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North Dakota Supreme Court Review

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NORTH DAKOTA SUPREME COURT REVIEW

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

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ANIMALS—REGULATION—SEARCHES, SEIZURES, INSPECTIONS AND FORFEITURES

IN RE PETERSON'S DOGS

In *In re Peterson's Dogs*,[1] Lila Peterson appealed the district court's order finding she could not care for her dogs and ordering the State not to return the animals to her.[2] The North Dakota Supreme Court affirmed the district court's order, holding the State had probable cause to confiscate the dogs and the district court did not err in concluding Peterson could not provide adequate care for them.[3]

On February 7, 2008, Deputy Sheriff James Hulm visited Peterson's home in response to a report of possible animal abuse.[4] Peterson showed Hulm the basement where she raised Chihuahua dogs.[5] She also allowed Hulm to take pictures of the area.[6] On March 1, 2008, Hulm returned to Peterson's home, this time accompanied by a number of deputy sheriffs and Central Humane Society employees.[7] Together, they removed forty-seven dogs from Peterson's home.[8]

At the time of confiscation, Hulm provided Peterson with two forms—a relinquishment of ownership form and a "Notice of Confiscation" form.[9] The relinquishment of ownership form effectively waived any future claims to the Chihuahuas.[10] The "Notice of Confiscation" form, on the other hand, stated Peterson had five days to claim the dogs.[11] Peterson signed both forms during the confiscation on March 1, 2008.[12] Five days later, on March 6, 2008, Peterson contacted the sheriff's department demanding the dogs be returned to her or, in the alternative, demanding a court hearing to challenge the validity of the dogs' confiscation.[13]

Following Peterson's request, the district court scheduled a hearing.[14] The State moved for a cancellation of the hearing, asserting Peterson had

1. 2009 ND 206, 776 N.W.2d 52.
2. *Peterson's Dogs*, ¶ 1, 776 N.W.2d at 53.
3. *Id.*
4. *Id.* ¶¶ 2, 6, 776 N.W.2d at 53-54.
5. *Id.* ¶ 2, 776 N.W.3d at 53.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* ¶ 3.
10. *Id.*
11. *Id.*, 776 N.W.2d at 54.
12. *Id.*, 776 N.W.2d at 53.
13. *Id.*, 776 N.W.2d at 54.
14. *Id.* ¶ 4.

waived her right to a hearing when she signed the relinquishment of ownership form.[15] The district court granted the State's motion, and Peterson appealed to the North Dakota Supreme Court.[16] The supreme court held the district court erred in cancelling the hearing and remanded the case for further proceedings.[17]

Accordingly, the district court held a two-day evidentiary hearing to determine if Peterson had voluntarily relinquished her rights to the dogs.[18] The district court found the two forms Hulm provided to Peterson were conflicting and concluded that, given the conflicting nature of the forms, Peterson did not voluntarily relinquish the dogs to the sheriff's department.[19] Next, the district court considered whether Peterson was capable of providing adequate care for the dogs.[20] The district court heard the testimony from five individuals on the matter.[21]

First, the district court heard from Deputy Sheriff Hulm who testified his visit to Peterson's home revealed: Peterson had over sixty dogs in only two kennels; the dogs had no way to enter or exit the kennels; and the kennels had no food or water in them.[22] The district court then heard testimony from two individuals who assisted Hulm in confiscating the dogs on March 1, 2008.[23] The first individual testified "the dogs were not exposed to cold or inclement weather[,]" and food and water were readily available to them.[24] The other individual testified "one mother chihuahua appeared dehydrated and several puppies needed supplemental feeding."[25] The individual also testified she observed a spaniel, with numerous bite wounds, that appeared to be malnourished, and the individual found Peterson's basement to be too dark and too small for raising that number of dogs.[26] In her testimony, Peterson stated she was raising seventy-five dogs in her basement and explained she provided food and water and cleaned the dogs' kennels three times a day.[27] The last witness, the president of the Bismarck

15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* ¶ 5.
19. *Id.*
20. *Id.*
21. *See id.* ¶¶ 6-9, 776 N.W.2d at 54-55.
22. *Id.* ¶ 6, 776 N.W.2d at 54.
23. *Id.* ¶ 7.
24. *Id.*, 776 N.W.2d at 54-55.
25. *Id.*, 776 N.W.2d at 55.
26. *Id.*
27. *Id.* ¶ 8.

Kennel Club, testified his examination of Peterson's basement revealed the environment was "perfectly satisfactory for Chihuahuas."[28]

After the hearing, the district court issued a memorandum opinion and order, finding Peterson's basement was too small and not clean enough for raising seventy-five dogs.[29] Thus, the district court concluded Peterson could not adequately care for the dogs and ordered the State not to return the dogs to her care.[30] Peterson appealed, arguing the State lacked probable cause to confiscate the dogs.[31] The North Dakota Supreme Court disagreed, explaining under section 36-21.1-06(1) of the North Dakota Century Code, "Any sheriff, police officer, licensed veterinarian, or investigator may take custody of and care for any animal unjustly exposed to cold or inclement weather or not properly fed or watered."[32] Based on the observations of Deputy Sheriff Hulm and another individual present during the confiscation, the State had probable cause to confiscate the animals on the ground Peterson did not properly feed or water the dogs.[33]

After determining the State had probable cause to confiscate the dogs, the supreme court recognized the State was required to notify Peterson she had five days to redeem her dogs following the confiscation.[34] However, before the State could return the dogs to Peterson, the district court had ten days to determine whether Peterson could provide adequate care for the animals.[35] The district court found Peterson was not capable of adequately caring for the dogs and ordered the State not to return the dogs to her care.[36] The North Dakota Supreme Court reviewed the district court's finding, applying a clearly erroneous standard of review.[37]

On appeal, Peterson argued section 36-21.1-06(8) required the district court to determine whether Peterson could provide adequate care for her dogs, rather than whether she had provided adequate care in the past.[38] The supreme court agreed with Peterson's interpretation of the relevant statutory language, but explained the section did not "preclude district courts from considering evidence of an owner's past care" in determining an owner's

28. *Id.* ¶ 9.
29. *Id.* ¶ 10.
30. *Id.*
31. *Id.* ¶ 11.
32. *Id.* (quoting N.D. CENT. CODE § 36-21.1-06(1) (2009)).
33. *Id.* ¶ 12, 776 N.W.2d. at 56.
34. *Id.* ¶ 13 (citing N.D. CENT. CODE § 36-21.1-06(1), (3)).
35. *Id.* (citing N.D. CENT. CODE § 36-21.1-06(8)).
36. *Id.*
37. *Id.* ¶ 14 (citing Aasmunstad v. State, 2008 ND 206, ¶ 16, 763 N.W.2d 748, 756-57).
38. *Id.* ¶ 15.

ability to adequately care for animals.[39] The supreme court further explained while there was testimony in the record to support a finding Peterson had adequately cared for her dogs in the past, there was also testimony establishing Peterson could not care for the dogs if they were returned to her.[40] Because a district court's choice between two permissible views does not constitute clear error, the North Dakota Supreme Court affirmed the district court's order, concluding the district court's findings were not clearly erroneous.[41]

39. *Id.*
40. *Id.*
41. *Id.* ¶¶ 15-16, 776 N.W.2d at 56-57.

CIVIL COMMITMENTS—SEXUALLY DANGEROUS INDIVIDUALS

IN RE VOISINE

In *In re Voisine*,[42] Raymond J. Voisine appealed his commitment to the care, custody, and control of the Department of Human Services after a district court found him a sexually dangerous individual.[43] The North Dakota Supreme Court reversed the district court's order, holding the district court erred in concluding incest between consenting adults constituted sexually predatory conduct, and for failing to make specific findings on two prongs of the test for sexually dangerous individuals.[44]

In 2003, an officer searched Voisine's apartment for firearms.[45] During the search, the officer found sexually explicit photographs of Voisine's daughter under his pillow.[46] After an investigation, it was established Voisine had fathered two children with his daughter.[47] Furthermore, interviews with Voisine's family members revealed Voisine had engaged in sexual acts with one of his grandsons who was six or seven years old at the time.[48] The State subsequently charged Voisine with gross sexual imposition for the sexual contact with his grandson.[49] Voisine pleaded guilty to the charge and was incarcerated until his release in 2008.[50]

Following Voisine's release, the State petitioned the district court to commit him as a sexually dangerous individual.[51] In support of its petition, the State asserted Voisine had three children with two of his daughters, abused his children when they were minors, and promoted obscenity to his minor grandson.[52] Voisine denied the allegations, but the district court found probable cause to detain him.[53] The district court also scheduled a commitment hearing.[54] At the hearing, expert reports on whether Voisine was a sexually dangerous individual were presented and considered by the district court.[55] Based on the evidence, the district court found the incest between Voisine and his daughters to be sexually predatory conduct and

42. 2010 ND 17, 777 N.W.2d 908.
43. *Voisine*, ¶ 1, 777 N.W.2d at 909.
44. *Id.*, 777 N.W.2d at 909-10.
45. *Id.* ¶ 2, 777 N.W.2d at 910.
46. *Id.*
47. *Id.*
48. *Id.* ¶ 3.
49. *Id.* ¶ 4.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* ¶ 5.
54. *Id.*
55. *Id.* ¶ 6.

concluded Voisine was likely to engage in such conduct again.[56] Accordingly, the district court ordered Voisine committed to the care, custody, and control of the Department of Human Services.[57]

Voisine appealed the district court's order, arguing the court erred in applying the sexually dangerous individual analysis.[58] The North Dakota Supreme Court stated in commitment proceedings, the State bears the burden of showing by clear and convincing evidence the individual has:

> [1] engaged in sexually predatory conduct . . . [2] has a . . . condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction that [3] makes that individual likely to engage in further acts of sexually predatory conduct which constitute a danger to the physical or mental health or safety of others.[59]

The Supreme Court further explained the North Dakota Century Code defines "sexually predatory conduct" as "engaging or attempting to engage in a sexual act or contact with another" through the application of force, threat of force, or the use of intoxicants.[60] In addition, when the victim is unaware of the sexual contact, is under the age of fifteen, or has a mental disability that prevents the victim from understanding the nature of the act, and the actor is aware of it, the actor has engaged in sexually predatory conduct.[61] Finally, the court noted the statute also defines as sexually predatory any sexual contact between a minor victim and an adult actor, including the situation when the actor is also the parent of the victim.[62] However, the court stated, although morally and criminally reprehensible, incest between consenting adults does not fall within the statutory definition of sexually predatory conduct.[63]

In ordering Voisine committed, the district court determined the incestuous contact between him and his daughters constituted sexually predatory conduct and was a breach of his parental duties.[64] The North Dakota Supreme Court held the district court's findings were clearly erroneous because incest between consenting adults is not sexually predatory.[65] Moreover, because the identification of the sexually predatory conduct

