<sup>18</sup>

The court then turned to the issue of the return of disputed funds under North Dakota Rules of Professional Conduct Rule 1.16(e).<sup>19</sup> The court stated the North Dakota Rules of Professional Conduct are based on the Model Rules of Professional Conduct, and thus it may look to other authorities who have interpreted a particular rule under the Model Rules.<sup>20</sup> The court acknowledged that while Rule 1.16 jurisprudence requires lawyers must return any unearned advance payments when the contemplated work was not completed, the decisions have not squarely addressed an attorney’s obligations where the fee was labelled “non-refundable,” and the client, not the attorney, breached the contract for legal services.<sup>21</sup> Other courts, however, have determined that “regardless of how fees are designated by an agreement . . . [an attorney] may still have a duty to refund fees which have been considered property of the attorney and not held in trust.”<sup>22</sup> Furthermore, other jurisdictions have required the total fee be subject to a reasonableness standard.<sup>23</sup> The court specifically noted that even if the fee is reasonable at the time the agreement was reached, later events may cause the fee agreement to become unreasonable at the time of enforcement.<sup>24</sup> Accordingly, the client may be entitled to a return of some

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13. *Id.*

14. *Id.* ¶ 9.

15. *Id.* ¶ 19.

16. *Id.*

17. *Id.* ¶ 15.

18. *Id.*

19. *Id.* ¶ 20.

20. *Id.* ¶ 22.

21. *Id.* ¶ 23.

22. *Id.* ¶ 24.

23. *Id.* ¶ 25.

24. *Id.*

portion of the non-refundable fee retainer under the circumstances, subject to the reasonableness of the fee.<sup>25</sup>

The court further underscored that a client may discharge the attorney at any time for any reason.<sup>26</sup> In the case of termination, the lawyer is not entitled to the full amount contracted for, but should only be compensated for the legal services actually performed.<sup>27</sup> Even though the attorney and client have clearly agreed to a non-refundable, minimum fee; upon termination, the lawyer is required to return that portion of the fees collected, but not yet earned, such that the total fee collected for the legal services provided is not unreasonable.<sup>28</sup>

The court concluded that Hoffman committed the alleged violation in failing to return funds after the termination of services when all of the services under the contract had not been performed to completion.<sup>29</sup> The court ordered return of the funds not yet earned.<sup>30</sup> However, the court refused to impose discipline proposed by the Disciplinary Board, citing that there was no clear prior decision on the issue of whether an attorney may be required to return a non-refundable fee when a client terminated the lawyer's services.<sup>31</sup> Furthermore, the court cited to the facts that no evidence was presented that Hoffman violated the contract, that the client had previously terminated another attorney's representation, and evidence was presented that minimum fee agreements are common in North Dakota among the criminal defense bar.<sup>32</sup> Finally, the court exercised its discretion to alter the assessment of costs and fees against Hoffman.<sup>33</sup> Thus, the court reduced the assessment of the Disciplinary Board by approximately two-thirds, representing the fact that Hoffman only committed one of three alleged violations.<sup>34</sup>

While Hoffman was not accused of failure to safe keep property, the court provided guidance on this issue.<sup>35</sup> Once the attorney has notice that the funds are in dispute, even in a minimum fee agreement, the attorney is required to segregate those funds into a trust account under the rule

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25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* ¶ 28.

30. *Id.* ¶ 27.

31. *Id.* ¶ 30.

32. *Id.* ¶ 31.

33. *Id.* ¶ 35.

34. *Id.*

35. *Id.* ¶ 27.

requiring safekeeping of client property until the dispute is resolved.<sup>36</sup> The court acknowledged this could become an issue in a minimum fee agreement, as the attorney may not have sufficient funds to place into a trust account.<sup>37</sup>

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36. *Id.*

37. *Id.*

AUTOMOBILES – ADMINISTRATIVE PROCEDURES – DRIVING  
UNDER THE INFLUENCE*Morrow v. Ziegler*

In *Morrow v. Ziegler*<sup>38</sup> Charles Morrow sought review of a district court judgment affirming a hearing officer's decision suspending his license to drive for one year. After his privileges were revoked for refusal to submit to an SD-5 test during the course of a DUI investigation, Morrow requested an administrative hearing on the suspension of his driving privileges, arguing section 39-20-04 requires an officer to include on a report and notice that an individual's body contained alcohol.<sup>39</sup> The North Dakota Department of Transportation's ("Department") hearing officer held when the police officer checked the section of the report and notice by "[r]efused onsite screening test," the officer indicated the elements under section 39-20-14 were met and Morrow's one-year suspension was proper.<sup>40</sup> On appeal, Morrow argued an officer must specifically indicate a belief that a driver's body contained alcohol on the report and notice document.<sup>41</sup> The Department maintained the officer's opinion serves as a pre-requisite to a request for onsite screening and therefore checking the "[r]efused onsite screening test" implies the officer's opinion as to the suspect's intoxication.<sup>42</sup> The North Dakota Supreme Court reversed.<sup>43</sup>

Charles Morrow was stopped for speeding by Highway Patrol Officer Shawn Skogen.<sup>44</sup> During the investigation, Officer Skogen observed Morrow had blood shot eyes and smelled of alcohol.<sup>45</sup> Morrow admitted to consuming one beer with dinner and Officer Skogen conducted a standard battery of field sobriety tests to determine Morrow's level of intoxication.<sup>46</sup> Morrow was read the implied consent advisory and asked to submit to the SD-5 screening but refused.<sup>47</sup> Thereafter, Officer Skogen concluded he did not believe Morrow was sufficiently intoxicated to be arrested for driving under the influence and released him.<sup>48</sup> On the report and notice however, Officer Skogen checked the box indicating Morrow had refused the onsite

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38. 2013 ND 28, 826 N.W.2d 912.

39. *Id.* ¶ 5.

40. *Id.* ¶ 7.

41. *Id.*

42. *Id.*

43. *Id.* ¶ 13.

44. *Id.* ¶ 2.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

test and the nature of the traffic violation supporting the stop, but wrote “N/A” in the probable cause section.<sup>49</sup> This action initiated Morrow’s license suspension principally in dispute.<sup>50</sup>

For its analysis, the court focused on its decision in *Aamodt v. N.D. Department of Transportation*,<sup>51</sup> to determine whether the provision in question was basic and mandatory. In *Aamodt*, when an officer failed to provide adequate probable cause that an individual was in actual physical control of a vehicle while under the influence, it was a material requirement to the subsequent suspension and predicated the Department’s action.<sup>52</sup> Without probable cause, the court noted, the Department had insufficient information to suspend driving privileges.<sup>53</sup> A central takeaway is that an officer must similarly form an opinion that an individual’s body contains alcohol before the implied consent provision will apply.<sup>54</sup>

Morrow’s contention was not that the form was insufficient, but that Officer Skogen could have recorded his observations or his belief of Morrow’s intoxication on the form but failed to do so.<sup>55</sup> The current report and notice form provided space to mark Officer Skogen’s findings and this would have given the Department sufficient information to reasonably infer Morrow’s body contained alcohol.<sup>56</sup> The Department argued the officer’s opinion was essentially a “predicate to requesting an onsite screening test” and the opinion of Morrow’s intoxication was implied in fact by virtue of the test being requested in the first place.<sup>57</sup>

The court disagreed, noting such an inference runs contrary to legislative intent and “slants the law too much toward the Department’s convenience.”<sup>58</sup> The report and notice, when used to suspend an individual’s driving privileges, must communicate in some sufficiently direct or indirect way that an officer believed the individual’s body contained alcohol.<sup>59</sup> Even though Officer Skogen did not find sufficient probable cause to arrest, he still could have accurately logged his observations and the Department would have had legitimate grounds to

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49. *Id.* ¶ 4.

50. *Id.* ¶ 8.

51. 2004 ND 134, ¶ 15, 682 N.W.2d 308.

52. *Id.* ¶ 23.

53. *Id.* ¶ 9.

54. *Morrow*, 2013 ND 28 (citing N.D. CENT. CODE § 39-20-14).

55. *Id.* ¶ 7.

56. *Id.*

57. *Id.*

58. *Id.* ¶ 12.

59. *Id.*

revoke the license.<sup>60</sup> The absence of such observational information, however, made the report, not the form itself, deficient and did not provide the Department with sufficient authority to act.<sup>61</sup>

Justices Sandstrom and Maring concurred with Chief Justice VandeWalle's majority opinion.<sup>62</sup> Justice Kapsner concurred in the result, but filed a separate opinion to which Justice Crothers concurred.<sup>63</sup> Justice Kapsner's concurrence found the officer's form plainly provided no authority and, in fact, was not deficient as the majority suggested.<sup>64</sup> The officer's response to the probable cause prompt, "N/A," and submission of the form to the Department was clear indication the officer had no opinion as to whether Morrow's body contained alcohol, and thus, the Department had no authority to act.<sup>65</sup>

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60. *Id.*

61. *Id.*

62. *Id.* ¶ 14.

63. *Id.* ¶¶ 15-20.

