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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, the majority of which originate from cases decided between April 2008 and April 2009, are included in the Review:

ALTERNATIVE DISPUTE RESOLUTION—ARBITRATION AGREEMENTS—STAY OF PROCEEDINGS PENDING ARBITRATION

CITIBANK (SOUTH DAKOTA) NA V. REIKOWSKI

In *Citibank v. Reikowski*,[1] Sarah Reikowski appealed a district court order that (1) denied her motion to vacate summary judgment; (2) granted Citibank summary judgment; (3) denied her motion for a new trial; (4) denied her motion to vacate the order which vacated the stay of litigation pending arbitration; and (5) dismissed her counterclaim.[2] The North Dakota Supreme Court vacated the summary judgment motion, reversed the order denying summary judgment, and held the litigation should have been stayed pending arbitration.[3]

Reikowski owed $13,612.45 to Citibank on a credit card account.[4] Citibank sued and obtained a default judgment for the money due.[5] In a 2005 appeal, the North Dakota Supreme Court vacated the default judgment and reversed and remanded the suit.[6] In August 2007, Citibank moved for summary judgment.[7] Subsequently, on September 22, 2007, Reikowski moved to stay the litigation pending arbitration.[8] The credit card agreement terms provided for a litigation stay pending arbitration.[9] Citibank agreed to arbitrate on September 28, 2007, so long as the arbitration complied with the credit card agreement and commenced within 30 days.[10] Even though the parties agreed to stay the litigation pending arbitration, the district court granted Citibank's motion for summary judgment on October 1, 2007, entered judgment in favor of Citibank on October 24, 2007, and entered an order staying litigation pending arbitration.[11]

On appeal, Reikowski argued that the district court erred because the litigation should have been stayed in lieu of arbitration proceedings.[12] To support her assertion, she cited sections 3, 7, and 9 of the Federal Arbitra-

1. 2009 ND 12, 760 N.W.2d 97.
2. *Reikowski*, ¶ 1, 760 N.W.2d at 98.
3. *Id.* ¶ 13, 760 N.W.2d at 100.
4. *Id.* ¶ 2, 760 N.W.2d at 98.
5. *Id.* ¶ 3. Reikowski represented herself. 760 N.W.2d at 98.
6. *Reikowski*, ¶ 3. *See also* Citibank v. Reikowski, 2005 ND 133, 699 N.W.2d 851.
7. *Reikowski*, ¶ 3, 760 N.W.2d at 98.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 98-99.
12. *Id.* ¶ 4, 760 N.W.2d at 99.

tion Act (FAA) and section 7 of the North Dakota Uniform Arbitration Act.[13] Citibank asserted that Reikowski waived her right to assert the North Dakota Uniform Arbitration Act because she did not argue that North Dakota law would control in her appeal.[14] Instead, Citibank argued that South Dakota law should be applied.[15] Citibank also noted that Reikowski had not argued for South Dakota application of law.[16] The credit card agreement contained an agreement that federal and South Dakota law would apply to any disputes.[17]

The North Dakota Supreme Court agreed with Citibank and concluded Reikowski had not argued for the application of South Dakota arbitration law.[18] The court noted its general rule, that the court will not consider questions that were not raised before the district court.[19] However, the court also stated that it will consider and apply the appropriate statutes if the results would otherwise be erroneous or incomplete applications of the law.[20]

Therefore, the court considered South Dakota Codified Law section 21-25A-7, which provides: "Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefore has been made under § 21-25A-5 [Application to compel arbitration] or, if the issue is severable, the stay may be with respect thereto only."[21] The court stated that section 21-25A-7 required the district court to stay the litigation until it considered the motion to stay litigation and compel arbitration.[22] The court noted that Reikowski made her motion to stay litigation and compel arbitration before the court signed and entered judgment on the summary judgment motion.[23] Moreover, in addition to the statute, the court cited *Williston on Contracts*, which provides "[o]rdinarily, a court that is asked to stay proceedings pending arbitration must first determine whether parties agreed to arbitrate and the scope of that

13. *Id.* ¶ 6.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* The agreement provides: "Applicable Law: The terms and enforcement of this Agreement shall be governed by federal law and the law of South Dakota, where we are located." *Id.*
18. *Id.* ¶ 7.
19. *Id.* (citing Griggs v. Fisher, 2006 ND 255, ¶ 8, 725 N.W.2d 201).
20. *Id.*
21. *Id.* ¶ 8, 760 N.W.2d at 100 (citing S.D. CODIFIED LAWS § 21-25A-7 (2004)).
22. *Id.* ¶ 9.
23. *Id.*

agreement."[24] Because both parties had notified the district court that an arbitration agreement existed and that this case fell within the agreement, the North Dakota Supreme Court concluded that the district court erred by failing to stay the litigation and granting summary judgment.[25]

The court also explained that it would have reached the same result under federal law.[26] Section 3 of the FAA provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.[27]

The court explained that it had applied South Dakota law to this dispute and that section 7 of South Dakota Codified Laws is consistent with the FAA.[28] Thus, the court vacated the district court's summary judgment and judgment orders, reversed the order denying the motion to vacate summary judgment, and remanded the case for entry of an order staying litigation pending arbitration.[29]

24. *Id*. (citing 21 RICHARD A. LORD, WILLISTON ON CONTRACTS § 57:57, at 378 (4th ed. 2001)).
25. *Id*. ¶ 10.
26. *Id*. ¶ 11.
27. *Id*.
28. *Id*. ¶ 12.
29. *Id*. ¶ 13.

CONSTITUTIONAL LAW—CIVIL COMMITMENT—PETITION FOR DISCHARGE

IN RE E.W.F.