56. *Id.*, 777 N.W.2d at 910-11.
57. *Id.*, 777 N.W.2d at 910.
58. *Id.* ¶¶ 8-9, 777 N.W.2d at 911.
59. *Id.* ¶ 9 (quoting N.D. CENT. CODE § 25-03.3-01(8) (2009)).
60. *Id.* ¶ 10 (quoting N.D. CENT. CODE § 25-03.3-01(9) (2009)).
61. *Id.*, 777 N.W.2d at 911-12.
62. *Id.*, 777 N.W.2d at 912.
63. *Id.*
64. *Id.* ¶ 11.
65. *Id.*

plays a role in each step of the sexually dangerous individual analysis, the district court's erroneous view of the law likely affected its conclusion Voisine was a sexually dangerous individual.[66] The court explained although Voisine's sexual contact with his grandson could have satisfied the first prong of the analysis, the district court's failure to make specific findings about the prong, other than those related to the incestuous conduct, was a legal error.[67] The court also concluded the district court erred in the second prong of the analysis by failing to make any findings about Voisine's sexual, personality, or mental disorder.[68] Finally, the supreme court stated the district court properly relied on Voisine's prior behavior and on the experts' reports presented at the commitment hearing in determining Voisine was likely to engage in future acts of sexually predatory conduct.[69] However, because the district court erred in finding incest between consenting adults was sexually predatory conduct and failed to make specific findings as to the first and second prong of the sexually dangerous individual analysis, the North Dakota Supreme Court reversed the commitment order and remanded for further proceedings.[70]

66. *Id.*
67. *Id.* ¶ 12, 777 N.W.2d at 912-13.
68. *Id.*, 777 N.W.2d at 913.
69. *Id.* ¶ 14.
70. *Id.* ¶ 15.

CIVIL PROCEDURE—POST-CONVICTION RELIEF PROCEEDINGS—MOTIONS

DELVO V. STATE

In *Delvo v. State*,[71] Jessica Delvo appealed the district court's summary dismissal of her application for post-conviction relief.[72] The North Dakota Supreme Court affirmed the district court's order, holding summary dismissal of the post-conviction relief application was proper because Delvo failed to present affidavits or other evidence in support of her application after she was put on notice the State was seeking summary disposition.[73]

In 2005, Delvo pleaded guilty to certain drug-related charges.[74] The district court placed her on probation.[75] In 2008, the State sought to revoke Delvo's probation, asserting fourteen separate grounds for its request.[76] The district court held a probation hearing at which Delvo admitted to four of the State's allegations, including her conviction of ingesting a controlled substance, forgery, and possession of marijuana.[77] Delvo's probation officer also testified at the hearing.[78] Based on Delvo's admissions at the probation hearing, the district court revoked her probation.[79]

In 2009, Delvo applied for post-conviction relief, asserting three grounds for her application.[80] First, Delvo argued she did not voluntarily and knowingly make the admissions at the probation hearing.[81] Second, Delvo asserted her admissions were unlawfully induced because the State had failed to disclose evidence favorable to her application.[82] Finally, Delvo claimed ineffective assistance of counsel based on her attorney's failure to pursue perjury charges against her probation officer who allegedly gave false testimony at the hearing.[83]

The State responded and requested a summary dismissal of Delvo's application.[84] The State did not make a separate motion, but rather argued

71. 2010 ND 78, 782 N.W.2d 72.
72. *Delvo*, ¶ 1, 782 N.W.2d at 73.
73. *Id.*
74. *Id.* ¶ 2.
75. *Id.*
76. *Id.* ¶ 3.
77. *Id.* ¶¶ 3-4.
78. *Id.* ¶ 4.
79. *Id.* ¶ 5.
80. *Id.* ¶ 6, 782 N.W.2d at 73-74.
81. *Id.*
82. *Id.*, 782 N.W.2d at 74.
83. *Id.*
84. *Id.* ¶ 7.

in its response the district court should deny Delvo's application.[85] Delvo did not amend her application after the State filed its response.[86] The district court, finding no genuine issue of material fact existed, chose not to hold a hearing on the matter and summarily dismissed Delvo's application.[87]

On appeal, Delvo argued the district court erred in summarily dismissing her application and in not holding an evidentiary hearing.[88] Writing for the majority, Chief Justice VandeWalle first explained post-conviction relief proceedings are civil in nature and are governed accordingly by the North Dakota Rules of Civil Procedure.[89] Moreover, when reviewing a summary denial of an application for post-conviction relief, the North Dakota Supreme Court applies a standard of review similar to the standard for reviewing a summary judgment.[90] Thus, "[t]he party opposing the motion for summary disposition is entitled to all reasonable inferences at the preliminary stages of a post-conviction proceeding and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact."[91]

The court then explained section 29-32.1-09(1) of the North Dakota Century Code allows a district court, upon a motion by either party, to summarily dismiss an application for post-conviction relief if no genuine issue of material fact exists and the party making the motion is entitled to judgment as a matter of law.[92] If the State moves for summary dismissal, the applicant must present evidence in support of her application.[93] Thus, the court emphasized, an applicant for post-conviction relief is not required to present evidentiary support for her application until she is given notice the State is putting her to her proof.[94] Once the applicant receives notice, however, she "must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact" and may not simply rely on conclusory allegations.[95]

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85. *Id.*
86. *Id.*
87. *Id.* ¶ 8.
88. *Id.* ¶ 9.
89. *Id.* ¶ 10 (citing Clark v. State, 2008 ND 234, ¶ 11, 758 N.W.2d 900, 905). Chief Justice VandeWalle delivered the opinion of the Court, in which Justice Maring and Justice Sandstrom joined.
90. *Id.* (citing Henke v. State, 2009 ND 117, ¶ 9, 767 N.W.2d 881, 884).
91. *Id.* (quoting Berlin v. State, 2005 ND 110, ¶ 6, 698 N.W.2d 266, 269).
92. *Id.* ¶ 12, 782 N.W.2d at 75 (quoting N.D. CENT. CODE § 29-32.1-09(1) (2009)).
93. *Id.* (citing *Henke*, ¶ 11, 767 N.W.2d at 885).
94. *Id.* (quoting State v. Bender, 1998 ND 72, ¶ 20, 576 N.W.2d 210, 214).
95. *Id.* (quoting *Bender*, ¶ 20).

In affirming the district court's summary denial of Delvo's application, the majority focused on whether the State put Delvo to her proof.[96] The majority explained although the district court did not hold an evidentiary hearing after the State requested summary dismissal, Delvo conceded she had notice she was put to her proof.[97] Furthermore, Delvo did not contest the manner in which the State requested summary dismissal—response, rather than a motion.[98] Accordingly, Delvo had notice and was required to present evidence in support of her application.[99] Because Delvo failed to offer any evidence, which could raise a genuine issue of material fact, the district court did not err in summarily denying her application for post-conviction relief.[100]

Justice Crothers filed a dissenting opinion, joined by Justice Kapsner.[101] The dissent stated summary denial of the application for post-conviction relief was not proper because "Delvo had no chance to make *any* argument in the district court because her action was dismissed without notice and without a motion by the State."[102] Justice Crothers explained the majority erred in concluding the State put Delvo to her proof by simply filing an answer to her application.[103] The majority's conclusion, the dissent noted, contradicted the requirements set forth both in the post-conviction relief statute and in the North Dakota Rules of Civil Procedure.[104] Neither law requires an application for post-conviction relief to contain specific evidence and neither obliges an applicant to respond to an answer.[105]

The record on appeal showed, the dissent noted, the State failed to timely respond to Delvo's application and discovery requests.[106] In fact, the State did not file an answer until the district court scheduled a hearing on the matter.[107] Even then, the State's answer contained mere allegations the State was entitled to judgment as a matter of law.[108] Therefore, the dissent concluded Delvo had no notice she was put to her proof.[109] Because Delvo did not have an opportunity to supply her proof and because the district

96. *Id.* ¶ 13.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* ¶ 17, 782 N.W.2d at 76.
101. *Id.* ¶¶ 19, 36.
102. *Id.* ¶ 21, 782 N.W.2d at 77 (Crothers, J., dissenting) (emphasis in original).
103. *Id.* ¶ 22.
104. *Id.*
105. *Id.*
106. *Id.* ¶ 23.
107. *Id.*
108. *Id.*
109. *Id.* ¶ 24.

court summarily denied her application without holding an evidentiary hearing, the district court's order constituted legal error.[110]

The dissent explained in post-conviction relief proceedings, the State may respond to an application either by filing an answer or by filing a motion to dismiss.[111] The State in the present case chose to file an answer and referenced in its answer allegations the propriety of summary denial.[112] However, a district court may summarily deny an application for post-conviction relief only after the State files a motion.[113] An answer, the dissent stated, is not a motion.[114]

Citing the North Dakota Rules of Civil Procedure, the dissent explained a motion must be in writing and must state with specificity the grounds for the motion and the relief sought.[115] On the other hand, an answer is simply one of the forms of pleadings, which addresses the merits of the case by usually denying the allegations set forth in the complaint.[116] Moreover, the dissent explained while the North Dakota Rules of Civil Procedure allow certain defenses to be raised by motion, rather than in an answer, no law allows "a defense to be alleged in an answer and then adjudicated as if a motion had been made."[117] The dissent further noted the primary purpose of a motion is to put both the court and the opposing party on notice regarding the nature of the claims and the relief sought.[118] By using the State's answer as a motion, the dissent concluded, the district court effectively deprived Delvo of her constitutional right to notice and opportunity to be heard.[119] Because the State failed to file and serve a motion requesting summary dismissal, Delvo did not have notice she was being put to her proof.[120] Therefore, the dissent stated, Delvo was not required to present evidentiary support after the State filed its answer, and the district court erred in summarily denying her application for post-conviction relief.[121]

110. *Id.*, 782 N.W.2d at 77-78.
111. *Id.* ¶ 26, 782 N.W.2d at 78.
112. *Id.*
113. *Id.* (quoting N.D. CENT. CODE § 29-32.1-09(1) (2009)).
114. *Id.* ¶ 28.
115. *Id.* (quoting N.D. R. CIV. P. 7(b)(1)).
116. *Id.* ¶ 29 (citing N.D. R. CIV. P. 7(a)).
117. *Id.* ¶ 31, 782 N.W.2d at 79 (citing N.D. R. CIV. P. 12(b)).
118. *Id.* ¶ 32 (citing Vande Hoven v. Vande Hoven, 399 N.W.2d 855, 859 (N.D. 1987)).
119. *Id.* ¶ 33.
120. *Id.* ¶ 35, 782 N.W.2d at 79-80.
121. *Id.*

CONSTITUTIONAL LAW—FIGHTING WORDS—ADJUDICATING A JUVENILE DELIQUENT FOR DISORDERLY CONDUCT

IN RE H.K.