64. *Id.*

65. *Id.*

CRIMINAL LAW – CONSPIRACY – HOMICIDE – CRIMINAL  
INTENT*State v. Borner*

In *State v. Borner*,<sup>66</sup> the North Dakota Supreme Court held that the charge of conspiracy to commit murder is not a cognizable offense.<sup>67</sup> Over vigorous dissent, the court recognized that conspiracy is a specific intent crime that requires both intent to agree and the intent to achieve a particular result that is criminal.<sup>68</sup> Thus, conspiracy to commit murder requires a finding of intent to cause death and cannot be based on a theory of murder under extreme indifference murder.<sup>69</sup>

Borner was charged with criminal conspiracy to commit murder under both criminal conspiracy and extreme indifference murder statutes.<sup>70</sup> At a pretrial hearing, the State amended the criminal information to specify the culpability requirement for extreme indifference murder includes “knowingly” rather than “willfully.”<sup>71</sup> At trial, there was debate over the definition of conspiracy to commit murder in the jury instructions.<sup>72</sup> The court included that conspiracy to commit murder requires an agreement to cause murder or cause death.<sup>73</sup> However, the State argued the agreement was to create a circumstance, manifested by an extreme indifference to the value of human life, and an agreement to commit murder was not an essential element of the charge.<sup>74</sup> Borner agreed with the court, arguing an agreement to create circumstances manifesting extreme indifference constituted conspiracy to commit reckless endangerment.<sup>75</sup>

After the State’s case, Borner’s co-conspirator sought a judgment of acquittal, arguing a failure to prove beyond a reasonable doubt the defendant’s agreed to commit murder.<sup>76</sup> The motion was denied, and

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66. 2013 ND 141, 863 N.W.2d 383.

67. *Id.* ¶ 1.

68. *Id.*

69. *Id.* ¶ 24.

70. *Id.* ¶ 2. N.D. CENT. CODE §§ 12.1-06-04, 12.1-16-01(1)(b). *Id.*

71. *Id.* The amended complaint in Count One stated, “That the Defendants did then and there agree with one another to knowingly engage in or cause circumstances manifesting extreme difference to the value of life.” *Id.* ¶ 3.

72. *Id.* ¶ 4.

73. *Id.* ¶ 5.

74. *Id.*

75. *Id.* The final jury instructions defined conspiracy to commit murder as follows: “A person is guilty of conspiracy to commit murder if the person agreed with another to knowingly engage in or cause conduct which, in fact, constitutes the offense of murder of another under circumstances manifesting extreme indifference to the value of human life, and one party to that agreement did an overt act to effect an objective of the conspiracy.” *Id.*

76. *Id.* ¶ 6.

Borner was found guilty of two counts of conspiracy to commit murder.<sup>77</sup> Upon conviction, Borner appealed the trial court's conviction for conspiracy to commit murder, arguing the amended criminal information failed to charge him with an offense, the jury instructions did not correct the information's defect, and evidence presented was insufficient to support a finding that defendants knowingly agreed to willfully cause the death of any person.<sup>78</sup>

Conspiracy is a specific intent crime.<sup>79</sup> The Court observed that conspiracy is really composed of two "intents;" the first is the intent to agree, and the second is the intent to achieve the criminal result.<sup>80</sup> Upon review of the North Dakota statute, the Court perceived that the conspiracy statute requires proof the accused agreed to engage in or cause conduct, the agreed upon conduct constitutes a criminal offense, and a party to the agreement has performed an overt act to effectuate on objective of the conspiracy.<sup>81</sup> The court further noted many jurisdictions also require the specific intent that conduct constituting a crime be performed for conspiracy to exist.<sup>82</sup>

Borner was charged with agreeing to engage in conduct causing circumstances manifesting an extreme indifference to the value of human life.<sup>83</sup> The State argued that by so agreeing, Borner agreed to engage in conduct which constitutes the offense of murder.<sup>84</sup> The court disagreed, citing the requisite intent for conspiracy under the Model Penal Code as follows:

In relation to those elements of substantive crimes that consist of proscribed conduct or undesirable results of conduct, the Code requires purposeful behavior for guilt, regardless of the state of mind required by the definition of the substantive crime. . . . If [the crime] is defined in terms of a result of conduct, such as homicide, his purpose must be to promote or facilitate the production of that result. Thus, it would not be sufficient as it is under the attempt provision of the Code, if the actor only believed

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77. *Id.*

78. *Id.* ¶¶ 6-7.

79. *Id.* ¶ 12.

80. *Id.*

81. *Id.* ¶ 13.

82. *Id.* ¶ 19.

83. *Id.* ¶ 14.

84. *Id.*

the result would be produced but did not consciously plan or desire to produce it.<sup>85</sup>

The court further cited another source which states, “there is no such thing as a conspiracy to commit a crime which is defined in terms of recklessly or negligently causing a result.”<sup>86</sup> The court noted extreme indifference murder is a general intent crime in which the accused does not intend to cause death, rather death is a result of the accused’s willful conduct.<sup>87</sup> Thus, “when recklessness or negligence suffices for the actor’s culpability with respect to a result element of a substantive crime . . . there could not be a conspiracy to commit that crime.”<sup>88</sup>

Accordingly, the court noted, charging the specific intent crime of murder requires the accused had the intent to cause the death of another person.<sup>89</sup> Charging the defendant with conspiracy to commit extreme indifference murder, a general intent crime, is inconsistent with the elements of conspiracy.<sup>90</sup> The court discerned an individual cannot intend to achieve a particular offense that by its definition is unintended; one cannot agree in advance to accomplish an unintended result.<sup>91</sup>

In North Dakota, conspiracy to commit extreme indifference murder is not a cognizable offense.<sup>92</sup> To find a defendant guilty of conspiracy to commit murder, the State must show an intent to agree, an intent to cause death, and an overt act.<sup>93</sup> The criminal judgment for conspiracy to commit murder was reversed.<sup>94</sup>

Chief Justice VandeWalle concurred in the result obtained by the majority, but observed the majority’s analysis was hyper technical.<sup>95</sup> Rather, the Chief Justice observed, the conspiracy and murder statutes, when read together are ambiguous. As a result, they are to be construed against the government.<sup>96</sup>

Justice Sandstrom dissented vigorously, citing failure of Borner to object at trial and inability of the Defendant to establish plain error on

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85. *Id.* ¶ 15. (quoting MODEL PENAL CODE AND COMMENTARIES § 5.03).

86. *Id.* ¶ 15 (quoting SUBSTANTIVE CRIMINAL LAW § 12.2(c)(2)).

87. *Id.* ¶ 18.

88. *Id.* (quoting MODEL PENAL CODE AND COMMENTARIES § 5.03).

89. *Id.* ¶ 18.

90. *Id.*

91. *Id.*

92. *Id.* ¶ 20.

93. *Id.*

94. *Id.* ¶ 27.

95. *Id.* ¶ 29.

96. *Id.*

appeal.<sup>97</sup> Additionally, the dissenting opinion rebutted most of the contentions held by the majority, citing United States Supreme Court and other persuasive authority's rulings on conspiracy, which require only proof of the criminal intent required by the substantive offense itself.<sup>98</sup> These cases supported the State's view of the charge, that is, it is the conduct that must be intended, as opposed to the result.<sup>99</sup> The dissent also noted the North Dakota laws are modeled on federal law, and not the Model Penal Code, which diverge on this issue.<sup>100</sup> Thus, it was incorrect to rely on the Model Penal Code in analyzing this issue under North Dakota law.<sup>101</sup>

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97. *Id.* ¶ 31.

98. *Id.* ¶ 37.

99. *Id.*

100. *Id.* ¶ 56.

101. *Id.* ¶ 69.

CRIMINAL LAW – DOUBLE JEOPARDY – JUVENILE  
PROCEEDINGS  
*In re M.H.P.*

*In re M.H.P.*,<sup>102</sup> was a case in which the State of North Dakota sought reversal of a juvenile court order dismissing the State’s delinquency petition against a minor, M.H.P. In a case of first impression, the North Dakota Supreme Court upheld the juvenile court’s findings and dismissal.<sup>103</sup> The Court based its ruling by applying the double jeopardy clause under the Fifth Amendment.<sup>104</sup>

In 2012, fifteen-year-old male, M.H.P., was alleged by the State to have committed felony gross sexual imposition (“GSI”) against E.B., a minor, by touching her vaginal area through her clothes.<sup>105</sup> At the initial hearing, a juvenile referee determined M.H.P. had indeed engaged in sexual contact with E.B., and scheduled a dispositional hearing.<sup>106</sup> At the later held hearing however, the referee ruled M.H.P.’s treatment or rehabilitation as a delinquent child, required for a statutory finding of delinquency, did not need to be decided.<sup>107</sup> While the referee previously found beyond a reasonable doubt that M.H.P. had committed the delinquent act, he clarified his new position: “[a]lthough this fact alone [commission of the alleged GSI act] would be sufficient to sustain a finding of a need for treatment and rehabilitation, there was a substantial amount of evidence to the contrary.”<sup>108</sup> Thereafter, the State’s petition was dismissed and the juvenile court determined M.H.P.’s question as to registration as a sexual offender need not be decided.<sup>109</sup>

On appeal, the State argued the juvenile court erred in holding treatment or rehabilitation of M.H.P. was not needed, the juvenile court erred in dismissing the State’s petition and in failing to address whether M.H.P.’s registration as a sexual offender.<sup>110</sup> M.H.P. maintained the State’s appeal was barred by the double jeopardy clause of the Fifth Amendment because of the juvenile court’s finding of insufficient evidence.<sup>111</sup> On a matter of first impression, the court sought to resolve the issue of whether a

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102. 2013 ND 61, 830 N.W.2d 216.

103. *Id.*

104. U.S. CONST. amend. V.

105. *Id.* ¶ 2.

106. *Id.*

107. *Id.* ¶ 3.

108. *Id.* ¶ 3.

109. *Id.* ¶ 3.

110. *Id.* ¶ 6.