In *In re E.W.F.*,[30] E.W.F. appealed an order denying his petition for discharge from commitment as a sexually dangerous individual, contending the State failed to prove that he was likely to engage in further acts of sexually predatory conduct and that his commitment violated his substantive due process rights.[31] The North Dakota Supreme Court affirmed.[32]

In 1994, E.W.F. (at the time twenty-one years old) molested his five-year-old niece.[33] After pleading guilty to gross sexual imposition in September 1995, he was sentenced to prison.[34] Three years later, in September 1998, he was committed to the North Dakota State Hospital as a sexually dangerous individual.[35] For the following eight years, E.W.F. waived his statutory right to annually petition for discharge.[36] In September 2007, he petitioned for discharge, and a hearing was held on January 3, 2008.[37]

State hospital staff psychologist Lynne Sullivan testified as an expert witness for the State during the hearing.[38] She testified that E.W.F. still suffered from two sexual disorders—paraphelia not otherwise specified and pedophilia.[39] Dr. Sullivan based her opinion on review of E.W.F.'s prior evaluations and current reports of his behavior at the state hospital.[40] In September 2007, Dr. Sullivan had prepared a Sexually Dangerous Individual Annual Re-evaluation Report, which the State filed with the district court prior to the hearing.[41] The report was not served upon E.W.F. or his counsel; nor was it offered by the State at the hearing.[42]

The district court found E.W.F. continued to be a sexually dangerous individual and denied his petition for discharge on January 9, 2008.[43] E.W.F. appealed, arguing the State failed to prove by clear and convincing

30. 2008 ND 130, 751 N.W.2d 686.
31. *In re E.W.F.*, ¶¶ 1, 7, 751 N.W.2d at 688-89.
32. *Id.* ¶ 1, 751 N.W.2d at 688.
33. *Id.* ¶ 2.
34. *Id.*
35. *Id.*
36. *Id.* ¶ 3.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* ¶ 6, 751 N.W.2d at 689.

evidence that he was likely to engage in further acts of sexually predatory conduct and that his substantive due process rights were violated.[44] The state supreme court reviewed under a modified clearly erroneous standard, under which civil commitments of sexually dangerous individuals are affirmed unless the district court's order is induced by an erroneous view of the law, or if the court is firmly convinced the order is not supported by clear and convincing evidence.[45]

E.W.F.'s first argument was that the State failed to prove by clear and convincing evidence that he was likely to engage in further acts of sexually predatory conduct.[46] His argument was based on the fact that the State did not offer Dr. Sullivan's written annual report during E.W.F.'s hearing.[47] The court concluded that contrary to E.W.F.'s contention, the State was not required to offer the report during the hearing; nor was it required to submit the report to E.W.F.[48] Under section 25-03.3-17(2) of the North Dakota Century Code, the State must conduct an annual examination of a committed individual's mental condition, and a report regarding that examination "must be provided to the court that committed the individual."[49] The statute does not require that the report be offered during the defendant's hearing; nor must the report be submitted to the defendant himself.[50] Similarly, the court wrote that section 25-03.3-18 of the North Dakota Century Code does not require that the written report be offered during the petition for discharge hearing.[51]

Furthermore, while E.W.F. did exercise his right to an independent psychological evaluation, he did not call the independent psychologist to testify during the discharge hearing.[52] The court held it was not improper for the district court to draw a negative inference from E.W.F.'s failure to

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44. *Id.* ¶ 7.

45. *Id.* ¶ 8 (citing In re Hehn, 2008 ND 36, ¶ 17, 745 N.W.2d 631).

46. *Id.* ¶ 11. The State must prove, by clear and convincing evidence, three elements before an individual may be committed: 1) That the individual engaged in sexually predatory conduct; 2) That the individual has a congenital or acquired condition that is manifested by a sexual disorder, a personality disorder, or other mental disorder or dysfunction; and 3) That the condition makes the 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. N.D. CENT. CODE § 25-03.3-01(8). Here, E.W.F. did not contend the State failed to meet its burden on the first two elements. *In re E.W.F.*, ¶ 11, 751 N.W.2d at 689. Instead, he argued solely that the State failed to prove, by clear and convincing evidence, that he was likely to engage in further acts of sexually predatory conduct. *Id.*

47. *Id.* ¶ 12.

48. *Id.* ¶ 13, 751 N.W.2d at 690 (citing N.D. CENT. CODE §§ 25-03.3-17 and 25-03.3-18).

49. *Id.* (citing N.D. CENT. CODE § 25-03.3-17).

50. *Id.*

51. *Id.* ¶ 14 (citing N.D. CENT. CODE § 25-03.3-18).

52. *Id.* ¶ 16.

call the independent psychologist; indeed, the district court could use the negative inference in determining whether there was clear and convincing evidence of E.W.F.'s likelihood of engaging in further acts of sexually predatory conduct.[53]

E.W.F. next contended that his substantive due process rights were violated, alleging his civil commitment served as an unconstitutional mechanism for punishing his underlying criminal conviction.[54] First, the court concluded E.W.F. gave no factual argument that his psychiatric diagnosis, and the severity of the mental abnormality itself, was not sufficient to distinguish him from the dangerous, but typical, recidivist convicted in an ordinary criminal case, the standard required by the United States Supreme Court case *Kansas v. Crane*.[55] Next, E.W.F. contended that his commitment lasted more than a "potentially indefinite" period of time, in violation of the United States Supreme Court holding of *Kansas v. Hendricks*.[56] He based this contention on the fact that he had been committed for nine years without improvement, and on the fact that the State committed about sixty sex offenders in the last ten years, none of whom had been released for successful completion in a treatment program.[57] The state supreme court determined that the fact that E.W.F. had been at the state hospital for a period of nine years, without more, did not show he would remain there indefinitely.[58] The court concluded by stating that because E.W.F.'s constitutional claims were not supported with substantial fact or law, the claims were not ripe for review.[59]

The court affirmed the district court's order denying E.W.F.'s petition for discharge.[60]

53. *Id.* at 691.
54. *Id.* ¶ 17.
55. *Id.* ¶ 19 (citing Kansas v. Crane, 534 U.S. 407 (2002)).
56. *Id.* ¶ 20, 751 N.W.2d at 692 (citing Kansas v. Hendricks, 521 U.S. 346, 363-64 (1997)).
57. *Id.*
58. *Id.* ¶ 21.
59. *Id.*
60. *Id.* ¶ 22.

CONSTITUTIONAL LAW—RIGHT OF ACCESS TO CRIMINAL TRIALS—JURY QUESTIONNAIRES

FORUM COMMUNICATIONS COMPANY V. PAULSON

In *Forum Communications Company v. Paulson*,[61] Forum Communications petitioned for a supervisory writ directing the district court to vacate its order sealing juror questionnaires and any other information that would help identify the full names of jurors in a concluded murder trial.[62] The North Dakota Supreme Court issued a supervisory writ reversing the district court's order and directing the district court to consider Forum Communications' request for information under the guidelines set forth by the court.[63]

Moe Maurice Gibbs was charged in Barnes County, North Dakota, with the murder of Mindy Morgenstern, a Valley City State University student.[64] The case was assigned to Judge John T. Paulson, a district court judge in the Southeast Judicial District. Pretrial publicity caused the trial to be moved from Valley City in Barnes County to Minot in Ward County.[65] The district court approved expanded media coverage of the trial in June 2007, but also issued an order restricting extrajudicial comments to the public or to the media.[66]

The State and Gibbs stipulated to the use of a jury questionnaire for prospective jurors to answer before trial.[67] The thirty-four page questionnaire covered several broad categories, including personal information, residence, family, education, employment, previous employment, personal, military, law enforcement and legal contacts, criminal justice system, juror service, and miscellaneous.[68] The parties also stipulated that the questionnaire would be held confidential, with the exception of distribution to court personnel, attorneys-of-record, and the parties themselves.[69] The district court approved the stipulation.[70]

Voir dire proceedings during the Minot trial were closed to the public and the media.[71] At one point during the trial, a district court judge for the

61. 2008 ND 140, 752 N.W.2d 177.
62. *Forum Commc'ns Co.*, ¶ 1, 752 N.W.2d at 178.
63. *Id.*
64. *Id.* ¶ 2.
65. *Id.*
66. *Id.*
67. *Id.* ¶ 3.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* ¶ 4.