In *In re H.K.*,[122] H.K. appealed from an order finding her a delinquent child, contending the juvenile court erred by rejecting her motion to dismiss, allowing evidence beyond the scope of the allegations in the petition, and finding she committed disorderly conduct.[123] The North Dakota Supreme Court affirmed.[124]

The State filed a petition alleging H.K. committed the delinquent act of disorderly conduct on or about February 27, 2009.[125] The petition stemmed from an incident at a teen center in Valley City, North Dakota, during which H.K. followed T.L., a teenage girl of African-American ancestry, into a bathroom, called T.L. a "nigger," and threatened her.[126] At a hearing on the matter, T.L. testified about the teen center events, an incident at a restaurant the same evening where more name-calling occurred, and an obscene gesture that H.K. made several weeks later.[127] During the hearing, H.K. argued the State was attempting to make use of the word "nigger" a crime and was thereby violating her rights under the First Amendment, but the juvenile court still found H.K. to be a delinquent child.[128]

On appeal, H.K. first argued the juvenile court should have dismissed the petition because the State failed to allege facts that satisfied the definition of disorderly conduct.[129] To bring a juvenile within the jurisdiction of the court, a petition must provide facts alleging a delinquent act, such as a crime.[130] Those factual allegations must also be specific enough to satisfy the adequate notice requirement of due process.[131] The petition filed by the State generally restated the definition of disorderly conduct with the addition of alleging H.K. called T.L. a "nigger."[132] The North Dakota Supreme Court held the petition satisfactorily alleged specific facts to satisfy the definition of disorderly conduct and provided H.K. with adequate notice of

122. 2010 ND 27, 778 N.W.2d 764.
123. *H.K.*, 2010 ND 27, ¶ 1, 778 N.W.2d at 764.
124. *Id.*
125. *Id.* ¶¶ 2, 7, 778 N.W.2d at 766, 768.
126. *Id.* ¶¶ 3, 7, 778 N.W.2d at 766-68.
127. *Id.* ¶ 3, 778 N.W.2d at 766-67. H.K. objected to the testimony relating to the gesture, arguing it was beyond the scope of the petition. *Id.*
128. *Id.* ¶ 4, 778 N.W.2d at 767.
129. *Id.* ¶ 6.
130. *Id.* ¶ 8, 778 N.W.2d at 768.
131. *Id.* ¶ 9.
132. *Id.* ¶ 7.

the charges against her because the petition described H.K.'s conduct at the teen center.[133]

H.K. argued further the juvenile court erred by denying her motion to dismiss because freedom of speech prohibited consideration of the statements H.K. made when she called T.L. a "nigger," and, therefore, there was no foundation for the disorderly conduct charge.[134] Under North Dakota law, a person may not be charged with disorderly conduct based upon a constitutionally protected activity.[135] While the First Amendment forbids the government from barring speech based upon the speech's content, fighting words that are likely to incite a breach of the peace are not protected by freedom of speech.[136] The context in which an expression was used is examined to determine if the particular phrases are fighting words.[137] The North Dakota Supreme Court held H.K.'s statements were fighting words because H.K. did more than simply yell racial slurs at T.L.[138] The context in which the statements were made, as well as the threatening nature of her words, were likely to incite a breach of the peace or provoke a violent reaction.[139] Consequently, the statements were properly considered by the juvenile court as evidence of disorderly conduct.[140]

H.K. next argued the juvenile court erred when it considered evidence beyond the scope of the petition.[141] During the hearing, the juvenile court allowed testimony from T.L. about events that took place at a restaurant after she left the teen center and about events that occurred weeks later.[142] H.K. objected to the admission of testimony concerning the latter but failed to object to the testimony about events at the restaurant.[143] An issue not raised during the hearing may not be considered on appeal unless the issue is an obvious error affecting a substantial right.[144] The North Dakota Supreme Court held the admission of the testimony did not affect H.K.'s substantial rights because it was not essential to the juvenile court's finding that H.K. committed the crime.[145] Although testimony regarding events

133. *Id.* ¶¶ 9-10, 778 N.W.2d at 768-69.
134. *Id.* ¶ 11, 778 N.W.2d at 769.
135. *Id.* ¶ 12. *See also* N.D. CENT. CODE § 12.1-31-01(2) (2009) (stating "[t]his section does not apply to constitutionally protected activity").
136. *H.K.*, ¶ 13, 778 N.W.2d at 770.
137. *Id.*
138. *Id.* ¶ 14.
139. *Id.*
140. *Id.*
141. *Id.* ¶ 15.
142. *Id.*
143. *Id.* ¶¶ 16-17, 778 N.W.2d at 771.
144. *Id.* ¶ 16.
145. *Id.*

weeks after the teen center testimony was admitted in error over H.K.'s objection, the North Dakota Supreme Court held the admission did not induce the juvenile court to base its finding on incompetent evidence because the finding could have been based entirely on the events at the teen center.[146]

Finally, H.K. argued the juvenile court's finding that H.K. performed actions that satisfied the definition of disorderly conduct was clearly erroneous.[147] After reiterating H.K.'s conduct at the teen center, the North Dakota Supreme Court held the juvenile court's finding that H.K. committed disorderly conduct was not clearly erroneous.[148] Having rejected all of H.K.'s contentions of error, the North Dakota Supreme Court affirmed the juvenile court's order.[149]

146. *Id.* ¶¶ 17-18.
147. *Id.* ¶ 19.
148. *Id.* ¶¶ 20-21, 778 N.W.2d at 772.
149. *Id.* ¶ 22.

CRIMINAL LAW—CRIMINAL PROCEDURE—EVIDENCE

STATE V. STRIDIRON

In *State v. Stridiron*,[150] Antonio Phillip Stridiron appealed from criminal judgment entered after a jury found him guilty of felony murder.[151] Bradley A. Davis appealed from a criminal judgment entered on a jury verdict finding him guilty of aggravated assault.[152] The North Dakota Supreme Court consolidated the appeals and affirmed the criminal judgments, holding the trial court did not abuse its discretion in its pre-trial rulings and concluding sufficient evidence existed to support the convictions.[153]

On July 29, 2007, Joshua Velasquez was found dead in Minot, North Dakota.[154] His body was discovered in an alley, across the street from a duplex where he had attended a party the night before.[155] Stridiron and Davis were living in the duplex at the time of the murder.[156] After police conducted an investigation, the State charged Stridiron with felony murder and Davis with aggravated assault.[157] The State asserted Stridiron shot Velasquez with a handgun after Davis struck Velasquez with "a garden tool containing serrated blades."[158] The district court consolidated the cases for trial.[159] The jury returned guilty verdicts.[160]

On appeal, Davis argued the district court erred in granting the State's pre-trial motion to join the cases for trial over Davis's objection and in failing to sever the cases when Davis renewed his objection during voir dire.[161] The North Dakota Supreme Court disagreed, concluding the district court did not err in joining the cases for trial and refusing to grant Davis's request for severance during voir dire.[162] The court explained under Rule 13 of the North Dakota Rules of Criminal Procedure, a trial court has the authority to "order two or more indictments, informations, or complaints to be tried together if the offenses and the defendants, if there is more than

150. 2010 ND 19, 777 N.W.2d 892.
151. *Stridiron*, ¶ 1, 777 N.W.2d at 895.
152. *Id.*
153. *Id.*
154. *Id.* ¶ 2.
155. *Id.*
156. *Id.*
157. *Id.*, 777 N.W.2d at 896.
158. *Id.*
159. *Id.* ¶ 3.
160. *Id.*
161. *Id.* ¶ 4.
162. *Id.* ¶ 9, 777 N.W.2d at 897.

one, could have been joined in a single indictment, information, or complaint."[163] The court further explained joinder is proper when multiple defendants participated jointly in an act.[164] But even when joinder is proper before trial, the court noted, severance of the cases may still be necessary at a later point if the district court determines substantial prejudice exists to one of the defendants as a result of the previously granted joinder.[165] Accordingly, under Rule 14 of the North Dakota Rules of Criminal Procedure, a district court has a continuing duty to monitor whether the joinder causes substantial prejudice and to order severance in cases where justice so requires.[166]

The State charged Stridiron and Davis with participating in the murder of Joshua Velasquez.[167] On appeal, Davis conceded the joinder allowed for judicial economy, but argued he was prejudiced because: a newspaper article stated Davis and Stridiron's trial was for the murder of Joshua Velasquez; evidence introduced at trial was relevant to Stridiron's murder charge, but not Davis's assault charge; and Stridiron's attorney attempted to implicate Davis in the murder of Velasquez.[168] The North Dakota Supreme Court, however, rejected Davis's arguments, holding Davis failed to demonstrate any prejudice to the jury resulting from the newspaper article.[169] In addition, the court stated "[b]are allegations that a defendant would stand a better chance of acquittal in a separate trial . . . [are] insufficient to compel severance."[170] Finally, the court reiterated its prior holding that "an attempt by one defendant to exculpate himself by inculpating another defendant is insufficient ground to require separate trials."[171] Therefore, the North Dakota Supreme Court concluded the district court did not err in granting the State's pre-trial motion for joinder and in declining to grant Davis's request for severance during voir dire.[172]

Stridiron also argued on appeal the district court erred in denying his pre-trial motions to pool the jury for bias through a public opinion survey and to change the trial venue on the ground of prejudicial pre-trial publicity.[173] The supreme court explained Rule 21(a) of the North Dakota Rules

163. *Id.* ¶ 6, 777 N.W.2d at 896 (quoting N.D. R. CRIM. P. 13).
164. *Id.* (citing N.D. R. CRIM. P. 8 explanatory note).
165. *Id.* (citing N.D. R. CRIM. P. 14).
166. *Id.*, 777 N.W.2d at 897 (citing N.D. R. CRIM. P. 14).
167. *Id.* ¶ 7.
168. *Id.*
169. *Id.* ¶ 8.
170. *Id.* (quoting State v. Wamre, 1999 ND 164, ¶ 30, 599 N.W.2d 268, 279).
171. *Id.*
172. *Id.* ¶ 9.
173. *Id.* ¶ 10, 777 N.W.2d at 897-98.

of Criminal Procedure requires a district court, upon a defendant's motion, to "transfer the proceeding against the defendant to another county if the court is satisfied that so great a prejudice against the defendants exists in the transferring county that the defendant cannot obtain a fair and impartial trial there."[174] However, the court noted publicity alone is not sufficient to establish prejudice and stated a criminal defendant bears the burden of showing the publicity did in fact prejudice him.[175] The court added "[t]he quantity of media coverage does not control a motion for change of venue."[176] What controls, the court explained, is the prejudicial effect of such coverage upon the defendant's ability to obtain a fair and impartial trial.[177]