111. *Id.* ¶ 5.

juvenile dispositional hearings' finding is appealable or whether it is barred by double jeopardy.<sup>112</sup> The court referenced and distinguished its decision in *In re B.F.*,<sup>113</sup> where the State was precluded from appealing a juvenile court's order of acquittal of a juvenile and rejection of a judicial referee's finding of guilt.<sup>114</sup> Applying a similar analysis, the court first examined the underlying delinquency posture in M.H.P.'s case.<sup>115</sup>

Under section 27-20-02(7), North Dakota defines a delinquent child as "a child who has committed a delinquent act and is in need of treatment or rehabilitation."<sup>116</sup> To meet the statutory definition, the juvenile must be found to have (a) committed a delinquent act and (b) found to be in need of treatment or rehabilitation.<sup>117</sup> While M.H.P. was found by the juvenile court at the initial petition hearing to have committed a delinquent act, the determination of treatment or rehabilitation was reserved for a second dispositional hearing.<sup>118</sup> Evidence presented at the dispositional hearing on M.H.P.'s behalf, however, gave rise to the referee's conclusion that treatment or rehabilitation was not needed.<sup>119</sup>

Because the State was essentially asking the court to reverse a factual finding by the juvenile court and order M.H.P. be deemed delinquent, the court concluded this was impermissible.<sup>120</sup> To make such a finding would place M.H.P. at risk of loss of liberty, the very concern the Double Jeopardy Clause seeks to prevent.<sup>121</sup> Double jeopardy, the court noted, is meant to require that an individual only be subject to the experience of threatened liberty once for the same crime.<sup>122</sup> And while in the juvenile action, M.H.P. is not at risk for per se criminal punishment, the Double Jeopardy Clause still applies in equal force to juvenile delinquency proceedings and precludes the court from overturning the juvenile court's findings.<sup>123</sup>

In response to the State's second argument that the judicial referee erred by dismissing the petition and not requiring M.H.P. to register as a sexual offender, the court recognized that double jeopardy does not bar an appellate review of the issue of registration because it does not concern

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112. *Id.*

113. 2009 ND 53, 764 N.W.2d 170.

114. *In re M.H.P.*, 2013 ND 61, ¶ 8.

115. *Id.* ¶ 8.

116. N.D. CENT. CODE § 27-20-02(7).

117. *In re M.H.P.*, 2013 ND 61, ¶ 9.

118. *Id.*

119. *Id.* ¶ 3.

120. *Id.* ¶ 13

121. *Id.*

122. *Id.*

123. *Id.*

prosecution or re-prosecution of a criminal offense.<sup>124</sup> Nevertheless, the dismissal was found valid.<sup>125</sup> The State argued the judicial referee only dismissed the “proceeding” (the dispositional hearing) and therefore the referee could still have made a determination as to whether M.H.P. was required to register as a sexual offender.<sup>126</sup> Citing subsections (1) and (2) of 27-20-29, the State focused on the usage of “petition” and “proceeding” in the statute.<sup>127</sup> The wording of subsection (1) directs the court to “dismiss the *petition*” in the event the court finds delinquency has not been met.<sup>128</sup> Similarly, subsection (2) directs the court to “dismiss the *proceeding*” if the juvenile is found not to be in need of treatment or rehabilitation.<sup>129</sup> On these grounds, the State alleged even if the proceeding was dismissed, the referee could still have made a determination on the issue as to M.H.P.’s registration as a sexual offender.<sup>130</sup> The court disagreed, noting the juvenile court must find the child is in need of treatment or rehabilitation before other procedural dispositions may be pursued and, absent such a finding, the case must be dismissed.<sup>131</sup> The State’s appeal of the findings was dismissed for violating the Double Jeopardy Clause and the juvenile order dismissing the State’s petition was affirmed.<sup>132</sup>

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124. *Id.* ¶¶ 16, 17.

125. *Id.* ¶ 17.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* ¶ 19 (citing MODEL JUVENILE COURT ACT (U.L.A.) § 29 cmt.).

132. *Id.* ¶ 22.

## CRIMINAL LAW – INDICTMENT AND INFORMATION – INFANTS

*State v. Stegall*

In *State v. Stegall*,<sup>133</sup> the State appealed a consolidated dismissal of three separate criminal complaints of endangerment of a child. The North Dakota Supreme Court upheld the district court dismissals. The Court held the state child endangerment statute did not apply to acts by a mother against an unborn child, and the fugitive dismissal rule did not apply to a defendant's pretrial motion to dismiss.<sup>134</sup>

Defendants Alexis Stegall, Chelsea Hettich, and Kimberlie Lamon ("Defendants") were all separately charged with endangerment of a child under section 19-03.1-22.2 of North Dakota's Criminal Code after all three Defendants gave birth to children testing positive for methamphetamine.<sup>135</sup> After giving birth to her child in December of 2011 and later charged, Stegall became a fugitive after missing important motion deadlines and court dates.<sup>136</sup> Stegall was apprehended in July of 2012 and her second court-appointed attorney moved to dismiss, arguing the child endangerment statute does not apply to prenatal ingestion of controlled substances.<sup>137</sup> Despite Stegall's earlier truancy, the trial court reviewed her motion and dismissed the State's complaint, finding no evidence to support post-natal allegations of exposure.<sup>138</sup>

Hettich was charged in April of 2012 with two counts of endangerment of a child after giving birth to twins, whom later tested positive for methamphetamine.<sup>139</sup> Subsequent tests revealed one child presented with methamphetamine and one did not.<sup>140</sup> Testimony from investigators heard by the trial court, however, indicated neither Hettich nor the new born twins, were exposed to methamphetamine after birth.<sup>141</sup> Finding the State's allegations insufficient, the trial court granted Hettich's motion to dismiss.<sup>142</sup>

Defendant Lamon was charged with one count of endangerment of a child in July of 2012 after testing positive for methamphetamine

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133. 2013 ND 49, 828 N.W.2d 526.

134. *Id.* ¶ 1.

135. *Id.* ¶¶ 1, 2.

136. *Id.*

137. *Id.* ¶¶ 3, 4.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* ¶ 7.

immediately following her child's birth.<sup>143</sup> Lamon similarly moved for a dismissal, arguing the State's information and complaint failed to allege commission of an act against her child.<sup>144</sup> The trial court concluded no allegations demonstrating methamphetamine exposure took place after the child's birth and therefore the complaint was insufficient.<sup>145</sup> Lamon's case was similarly dismissed.<sup>146</sup>

While the court addressed the implications of the fugitive dismissal rule in Stegall's case, finding it within the district court's discretion to extend motion deadlines, the principal issue in all three appeals was whether section 19-03.1-22.2 may be used to prosecute all three pregnant women for ingesting a controlled substance during pregnancy based on detrimental postpartum effects on the children.<sup>147</sup> Defendants maintained the statute did not apply to unborn children.<sup>148</sup> The State argued the prenatal ingestion of controlled substances continued to impact the health and welfare of the child, and therefore the child is still "exposed" to the substance even though no postpartum ingestion exists.<sup>149</sup> The North Dakota Supreme Court disagreed with the State's position.

Citing its decision in *State v. Geiser*,<sup>150</sup> the court focused its analysis on the definition of the terms "minor" and "child."<sup>151</sup> Section 14-10-01, as interpreted in *Geiser*, plainly establishes a "child" is a "minor" and is acknowledged as such from the first minute of the day the person is born.<sup>152</sup> However, section 19-03.1-22.2 does not apply to an unborn child, nor did the court find any legislative intent showing the provision would pertain to unborn children.<sup>153</sup> Since the Legislature defined unborn child in section 12.1-17.1, the court noted the Legislature was capable of incorporating the definition into other statutes, but did not do so for the purposes of the child endangerment law.<sup>154</sup> In its opinion, the court recognized rights of unborn children to be shielded from *third party actors* by virtue of statutes criminalizing, among several acts, aggravated assault, murder, or assault against an unborn child.<sup>155</sup> This evidenced the legislative intent to

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143. *Id.* ¶ 8.

144. *Id.* ¶ 9.

145. *Id.* ¶ 9.

146. *Id.* ¶ 9.

147. *Id.* ¶ 14.

148. *Id.*

149. *Id.* ¶ 14.

150. 2009 ND 36, 763 N.W.2d 469.

151. *Stegall*, 2013 ND 49, ¶ 16.

152. *Id.* ¶ 16 (citing *Geiser* interpretation of N.D. CENT. CODE § 14-10-01).

153. *Id.*

154. *Id.* ¶¶ 16, 17.

155. *Id.* ¶ 17 (emphasis added).

expressly protect unborn children, which is not similarly present under the endangerment of a child statute.<sup>156</sup>

The State argued the *Geiser* holding was not applicable since the unborn child in *Geiser* died in utero.<sup>157</sup> The court responded by noting the decision in *Geiser*, where a mother was charged for endangerment of a child after overdosing on prescription drugs which contributed to the demise of her unborn child in utero, was not a determinative fact in that case.<sup>158</sup> Rather, the *Geiser* decision is in line with a majority of states holding a viable fetus is not a child and pregnant women cannot be prosecuted for ingestion of controlled substances during pregnancy.<sup>159</sup> For the Defendants' case, the court held section 19-03.1-22.2 does not apply to acts committed upon an unborn child irrespective of whether the child is born alive or perishes in utero.<sup>160</sup> A pregnant woman is not criminally liable for endangerment of a child resulting from prenatal conduct, even if the child is born harmed.<sup>161</sup> Holding otherwise, the court concluded, would result in the criminalization of an act that is not criminal at the time of the act, if the child dies in utero, but only it affects the child who is born.<sup>162</sup>

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156. *Id.* ¶ 17.

157. *Id.* ¶ 19.

158. *Id.*

159. *Id.* ¶ 21.

160. *Id.* ¶ 19.

161. *Id.* ¶ 24.