Northwest Judicial District issued a disorderly conduct restraining order against a Bismarck resident attending the trial.[72] The jury in the Minot trial deadlocked on a verdict, and the trial was rescheduled for October 2007, in Bismarck.[73]

The district court in the second trial issued a scheduling order requiring each prospective juror to complete the juror questionnaire used in the first trial.[74] Forum Communications moved to open courtroom proceedings, including voir dire, to the public, to unseal court documents, including the completed jury questionnaires, and to vacate the gag order.[75] The district court ordered that the public be allowed access to jury voir dire, subject to closure whenever counsel believed sensitive subjects would be discussed with prospective jurors.[76] The district court also granted access to a blank juror questionnaire, but left intact the order restricting extrajudicial comments.[77] During five days of jury selection in Bismarck, the public and the media were allowed to attend voir dire, subject to some *in camera* proceedings, but the jurors were referred to only by their first names and the initial of their last names.[78] In November 2007, the Bismarck jury returned a guilty verdict.[79]

In December 2007 and January 2008, Forum Communications asked the district court to release the names of the jurors in the Bismarck trial.[80] The district court sealed the juror questionnaires and any other identifying information until "such time as any appeal, or any ordered retrial and appeal therefrom have been determined."[81] The district court stated as reasoning for its order that "the Court gave its word to the jurors . . . that it would protect those jurors' identity as confidential. And . . . the Court had previous harassment problems of jurors and counsel from a Bismarck man when the case was tried in Minot, North Dakota."[82] Forum Communications petitioned the North Dakota Supreme Court to issue a supervisory writ reversing the district court's order.[83]

72. *Id.*
73. *Id.* at 178-79.
74. *Id.* ¶ 5, 752 N.W.2d at 179.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* ¶ 6.
81. *Id.*
82. *Id.*
83. *Id.*

In its decision, the state supreme court began by concluding the case was an appropriate one to exercise its original jurisdiction because it involved "issues of vital concern about the interrelationship of guidelines for public and media access to court records, for juror privacy, and for a criminal defendant's right to a fair trial."[84] Additionally, the court found no adequate remedy by appeal existed to resolve the issues.[85]

The court first noted that the general public and the media have a constitutional right of access to criminal trials.[86] The court cited *Globe Newspaper Co. v. Superior Court*,[87] a United States Supreme Court case that gave two major rationales for the right of access to criminal trials—first, that criminal trials have historically been open to the press and the general public and second, that openness enhances the quality and safeguards the integrity of the fact-finding process for both the defendant and society as a whole.[88]

The right of access, however, is not absolute.[89] The court again cited *Globe*, writing, "Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[90]

The court turned to *Press-Enterprise Co. v. Superior Court*,[91] which held that jury voir dire is part of a criminal trial and is thus subject to the same right of access.[92] A presumption exists in favor of jury selection being as open to the public as any other part of a criminal trial.[93] The presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.[94] Furthermore, the findings must be articulated specifically enough that a reviewing court can determine whether the closure order was properly entered.[95]

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84. *Id.* ¶ 9, 752 N.W.2d at 180.

85. *Id.*

86. *Id.* ¶ *11* (citing Waller v. Georgia, 467 U.S. 39, 44-85 (1984); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 505 (1984); Globe Newspaper v. Superior Court, 457 U.S. 596, 603 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 558-81 (1980)).

87 457 U.S. 596 (1982).

88. *Forum Commc'ns Co.*, ¶ 11, 752 N.W.2d at 181 (citing *Globe*, 457 U.S. at 604-06).

89. *Id.*

90. *Id.* ¶ 11 (citing *Globe*, 457 U.S. at 604-06).

91. 464 U.S. 501 (1984).

92. *Forum Commc'ns Co.*, ¶ 12, 752 N.W.2d at 181 (citing *Press-Enterprise*, 464 U.S. at 505).

93. *Id.* ¶ 13, 752 N.W.2d at 182 (citing *Press-Enterprise*, 464 U.S. at 505-10).

94. *Id.* (citing *Press-Enterprise*, 464 U.S. at 510).

95. *Id.* (citing *Press-Enterprise*, 464 U.S. at 510).

The court stated that the right of access articulated in *Press-Enterprise* has been applied to preliminary jury questionnaires, such as the one at issue in *Forum Communications*.[96] Thus, both the public and media have a presumptive right of access to juror questionnaires that is not absolute and that must be balanced against both a defendant's right to a fair trial and jurors' privacy interests.[97] The presumption of openness can be overcome only by an overriding interest and must be articulated with findings specific enough to permit effective review.[98] Finally, any closure must be narrowly tailored to serve the competing interests.[99]

The court went on to note that section 27-09.1-09(3) of the North Dakota Century Code requires public access to jurors' names unless the interests of justice require the names be kept confidential.[100] The "interests-of-justice" standard has been interpreted to mean that the trial court must give specific and convincing reasons juror identities should be withheld, and that withholding should occur only in exceptional cases.[101]

Furthermore, the court cited North Dakota Supreme Court Administrative Rule 41, which requires public access to court records, with certain exceptions.[102] The first applicable exception is N.D. Sup. Ct. Admin. R. 41(5)(b)(5), which states that the names of qualified or summoned jurors and contents of jury qualification forms are open to the public unless by court order disclosure is prohibited or restricted.[103] The second applicable exception is N.D. Sup. Ct. Admin. R. 41(5)(b)(6), which states that records of juror voir dire are not open to the public, unless by court order disclosure is permitted.[104] Under N.D. Sup. Ct. Admin. R. 41(6)(b), when a request for public access is made, a court must decide whether sufficient grounds exist to overcome the presumption of openness of court records and may prohibit access according to applicable constitutional, statutory, and case law.[105] In making a decision whether to permit or prohibit access, the court must consider that the presumption of openness may be overcome only by an overriding interest, which must be specifically articulated and narrowly tailored.[106]

96. *Id.* ¶ 16.
97. *Id.* at 183.
98. *Id.*
99. *Id.*
100. *Id.* ¶ 17 (citing N.D. CENT. CODE § 27.09.1-09(3)).
101. *Id.* (citing In re Globe Newspaper Co., 920 F.2d 88, 93 (1st Cir. 1990)).
102. *Id.* ¶ 18 (citing N.D. SUP. CT. ADMIN. R. 41).
103. *Id.* ¶ 19, 752 N.W.2d at 184 (citing N.D. SUP. CT. ADMIN. R. 41(5)(b)(5)).
104. *Id.* (citing N.D. SUP. CT. ADMIN. R. 41(5)(b)(6)).
105. *Id.* (citing N.D. SUP. CT. ADMIN. R. 41(6)(b)).
106. *Id.* (citing N.D. SUP. CT. ADMIN. R. 41(6)(b)).