The supreme court rejected Stridiron's arguments that the district court erred in denying his pre-trial motions.[178] The court explained the district court conducted its own extensive questioning of the jury to assess the jury's knowledge of the case and determine any possible bias.[179] Moreover, each juror was questioned both by the court and by the parties.[180] Because the district court was in a better position to listen to the jury's responses and draw any inferences from them, and because the district court was better able to ascertain the prejudicial effect of any pre-trial media publicity, the district court did not abuse its discretion in denying Stridiron's pre-trial motions to pool the jury and to change the trial venue.[181]

Furthermore, both Stridiron and Davis argued the State's use of a peremptory challenge to excuse the only African-American individual from the jury was racially motivated and asserted the district court was clearly erroneous in ruling it was not.[182] In addressing the appellants' argument, the North Dakota Supreme Court first noted the Equal Protection Clause prohibits the prosecution from using a peremptory challenge when the only basis for the challenge is race.[183] The court then explained when a defendant challenges the use of a peremptory challenge, the defendant must show: (1) he is a member of a cognizable racial group and that the peremptory challenge was used to excuse another member of defendant's group; (2) he is entitled to rely on the fact peremptory challenges "constitute a jury

174. *Id.* ¶ 11, 777 N.W.2d at 898 (quoting N.D. R. CRIM. P. 21(a)).
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* ¶ 14, 777 N.W.2d at 899.
179. *Id.* ¶ 12, 777 N.W.2d at 898.
180. *Id.*
181. *Id.* ¶¶ 13-14, 777 N.W.2d at 898-99 (quoting State v. Austin, 520 N.W.2d 564, 568 (N.D.1994)).
182. *Id.* ¶ 15, 777 N.W.2d at 899. Both Davis and Stridiron are African-American. *Id.* ¶ 2, 777 N.W.2d at 895.
183. *Id.* ¶ 16, 777 N.W.2d at 899 (citing Batson v. Kentucky, 476 U.S. 79, 87 (1986)).

selection practice that permits 'those to discriminate who are of a mind to discriminate[;]'" and (3) the relevant circumstances raise an inference of purposeful discrimination on the part of the prosecution.[184] If the defendant meets all three requirements, then the burden shifts to the prosecution to give a clear and reasonably specific race-neutral explanation for the use of the peremptory challenge in question.[185] The court concluded the State successfully met its burden in the case at hand.[186] The State's explanation that the juror was excused because she had served as a juror in an earlier homicide case, which the prosecutor had tried, was reading a book while the judge was talking to the jury members and had unsatisfactory responses to the questions related to self-defense. This overcame the prima facie evidence of racial motivation in the use of the peremptory challenge.[187] Accordingly, the supreme court affirmed the district court's ruling that the exclusion of the only African-American from the jury pool "was not based on race."[188]

Next, Stridiron argued the district court erred in denying his request to introduce testimony from a witness stating Davis had confessed to the murder.[189] Stridiron contended the testimony was admissible under the statement against interest exception of Rule 804(b)(3) of the North Dakota Rules of Evidence.[190] The North Dakota Supreme Court explained Rule 804(3)(b) has three requirements.[191] First, the party seeking to invoke the exception must show the declarant is unavailable.[192] Second, the statement must be of such nature as to expose the declarant to criminal liability at the time he made the statement.[193] Finally, the statement must be corroborated by circumstances clearly indicating its trustworthiness.[194] In denying Stridiron's motion, the district court found the proposed testimony failed the trustworthiness requirement of Rule 804(3)(b).[195] On appeal, Stridiron asserted the district court should have focused on the trustworthiness of Davis's "confession," not the trustworthiness of the witness's proposed testimony.[196]

184. *Id.* (citations omitted).
185. *Id.* (citing *Batson*, 476 U.S. at 97-98).
186. *Id.* ¶ 17, 777 N.W.2d at 900.
187. *Id.*
188. *Id.* ¶ 18.
189. *Id.* ¶ 19.
190. *Id.* ¶ 20.
191. *Id.* ¶ 21.
192. *Id.*
193. *Id.*
194. *Id.*, 777 N.W.2d at 901.
195. *Id.* ¶ 22.
196. *Id.*

Recognizing the issue raised by Stridiron was one of first impression for the court, the North Dakota Supreme Court first discussed the split in jurisdictions that have previously addressed Stridiron's argument.[197] The court ultimately agreed "with the courts which allow a district court to analyze the veracity of the in-court witness because those decisions are better reasoned and give effect to the intention of the drafters of Fed. R. Ev. 804(b)(3)."[198] Accordingly, the court adopted the rule that a district court determining the "corroborating circumstances" under Rule 804(b)(3) must analyze "both the credibility of the in-court witness and the reliability of the out-of-court declarant."[199] To assist district courts in applying the newly adopted rule, the North Dakota Supreme Court provided several non-exclusive factors district courts may consider in determining "the veracity of the in-court witness and the reliability of the out-of-court declarant."[200] The factors include an inquiry into the declarant's motive to misrepresent the matter, the general character of the in-court witness, the spontaneity of the statement, and the relationship between the declarant and the witness.[201]

Here, the district court found the proposed in-court witness had a motive to misrepresent the matter because she was the best friend of Stridiron's girlfriend.[202] Furthermore, the district court analyzed the veracity of Davis's alleged confession and determined the evidence was insufficient to make the "confession" trustworthy.[203] Because the Supreme Court concluded the district court properly applied the factors for analyzing corroborating circumstances under Rule 804(3)(b), the court affirmed the district court's ruling that the proffered testimony was inadmissible.[204]

Finally, Davis argued insufficient evidence existed to support his conviction for aggravated assault.[205] Davis's argument was largely based on the jury's unwillingness to accept his self-defense assertion at trial.[206] The North Dakota Supreme Court explained when a defendant brings a sufficiency of the evidence challenge on appeal, the court "does not sit as a thirteenth juror to make independent determinations of credibility of

197. *Id.* ¶ 23.
198. *Id.* ¶ 24, 777 N.W.2d at 902.
199. *Id.*
200. *Id.* ¶ 25.
201. *Id.*, 777 N.W.2d at 902-03 (quoting United States v. Rasmussen, 790 F.2d 55, 56 (8th Cir. 1986)).
202. *Id.* ¶ 26, 777 N.W.2d at 903.
203. *Id.*
204. *Id.* ¶ 27.
205. *Id.* ¶ 28.
206. *Id.* ¶ 31.

witnesses or other evidentiary weight."[207] The court stated a number of witnesses testified to seeing Davis strike Velasquez with the garden tool.[208] Thus, the court determined sufficient evidence existed to support the conviction and affirm the jury verdict of guilty.[209]

207. *Id.* (internal quotations omitted).
208. *Id.*
209. *Id.*

CRIMINAL LAW—SEXUAL OFFENSES—EVIDENCE

STATE V. PAUL

In *State v. Paul*,[210] Wilson Grant Paul, Sr. appealed from a jury verdict finding him guilty of gross sexual imposition.[211] The North Dakota Supreme Court, concluding the district court did not commit a reversible error during the evidentiary hearing, affirmed the judgment because the evidence was sufficient to sustain the verdict.[212]

In August 2007, L.L., Paul's girlfriend's nine-year-old niece, who was then living in Oklahoma with her older sister, V.L., and the mother of Paul's girlfriend, S.L., told V.L. and S.L. that Paul had touched her inappropriately while she was visiting Paul and his girlfriend a month earlier.[213] S.L. reported her conversation with L.L. to the Oklahoma Department of Health and Human Services.[214] A social worker subsequently conducted an interview with L.L., which the social worker videotaped.[215] As a result of the interview and following further investigation by the authorities, Paul was charged with gross sexual imposition.[216] Specifically, the basis for the charge was L.L.'s statement that Paul made her "touch his penis with her hand."[217]

The district court held an evidentiary hearing to determine the admissibility of L.L.'s out-of-court statements to V.L., S.L., and the social worker.[218] The district court found the statements were admissible.[219] At trial, the district court allowed the jury to both view L.L.'s videotaped interview and to hear V.L.'s and S.L.'s testimony about L.L.'s allegations of sexual abuse.[220] The court further allowed the State to present expert testimony regarding the time it takes children to report sexual abuse and their presentation when making such reports.[221] L.L. testified on three separate occasions during trial.[222] In her first two testimonies, she denied remembering any sexual abuse.[223] On the third time, however, she stated

210. 2009 ND 120, 769 N.W.2d 416.
211. *Paul*, ¶ 1, 769 N.W.2d at 418.
212. *Id.*
213. *Id.* ¶¶ 2-3.
214. *Id.* ¶ 3.
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.* ¶ 4, 769 N.W.2d at 419.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*

Paul had made improper sexual advances toward her while she was in his apartment.[224] Paul denied L.L.'s allegations and called his girlfriend to testify in his defense.[225] At the end of trial, the jury returned a guilty verdict.[226] Paul was subsequently sentenced to twenty-five years in prison, seven of which were suspended.[227]

On appeal, Paul argued the district court erred in allowing the State to introduce expert testimony on the delayed reporting of sexual abuse by children and on children's presentation regarding such reports.[228] The North Dakota Supreme Court analyzed Paul's argument by stating under Rule 702 of the North Dakota Rules of Evidence, "[A] witness who qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise," as long as his or her testimony would assist the jury in understanding the evidence.[229] The court noted the decision to admit expert testimony is within the discretion of the district court and will not be overturned on appeal unless the district court acted "in an arbitrary, unreasonable, or unconscionable manner."[230] Because the State's expert witness was a counselor from the Rape and Abuse Crisis Center who had a master's degree in clinical education and had worked with more than one hundred sexually abused children, the North Dakota Supreme Court concluded the district court did not abuse its discretion in ruling the witness could testify as an expert on the narrow issue of delay in reporting sexual abuse by children.[231]

Next, Paul challenged the district court's admission of L.L.'s out-of-court statements, including L.L.'s statements to V.L., S.L., and the social worker.[232] Paul first challenged the admission of the statement on grounds of insufficient guarantees of trustworthiness and reliability, as required by Rule 803(24) of the North Dakota Rules of Evidence.[233] However, because Paul only objected to the admission of the evidence pre-trial and failed to do so at trial, the North Dakota Supreme Court stated it would review the admission of L.L.'s out-of-court statements only for "obvious error