162. *Id.*

CRIMINAL LAW – SEARCHES AND SEIZURES – EVIDENCE  
WRONGLY OBTAINED*State v. Nickel*

In *State v. Nickel*,<sup>163</sup> the North Dakota Supreme Court held that removal of a package suspected to contain illicit material from a shipping center to the police station and subsequently to the state crime lab was in contravention of the Fourth Amendment, and evidence stemming from such warrantless seizure should be suppressed.<sup>164</sup> Nickel and another co-defendant owned Big Willies ATP, a smoke shop. Nickel's sister delivered a package to We Ship, Etc. ("We Ship"), a United Parcel Services outlet, for delivery to a company in California.<sup>165</sup> The owner asked the sister about the package's contents, and observed that while she appeared nervous and evasive, she eventually replied that she was returning merchandise.<sup>166</sup> The owner had previously refused to ship packages for Big Willies over concerns for legality of the items shipped, and he felt suspicious about the contents of this package, as well.<sup>167</sup>

Pursuant to We Ship's store policy, which allows any suspicious package to be opened and inspected, We Ship contacted the local police department prior to opening the package.<sup>168</sup> Four officers were present at the store when the package was opened.<sup>169</sup> The officers saw in plain view several large plastic bags containing plant material in clear plastic tubes.<sup>170</sup> While the officers were uncertain what the plant material was, they had suspicions that the material was synthetic cannabinoid, but were uncertain as to its legality.<sup>171</sup> Without a warrant, the officers inventoried the contents of the package and seized the contents of one tube for testing at the state crime lab.<sup>172</sup>

The initial crime lab test was negative for any controlled substance, so the officers resealed the box at We Ship and it was shipped out.<sup>173</sup> Later, the crime lab notified the officers that an error may have been made on the

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163. 2013 ND 155; 836 N.W.2d 405.

164. *Id.* ¶ 33.

165. *Id.* ¶ 2.

166. *Id.*

167. *Id.*

168. *Id.* ¶ 3.

169. *Id.*

170. *Id.* ¶ 4.

171. *Id.* ¶ 5.

172. *Id.* ¶ 6.

173. *Id.*

specimen, and the plant material may contain a controlled substance.<sup>174</sup> The officer notified We Ship to have the package returned to the store.<sup>175</sup> Upon confirmation from the state crime lab that the plant material did contain a controlled substance, the officers retrieved the package from We Ship.<sup>176</sup>

Law enforcement contacted Defendants about the contents of the package.<sup>177</sup> Defendants replied they were returning product which was initially thought to be legal in the State, but was later found to be illegal, seeking a refund of the purchase price.<sup>178</sup> Defendants were charged with conspiracy to deliver controlled synthetic cannabinoids by agreeing to arrange for the shipment of delivery of the substance to another.<sup>179</sup> Defendants sought to suppress evidence obtained in violation of their Fourth Amendment rights, arguing the package had been unlawfully searched and seized without a warrant.<sup>180</sup> The trial court disagreed, finding the initial opening of the package a private party search, law enforcement's information obtained during the private party search established probable cause, and the plain view exception allowed the warrantless seizure of the package contents. Furthermore, the court ruled the removal of a single specimen for analysis was not a search, and the loss of a portion of the material was de minimis.<sup>181</sup> Finally, the court decided the return of the package to We Ship was justified by exigent circumstances, and there was no reasonable expectation of privacy in the package after the contents had previously been viewed by law enforcement.<sup>182</sup> Defendants were found guilty in a jury trial.<sup>183</sup>

Upon review, the court looked to the Constitution's Fourth Amendment<sup>184</sup> and jurisprudence in North Dakota.<sup>185</sup> The court found the wrapped package, brought to We Ship, was an "effect" under the Fourth

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174. *Id.* ¶ 7.

175. *Id.*

176. *Id.*

177. *Id.* ¶ 8.

178. *Id.*

179. *Id.* ¶ 9.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath of affirmation and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

185. *Nickel*, 2013 ND 155, ¶ 13.

Amendment and was therefore entitled to protection against unreasonable searches and seizures.<sup>186</sup> The Defendants first argued the opening of the package by We Ship employees in the presence of law enforcement constituted a search by a governmental agent and not a search by a private party.<sup>187</sup> The court rapidly disposed of this argument, citing the lower court's notice of the fact that We Ship had contacted law enforcement, We Ship had made the decision to open the package in conformity with store policy, and no evidence was presented that law enforcement had encouraged the opening of the package, nor had they exceeded the scope of the private party search.<sup>188</sup>

The Defendants also argued it was error for the district court to refuse to suppress the contents of the shipped package, as law enforcement officers violated the Fourth Amendment by conducting a warrantless search and seizure after the private party search.<sup>189</sup> The court responded by analogizing to a similar case,<sup>190</sup> also involving the opening of a suspicious package at We Ship under store policy.<sup>191</sup> Then, the officer transported the package to the law enforcement center to conduct a dog sniff.<sup>192</sup> When the dog alerted, the officer inventoried the package and proceeded to conduct a warrantless search of the sender's garbage at his residence.<sup>193</sup> The court in that case found the removal of the package from We Ship to the law enforcement center was more than a detention, it was seizure.<sup>194</sup> The court then ruled that all evidence that flowed from the unreasonable seizure must be suppressed as fruit of the poisonous tree.<sup>195</sup>

Here, the trial court found the seizure of the plant material from Nickel's package was supported by probable cause, thus a warrant was not required under the plain view exception. However, the North Dakota Supreme Court disagreed, stating "plain view does not justify the warrantless seizure of the package for testing of the contents . . . and the warrantless seizure of the rest of the contents of the package for transport to the . . . law enforcement center."<sup>196</sup> Citing to United States Supreme Court

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186. *Id.* ¶ 14.

187. *Id.* ¶ 15.

188. *Id.* ¶ 17.

189. *Id.* ¶ 19.

190. *State v. Ressler*, 2005 ND 140, 701 N.W.2d 915.

191. *Nickel*, 2013 ND 155, ¶ 23.

192. *Id.* ¶ 23.

193. *Id.*

194. *Id.* ¶ 24.

195. *Id.* ¶ 26.

196. *Id.* ¶ 28.

precedent,<sup>197</sup> the court noted that not only must the object be in plain view, its incriminating character must be immediately apparent.<sup>198</sup> In *Nickels*, the officer admitted that he was unable to ascertain whether the plant material was an illegal or legal substance.<sup>199</sup> Thus, the State did not establish the immediate incriminating evidence of the plant material.<sup>200</sup> Nor did the State establish that exigent circumstances existed at *We Ship* that would justify a warrantless seizure at the time Nickel's package was re-opened.<sup>201</sup> Finally, the inventory of the package at *We Ship* in the absence of a warrant, was not shown to have been done to protect or safeguard any owner's interest.<sup>202</sup>

The court concluded the package was properly opened in a private party search, and as a result the officers legitimately viewed the contents of the package.<sup>203</sup> However, the subsequent seizure of a specimen from the package contents and removal of the specimen to the law enforcement center and ultimately, the state crime lab, contravened the protections of the Fourth Amendment.<sup>204</sup> No recognized exception to the warrant requirement was found on the record.<sup>205</sup> Thus, the district court was found to have erred in denying the suppression motions which would have prohibited any evidence stemming from the warrantless seizure of Nickel's package to be admitted at trial.<sup>206</sup> The court reversed the criminal judgments.<sup>207</sup>

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197. *Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301 (1990).

198. *Nickel*, 2013 ND 155, ¶ 30.

199. *Id.* ¶ 31.

200. *Id.*

201. *Id.*

202. *Id.* ¶ 32.

203. *Id.* ¶ 33.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* ¶ 35.

## GUARDIAN AND WARD – APPOINTMENT OF GUARDIAN

*In re Guardianship of J.S.L.F.*

*In re Guardianship of J.S.L.F.*,<sup>208</sup> considered the granting to temporary guardians of permanent guardianship supported, in part, by a minor guardianship provision within the Uniform Probate Code (“UPC”). The North Dakota Supreme Court reversed and remanded the district court’s grant of guardianship. The Court held that the “suspended by circumstances” provision in the UPC must contemplate some set of circumstances that deprives a parent the opportunity to accept parenthood rights and responsibilities, the provision is inappropriate in its use to evaluate the fitness of a parent, and the record did not support a finding of paternal abandonment.<sup>209</sup>

Shortly after the birth of J.S.L.F. in 2008, the child’s parents, B.F. and S.M.L., came under investigation by Grand Forks County Social Services.<sup>210</sup> County social workers determined services were required on at least two occasions as a result of child neglect and psychological maltreatment.<sup>211</sup> In October of 2008, the couple and child moved to Glenburn, North Dakota and were investigated on at least three additional reports of improper supervision of the child, substandard living conditions, and malnutrition.<sup>212</sup> In March of 2009, the couple separated and the father returned to Grand Forks leaving the mother and child alone.<sup>213</sup> Between March of 2009 and December of 2010, the father saw the child approximately six times but maintained timely child support payments.<sup>214</sup>

Following the father’s departure, S.M.L. enrolled with Job Corps to learn better professional and parenting skills, but the reports to child services persisted.<sup>215</sup> In November of 2010, the mother left the child in the custody of three co-petitioners, G.S., G.J., and K.C., and signed a co-petition for guardianship consenting to their appointments as guardians.<sup>216</sup> Two days after signing the consent form however, the mother returned to G.S. and G.J.’s home with police to take back custody of the child.<sup>217</sup> A day later, the district court entered an ex parte order granting temporary

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208. 2013 ND 31, 826 N.W.2d 916

209. *Id.* ¶ 13, 14.

210. *Id.* ¶ 2.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* ¶ 3.