The North Dakota Supreme Court stated that the district court's decision to seal all information pertaining to juror identification was based on two articulated reasons: (1) that the district court gave "its word to jurors . . . that it would protect those jurors' identity as confidential," and (2) "previous harassment problems of jurors and counsel from a Bismarck man when the case was tried in Minot."[107] The court found those reasons insufficient to rebut the presumption of openness and to warrant a blanket closure, stating the public and the media have a First Amendment right of post-verdict access to jurors' names.[108] That right may be limited by articulated findings to protect privacy or juror safety, but the court found nothing in the record to suggest either harassment problems of the jurors during the Bismarck trial or any impending threats of juror harassment or safety.[109] Additionally, the court concluded that the district court did not articulate any specific findings to support closure to protect juror privacy or safety after the jury was discharged.[110] Thus, the court held that the names of the jurors who were sworn and tried the case to verdict must be released after notice was sent to each of them.[111]

Next, the court stated that the district court's findings did not support a blanket closure of the Bismarck trial jurors' questionnaires.[112] The desire of the trial judge to protect jurors, the court wrote, must be balanced against the right to access under the *Press-Enterprise* test.[113] The court also recognized that expanded questionnaires are a way of obtaining personal information from perspective jurors in a manner other than in open court.[114] Finally, the court suggested that the expanded jury questionnaires be accompanied by a paragraph that states in unambiguous language that the questionnaires will become public records, and that prospective jurors can respond to the questions by requesting a closed appearance before the judge with counsel and the accused present.[115] The judge can then decide if that portion of jury selection should be available under *Press-Enterprise*.[116]

The court remanded for the district court to consider the questionnaires of the Bismarck jurors and to determine if an overriding interest for closure overcame the presumption of openness under *Press-Enterprise* and N.D.

107. *Id.* ¶ 20, 752 N.W.2d at 185.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* ¶ 21.
113. *Id.*
114. *Id.* at 185-86.
115. *Id.* at 186.
116. *Id.*

Sup. Ct. Admin. R. 41.[117] The court held that at a minimum, recognized privacy concerns required redaction of jurors' dates of birth and non-public addresses and telephone numbers.[118] The court also directed the district court to consider possible redaction of questions pertaining to medications, whether jurors were victims of crimes, and information regarding racial and ethnic groups.[119] The court exercised its original jurisdiction and issued a supervisory writ reversing the district court's order and directing the court to consider Forum Communications' request for information under the guidelines set forth.[120]

Chief Justice VandeWalle specially concurred.[121] He wrote that in addition to the law cited in the opinion, N.D. Sup. Ct. Admin. R. 9 is also involved in selecting juries.[122] Rule 9(5) states that the administration and management of the jury system must comply with the Standards Relating to Juror Use and Management, which are incorporated in the rule as an appendix.[123] Standard 7, which governs voir dire, states that basic background information should be made available in writing to counsel or each self-represented party, unless disclosure is limited by the court in accordance with section 27-09.1-09 of the North Dakota Century Code.[124] That section, as the majority opinion noted, provides that the names of qualified jurors and the contents of jury qualification forms "shall be made available to the public unless the court determines in any instance that this information in the interest of justice should be kept confidential or its use limited in whole or in part."[125] Standard 7 also requires the judge to ensure that the privacy of prospective jurors is reasonably protected, and that questioning by counsel is consistent with the purposes of voir dire.[126]

Chief Justice VandeWalle next noted that N.D. Sup. Ct. Admin. R. 9(3) provides that the State Court Administrator shall file a jury selection plan with the Clerk of the North Dakota Supreme Court.[127] Rule 9(3) goes on to state that the plan "shall detail the procedures to be followed in selecting and managing jurors in order to implement the policies set forth" in the

117. *Id.* ¶ 22.
118. *Id.*
119. *Id.*
120. *Id.* ¶ 23.
121. *Id.* ¶ 26 (VandeWalle, C.J., concurring).
122. *Id.* (citing N.D. SUP. CT. ADMIN. R. 9).
123. *Id.* (citing N.D. SUP. CT. ADMIN. R. 9(5)).
124. *Id.* (citing N.D. CENT. CODE § 27-09.1-09).
125. *Id.* at 187 (citing N.D. CENT. CODE § 27-09.1-09).
126. *Id.* ¶ 27.
127. *Id.* ¶ 28 (citing N.D. SUP. CT. ADMIN. R. 9(3)).

Uniform Jury Selection and Service Act.[128] The jury selection plan recognizes a distinction between the juror qualification form, which contains only questions about the qualifications of the prospective juror to sit on any jury, and the jury questionnaire, which seeks information that the parties or their counsel use in determining whether a prospective juror should be challenged for cause or peremptorily removed from a panel in a particular case.[129] It is the questionnaire, Chief Justice VandeWalle noted, that may ask questions that call for answers which should remain confidential due to juror privacy.[130] Thus, in an effort to reasonably protect the privacy of prospective jurors, the district court in future cases may be unwilling to allow an expanded jury questionnaire.[131]

Additionally, Chief Justice VandeWalle wrote, it is problematic that counsel will ask each juror the amount of questions that may be included in an expanded jury questionnaire during voir dire in open court.[132] Therefore, he noted, the agreement to keep the questionnaires confidential has some logical purpose—but the sweep of confidentiality in this case was too great.[133] Chief Justice VandeWalle concluded his concurrence by highlighting the balancing process between the public's right to access and the juror's right to privacy.[134]

128. *Id.* (citing N.D. SUP. CT. ADMIN. R. 9(3)).
129. *Id.* ¶ 30.
130. *Id.*
131. *Id.* ¶ 32.
132. *Id.*
133. *Id.*
134. *Id.* ¶ 33, 752 N.W.2d at 187-88.