224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.* ¶ 5.
229. *Id.* ¶ 6 (quoting N.D. R. EVID. 702).
230. *Id.* (citing State v. Schmidkunz, 2006 ND 192, ¶ 15, 721 N.W.2d 387, 393).
231. *Id.* ¶¶ 7-8, 769 N.W.2d at 419-20.
232. *Id.* ¶ 9, 769 N.W.2d at 420.
233. *Id.* ¶¶ 9-10. Rule 803(24) of the North Dakota Rules of Evidence supplies a hearsay exception for a child's out-of-court statement regarding sexual abuse. *Id.* ¶ 12.

affecting substantial rights."[234] The court then explained Rule 803(24) requires a district court to consider and make explicit findings on the following non-exclusive factors of trustworthiness: "(1) 'spontaneity and consistent repetition' of the statements, (2) 'the mental state of the declarant,' (3) use of terminology unexpected of a child of similar age,' and (4) 'a lack of motive to fabricate.'"[235] A district court's ruling to admit certain evidence is discretionary, the court noted, and will not be disturbed unless "the ruling was arbitrary, capricious or unreasonable."[236] The North Dakota Supreme Court held the district court did not abuse its discretion in ruling L.L.'s out-of-court statements were admissible because the district court carefully considered and thoroughly analyzed each of these factors.[237] In particular, the North Dakota Supreme Court concluded the district court did not commit an obvious error because the district court found all four factors for trustworthiness were met: (1) L.L. repeated her allegation of sexual abuse numerous times to her sister, V.L., and spontaneously told S.L. and the social worker about the abuse when asked what happened; (2) L.L. was emotional when talking about the alleged abuse, as evidenced by her crying; (3) the terminology L.L. used was appropriate for a child of similar age; and (4) no evidence showed L.L. had a motive to fabricate the sexual abuse allegations.[238]

Paul further argued L.L.'s out-of-court statements implicated him in "other crimes" and the admission of these "other crimes" constituted a reversible error under Rule 404(b) of the North Dakota Rules of Evidence.[239] The "other crimes" Paul referred to involved prior sexual contact between Paul and L.L.[240] Both V.L. and S.L. testified L.L. had informed them Paul had sexually abused her on several occasions prior to the July 2007 incident.[241] Paul argued the district court abused its discretion by allowing V.L. and S.L. to testify to those "other [uncharged] crimes."[242]

In addressing Paul's 404(b) argument, the North Dakota Supreme Court explained, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."[243] The court clarified, however, evidence of other crimes is

234. *Id.* ¶ 11 (citing State v. Wegley, 2008 ND 4, ¶ 13, 744 N.W.2d 284, 291).
235. *Id.* ¶ 12 (quoting State v. Muhle, 2007 ND 131, ¶ 12, 737 N.W.2d 636, 640).
236. *Id.*, 769 N.W.2d at 421 (citing *Wegley*, 2008 ND 4, ¶ 12, 744 N.W.2d at 290-91).
237. *Id.* ¶¶ 13-14, 769 N.W.2d at 421-22.
238. *Id.* ¶ 13.
239. *Id.* ¶¶ 9, 15, 769 N.W.2d at 420, 422.
240. *See id.* ¶ 15, 769 N.W.2d at 422.
241. *Id.* ¶ 16.
242. *See id.* ¶¶ 15-16.
243. *Id.* ¶ 17 (quoting N.D. R. EVID. 404(b)).

admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[244] The court stated district courts must consider three factors in determining the admissibility of other crimes evidence.[245] First, district courts must consider the purpose for which the evidence of other crimes is being offered.[246] Next, district courts must determine whether the evidence of prior acts is substantially reliable.[247] Moreover, if evidence of other crimes is offered in a criminal case, proof of the crime charged must exist as to allow the jury to "establish the defendant's guilt or innocence independently on the evidence presented, without consideration of the evidence of prior acts."[248] Finally, under Rule 403 of the North Dakota Rules of Evidence, district courts must consider whether the probative value of the evidence outweighs its prejudicial effect.[249]

After reviewing the district court's findings, the North Dakota Supreme Court held the district court did not abuse its discretion in allowing evidence of Paul's prior acts of sexual abuse against L.L.[250] The court reasoned the lapse of time—fourteen months—between Paul's prior acts of sexual abuse and the July 2007 incident did not render Paul's prior acts "wholly independent crimes."[251] The court explained because Paul did not have access to L.L. during the lapse and because "the prior acts and charged crime involved the same victim," Paul's prior acts of sexual abuse were not evidence of "wholly independent crimes," but rather constituted "evidence of activity in furtherance of the same criminal activity."[252] The district court's ruling to admit evidence of Paul's prior sexual abuse against L.L. was not, therefore, a reversible error.[253]

Finally, Paul argued the evidence was insufficient to support the guilty verdict.[254] The North Dakota Supreme Court stated appellate review of sufficiency of the evidence is rather limited because the court considers only the evidence "most favorable to the verdict and the reasonable inferences

244. *Id.* (quoting N.D.R. EVID. 404(b)).

245. *Id.* ¶ 18.

246. *Id.* (citing State v. Alvarado, 2008 ND 203, ¶ 14, 757 N.W.2d 570, 577).

247. *Id.* (citing *Alvarado*, ¶ 14).

248. *Id.* (citing *Alvarado*, ¶ 14).

249. *Id.* (citing *Alvarado*, ¶ 19).

250. *Id.* ¶ 28, 769 N.W.2d at 426.

251. *Id.* ¶¶ 23-25, 769 N.W.2d at 424-25 (citing State v. Thomson, 533 S.E.2d 834, 839 (N.C. Ct. App. 2000)) ("When there is a period of time during which there is no evidence of sexual abuse, the lapse does not require exclusion of the evidence if the defendant did not have access to the victim . . . during the lapse.").

252. *Id.* ¶¶ 24-25 (citing *Alvarado*, ¶ 12, 757 N.W.2d at 576).

253. *Id.* ¶ 28, 769 N.W.2d at 426.

254. *Id.* ¶ 29.

therefrom to see if there is substantial evidence to warrant a conviction."[255] The court will reverse a conviction only if "no rational fact finder could have found the defendant guilty beyond a reasonable doubt."[256] Viewing the evidence in light most favorable to the prosecution, the North Dakota Supreme Court held L.L.'s testimony that Paul made her "touch his penis with her hand" was sufficient to establish sexual contact and sustain the conviction of gross sexual imposition.[257]

255. *Id.* ¶ 30.

256. *Id.*

257. *Id.* ¶ 31 (citing State v. Morstad, 493 N.W.2d 645, 646 (N.D. 1992) (explaining the uncorroborated testimony of a child is sufficient to sustain a guilty verdict for a sexual offense)).

FAMILY LAW—CHILD CUSTODY—BEST INTERESTS OF THE CHILD FACTORS

FRUEH V. FRUEH

In *Frueh v. Frueh*,[258] Darin Frueh appealed a district court order denying his motion for a change of custody.[259] The North Dakota Supreme Court held the district court relied on impermissible factors in considering whether a change of custody was in the best interest of the child.[260] The court explained Darin Frueh's child support payment amount, which was set by the district court, should not have been considered a relevant factor.[261] The court reversed the district court's order and remanded the case.[262]

Darin Frueh (Frueh) and Malissa Frueh Hoheisel (Hoheisel) were married in 1992 and had one child in 1994.[263] The couple divorced in January 2004.[264] During the divorce, the parties stipulated Hoheisel would take physical custody of the child and Frueh would have visitation rights.[265] The stipulation was incorporated into the final divorce judgment.[266] When Frueh's child support obligation was initially set, he was a self-employed farmer of 3300 acres.[267] Frueh's average income over the five-year period prior to the divorce was below the minimum wage. Accordingly, in July 2004, the district court set Frueh's child support payment at the "minimum wage" amount of $168 per month.[268] The amount of child support had not been reviewed since July 2004.[269]

In July 2007, Frueh made the motion to modify the custody arrangement.[270] Frueh argued several events amounted to a material change in circumstances, including Hoheisel's move from Goodrich to Bismarck, Hoheisel's remarriage, the child's desire to live with Frueh, and allegations that Hoheisel's husband physically assaulted the child.[271] In support of Frueh's motion, the child signed an affidavit that explained why the child

258. 2009 ND 155, 771 N.W.2d 593.
259. *Frueh*, ¶ 1, 771 N.W.2d at 595.
260. *Id.*
261. *Id.* ¶ 13, 771 N.W.2d at 598-99.
262. *Id.* ¶ 1, 771 N.W.2d at 595.
263. *Id.* ¶ 2.
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.* ¶ 13, 771 N.W.2d at 598.
268. *Id.*
269. *Id.*
270. *Id.* ¶ 3.
271. *Id.*

wanted to live with Frueh and alleged that Hoheisel's husband grabbed the child by the throat in 2006.[272] The district court concluded Frueh's allegations did not amount to a material change and denied Frueh an evidentiary hearing.[273] On appeal, the North Dakota Supreme Court held Frueh established a prima facie case by showing there was a material change in circumstances.[274] The court reversed the district court's decision and remanded for an evidentiary hearing on Frueh's motion.[275]

On remand and after an evidentiary hearing, the district court again denied Frueh's motion to modify custody.[276] At the hearing in August 2008, several witnesses testified.[277] Although the district court found there was a material change in circumstances, the court concluded a change in custody was not in the best interest of the child.[278] The district court considered the child's interest in living with Frueh, but discounted the child's preference because it determined he was not mature.[279] Also, the district court discussed Frueh's child support payment.[280] The district court noted Frueh currently had a large farming operation and gave expensive gifts to the child, yet his child support obligation was still based upon the "minimum wage" amount.[281] The district court commented Frueh attempted to buy the affections of the child and because Hoheisel did not have the financial resources to compete, the factor favored Hoheisel.[282]

On appeal, Frueh argued the district court erred when it denied his motion for a change of custody.[283] Frueh contended: (1) the district court improperly based its decision on its opinion that Frueh was not paying sufficient child support, and (2) its finding that the child was not a mature child for purposes of expressing a preference was clearly erroneous.[284] The North Dakota Supreme Court agreed with Frueh and held the district court misapplied the law when it considered the amount of Frueh's child support obligation.[285] The court explained a district court may modify a prior

272. *Id.*
273. *Id.*, 771 N.W.2d at 596.
274. *Id.* (citing Frueh v. Frueh, 2008 ND 26, 745 N.W.2d 362).
275. *Id.*
276. *Id.* ¶ 4.
277. *Id.*
278. *Id.*
279. *Id.* ¶ 14, 771 N.W.2d at 599.
280. *Id.* ¶ 12, 771 N.W.2d at 598.
281. *Id.*
282. *Id.*
283. *Id.* ¶ 6, 771 N.W.2d at 596.
284. *Id.*
285. *Id.* ¶ 13, 771 N.W.2d at 598.

custody order after two years from the time since an order establishing custody was entered if the court finds:

> On the basis of facts that have arisen since the prior order or which were unknown to the court at the time of the prior order, a material change has occurred in the circumstances of the child or the parties; and the modification is necessary to serve the best interest of the child.[286]

The court noted the district court must consider whether a change in custody is necessary to serve the best interests of the child if it finds there has been a material change in circumstances.[287] As the proponent of the custody modification, Frueh had the burden of proving both that there had been a material change in circumstances and that a change in custody was necessary to serve the child's best interests.[288] In determining whether the child's best interest would be served by a modification, the court must apply the factors set out by statute.[289] The court explained a district court's decision to modify custody is a finding of fact and will not be reversed unless it was clearly erroneous.[290]

The North Dakota Supreme Court held the district court clearly erred when it impermissibly considered Frueh's child support obligation.[291] The court explained child support payments are presumed to be correct when set using the child support guidelines. In this case, Frueh's support obligation was based upon the guidelines in July 2004 and, therefore, should have been presumed to be the correct amount of support.[292] Further, there was no evidence that Frueh ever was late or missed a child support payment.[293] The court held the district court misapplied the law when it improperly considered Frueh's child support payment insufficient, despite the presumed correctness of the payment.[294]

The North Dakota Supreme Court determined Frueh failed to meet his burden of proving the district court clearly erred when it discounted the child's preference to live with Frueh.[295] The court explained a child's

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286. *Id.* ¶ 8 (quoting N.D. CENT. CODE § 14-09-06.6(6) (2009)).
287. *Id.* ¶ 10.
288. *Id.*
289. *Id.* (citing N.D. CENT. CODE § 14-09-06.2(1)).
290. *Id.* ¶ 7.
291. *Id.* ¶ 13, 771 N.W.2d at 598-99.
292. *Id.* at 598; *see* N.D. ADMIN. CODE § 75-02-04.1-09 (2009) (stating child support that is calculated using the child support guidelines is presumptively correct).
293. *Id.* ¶ 13, 771 N.W.2d at 598.
294. *Id.*, 771 N.W.2d at 598-99.
295. *Id.* ¶ 14, 771 N.W.2d at 599.

preference is given more weight as children mature.[296] The district court found the child was not mature and his preference was not a factor in deciding custody.[297] The North Dakota Supreme Court held the district court's determination was supported by the evidence and was not clearly erroneous.[298] Thus, there was no clear error on this factor, but the court reversed the district court's order denying Frueh's motion for a change in custody—because the district court clearly erred when it considered the amount of Frueh's child support—and remanded the case to properly consider the best interest factors.[299]

Justice Maring filed a concurring and dissenting opinion.[300] Justice Maring concurred with the majority in its finding of no reversible error, but dissented from the majority reversing the case.[301] Justice Maring explained the trial court did not deny the motion to modify custody because it concluded Frueh paid too little child support, but rather that Frueh's credibility was called into question because Frueh gave his child extravagant gifts and money while he made child support payments based on the "minimum wage" amount.[302] Justice Maring stated the district court's order denying Frueh's motion to modify custody was supported by the evidence, and the district court did not misapply the law or consider improper evidence.[303]

296. *Id.* (citing Dronen v. Dronen, 2009 ND 70, ¶ 14, 764 N.W.2d 675, 684).
297. *Id.* ¶ 15.
298. *Id.*
299. *Id.* ¶ 17, 771 N.W.2d at 600.
300. *Id.* ¶ 23, 771 N.W.2d at 601.
301. *Id.*
302. *Id.* ¶¶ 27-28, 771 N.W.2d at 602.
303. *Id.* ¶ 35, 771 N.W.2d at 604.

HOUSING DISCRIMINATORY PRACTICES STATUTE OF LIMITATIONS

DEPARTMENT OF LABOR V. MATRIX PROPERTIES

In *Department of Labor v. Matrix Properties*,[304] the State, through the Department of Labor (Department), appealed from a summary judgment dismissing its discriminatory housing practice action on the ground the action was barred by the applicable statute of limitations.[305] The State contended the district court erred when it ruled the civil action was barred by the two-year statute of limitations in 42 U.S.C. § 3613(a)(1)(A) and section 14-02.5-39(1) of the North Dakota Century Code.[306] The North Dakota Supreme Court affirmed.[307]

Evert Johnson, who is disabled and uses a wheelchair, issued a complaint to the Department in December 2005.[308] Johnson alleged Matrix Properties Corporation, formerly known as E.W. Wylie Corporation, Wild & Associates, Ltd., and Ulteig Engineers, Inc. (collectively, Matrix), committed discriminatory acts by failing to comply with the design and construction requirements under federal and state law for the Stonebridge Apartments in Fargo.[309] The apartment building Johnson lived in received its certificate of occupancy from the city in 1998.[310] After an investigation, the Department issued a determination of reasonable cause and a charge of discrimination against Matrix in January 2007, and Matrix elected to have the claims decided in district court.[311]

Matrix moved for summary judgment dismissal of the action, claiming it was barred by the two-year statute of limitations under the federal Fair Housing Act (FHA) and the state Housing Discrimination Act.[312] The district court determined the statute of limitations required any action concerning the design and construction of the apartment building must be brought within two years from the issuance of the certificate of occupancy in 1998.[313] Because the civil action was not brought until 2005, the court dismissed the action as time barred.[314] An alternative claim that Matrix had

304. 2009 ND 137, 770 N.W.2d 290.
305. *Matrix Properties*, ¶ 1, 770 N.W.2d at 291-92.
306. *Id.* ¶ 4, 770 N.W.2d at 292.
307. *Id.* ¶ 1.
308. *Id.* ¶ 2.
309. *Id.* ¶¶ 1-2.
310. *Id.* ¶ 2.
311. *Id.*
312. *Id.* ¶ 3.
313. *Id.*
314. *Id.*

engaged in a pattern or practice of discrimination was also dismissed without prejudice because the State had failed to first make an administrative determination of reasonable cause.[315]

The court began its analysis by outlining the standard of review, stating the determination of when a cause of action accrues is generally a question of fact, but if there is no dispute about the relevant facts, the determination is a question of law for the court.[316] The court next examined the legislature's goals in adopting North Dakota's Housing Discrimination Act, chapter 14-02.5 of the North Dakota Century Code, in 1999.[317] The first goal was to establish "a regulatory authority and administrative process for receiving and investigating charges of housing discrimination under state law."[318] Next, the Housing Discrimination Act "provides for state enforcement of federal fair housing law, provided that its provisions are 'substantially equivalent' to . . . those in the Federal Fair Housing Act."[319] The "substantial equivalency" component was important to ensure the state agency could be "eligible to receive federal funds from HUD [Department of Housing and Urban Development] to investigate charges of housing discrimination filed under federal law."[320] The State contended North Dakota's Housing Discrimination Act had been certified by the Secretary of HUD as being substantially equivalent to the rights, procedures, and remedies created under the federal FHA.[321] "Discrimination" is defined to include a failure to "design and construct" covered multifamily dwellings that comport with certain accessibility requirements for handicapped persons.[322]

A civil action to enforce the design and construction requirements may be brought by an aggrieved person and "not later than the second year after the date of the occurrence or the termination of an alleged discriminatory housing practice."[323] The State argued the two-year limitation period began to run only when Johnson discovered the design and construction flaws in the Stonebridge Apartments, and the lawsuit was, therefore, brought in a timely manner, while the defendants argued the two-year limitation period

315. *Id.*

316. *Id.* ¶ 5, 770 N.W.2d at 293.

317. *Id.* ¶ 6.

318. *Id.* (quoting *Hearing on HB 1043 Before House Judiciary Comm.*, 56th N.D. Legis. Sess. (Jan. 12, 1999) (written testimony of Mark Bachmeier, Interim Department of Labor Commissioner)).

319. *Id.*

320. *Id.* (quoting *Hearing on HB 1043 Before S. Appropriations Comm.*, 56th N.D. Legis. Sess. (March 25, 1999) (written testimony of Mark Bachmeier, Interim Department of Labor Commissioner)).

321. *Id.*

322. *Id.* *See* 42 U.S.C. § 3604(f)(3)(C) (2006); N.D. CENT. CODE § 14-02.5-06(3)(c) (2009).

323. *Id.* ¶ 7 (quoting N.D. CENT. CODE § 14-02.5-39(1)); *see also* 42 U.S.C. § 3613(a)(1)(A).

began to run in 1998, when Fargo issued the certificate of occupancy.[324] The district court agreed with the defendant's interpretation and concluded because the lawsuit was not brought until 2005, it was time barred.[325]

The North Dakota Supreme Court stated the interpretation of 42 U.S.C. § 3613(a)(1)(A) and section 14-02.5-39(1) of the North Dakota Century Code presented a question of law.[326] The first rule of statutory construction is to determine the intent of the legislature by first looking at the language of the statute.[327] The operative language in 42 U.S.C. § 3613(a)(1)(A) and section 14-02.5-39(1) of the North Dakota Century Code is identical, with both stating a civil action must be commenced not later than two years after the "occurrence or the termination of an alleged discriminatory housing practice."[328] The issue of when the statute of limitations begins to run in a design and construction case brought under the FHA was a question of first impression in North Dakota.[329]

The North Dakota Supreme Court found the Virginia decision *Moseke v. Miller and Smith, Inc.*[330] instructive, which examined when the statute of limitations would be triggered.[331] The *Moseke* court focused on the "occurrence rule," which it observed "ties the running of the limitations period to the occurrence of the act or omission causing the injury," rather than when the plaintiff discovered the injury.[332] The State argued the statute of limitation period did not begin to run until units in the challenged housing development became available to persons with disabilities, and so long as the units did not conform to those requirements, there was an ongoing discriminatory practice.[333] The State supported its continuing violation argument by citing to *Havens Realty Corp. v. Coleman*,[334] and analogizing design and construction cases to race discrimination cases under the FHA.[335]

Several courts have refused to apply the continuous violation doctrine to design and construction cases under the FHA, including *Garcia v. Brockway*,[336] in which the Ninth Circuit Court of Appeals held the statute

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324. *Id.*
325. *Id.*
326. *Id.* ¶ 8.
327. *Id.*, 770 N.W.2d at 294.
328. *Id.* ¶ 9 (quoting 42 U.S.C. § 3613(a)(1)(A); N.D. CENT. CODE § 14-02.5-39(1)).
329. *Id.*
330. 202 F. Supp. 2d 492 (E.D. Va. 2002).
331. *Matrix Properties*, ¶ 10, 770 N.W.2d at 294.
332. *Id.* (quoting *Moseke*, 202 F. Supp. 2d at 503).
333. *Id.* ¶ 11, 770 N.W.2d at 295.
334. 455 U.S. 363 (1982).
335. *Matrix Properties*, ¶ 11.
336. 526 F.3d 456 (9th Cir. 2008).