216. *Id.*

217. *Id.* ¶ 4.

guardianship of the child to G.S., G.J., and K.C., citing the mother's inability to provide care and finding her parental rights had been "suspended by the circumstances."<sup>218</sup> No notice was ever given to the father and no hearing was held on the temporary appointment of guardianship.<sup>219</sup> In late December of 2010, co-petitioners filed a notice of petition on both parents for permanent guardianship.<sup>220</sup> At the hearing on petition for permanent guardianship, the district court ordered both parents' rights were suspended by the circumstances under the relevant portion of the UPC and granted permanent guardianship to co-petitioners.<sup>221</sup>

B.F. argued on appeal that his parental rights were not suspended by the circumstances pursuant to section 30.1-27-04. In pertinent part, the statute provides "[t]he court may appoint a guardian for an unmarried minor if all parental rights of custody have been terminated or suspended by circumstances or prior court order." However, the court may not appoint a guardian when a living parent of the minor is entitled to custody.<sup>222</sup> Co-petitioners argued parental rights to a child are suspended by circumstances if the parents are found by a court to be unfit and therefore the guardianship appointment by the district court was proper.<sup>223</sup>

The North Dakota Supreme Court disagreed, noting parental rights may be suspended by circumstances when exceptional circumstances are present which may then permit a court to utilize the best interests of the child test.<sup>224</sup> The court explained the phrase "suspended by circumstances" is not defined under state statute, but found the definition used by the Idaho Supreme Court and other jurisdictions to be persuasive: "[s]uspended by circumstances must contemplate some set of circumstances which deprives a parent of the ability to accept the rights and responsibilities of parenthood."<sup>225</sup> A guardianship proceeding, however, is not an appropriate forum to test the fitness of a parent, even if it may be appropriate if a parent has formerly been adjudicated as unfit.<sup>226</sup> The guardianship provisions within the UPC used in the present case to suspend the parental rights of the father were not intended by the legislature, in the court's view, to usurp

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218. *Id.*

219. *Id.*

220. *Id.* ¶ 5.

221. *Id.*

222. *Id.* ¶ 7 (citing UNIFORM PROBATE CODE PRACTICE MANUAL VOL. 2, 511 (Richard Wellman, ed., 2nd ed., 1977)).

223. *Id.* ¶ 9.

224. *Id.* ¶ 9.

225. *Id.* ¶ 9 (quoting *Guardianship of Copenhaver*, 865 P.2d 979, 984 (Idaho 1993)).

226. *Id.* ¶ 9.

existing custody jurisprudence since the Uniform Juvenile Act (“UJA”) roundly protects the interests of children and parents.<sup>227</sup>

The court also found the guardianship lacking in several other areas, principally in its failure to adhere to well-settled procedural guidelines under the UJA.<sup>228</sup> For one, the district court failed to find by clear and convincing evidence under section 27-20-29 that deprivation or unfitness was present in J.S.L.F.’s case. Moreover, the district failed to pursue or discuss other available procedural options for resolving the facts.<sup>229</sup>

The district court’s finding of abandonment by suspension of the circumstances was also found by the court to be deficient by not “stating a legal standard for abandonment.”<sup>230</sup> The court cited its criteria for an appropriate finding of abandonment considering factors such as a parent’s contact and communication with the child, love, care, affection, and parental intent.<sup>231</sup> For a petitioner to create guardianship on the basis of abandonment, the party must demonstrate the exact circumstances justifying abandonment under the UJCA or the Revised Uniform Adoption Act (“RUAA”).<sup>232</sup> Based on the father’s frequent contact, regular visitation, timely child support payments, and recent co-habitation with the child and mother, a finding of abandonment was not appropriately supported by facts and was clearly erroneous.<sup>233</sup> Accordingly, the guardianship appointments were reversed and the case was remanded for entry of judgment in the father’s favor and grant of paternal custody.<sup>234</sup>

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227. *Id.* ¶ 9 (citing *Hearing on H.B. 1040 Before the S. Judiciary Comm.*, 43rd Legis. Assemb. Reg. Sess. (N.D. 1973) (Report of the Legislative Council for consideration by the Comm. on Model Laws and Intergovernmental Cooperation.)).

228. *Id.* ¶ 10.

229. *Id.* ¶ 10.

230. *Id.* ¶ 11.

231. *Id.* ¶ 11.

232. *Id.* ¶ 12.

233. *Id.* ¶ 13.

234. *Id.* ¶ 13.

## INSURANCE – AUTOMOBILE – STACKING

*Tweten v. Country Preferred Ins. Co.*

In response to a certified question by the United States District Court of the District of North Dakota, *Tweten v. Country Preferred Ins. Co.*,<sup>235</sup> answered as a matter of first impression whether limitations on North Dakota anti-stacking statutory provisions precluded divorced, surviving parents of a minor from recovering under multiple underinsured motorist policies. The North Dakota Supreme Court answered “Yes” to the certified question. The Court held the term “insured” was exclusively applicable to the deceased minor and state anti-stacking provisions prevented stacking and recovery under multiple, separately-held insurance policies owned by the child’s parents.<sup>236</sup>

Following their separation and divorce in 2004, Michelle and Tony Tweten, maintained separate households and, at the time of their child’s death, owned separate underinsured motorist policies.<sup>237</sup> Tony Tweten’s coverage was under a policy with American National Property and Casualty Company (“ANPAC”) for \$250,000 and Michelle Tweten was insured with COUNTRY insurance for the same amount.<sup>238</sup> The Twetens’ son, T.T., died in a single motor vehicle accident in 2010 while riding as the passenger in a vehicle driven by E.N.<sup>239</sup> E.N. owned liability insurance with Horace Mann Insurance Company with limits set at \$100,000 per person, but E.N.’s vehicle was otherwise underinsured.<sup>240</sup>

In the wake of the accident, the Twetens collectively settled a claim against E.N.’s insurer for the policy limit of \$100,000 and notified COUNTRY and ANPAC of the settlement amount.<sup>241</sup> Both COUNTRY and ANPAC were provided notice by the Twetens and an opportunity to substitute these amounts to preserve potential future claims against E.N.<sup>242</sup> Both companies refused.<sup>243</sup> The Twetens subsequently filed an action in federal district court against COUNTRY and ANPAC “to recover underinsured motorist benefits and claimed each insurer owed its per person limit of \$250,000.”<sup>244</sup>

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235. 2013 ND 112, 833 N.W.2d 435.

236. *Id.* ¶ 22.

237. *Id.* ¶¶ 2, 3.

238. *Id.* ¶ 3.

239. *Id.* ¶ 4.

240. *Id.*

241. *Id.* ¶ 4.

242. *Id.*

243. *Id.*

244. *Id.*

Finding a lack of controlling case law, the United States District Court of the District of North Dakota issued a certified question to the North Dakota Supreme Court for interpretation on statutory stacking prohibitions and its effects on “identical insurance claims of divorced persons, on separate policies, for the death of their minor son.”<sup>245</sup> The question sought resolution on two issues: (1) whether the Twetens were precluded from full recovery from both policies based on anti-stacking provisions of section 26.1-40 of the North Dakota Century Code; and (2) whether the Twetens were foreclosed from full recovery from both policies by the phrase “other insurance” referenced in both policies.<sup>246</sup>

Seeking a “Yes” to the certified question, insurers COUNTRY and ANPAC maintained the term “insured” applied exclusively to the injured party, T.T. In opposition and seeking a “No” to the certified question, the Twetens maintained the term “insured” did not exclusively apply to T.T., and even if it did, each insurer’s policy provided greater coverage for underinsured motorists than the minimum required under North Dakota law and entitled each parent to additional recovery.<sup>247</sup> The North Dakota Supreme Court held, “Yes,” any recovery of underinsured motorist benefits arising out of a wrongful death claim turned on the decedent’s status as an “insured” under the policy, not the surviving claimants. The court disagreed with the Twetens’ principal contention, because neither Michelle nor Tony were entitled to recovery of underinsured motorist coverage under the other parent’s policy, the stacking did not violate statutory provisions.<sup>248</sup> In response, the court cited its reasoning in *Bjornson v. Guaranty Nat. Ins. Co.*,<sup>249</sup> where the daughter of a deceased motorist was entitled to recovery via underinsured motorist coverage even though the decedent’s policy precluded recovery of uninsured motorist benefits. In *Bjornnson*, the “insured” was the decedent as the holder of the policy, not the surviving daughter seeking recovery.<sup>250</sup> The daughter’s recovery for underinsured motorist benefits in the wrongful death claim turned on the decedent’s status as an “insured” entity under the policy.<sup>251</sup> Moreover, she was precluded from recovery of uninsured motorist benefits but was entitled to underinsured motorist coverage.<sup>252</sup>

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245. *Id.* ¶ 5.

246. *Id.* ¶ 9.

247. *Id.* (citing N.D. CENT. CODE § 26.1-40-15-15.3(1)).

248. *Id.*

249. 539 N.W.2d 46, 47 (N.D. 1995).

250. *Id.* at 47.

251. *Tweten*, 2013 ND 112, ¶ 17 (citing 539 N.W.2d at 49).

252. *Id.* ¶ 17 (citing 539 N.W.2d at 49).

For the Twetens' claim, the court noted the provision in question requires an insurer to provide underinsured coverage for motorists "at limits to equal the limits of uninsured motorist coverage."<sup>253</sup> Under the statute, the underinsured motorist coverage is required to pay compensatory damages that the "insured" is entitled to collect.<sup>254</sup> The Twetens' recovery of the underinsured benefits was permitted because T.T. qualified as the "insured" under the policy. T.T., and not the Twetens by virtue of holding separate policies, represented the "insured" party and T.T., as the "insured," was entitled to underinsured motorist coverage under section 26.1-40-15.3(1) but precluded under from stacking policies to determine coverage amounts under section 26.1-40-15.4(2).<sup>255</sup> The court refused to address the second issue regarding "other insurance" clauses in the Twetens' policies because their recovery was expressly barred by section 26.1-40-15.4(2).<sup>256</sup>

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253. *Id.* (citing N.D. CENT. CODE 26.1-40-15.3(1)).