CONSTITUTIONAL LAW—SPECIAL LAWS, PRIVILEGES AND IMMUNITIES, GIFTS

TEIGEN V. STATE

In *Teigen v. State*,[135] James Teigen, Deb Lundgren, Greg Svenningsen, the North Dakota Farmers Union, and the Dakota Resource Council appealed a summary judgment dismissing their declaratory judgment action.[136] They challenged the constitutionality of language in sections 4-28-07(4) and 4-28-07.1(4) of the North Dakota Century Code, relating to the North Dakota State Wheat Commission.[137]

The statute requires the North Dakota State Wheat Commission to expend at least two mills of a wheat tax for contracts for activities related to domestic wheat policy issues, wheat production, promotion, and sales.[138] The statute also requires the contracts to be between no more than two trade associations that are incorporated in the state and that have as their primary purpose the representation of wheat producers.[139] The plaintiffs claimed the law effectively compels the State Wheat Commission to contract with two specific entities, the North Dakota Grain Growers Association and the Durum Growers Association of the United States.[140] The plaintiffs also claimed the statute violates state constitutional provisions that prohibit special laws, gifts, and special privileges and immunities.[141]

The North Dakota Supreme Court held the law was constitutional, and affirmed.[142] The court first stated that the issue of whether a statute is constitutional is a question of law, fully reviewable on appeal.[143] It noted the court exercises the power to declare legislation unconstitutional with great restraint and will not do so unless at least four justices agree on the unconstitutionality.[144]

The court began its analysis with whether the statute violates the special law provision of the North Dakota constitution, which prohibits the

135. 2008 ND 88, 749 N.W.2d 505.

136. *Teigen*, ¶ 1, 749 N.W.2d at 507.

137. *Id.* The same language, after the 2009 legislative session, is found in section 4.1-13-23 of the North Dakota Century Code.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* ¶ 7, 749 N.W.2d at 509.

144. *Id.*

legislature from enacting local or special laws.[145] Special laws, the court stated, are those relating to particular persons or things of a class.[146] The plaintiffs argued the effect of the trade association clause is to create a special law, contending that while the language of the statute is neutral, the underlying intent and effect is that contracts go only to the Grain Growers Association and the Durum Growers Association.[147]

The court laid out the standard of review of a classification under the special laws provision—reasonableness.[148] A statutory classification is reasonable, the court stated, if it is "natural, not arbitrary, and standing upon some reason having regard to the character of the legislation of which it is a feature."[149] The court went on to state that a classification is reasonable if it "bears alike upon all persons and things upon which it operates and it contains no provision that will exclude or impede this uniform operation upon all citizens, subjects and places within the state provided they are brought within the relations and circumstances specified in the statute."[150]

The court then went through previous case law regarding special law provisions, noting that the common inquiry in special law cases is whether statutory classifications are written in general terms, rather than applying to particular persons or things.[151] Additionally, if written in general terms, the court examines whether the classification "closes the door against accessions to the class."[152] The court recognized that special law challenges necessarily involve statutory interpretation, a question of law fully reviewable on appeal.[153]

The court stated that the trade association clause is phrased in general terms that "contracts may be with no more than two trade associations that are incorporated in this state and which have as their primary purpose the representation of wheat producers."[154] The plain language of the clause, the court opined, does not contemplate a closed class and does not preclude other organizations from further accession into the class if they meet those qualifications.[155] Instead, the clause operates alike for all similarly situated

145. *Id.* ¶ 9.
146. *Id.* ¶ 12, 749 N.W.2d at 510 (citing MCI Telecomms. Corp. v. Heitkamp, 523 N.W.2d 548 (N.D. 1994)).
147. *Id.* ¶ 9, 749 N.W.2d at 509.
148. *Id.* ¶ 13, 749 N.W.2d at 510.
149. *Id.* (quoting Best Prods. Co., Inc. v. Spaeth, 461 N.W.2d 91, 99 (N.D. 1990)).
150. *Id.* at 511 (quoting *Best Prods.*, 461 N.W.2d at 99).
151. *Id.* ¶ 18, 749 N.W.2d at 512.
152. *Id.* (quoting Edmonds v. Herbrandson, 2 N.D. 270, 50 N.W. 970 (1891)).
153. *Id.* ¶¶ 18, 19, 749 N.W.2d at 513.
154. *Id.* ¶ 20.
155. *Id.*

entities that satisfy the statutory requirements for a contract.[156] The court also stated that because the language of the trade association clause is clear and unambiguous, it would not resort to legislative history or administrative interpretation to construe the plain meaning of the statute.[157] Thus, the court concluded the trade association clause is a general law, and the general classification for trade associations incorporated in North Dakota that have as their primary purpose the representation of wheat producers is reasonable in view of the contractual services sought by the state wheat commission.[158]

The plaintiffs next argued that the trade association clause is unconstitutional as a law granting special privileges and immunities under the state's equal protection clause.[159] Because the trade association clause involves social and economic legislation regarding the wheat industry, the state supreme court applied rational basis scrutiny.[160] Under the rational basis standard, a legislative classification is sustained unless it is arbitrary and bears no rational relationship to a legitimate governmental interest.[161] The court concluded it was not unreasonable for the legislature to classify trade associations incorporated in the state and having as their primary purpose the representation of wheat producers from other groups for purposes of contracting for activities related to domestic wheat policy issues, wheat production, promotion, and sales.[162] The court further concluded the legislature's classification of trade associations bore a rational relationship to a legitimate government interest of promoting activities related to domestic wheat policy issues, wheat production, promotion, and sales.[163] Thus, the court held the trade association clause satisfies rational basis scrutiny and does not violate the equal protection clause of the state constitution.[164]

Finally, the plaintiffs argued the trade association clause constitutes a gift to the Grain Growers Association and the Durum Growers Association in violation of Article X of the North Dakota Constitution, because the statute eliminates competitive bidding and the money paid to the two associations is unrelated to the services provided.[165] Because the amount of the final payment from collection of the wheat tax is not known when the

156. *Id.*
157. *Id.* ¶ 21, 749 N.W.2d at 514.
158. *Id.* ¶ 23.
159. *Id.* ¶¶ 24, 25, 749 N.W.2d at 514, 515.
160. *Id.* ¶¶ 25, 26, 749 N.W.2d at 515.
161. *Id.* ¶ 26.
162. *Id.* ¶ 27.
163. *Id.*
164. *Id.*
165. *Id.* ¶¶ 28, 29.