of limitations in a design and construction case under the FHA is "triggered at the conclusion of the design-and-construction phase, which occurs on the date the last certificate of occupancy is issued."[337] Despite a split of authority on the issue, the North Dakota Supreme Court followed the holding in *Garcia* because its reasoning was persuasive and it was the only federal circuit court of appeals decision to directly address the specific issue.[338]

The State argued the court should not follow *Garcia* because the words used by the North Dakota Legislature in enacting chapter 14-02.5 of the North Dakota Century Code showed the legislature did not intend for the statute of limitations triggering date to be at the completion of the construction of a dwelling.[339] However, the court stated the legislative history did not shed light on when the statute of limitations was triggered and was instead concerned the state law be "substantially equivalent" to federal law.[340] In the context of a design and construction case, it is the completion of the construction, rather than the mere existence of a noncompliant building, which constitutes the act that triggers the limitation period.[341]

Because the State did not raise on appeal the concern that the district court's decision converts the statute of limitations into a statute of repose, amici curiae were prohibited from raising the issue and were "limited to issues raised on appeal by the parties."[342] *Hanson v. Williams County*[343] held a products liability statute of repose violated the equal protection provision of the North Dakota Constitution.[344] However, the court noted even if section 14-02.5-39(1) of the North Dakota Century Code was a statute of repose, statutes of repose are not invariably unconstitutional.[345]

The State further contended the FHA and the Housing Discrimination Act should be liberally construed.[346] However, the court will "not ignore the clear language of a statute under the guise of liberal construction."[347] The policy-making bodies of government make the decision of whether public policy would be better served by extending the limitation period.[348] Thus, the court concluded the two-year statute of limitations was triggered

337. *Matrix Properties*, ¶ 13.
338. *Id.*, 770 N.W.2d at 296.
339. *Id.* ¶ 14.
340. *Id.*, 770 N.W.2d at 297.
341. *Id.*
342. *Id.* ¶ 15 (quoting N.D. R. APP. P. 29(a)).
343. 389 N.W.2d 319, 320 (N.D. 1986).
344. *Matrix Properties*, ¶ 15.
345. *Id.*
346. *Id.* ¶ 16.
347. *Id.* (quoting Stein v. Workforce Safety and Ins., 2006 ND 34, ¶ 11, 710 N.W.2d 364, 368-69).
348. *Id.* ¶ 16.

when the building in which Johnson resided received its certificate of occupancy in 1998, and the civil action time was barred because it was not commenced until 2005.[349] The district court's summary judgment dismissal was affirmed.[350]

Justice Kapsner dissented, joined by Justice Maring.[351] The dissent claimed if an owner of a building can survive two years after the construction without litigation, the owner can continue to reap the benefits of noncompliant construction, and persons with disabilities are denied the protections that were intended by federal and state statutes.[352] Justice Kapsner stated the majority followed an interpretation of the statutes that denies the relief the housing statutes were designed to provide.[353] The dissent noted the certificate of occupancy does not have a relationship to the requirements of the statutes, but instead shows only that the premises may be occupied under the municipal codes.[354] The majority and the *Garcia* court viewed the certificate of occupancy as a starting point for the statute of limitations.[355] In applying this notion, the *Garcia* court relied on *Ledbetter v. Goodyear Tire & Rubber Co.*,[356] which has since been superseded by statute as contrary to congressional intent in its analysis of the statute of limitations.[357]

The Lilly Ledbetter Fair Pay Act of 2009[358] addressed pay discrimination and indicated pay discrimination was a continuing violation, allowing for a new claim to be filed each time a paycheck was issued.[359] The Act included the specific congressional finding that the "Ledbetter decision undermine[d] those statutory protections by unduly restricting the time period in which victims of discrimination [could] challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress."[360] Justice Kapsner found persuasive the rationale behind the Act that the United States Supreme Court erred in its analysis of the statute of limitations.[361] Because North Dakota's housing statutes were

349. *Id.* ¶ 17, 770 N.W.2d at 297-98.
350. *Id.* ¶ 18, 770 N.W.2d at 298.
351. *Id.* ¶ 39, 770 N.W.2d at 304.
352. *Id.* ¶ 38, 770 N.W.2d at 303.
353. *Id.* ¶ 21, 770 N.W.2d at 298.
354. *Id.* ¶ 22.
355. *Id.*
356. 550 U.S. 618 (2007).
357. *Matrix Properties*, ¶ 23.
358. Pub. L. No. 111-2, 123 Stat. 5 (Jan. 29, 2009).
359. *Matrix Properties*, ¶ 25, 770 N.W.2d at 299.
360. *Id.* ¶ 25 (quoting Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (Jan. 29, 2009)).
361. *Id.* ¶ 26.

designed to mirror the federal statues, Justice Kapsner believed the clear indication from Congress that the United States Supreme Court misinterpreted congressional intent on the limitations period to be applied in *Ledbetter* should now inform decisions about the period of limitations, instead of the flawed reasoning of *Garcia*, which incorporated the incorrect reasoning of *Ledbetter*.[362]

Further, the *Ledbetter* decision did not correspond with the United States Supreme Court's prior interpretation of the Fair Housing Act in *Havens*.[363] Justice Kapsner believed the State's position, that there can be a continuing violation of the statute and that the period of limitations does not run while the violation continues, was the appropriate position and supported by the language in both the state and federal statutes.[364] Other courts have held the ongoing offering for sale or lease of properties which are noncompliant with the adaptive design requirements constituted a continuing violation under similar language in the federal statute.[365] Justice Kapsner also noted the owner/lessor is treated differently than the architects and contractors who constructed the noncompliant building.[366] Thus, the result in *Moseke* could only apply to one defendant in this case.[367]

According to Justice Kapsner, the majority's analysis was incorrect when it separated a single subsection from the interpretation of the statute as a whole.[368] Subsection 3 is a definitional subsection of section 14-02.5-06 of the North Dakota Century Code that provides context to subsections 1 and 2.[369] A violation of the general prohibition against discrimination is contained in the overarching provisions of the statute, which is contained in subsections 1 and 2.[370] The dissent in *Garcia* echoed Kapsner's position, believing the statute of limitations begins when the individual first attempts to buy, rent, or test the FHA-noncompliant unit.[371] The *Garcia* dissent explained it was at that time that the person with the disability was discriminated against by the developer or landlord.[372] A person that does not attempt to rent until more than two years after completion of the building has

362. *Id.* ¶ 27.
363. *Id.* ¶ 28.
364. *Id.*
365. *Id.* ¶ 29, 770 N.W.2d at 300.
366. *Id.* ¶ 30.
367. *Id.*
368. *Id.* ¶ 31, 770 N.W.2d at 301.
369. *Id.*
370. *Id.*
371. *Id.* ¶ 32.
372. *Id.*

no remedy under the majority's interpretation.[373] Justice Kapsner interpreted the statutes as declaring an owner, who continues to offer for rent or sale a nonconforming unit, has not yet terminated a discriminatory housing practice, and it is the termination of the discriminatory housing practice that would start the period of limitations.[374] Thus, because Johnson rented the apartment in March 2005 and moved out of the apartment in October 2005, Johnson's claim would be timely.[375]

Finally, despite the majority not addressing the issue of a statute of repose, Justice Kapsner explained discussion of the issue was necessary because affirming the district court's decision turned the statute of limitations into a statute of repose.[376] "A statute of limitation bars a right of action unless it is filed within a specified period of time after an injury occurs."[377] "A statute of repose terminates any right of action after a specific time has elapsed, regardless of whether or not there has as yet been an injury."[378] While agreeing that statutes of repose are not always unconstitutional, the dissent reasoned that interpreting the statute of limitations as a statute of repose is contrary to the plain language of the statutes.[379] To qualify as an aggrieved person under section 14-02.5-01(1) of the North Dakota Century Code, a person has to have been injured or has to foresee a future injury.[380] The North Dakota Supreme Court has previously held the termination of a statute of repose is not contingent on whether a person had been injured.[381] As a result, Justice Kapsner concluded the court's precedent and the plain language of the statute contradict one another as a result of the outcome of this case.[382]

373. *Id.*, 770 N.W.2d at 302.
374. *Id.* ¶ 33.
375. *Id.* ¶ 34.
376. *Id.* ¶ 35.
377. *Id.* ¶ 36, 770 N.W.2d at 303 (quoting Hoffner v. Johnson, 2003 ND 79, ¶ 9, 660 N.W.2d 909, 913-14).
378. *Id.* (quoting *Hoffner*, ¶ 9).
379. *Id.* ¶ 37.
380. *Id.*
381. *Id.* (citing *Hoffner*, ¶ 9).
382. *Id.*

JURISDICTION—N.D. SUPREME COURT—SUPERVISORY WRITS

STATE V. LEE

In *State v. Lee*,[383] the State petitioned for a supervisory writ, asking the North Dakota Supreme Court to recognize a district court's jurisdiction over a driving offense, which occurred within city limits.[384] The supreme court granted the State's petition and held the district court had jurisdiction over the driving offense.[385]

A highway patrol officer stopped a driver for speeding within the city limits of Minot, North Dakota.[386] The officer found the driver's license had been suspended and charged the driver with driving while under suspension.[387] The officer issued a citation for the offense, which stated the case would be heard in Ward County's district court.[388] However, although the driver pleaded guilty to the offense, the district court refused to accept the guilty plea.[389] The district court explained because the offense occurred within the city limits of Minot, the case should have been brought in city court.[390] Accordingly, the district court dismissed the charges against the driver.[391]

The district court entered its written order dismissing the case against the driver on May 9, 2009.[392] The State subsequently filed a motion for reconsideration, which the district court denied on July 13, 2009.[393] On July 20, 2009, the State filed a notice of appeal.[394] The North Dakota Supreme Court asked the State to address the timeliness of its appeal.[395] The State conceded the appeal was untimely, but asked the supreme court to exercise its supervisory authority.[396] A majority of the court agreed the use of the court's discretionary supervisory authority was proper in this case.[397]

383. 2010 ND 88, 782 N.W.2d 626.
384. *Lee*, ¶ 1, 782 N.W.2d at 627-28.
385. *Id.* ¶ 1, 782 N.W.2d at 628.
386. *Id.* ¶ 2.
387. *Id.*
388. *Id.*
389. *Id.* ¶ 3.
390. *Id.*
391. *Id.*
392. *Id.* ¶ 4.
393. *Id.*
394. *Id.*
395. *Id.* ¶ 5.
396. *Id.*
397. *Id.* ¶ 7, 782 N.W.2d at 629. Justice Sandstrom delivered the opinion of the court, in which Chief Justice VandeWalle and Justices Kapsner and Crothers joined.