254. *Id.*

255. *Id.*

256. *Id.*

INSURANCE – CONTRACTS AND POLICIES – RULES OF  
CONSTRUCTION*K & L Homes, Inc. v. American Family Mutual Ins. Co.*

In *K & L Homes Inc., v. American Family Mutual Ins. Co.*,<sup>257</sup> the issue was whether an “occurrence” as referenced in a commercial general liability (“CGL”) policy could have taken place such that summary judgment by the district court was premature. The North Dakota Supreme Court concluded the facts of the case could support finding an “occurrence.” The Court reversed the district court’s order for summary judgment and remanded.<sup>258</sup>

The dispute arose out of an underlying adverse judgment K & L received in *Leno v. K & L Homes Inc.*<sup>259</sup> Homeowners, the Lenos, purchased a brand-new home from K & L and later discovered cracks, unevenness, and shifting in the home’s foundation.<sup>260</sup> Lenos sought recovery for damages on the basis of breach of contract and breach of implied warranty claims.<sup>261</sup> A jury found in favor of the Lenos for \$254,629.25 and, on appeal, the court affirmed this award.<sup>262</sup> Improper footings and substantial shifting resulting from improperly compacted soil formed the basis for the Lenos’ claim in the underlying action.<sup>263</sup> During construction of the home, not commissioned by the Lenos at the time, K & L subcontracted with Dakota Ready Mix to perform the home’s foundation work.<sup>264</sup> At the time of construction, K & L was insured by American Family Insurance under a CGL policy; but after the Lenos’s award, American Family denied K & L’s claim for damages under the CGL policy.<sup>265</sup>

At the district court, K & L moved for summary judgment on its claims against American Family for declaratory judgment and breach of contract.<sup>266</sup> American Family cross-motined for summary judgment.<sup>267</sup> The district court concluded that since K & L’s work product was the entire house, the damage caused by the subcontracted work was outside the scope

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257. 2013 ND 57, 829 N.W.2d 724.

258. *Id.*

259. 2011 ND 171, 803 N.W.2d 543.

260. *K&L Homes*, 2013 ND 57, ¶ 3.

261. *Id.* ¶ 3.

262. *Id.*

263. *Id.* ¶ 4.

264. *Id.*

265. *Id.*

266. *Id.* ¶ 5.

267. *Id.*

of the CGL policy.<sup>268</sup> Summary judgment was found in favor of American Family.<sup>269</sup>

The CGL policy in the agreement obligated American Family to “pay those sums that the insured [K & L] becomes legally obligated to pay as damages because of . . . ‘property damage’ to which this insurance applies.”<sup>270</sup> Property damage was a term defined within the policy and required an “occurrence” to take place within the “coverage territory” in order to be coverable.<sup>271</sup> Under the policy, the term “occurrence” was defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”<sup>272</sup> The CGL policy also contained several exclusions to coverage including a “your work” exclusion with a “subcontractor exception.”<sup>273</sup>

K & L argued the property damage from the subcontractor’s poor workmanship constituted an “occurrence” under the policy even though the house was considered K & L’s work and was therefore within the scope of the policy.<sup>274</sup> K & L further submitted the policy as a whole should be given its full effect and the “subcontractor exception” and the “your work” exclusion should apply.<sup>275</sup> American Family argued the decision *ACUITY v. Burd & Smith Constr.*,<sup>276</sup> was controlling, but the court disagreed.<sup>277</sup>

Similar to a number of other courts, *Burd & Smith* held a CGL policy, standing alone, does not constitute an accidental occurrence unless the workmanship caused bodily harm or property damage to something other than the insured general contractor’s work product.<sup>278</sup> Taking up the issue as to whether faulty workmanship constitutes an occurrence for K & L’s claim, the court corrected its rationale from *Burd & Smith*, noting the distinction between faulty workmanship where an insured’s work product is damaged and faulty workmanship where a third party’s work or property is damaged.<sup>279</sup> Nothing in the CGL policy defined an occurrence by distinguishing insured work product from third party property damages.<sup>280</sup> Accordingly, the *Burd & Smith* rationale was overruled such that faulty

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268. *Id.*

269. *Id.*

270. *Id.* ¶ 10.

271. *Id.* ¶ 11.

272. *Id.*

273. *Id.* ¶ 12.

274. *Id.*

275. *Id.*

276. 2006 ND 187, 721 N.W.2d 33

277. *K&L Homes*, 2013 ND 57, ¶ 21.

278. *Id.* ¶¶ 23-24 (citing *Burd*, 2006 ND 187, ¶ 15).

279. *Id.*

280. *Id.* ¶ 25.

workmanship may rise to an “occurrence in the event “the faulty work was ‘unexpected’ and not intended by the insured, and the property damage was not anticipated or intentional so that neither the cause nor the harm was anticipated, intended or expected.”<sup>281</sup>

But for the purpose of K & L’s CGL policy, only the occurrences that result in “property damage” is covered.<sup>282</sup> The court concluded the CGL exclusion for damage under the “your work” exclusion would eliminate coverage but for the subcontractor exception.<sup>283</sup> As a result, an insured general contractor’s liability for damage resulting from work by a subcontractor is preserved by the “your work” exclusion.<sup>284</sup> Justice Maring’s majority opinion with a concurrence by Justice Kapsner concluded an “occurrence” may be present with the CGL policy and remanded for additional fact finding on unexpected or unintended nature of the resultant damage and if other exclusions are applicable.<sup>285</sup>

Justice Crothers concurred with the majority opinion’s result but resisted the majority’s overruling of *Burd & Smith* since the present case concerned defective subcontractor work and *Burd & Smith* involved insured general contractor workmanship.<sup>286</sup> He resisted the majority’s broad holding that faulty workmanship can be deemed an accidental occurrence under a CGL policy and wished to wait to take up a similar contractor party issue in advance of overruling *Burd & Smith*.<sup>287</sup> Chief Justice VandeWalle separately dissented, noting the majority’s departure from precedent was not needed or prudent simply to match popular academic opinion.<sup>288</sup> His main contention was the court could reasonably source from its past decisions to hold property damage resulting from poor craftsmanship should constitute an occurrence to the extent property is damaged.<sup>289</sup> Justice Sandstrom dissented, reasoning Dakota Ready Mix was not a subcontractor, and thus, the CGL exclusion and exception at issue would not be applicable.<sup>290</sup> He argued there was potentially no “occurrence” under the policy since Dakota Ready Mix was not a subcontractor to an

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281. *Id.*

282. *Id.* ¶ 27.

283. *Id.*

284. *Id.* (citing *Lamar Homes, Inc., v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 12 (Tex. 2007)).

285. *Id.*

286. 829 N.W.2d ¶ 30.

287. *Id.* ¶ 41

288. *Id.* ¶43.

289. *Id.*

290. *Id.* ¶¶ 50, 51.

existing contract at the time the foundation work was performed.<sup>291</sup> Given that K & L had no contractual obligation to the home buyer during the construction of the house, Dakota Ready Mix was not acting as a subcontractor since no contract was yet in existence.<sup>292</sup>

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291. *Id.*

292. *Id.*

MINES AND MINERALS – ADMINISTRATIVE LAW AND  
PROCEDURE – APPEAL AND ERROR*Gadeco, LLC v. Industrial Com'n of State of North Dakota*

In *Gadeco, LLC v. Industrial Com'n of State of North Dakota*,<sup>293</sup> the owners of oil and gas leasehold interests in Mountrail County real property, Gadeco, LLC (“Gadeco”) were invited by shared owners in the same interest, Slawson Exploration Company’s (“Slawson”), to participate in the cost of drilling and completing a new well. In the case’s first review in 2012, the North Dakota Supreme Court reversed a district court order overturning the Industrial Commission’s original assessment of a 200 percent risk penalty against Gadeco in *Gadeco LLC v. Industrial Comm’n*<sup>294</sup> for failing to accept Slawson’s invitation to participate in the well and remanded to the Industrial Commission (“Commission”) for additional explanation.<sup>295</sup> The Commission determined Slawson’s invitation to participate to Gadeco was made in accordance with regulatory requirements and again authorized a 200 percent risk penalty against Gadeco.<sup>296</sup> Gadeco appealed the Commission’s second order on remand and the court affirmed.<sup>297</sup>

The parties’ dispute dates back to July 8, 2009, when Slawson sent an invitation letter to Gadeco and other working interest owners in the Mountrail County spacing unit well called, Coyote 1-32H, to test drill.<sup>298</sup> Gadeco and other leaseholders were invited to elect to participate or risk imposition of a risk penalty and given a 30-day response window.<sup>299</sup> On July 15, 2009, Slawson sent a second letter informing Gadeco the drill location and the spud date had changed from August 25, 2009 to September 27, 2009.<sup>300</sup> Gadeco signed the election to participate invitation and returned a check totaling \$338,421.87 for its share of expenses.<sup>301</sup> Slawson acknowledged receipt of the check and election notice on August 20, 2009 but returned the check noting the 30-day election period had expired on August 10, 2009.<sup>302</sup>

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293. 2013 ND 72, 830 N.W.2d 535 (hereinafter “*Gadeco II*”).

294. 2012 ND 33, ¶¶ 19-21, 812 N.W.2d 405 (hereinafter “*Gadeco I*”).

295. *Id.*

296. *Id.*

297. *Gadeco II*, 2013 ND 72, ¶ 1.

298. *Id.* ¶ 2 (citing *Gadeco I*, 2012 ND 33, ¶¶ 9-12).