contract is executed, the plaintiffs claimed there is no correlation between the value received by the state and the funds paid by the state for the services—thus rendering the trade association clause a gift.[166] The court stated that the statute does not contemplate a gift; rather, it contemplates a contract for services and does not preclude competitive bidding with entities that meet the qualifications imposed by the statute.[167] The court also noted that the state wheat commission regularly enters into written contracts with entities qualified under the statute—contracts that identify the services to be performed by the entity, restrict the use of funds received from the wheat commission to the performance of those services, and impose record-keeping and reporting requirements.[168]

The court went on to state that the competitive bidding process helps ensure that the state receives a substantial benefit for its contracts and that the successful bidders incur a detriment.[169] The court determined that although the amount of the payments under the contracts is uncertain because the statute is based on a per bushel mill assessment, a rational relationship exists between larger payments attributable to an increased number of bushels of wheat and the services provided because of that increased quantity.[170] The North Dakota Supreme Court, concluding the trade association clause is constitutional, affirmed the judgment of the district court.[171]

Justice Sandstrom specially concurred.[172] He disagreed to the extent that dicta in the majority opinion could be read as suggesting that any consideration, no matter how minimal, would be sufficient to defeat the state constitution's prohibition on gifts.[173] The state constitutional limitation on gifts, he wrote, is the action of the people in general to restrain government actors from gifting public funds or property; thus, private-contract consideration is not the appropriate standard to determine whether there has been a gift of public funds.[174]

166. *Id.* ¶ 29.
167. *Id.* ¶ 30, 749 N.W.2d at 516.
168. *Id.* ¶ 31.
169. *Id.*
170. *Id.*
171. *Id.* ¶ 32.
172. *Id.* ¶ 34 (Sandstrom, J., concurring).
173. *Id.*
174. *Id.* ¶ 35, 749 N.W.2d at 517.

CORPORATIONS—PIERCING THE CORPORATE VEIL

AXTMANN V. CHILLEMI

In *Axtmann v. Chillemi*,[175] Geri Chillemi, as sole shareholder, and Michael Jon Natwick, as vice president and secretary, appealed from a district court judgment piercing the corporate veil of Main Realty, Inc. and voiding the assignments of real estate listings from Main Realty to Mainland, Inc.[176] The decision arose after Main Realty was unable to satisfy a previous jury verdict imposing substantial liability on Main Realty due to a real estate transaction concerning Thomas and Arel Axtmann.[177] The North Dakota Supreme Court affirmed the district court's decision to pierce the corporate veil of Main Realty and reversed the part of the district court's judgment imposing liability on Mainland.[178]

Geri Chillemi and other individuals incorporated Main Realty, Inc. in 1985 to purchase the trade name Main and Company Realtors for $20,000 and to list and sell real estate through its agents.[179] Chillemi was the sole shareholder, president, and treasurer of Main Realty.[180] Michael Jon Natwick was the vice president and secretary of Main Realty.[181] Chillemi and Natwick resided with each other and were also partners in Mainland Ventures Unlimited, a partnership that owned commercial property and leased office space to Main Realty.[182] Chillemi was the designated broker at Main Realty, and office policy required its associates to sign a contract with Chillemi to establish independent contractor status.[183]

Main Realty used a uniform real estate salesperson contract, which established that its agents were regarded as independent contractors.[184] Under the contract, agents received one hundred percent of any earned commissions in exchange for monthly rent and expenses paid to Main Realty.[185] The contract was month-to-month and could be terminated for failure to pay rent, which would also cause the commission to decrease to fifty percent.[186]

175. 2007 ND 179, 740 N.W.2d 838.
176. *Axtmann*, ¶1, 740 N.W.2d at 840.
177. *Id.* ¶ 5, 740 N.W.2d at 842.
178. *Id.* ¶ 25, 740 N.W.2d at 847.
179. *Id.* ¶ 2, 740 N.W.2d at 840.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* ¶ 3.
184. *Id.* ¶ 4, 740 N.W.2d at 841.
185. *Id.*
186. *Id.* at 841-42.

Thomas and Arel Axtmann sued Main Realty and one of its agents regarding the purchase of a house.[187] A jury found Main Realty and the agent jointly and severally liable to the Axtmanns for $75,000 in economic damages.[188] Both the agent and Main Realty were further found guilty of fraud and liable for exemplary damages of $45,500 and $19,500, respectively.[189]

Following the Axtmann judgment, Main Realty held a special meeting of the board of directors, which included Chillemi and Natwick.[190] The minutes of this meeting stated that three of Main Realty's agents transferred to other companies, that the remaining rent from the other five agents was insufficient to cover the company's cost of doing business, and that it was impossible to find new agents to transfer to Main Realty.[191] Accordingly, a motion was carried to dissolve Main Realty and to vacate its premises.[192] At this meeting, Natwick resigned as vice president and secretary of Main Realty in order to form his own company.[193] Chillemi filled those vacancies until the corporation was dissolved.[194]

On May 19, 2004, Natwick incorporated Mainland, Inc.[195] Chillemi subsequently signed several agreements in which Main Realty agreed to relinquish to Mainland all claims for any commissions for the sale of real estate covered by its listing contract.[196] All commissions were to be paid to Mainland, and Mainland would be responsible for the listing contract.[197] Mainland did not pay Main Realty any consideration for these assignments.[198] On May 28, 2004, Chillemi closed Main Realty's bank account and used the remaining $150.52 to pay the company's telephone bill.[199] Main Realty was then involuntarily dissolved by the North Dakota Secretary of State for failing to file an annual report.[200]

The Axtmanns subsequently levied on Main Realty's property and received a mere $7.52 toward their judgment from a sheriff's sale of office equipment.[201] The Axtmanns sued Chillemi, Natwick, Mainland, Main

187. *Id.* ¶ 5, 740 N.W.2d at 842.
188. *Id.*
189. *Id.*
190. *Id.* ¶ 6.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* ¶ 7.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* ¶ 8.
200. *Id.*
201. *Id.* ¶ 9.