The majority explained the North Dakota Constitution and the North Dakota Century Code allow the supreme court to review a district court's decision through the court's supervisory authority.[398] Supervisory writs, however, are to be exercised "rarely and cautiously"—only when no alternative remedy exists and when absolutely necessary to prevent injustice.[399] The court further explained supervisory writs "may be warranted when issues of vital concern regarding matters of important public interest are presented."[400] The issue whether a district court may hear state criminal matters that occurred within city limits, the majority concluded, was an issue of vital public concern, warranting the exercise of the court's supervisory authority.[401]

In addressing whether a district court has jurisdiction over criminal offenses occurring within city limits, the supreme court first analyzed the authority of highway patrol officers.[402] The court stated the authority of highway patrol officers is broad and includes the power to enforce those statutory provisions relating to the operation of motor vehicles and the use and protection of highways.[403] In addition, the court noted the authority of highway patrol officers extends to all violations occurring upon the state's highways.[404] The term highway, the court explained, should be construed to include the streets and roads within city limits.[405] Accordingly, the court concluded the statutory prohibition against driving under suspension "on a highway or on public or private areas to which the public has a right for access for vehicular use in this state" applied to driving on a street within city limits.[406]

The supreme court then addressed whether the existence of a city ordinance prohibiting driving under suspension superseded the application of state law.[407] The court noted under section 12.1-01-05 of the North Dakota Century Code, "No offense defined in this title or elsewhere by law shall be superseded by any city or county ordinance, or city or county home rule charter, or by an ordinance pursuant to such a charter."[408] Thus, the court held even when a city enacts an ordinance under its home rule charter, all

398. *Id.* ¶ 6.
399. *Id.*
400. *Id.*
401. *Id.* ¶ 7.
402. *Id.* ¶¶ 8-9.
403. *Id.* ¶ 9 (citing N.D. CENT. CODE §§ 39-03-09; 39-03-03 (2009)).
404. *Id.* (citing Brewer v. Ziegler, 2007 ND 207, ¶ 8, 743 N.W.2d 391, 396).
405. *Id.* ¶ 10, 728 N.W.2d at 630.
406. *Id.* ¶ 11 (quoting N.D. CENT. CODE § 39-06-42(1)).
407. *Id.* ¶ 12.
408. *Id.* (quoting N.D. CENT. CODE § 12.1-01-05).

state criminal laws "remain in full force and effect within the city limits."[409] The court determined because the statutory prohibition against driving under suspension clearly applied to offenses committed within city limits, and because the highway patrol officer had the authority to enforce the statute within city limits, the district court had jurisdiction to hear the criminal matter.[410] Therefore, the supreme court concluded the district court erred in dismissing the case for lack of jurisdiction.[411]

Justice Maring agreed with the majority's holding that the district court had jurisdiction, but filed a dissent asserting the court should not have exercised its supervisory authority in this case.[412] In her opinion, the State had an adequate alternative remedy, which it failed to exercise, and, thus, the State's petition for a supervisory writ should have been denied.[413] Justice Maring rejected the State's argument that as a result of its motion for reconsideration, the State missed the time to timely file an appeal and was, therefore, left with no adequate alternative remedy, warranting the issuance of a supervisory writ by the court.[414] She explained the proper standard requires the court to consider whether an alternative remedy to bring the issue to the court exists, "not whether, due to tactical choices or procedural errors, the party has lost its right to bring an issue to this Court through an appeal . . . ."[415] Justice Maring determined the State's failure to bring the issue to the court through the appeal process was the direct result of the State's tactical and procedural choices.[416] Justice Maring concluded because an alternative remedy existed and the State could have brought the issue through an appeal, "the extraordinary remedy of issuing a supervisory writ" was not necessary, and the State's petition for a supervisory writ should have been denied.[417]

409. *Id.* (citing State v. Brown, 2009 ND 150, ¶ 24, 771 N.W.2d 267, 275-76).
410. *Id.* ¶ 13.
411. *Id.* ¶ 14.
412. *Id.* ¶ 17, 728 N.W.2d at 631 (Maring, J., dissenting).
413. *Id.* ¶¶ 17-18.
414. *Id.* ¶ 20, 728 N.W.2d at 632.
415. *Id.* ¶ 21.
416. *Id.* ¶ 22.
417. *Id.* ¶¶ 22-23.

SETTLEMENTS—BOARDS AND COMMISSIONS—COLLEGES AND UNIVERSITIES

DAVIDSON V. STATE

In *Davidson v. State*,[418] members of the Committee for Understanding and Respect (Committee) appealed the district court's judgment dismissing their action against the State Board of Higher Education (Board).[419] The district court dismissed the Committee's attempt to enforce a settlement agreement against the Board and to enjoin the Board from "shortening the time period for the Spirit Lake Tribe and the Standing Rock Sioux Tribe to consider approving or rejecting [the] use of the 'Fighting Sioux' nickname and logo" by the University of North Dakota (UND).[420] The North Dakota Supreme Court affirmed the district court's judgment, holding the settlement agreement did not preclude UND or the Board from terminating the use of the "Fighting Sioux" nickname and logo before the two tribes had decided whether to approve or reject the use of the nickname and logo by UND.[421]

In August 2005, the National Collegiate Athletic Association (NCAA) prohibited its members from "using or displaying hostile and abusive racial or ethnic nicknames, mascots, or imagery at the NCAA championship events."[422] The NCAA identified UND's use of the "Fighting Sioux" nickname and logo as prohibited under the NCAA's newly adopted policy.[423] Opposing the policy, UND and the Board sued the NCAA in October 2006.[424] A year later, the parties entered into a settlement agreement.[425] The agreement specified UND and the Board would dismiss the suit against the NCAA and, in return, the NCAA would give UND until November 30, 2010, to obtain permission from the North Dakota Sioux Tribes for UND's use of the "Fighting Sioux" nickname and logo.[426]

418. 2010 ND 68, 781 N.W.2d 72.
419. *Davidson*, ¶ 1.
420. *Id.*, 781 N.W.2d at 73.
421. *Id.* ¶ 20, 781 N.W.2d at 78.
422. *Id.* ¶ 2, 781 N.W.2d at 73.
423. *Id.*
424. *Id.* ¶ 3.
425. *Id.*
426. *Id.* The North Dakota Sioux Tribes referred to in the settlement agreement were the Spirit Lake Tribe and the Standing Rock Sioux Tribe. *Id.* UND was to secure the tribes' "clear and affirmative support" in order to avoid application of the NCAA's policy. *Id.* The agreement further stated that "[i]f UND does not adopt a new nickname and logo, or if the transition to a new nickname and logo is not completed prior to August 15, 2011, then UND will be returned to the list of institutions subject to the Policy." *Id.* ¶ 4.

In April, 2009, one of the two tribes, the Spirit Lake Tribe, agreed to permit UND's continued use of the "Fighting Sioux" nickname and logo.[427] In May 2009, however, the Board voted to retire the nickname and logo beginning October 1, 2009.[428] The Board specified unless both tribes gave their approval for the continued use of the nickname and logo, UND would fully retire the name by August 1, 2010.[429] As of October 1, 2009, the Standing Rock Sioux Tribe had neither granted nor denied UND permission to continue using the name and logo.[430]

As a result, the Committee, which included members of the Spirit Lake Tribe, sought to enjoin the Board from retiring the "Fighting Sioux" nickname and logo before November 30, 2010, asserting such a termination violated the settlement agreement between the Board, UND, and the NCAA.[431] The district court granted the Committee's motion for a temporary restraining order.[432] The Board challenged the Committee's standing to seek enforcement of the settlement agreement and moved to dismiss the Committee's complaint before filing an answer, arguing the Board had the authority to terminate the use of the nickname and logo before November 30, 2010.[433] After a hearing on the issue, the district court found the Committee had standing to sue, but dismissed the complaint against the Board because the court concluded the settlement agreement unambiguously allowed the Board to terminate the use of the nickname and logo before November 30, 2010.[434] The Committee appealed.[435]

On appeal, the Committee argued under the plain and unambiguous language of the settlement agreement, the two tribes had until November 30, 2010, to approve the use of the "Fighting Sioux" nickname and logo and any decision by the Board to retire the nickname and logo prior to that date constituted a breach of the agreement.[436] Specifically, the Committee asserted, when considered in its entirety, the settlement agreement clearly intended to provide the two tribes with "a meaningful opportunity to demonstrate 'clear and affirmative support' for the Fighting Sioux nickname and logo by precluding the Board from retiring the nickname and logo

427. *Id.* ¶ 5, 781 N.W.2d at 74.
428. *Id.*
429. *Id.*
430. *Id.*
431. *Id.* ¶ 6.
432. *Id.*
433. *Id.*
434. *Id.* ¶ 7.
435. *Id.*
436. *Id.* ¶ 12.

before November 30, 2010."[437] The Board responded nothing in the language of the settlement agreement required the Board to wait until November 30, 2010, before retiring the nickname and logo.[438] The Board further contended "when read as a whole," the agreement allowed UND to retire the "Fighting Sioux" nickname and logo and transition to a new nickname and logo at any time before November 30, 2010.[439]

In addressing the parties' arguments, the North Dakota Supreme Court first explained under Article VIII of the North Dakota Constitution, the Board has the authority to control and administer the State's educational institutions, such as UND.[440] The court then stated nothing in the language of the settlement agreement limited the Board's constitutional authority or precluded the Board from retiring the "Fighting Sioux" nickname and logo before November 30, 2010.[441] Moreover, although the settlement agreement gave UND until November 30, 2010, to obtain the approval of the two tribes, the agreement did not require, and UND did not agree to, the continued use of the "Fighting Sioux" name and logo until that date.[442] The court noted the settlement agreement allowed UND to retain the rights over the "Fighting Sioux" if UND chose to transition to a new nickname and logo on November 30, 2010, or at any time before November 30, 2010.[443] Accordingly, the court concluded, the plain and unambiguous language of the agreement should be construed to allow UND to retire the "Fighting Sioux" nickname and logo and transition to a new nickname and logo at any time before November 30, 2010.[444] Therefore, the agreement did not provide the two tribes with the sole authority to determine the use of the "Fighting Sioux" nickname and logo and did not preclude the Board from terminating the usage of the nickname and logo before November 30, 2010.[445]

437. *Id.* ¶ 15, 781 N.W.2d at 76.
438. *Id.* ¶ 16.
439. *Id.*
440. *Id.* ¶ 17, 781 N.W.2d at 76-77 (citing N.D. CONST. art. VII, § 5).
441. *Id.*, 781 N.W.2d at 77.
442. *Id.* ¶ 18.
443. *Id.*
444. *Id.*
445. *Id.* ¶ 20, 781 N.W.2d at 78.