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

In November of 2009, Slawson petitioned the Commission for an order to pool all interests in the well's spacing unit and permit recovery of a 200-percent risk penalty against Gadeco and other non-participants.<sup>303</sup> Against Gadeco's objection, the Commission authorized the pooling and the risk penalty based on Slawson's compliance with section 43-02-03-16.3 of the North Dakota Administrative Code ("NDAC") and Gadeco's failure to timely respond to Slawson's original letter.<sup>304</sup> On the Commission's original decision, the district court reversed, holding the changed facts required Slawson to provide Gadeco with a new participation invitation.<sup>305</sup> The Court reversed the district court reversal and remanded to the Commission for further findings of how the risk penalty was assessed and what standard was used in its determination that the changes from the original letter were not material or substantial.<sup>306</sup> In short, the Commission's failure to make sufficient findings and provide sufficient explanation provided the district court and the Court with an inadequate order to review.<sup>307</sup>

On remand from the original appeal, the Commission ruled as it had previously: the 200 percent risk penalty against Gadeco was assessed and the invitation to participate was compliant.<sup>308</sup> The Commission's explanation of its standard and findings were sufficient for a district court to affirm the Commission's order noting the "findings and conclusions are sustained by the law and by substantial and credible evidence."<sup>309</sup> On appeal, the North Dakota Supreme Court applied the "substantial evidence test" defined as "relevant evidence as a reasonable mind might accept as adequate to support a conclusion," also affording deference to the Commission's findings.<sup>310</sup>

Gadeco made several arguments on appeal. First, the invitation to participate did not comport with the requirements under section 43-02-03-16.3 of the NDAC because the provision requires the well's location to be stated validly within the invitation.<sup>311</sup> Second, Gadeco argued the second invitation letter eliminated important terms regarding cost and spud date

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303. *Id.*

304. *Id.*

305. *Id.* ¶ 3.

306. *Id.* ¶ 4 (citing *Gadeco I*, 2012 ND 33, ¶¶ 19-21).

307. *Id.*

308. *Id.* ¶ 5.

309. *Id.* ¶ 6.

310. *Id.* ¶ 7 (citing *Gadeco I*, 2012 ND 33, ¶ 15 (quoting *Hanson v. Indus. Comm'n*, 466 N.W.2d 587, 590 (N.D. 1991))).

311. *Id.* ¶ 8.

sufficient to make the invitation non-compliant.<sup>312</sup> In response, Slawson and the Commission argued the “location” of the horizontal well did not pertain to the surface, but to the depth and location of production.<sup>313</sup> Moreover, the two parties maintained the terms in the letter were flexible and, as a result, Gadeco was not entitled to more time to respond based on the clear 30-day response requirement under section 43-02-03-16.3(1)(b).<sup>314</sup>

The principal issue turned on the interpretation of section 43-02-03-16.3 of the NDAC regarding invitation to participate requirements.<sup>315</sup> Justice Crothers’ majority opinion noted during the course of the current and prior appeals, the parties continued dispute over this section of the code confined the court’s holding to this singular issue.<sup>316</sup> Accordingly, the court focused on the requirements under this section of the code.<sup>317</sup> Noting the pertinent part of the code permitted flexibility in “estimated” costs and “approximate” spud date, additional obligatory portions were present: “the language relevant to the location of the well states the invitation must contain ‘[t]he location of the proposed or existing well and its proposed depth and objective zone.’”<sup>318</sup> In the order, the Commission held the well location to be the “completion location and not the surface location.”<sup>319</sup> The plain language of the code required that a valid invitation need provide both the location of the proposed well and the proposed depth and zone.<sup>320</sup> Following the literal meaning, the court found the Commission’s analysis ignored the word “and” but concluded it was within the Commission’s discretion to discern whether the invitation complied with the statutory requirements.<sup>321</sup>

The original invitation by Slawson included a description of the surface location, vertical depth, and termination point sufficiently giving rise to Slawson’s compliance with the invitation to participate requirements.<sup>322</sup> Moreover, the “letter did not substantially alter the requirements for a valid invitation for the well” and the changes were marginal.<sup>323</sup> Based on a review of the evidence from the Commission’s decision, the court

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312. *Id.*

313. *Id.* ¶ 9.

314. *Id.*

315. *Id.* ¶ 10.

316. *Id.* ¶ 14.

317. *Id.*

318. *Id.* ¶ 15 (quoting N.D. ADMIN. CODE § 43-02-03-16.3(1)(a)(1)).

319. *Id.*

320. *Id.*

321. *Id.* ¶ 17.

322. *Id.*

323. *Id.*

concluded the change in cost and approximate spud date were insubstantial and the Commission's findings that the actual well did not materially change from the original proposed well were proper and supported by credible evidence.<sup>324</sup> The term "must" from section 43-02-03-16.3(1)(b) governing the response window was mandatory and Gadeco's failure to respond within that window subjected them to an adverse ruling and a risk penalty.<sup>325</sup> Accordingly, the Commission's decision was given deference and the district court's judgment was affirmed.<sup>326</sup>

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324. *Id.*

325. *Id.*

326. *Id.* ¶ 21.

## TORTS – NEGLIGENCE – PREMISES LIABILITY – INNKEEPERS

*Wotzka v. Minndakota Ltd. P'ship*

In *Wotzka v. MinnDakota*,<sup>327</sup> the North Dakota Supreme Court reiterated the state standard on premises liability includes a reasonableness standard, in which a landowner must not only anticipate the potential harm of an open and obvious danger to an invitee, but must also act reasonably under the circumstances.<sup>328</sup> Wotzka sued Minndakota as the result of a slip and fall accident in a shower at defendant's hotel, claiming the hotel maintained a dangerous condition on its premises by failing to equip shower facilities with non-skid strips, bathmats or handrails.<sup>329</sup> The trial court granted summary judgment in favor of the hotel and dismissed the case, concluding the hotel had no duty to warn or take precautions against the open and obvious dangers of a shower, but if a duty did exist, there was no evidence of breach of that duty.<sup>330</sup> The court agreed summary judgment was inappropriate for determining whether a landowner both anticipated the harm to landowners and maintained its premises in a reasonably safe manner.<sup>331</sup>

Plaintiff's appeal was based in premises law, stating whether the hotel maintained its property in a reasonably safe manner is a question of fact inappropriate for summary judgment.<sup>332</sup> Plaintiff stipulated that a shower presents an open and obvious danger, but argued the hotel failed to anticipate the harm in the shower and to maintain the premises in a reasonably safe manner by installing a handrail, non-skid strips, or providing a bathmat.<sup>333</sup> The court opened its analysis by observing "negligence actions are ordinarily inappropriate for summary judgment because they involve issues of fact."<sup>334</sup> An action in negligence is based on a showing of duty, breach of duty and resulting injury proximately caused by the breach.<sup>335</sup> The question of whether a duty exists is generally a question of law.<sup>336</sup> However, when determining the existence of a duty

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327. 2013 ND 99, 831 N.W.2d 722.

328. *Id.* ¶ 13.

329. *Id.* ¶ 1.

330. *Id.* ¶¶ 4, 10.

331. *Id.* ¶ 21.

332. *Id.* ¶ 8.

333. *Id.*

334. *Id.* ¶ 6.

335. *Id.* ¶ 7.

336. *Id.*

depends on resolving factual issues, the question must be resolved by the trier of fact.<sup>337</sup>

The court then defined the contours of premises liability law in North Dakota, citing landowners owe a general duty to entrants and must use ordinary care to maintain their property in a reasonably safe condition.<sup>338</sup> Hotels, among other establishments, must “be operated with strict regard for the health, safety, and comfort of its patrons.”<sup>339</sup> However, when a dangerous condition exists on the property, which is open and obvious, the owner may be relieved of liability.<sup>340</sup> This relief from liability exists only so long as the owner takes reasonable measures to prevent injury to those whose presence can be foreseen.<sup>341</sup>

While the issue of whether hotels owe a duty, despite the open and obvious dangers of showering, has not been addressed in North Dakota, the court acknowledged there is a split among jurisdictions as to whether a hotel can be found liable in failing to provide safety equipment and features in shower facilities.<sup>342</sup> Furthermore, the court stated the open and obvious condition does not end the inquiry into duty, noting the owner must anticipate the physical harm when such conditions exist.<sup>343</sup> When the risk of harm exists, the owner may also have a duty to warn the invitee or take reasonable steps to protect him from such harm.<sup>344</sup>

Relying on Restatement (Second) of Torts<sup>345</sup> and state precedent,<sup>346</sup> the court observed the circumstances surrounding the dangerous condition should also be taken into consideration.<sup>347</sup> The landowner may be required to anticipate the invitee will encounter the dangerous condition.<sup>348</sup> If so, the landowner must then determine if the invitee could be distracted, fail to protect himself, or proceed to encounter the danger because the advantages of doing so outweigh the apparent risk.<sup>349</sup> In these cases, the obviousness of the danger alone does not determine if the landowner has acted reasonably under his duty.<sup>350</sup> Thus, the court states, even if the shower

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337. *Id.*

338. *Id.* ¶ 9.

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.* ¶ 10.

343. *Id.* ¶ 12.

344. *Id.*

345. RESTATEMENT (SECOND) OF TORTS § 343A (1965).

346. *Grouleau v. Bjornson Oil Co.*, 2004 ND 55, 676 N.W.2d 763.

347. *Wotzka*, 2013 ND 99, ¶ 12.