Realty, and Mainland Ventures, alleging that Main Realty fraudulently transferred the listing agreements and interests in commissions to Mainland for no value.[202] The Axtmanns sought a declaration that Mainland was a successor in interest to Main Realty for purposes of collecting on its prior judgment.[203] Further, the Axtmanns sought an order piercing the corporate veil of Main Realty to impose personal liability on Natwick and Chillemi for the company's debts.[204] The district court found that the listing contract transfers were fraudulent under chapter 13-02.1 of the North Dakota Century Code and that Mainland was liable for the Axtmann's judgment against Main Realty.[205] The court further pierced the corporate veil of Main Realty and held Chillemi and Natwick personally liable for the judgment.[206] On appeal to the North Dakota Supreme Court, Chillemi and Natwick argued that the district court erred in piercing the corporate veil of Main Realty.[207]

Chief Justice VandeWalle wrote for the majority in *Axtmann*. He began by stating that officers and directors are generally not liable for corporate debts due to the legitimate corporate principle of limited liability.[208] However, when the corporate structure is used to defeat public convenience, justify wrong, protect fraud, or defend crime, a corporation will be regarded as a mere "association of persons."[209] In making this determination, factors to consider include insolvency of the corporation at the time of the transaction in question, siphoning of funds by the dominant shareholder, and the existence of the corporation as a mere facade for individual dealings.[210] Furthermore, proof of fraud is not a necessary prerequisite for piercing the corporate veil, and there must be a degree of injustice, inequity, or fundamental unfairness.[211]

The standards for piercing the corporate veil are more flexible in tort than in contract.[212] Unlike contract actions, which involve an element of choice in entering the contractual relationship, tort cases involve unexpected occurrences.[213] Accordingly, in tort cases, greater significance is

202. *Id.*
203. *Id.*
204. *Id.* at 842-43.
205. *Id.* ¶ 10, 740 N.W.2d at 843.
206. *Id.*
207. *Id.* ¶ 11.
208. *Id.* ¶ 12 (citing Hanewald v. Bryan's, Inc., 429 N.W.2d 414, 415 (N.D. 1988), Jablonsky v. Klemm, 377 N.W.2d 560, 563 (N.D. 1985), and Hilzendager v. Skwarok, 335 N.W.2d 768, 774 (N.D. 1983)).
209. *Id.*
210. *Id.* ¶ 13 (quoting *Jablonsky*, 377 N.W.2d at 563).
211. *Id.*
212. *Id.* ¶ 14.
213. *Id.*

placed on corporate undercapitalization.[214] Doing corporate business without a sufficient basis of financial responsibility is an abuse of the separate entity.[215] If the organization is insufficiently capitalized when compared with its business dealings and risk of losses and liabilities, undercapitalization becomes a ground for piercing the corporate veil.[216] The burden of establishing this basis rests with the party making the claim, and the court must make a very fact-specific inquiry.[217]

The district court found three grounds for piercing the corporate veil: Main Realty was undercapitalized, it was insolvent at the time of the Axtmanns' judgment, and it was a "pass through" corporation with no substantial assets.[218] Under the clearly erroneous standard of review, the North Dakota Supreme Court first addressed the appellants' argument that Main Realty was sufficiently capitalized.[219] The appellants maintained that Main Realty functioned properly for twenty years, followed corporate formalities, and was solvent up until the Axtmanns' judgment.[220]

The district court made particular findings regarding the appellants' primary argument that it was sufficiently capitalized.[221] The district court found that after Chillemi purchased the business, there was no evidence that additional capital was put into the business, and that it was foreseeable that Main Realty might be liable for claims by customers, which would require further capitalization.[222] Further, the district court found that Main Realty was insolvent at the time of the Axtmanns' judgment, as it was unable to pay its normal debts and it was forced to rely on Chillemi's personal credit to operate.[223]

The North Dakota Supreme Court concluded that although Main Realty met all the statutory requirements of a real estate brokerage firm, it could not use its corporate form to avoid foreseeable liabilities.[224] The majority agreed with the district court and held that the record did not reflect any further capitalization of Main Realty for foreseeable liabilities, such as the Axtmanns' judgment.[225] Although Main Realty's salesperson contract

214. *Id.*
215. *Id.* at 844.
216. *Id.*
217. *Id.* ¶ 15.
218. *Id.* ¶ 16.
219. *Id.* ¶ 17.
220. *Id.*
221. *Id.* ¶18, 740 N.W.2d at 845.
222. *Id.*
223. *Id.*
224. *Id.* ¶ 20, 740 N.W.2d at 846.
225. *Id.*

provides for different commission percentages in certain situations, the record contained no evidence that Realtors were paid anything less than a full one hundred percent commission.[226] As a result, the listing agreements assigned by Main Realty to Mainland belonged to the respective listing agent and had no value to Main Realty, which supported the district court's finding that Main Realty was undercapitalized.[227]

The majority also recognized that Main Realty's annual meeting minutes established that it was not realizing a profit and had outstanding credit card debt.[228] Chillemi and Natwick had used their personal commissions to pay the debt.[229] The court determined that although Main Realty may have operated for several years, it struggled to satisfy its debt.[230] This factored into the court's undercapitalization analysis.[231]

After considering Main Realty's undercapitalization and reviewing the record, the North Dakota Supreme Court did not hold that the district court's decision was clearly erroneous.[232] However, the court expressly concluded that the district court erred in holding that the listing agreement transfers to Mainland were fraudulent.[233] This conclusion was based on the fact that the agreements had no value to Main Realty and belonged to the respective agents.[234] Therefore, Mainland should not have been liable as a continuation of Main Realty, and the court reversed the part of the judgment imposing liability on Mainland.[235]

Justice Crothers wrote a dissenting opinion in *Axtmann*.[236] Justice Crothers concurred with the majority's opinion reversing the district court imposing successor liability on Mainland, but dissented from the part of the majority opinion affirming the district court's piercing of Main Realty's corporate veil.[237] Justice Crothers expressed his concern that the majority's holding would make piercing the corporate veil the "rule, rather than the exception" and set dangerous precedent.[238]

Justice Crothers stated that categorizing a corporation as a "pass-through" corporation is not per se bad or determinative of inequity because

226. *Id.* ¶ 21.
227. *Id.*
228. *Id.* ¶ 22.
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.* ¶ 24, 740 N.W.2d at 847.
233. *Id.*
234. *Id.*
235. *Id.* ¶¶ 24, 25.
236. *Id.* ¶ 26 (Crothers, J., concurring in part and dissenting in part).
237. *Id.* ¶ 27.
238. *Id.*

the corporate entity is primarily used for limited liability purposes.[239] It is a legitimate and recognized reason for the corporate entity.[240] Further, Main Realty was an S corporation, which is designed to pass income through the corporation to the owner-shareholder.[241] For these reasons, Justice Crothers believed that the majority erroneously characterized Main Realty as a "pass through" or "shell" corporation.[242]

Justice Crothers also opined that the district court's finding that Main Realty was undercapitalized was erroneous.[243] The correct application of the law would have required examining the corporation's capitalization at its formation.[244] Main Realty was initially capitalized with $20,000 and had a very limited operation.[245] Therefore, Justice Crothers stated the district court erroneously concluded that Main Realty was undercapitalized or without profits sufficient to meet its capital needs.[246] Instead, the corporation's debt should receive little or no weight in the analysis.[247] Piercing Main Realty's corporate veil would mean that a corporation must ignore realities of organization, finance, and taxation, and have sufficient reserve money to pay any substantial judgment.[248] Justice Crothers found this result too hostile to small businesses and inconsistent with legislative intent, and therefore dissented.[249]