348. *Id.*

349. *Id.*

350. *Id.*

presents an open and obvious danger, the question for the trier of fact still remains: whether the landowner should have anticipated the harm, and, if so, the landowner acted reasonably to keep the premises safe under the particular circumstances.<sup>351</sup>

The court compared the shower to natural accumulations of snow and ice, noting many jurisdictions relieve landowners from liability because of the open and obvious nature of the danger.<sup>352</sup> North Dakota has declined to follow those jurisdictions and adheres to the reasonableness standard.<sup>353</sup> The court further noted it agreed with Montana, where a finding of negligence based on failure to provide safety enhancements in a hotel shower is a question of fact.<sup>354</sup> While the court affirmed the trial court's determination that the hotel had no duty to warn of the obvious danger of the shower, the court reversed the summary judgment as to whether the hotel anticipated the harm and failed to maintain the premises in a reasonably safe manner.<sup>355</sup>

Justice Crothers, joined by Justice Sandstrom, dissented from the majority opinion, advocating instead that North Dakota should join jurisdictions which find no duty to provide safety equipment in the face of the known dangers from a wet and soapy shower.<sup>356</sup> The dissent observed the majority of jurisdictions do not impose such liability.<sup>357</sup> Rather, most require a showing of a dangerous condition, such as a defect in the floor, beyond what is the open and obvious hazards presented by a wet, soapy shower. Relying on a treatise, the dissent noted, “[a] crucial factor in establishing liability for a slip and fall injury is showing that the defendant had notice of the hazardous condition. Without such notice no liability will attach.”<sup>358</sup> Thus, the court has previously held “the mere fact an injury has occurred is not evidence of negligence on the part of anyone; rather, negligence must be affirmatively established.”<sup>359</sup>

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351. *Id.* ¶ 13.

352. *Id.* ¶ 14-15.

353. *Id.* In *Makeeff v. City of Bismarck*, 2005 ND 60, 693 N.W.2d 639, the Court held the reasonableness standard was appropriate, otherwise the natural accumulation rule would diminish the landowner's responsibility, and directed the trial court to analyze the City's actions under a reasonableness standard to determine if it had breached its duty. *Id.*

354. *Id.* ¶ 17.

355. *Id.* ¶ 25.

356. *Id.* ¶ 27.

357. *Id.* ¶ 28.

358. *Id.* (quoting NORMAN J. LANDAU & EDWARD C. MARTIN, PREMISES LIABILITY LAW AND PRACTICE § 8.03 2010).

359. *Id.* (quoting *Larson v. Kubisiak*, 1997 ND 22, ¶ 7, 558 N.W.2d 852.)

UNEMPLOYMENT COMPENSATION – CAUSE OF  
UNEMPLOYMENT – LABOR OR TRADE DISPUTES  
*Olson v. Job Service*

In *Olson v. Job Service*,<sup>360</sup> a majority of the court reversed the judgment of the district court affirming Job Service of North Dakota’s (“Job Service”) denial of unemployment benefits to locked out claimants and remanded for administrative resolution consistent with the court’s opinion<sup>361</sup> Justice Kapsner authored the majority opinion with Justice Maring and Justice Crothers separately concurring<sup>362</sup> Chief Justice VandeWalle and Justice Sandstrom submitted separate dissents.<sup>363</sup>

In the summer of 2011, bargaining unit employees of American Crystal Sugar’s (“ACS”) North Dakota facilities, represented by a variety of local unions (“Unions”), were involved in contract negotiations with ACS leadership.<sup>364</sup> The parties were unable to reach an agreement, and in August of 2011, ACS locked out the bargaining unit employees and began using replacement workers.<sup>365</sup> The locked out employees (“Claimants”) applied for unemployment compensation with Job Service, but were found to be unqualified by virtue of their unemployment stemming from the labor dispute. In its ruling, Job Service relied on the language of section 52-06-02(4) which precludes recovery of unemployment benefits if “the individual’s employment is due to a strike, sympathy strike, or a claimant’s work stoppage dispute of any kind which exists because of a labor dispute at the factory, establishment, or other premises.”<sup>366</sup>

Claimants appealed as a consolidated party and an administrative referee affirmed Job Service’s denial of the claims.<sup>367</sup> The referee concluded the inclusion of the phrase “any kind” under section 52-06-02(4) was an attempt by the Legislature to be broad and could reasonably be construed to include lockouts even if an individual was willing to work.<sup>368</sup> Claimants sought review of the administrative decision in district court where the court affirmed Job Service’s decision, concluding the statute unambiguously demonstrated the Claimants were not eligible for

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360. 2013 ND 24, 827 N.W.2d 36.

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.* ¶ 2.

365. *Id.*

366. *Id.* ¶¶ 2, 3 (citing N.D. CENT. CODE. § 52-06-02(4)).

367. *Id.* ¶ 2.

368. *Id.*

unemployment compensation due to the lockout.<sup>369</sup> Claimants maintained the statute did not apply to locked out employees because the phrasing “strike, sympathy strike, or a claimant’s work stoppage dispute of any kind” only applied to work stoppages arising from employee conduct, not action initiated by an employer.<sup>370</sup> The inclusion of the phrase, “any kind,” Claimants added, referred merely to other types of employee-initiated work stoppages. ACS and Job Service argued the phrasing was intended to be broad, plain in meaning, and included lockouts of any kind regardless of the party responsible for causing the stoppage.<sup>371</sup>

Beginning with an analysis of the principle *ejusdem generis*, the majority cited a similar statutory interpretation analysis from *Resolution Trust v. Dickinson Econo-Storage*<sup>372</sup> where the phrase “any tax on any real estate is paid by or collected from any occupant or tenant or any other person . . . such occupant, tenant, or other person may recover by action the amount . . . paid.”<sup>373</sup> In *Resolution Trust*, appellee argued the phrase “any other person” broadly opened the door to any individual paying taxes in order to qualify for a money judgment against the property owner or liable party. The court rejected such a loose interpretation in that case and instead relied on the inclusion of similarly classed terms to derive legislative intent.<sup>374</sup> In short, “the word ‘other’ would generally be read as ‘other such like,’ so that persons or things may be read as *ejusdem generis* with, and not quality superior to or different from, those specifically enumerated.”<sup>375</sup>

Using the same logic for Claimant’s appeal, “strike, sympathy strike, or claimant’s work stoppage dispute of any kind” was found to pertain exclusively to employee work stoppages since strikes, sympathy strikes, and claimant work stoppages all arise out of employee-initiated action, whereas a lockout stems from employer-initiated action. The phrasing “of any kind” used by the Legislature was part of the other enumerated *employee* actions.<sup>376</sup> If expanded to other forms of stoppages, the court reasoned, it would follow that employee stoppages, not employer stoppages, was the reasonable inference.<sup>377</sup> Therefore, the phrase “claimant’s work stoppage dispute of any kind” applied only to employee-

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369. *Id.*

370. *Id.*

371. *Id.*

372. 474 N.W.2d 50 (1991).

373. *Olson*, 2013 ND 24, ¶ 8 (citing *Resolution Trust v. Dickinson Econo-Storage*, 474 N.W.2d 50 (1991) (emphasis included)).

374. *Id.*

375. *Id.* (quoting *Gaustad v. Nygaard*, 64 N.D. 785, 788, 256 N.W. 230, 231–32 (1934)).

376. *Id.* ¶¶ 9, 10 (emphasis added).

377. *Id.*

initiated actions and since the lockout was not employee initiated, the plain language of the statute would not prevent Claimants from receiving benefits.<sup>378</sup>

The court then examined the competing arguments on rational statutory interpretations by reviewing the relevant legislative history.<sup>379</sup> In 1981, the legislative assembly changed the statutory language to “claimant’s work stoppages” to differentiate employee initiated actions from employer initiated ones.<sup>380</sup> A review of the legislative history and cases *circa* 1981 demonstrated the Legislature amended “work stoppage” to include the word “claimant’s” in order to reflect employee ineligibility when the employee, not the employer, caused the stoppage.<sup>381</sup> In the end, the majority reversed the district court’s judgment affirming the Job Service denial of benefits and remanded to Job Service for resolution in accordance with the majority’s opinion.<sup>382</sup>

Justice Crothers agreed with the majority but added the plain meaning of the statute and any analysis should be limited to interpreting the statute, not debating legislative intent from the 1980s.<sup>383</sup> The statute would limit recovery of benefits if there was a labor dispute and if a “claimant’s work stoppage of any kind” arises. Since a company lockout is not a “claimant’s work stoppage,” the second element in a disqualification of benefits is not satisfied and therefore disqualification for benefits was improper.<sup>384</sup>

Justice Sandstrom and Chief Justice VandeWalle separately dissented with the majority’s decision. Justice Sandstrom took issue with the majority’s failure to consider other reasonable interpretations of the phrase “claimant’s work stoppage.” He submitted the phrase “work stoppage dispute” under the statute reasonably includes “strikes and lockouts,” and took issue with the majority’s interpretation which concludes “lockouts” do not apply because of the legislative inclusion of “a claimant’s[.]” “[t]hus the majority’s interpretation suggests the legislature intended the phrase ‘a claimant’s work stoppage dispute’ to mean ‘strikes and lockouts, but not lockouts.’ This is not reasonable, and a reasonable construction is presumed.”<sup>385</sup>

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378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.* ¶ 28.

383. *Id.* ¶ 34.

384. *Id.*

385. *Id.* ¶ 51.

Chief Justice VandeWalle dissented, and contended the judgment of the district court should be affirmed as to the denial of benefits.<sup>386</sup> He found section 52-06-04(2) and its legislative history were ambiguous such that deference be given to Job Service of North Dakota's interpretation of the statute.<sup>387</sup> Given the ambiguity, he concluded, any resolution should be properly left to the North Dakota State Legislature, not the court, to resolve.<sup>388</sup>

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386. *Id.* ¶ 71.

387. *Id.*

388. *Id.*