Justice Sandstrom wrote separately, concurring and dissenting from the majority opinion.[250] Justice Sandstrom dissented from the majority's holding that Main Realty had no interest in the listing contracts or that they had no value.[251] The listing contracts were contracts between the owner of the property and the broker, Main Realty.[252] Because under North Dakota law the broker is entitled to receive the commission and any commitment to pay the salesperson a commission is an unsecured obligation, the listing contracts were an asset of Main Realty.[253] Therefore, according to Justice

239. *Id.* ¶ 39, 740 N.W.2d at 852.
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.* ¶ 40.
244. *Id.* ¶ 41.
245. *Id.* ¶ 42, 740 N.W.2d at 853.
246. *Id.*
247. *Id.* ¶ 43.
248. *Id.* ¶ 44.
249. *Id.*
250. *Id.* ¶ 45 (Sandstrom, J., concurring and dissenting).
251. *Id.* ¶ 48, 740 N.W.2d at 854.
252. *Id.* ¶ 49
253. *Id.* ¶¶ 49, 50.

Sandstrom, Main Realty had a claim against the value of the agreements, and their transfers were fraudulent.[254]

Justice Kapsner also concurred in part and dissented in part.[255] Justice Kapsner agreed with the majority in affirming the district court's piercing of the corporate veil, but dissented from the majority holding that reversed the judgment imposing liability on Mainland.[256] Like Justice Sandstrom, Justice Kapsner believed the listing agreements had value to Main Realty because of its right to receive rent or partial commissions under them.[257] The agreements were transferred without consideration while Main Realty was insolvent.[258] Justice Kapsner stated the trial court was not clearly erroneous when it found that the transfers were made with intent to hinder, delay, or defraud the Axtmanns.[259] Therefore, Justice Kapsner dissented from the majority's holding that the transfers to Mainland were not fraudulent.[260]

Justice Kapsner also criticized the majority for failing to discuss the independent basis of successor liability of Mainland.[261] Although a successor corporation is not generally liable for the debts of the predecessor corporation simply due to the transfer of assets, there are exceptions.[262] One such exception is when the successor corporation is a mere continuation of the selling company.[263] Justice Kapsner determined that this exception applied to the facts of the case and thus Mainland was a continuation of Main Realty and liable for the entire debt of Main Realty to the Axtmanns.[264]

In *Axtmann*, the North Dakota Supreme Court held that the district court was not clearly erroneous when it found that Main Realty was undercapitalized.[265] Further, the court held that Main Realty acted as a "pass-through" corporation for purposes of avoiding personal liability on its shareholders.[266] The court reversed the district court's judgment imposing liability on Mainland because the transfers of the listing agreements had no value and, therefore, were not fraudulent.[267]

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254. *Id.* ¶ 50.
255. *Id.* ¶ 52 (Kapsner, J., concurring in part and dissenting in part).
256. *Id.* ¶ 53.
257. *Id.* ¶ 54.
258. *Id.* ¶ 55.
259. *Id.*
260. *Id.*
261. *Id.* ¶ 56.
262. *Id.* ¶ 57.
263. *Id.* ¶¶ 57, 59.
264. *Id.* ¶ 60.
265. *Id.* ¶ 25, 740 N.W.2d at 847.
266. *Id.*
267. *Id.*

CRIMINAL LAW—ENDANGERMENT OF A CHILD—APPLICATION TO UNBORN CHILDREN

STATE V. GEISER

In *State v. Geiser*,[268] Michelle Geiser appealed a district court order denying her motion to dismiss the charge of endangerment of a child.[269] The North Dakota Supreme Court held the district court erred when it applied the charge of endangerment of a child to an unborn child.[270] The court reversed and remanded to allow Geiser the opportunity to withdraw her guilty plea to the child endangerment charge.[271]

Geiser allegedly overdosed on prescription drugs when she was twenty-nine weeks pregnant.[272] The State asserted that the overdose led to the demise of Geiser's unborn child, and charged her with possession of a controlled substance, ingesting a controlled substance, and endangerment of a child or vulnerable adult in violation of section 19-03.1-22.2 of the North Dakota Century Code.[273]

Geiser filed a motion to dismiss the charge of endangerment of a child or vulnerable adult, asserting that the term "child" applied to individuals under the age of eighteen and did not include unborn children.[274] The district court denied the motion, relying on *Hopkins v. McBane*,[275] in which the North Dakota Supreme Court held a wrongful-death action could be brought against one whose tortious conduct causes the death of a viable unborn child.[276] The district court also relied on *Whitner v. South Carolina*,[277] in which the South Carolina Supreme Court determined a viable fetus was a person for the purpose of a statute against child abuse, the minority view opinion.[278] Geiser entered a conditional guilty plea to the charge of child

268. 2009 ND 36, 763 N.W.2d 469.

269. *Geiser*, ¶ 1, 763 N.W.2d at 470.

270. *Id.*

271. *Id.*

272. *Id.* ¶ 2.

273. *Id.* ¶ 3. Section 19-03.1-22.2 of the North Dakota Century Code states, "[A] person who knowingly or intentionally causes or permits a child or vulnerable adult to be exposed to, to ingest or inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia as defined in subsection 1, is guilty of a class C felony." N.D. CENT. CODE § 19-03.1-22.2(2).

274. *Geiser*, ¶ 4, 763 N.W.2d at 470.

275 359 N.W.2d 862 (N.D. 1984).

276. *Geiser*, ¶ 5, 763 N.W.2d at 470 (citing Hopkins v. McBane, 359 N.W.2d 862, 865 (N.D. 1984)).

277. 492 S.E.2d 777 (S.C. 1997).

278. *Geiser*, ¶ 5, 763 N.W.2d at 470 (citing Whitner v. South Carolina, 492 S.E.2d 777, 780 (S.C. 1997)).

endangerment, reserving her right to appeal the district court's denial of her motion to dismiss.[279]

The North Dakota Supreme Court reversed the denial.[280] The court began by noting that the issue of whether the charge of endangerment of a child applies to an unborn child is one of statutory interpretation, a question of law that is fully reviewable on appeal.[281] Section 19-03.1-22.2(1)(b) of the North Dakota Century Code states that for the purposes of the child endangerment section, "child" is defined as "an individual who is under the age of eighteen years."[282] When interpreting statutes, the court stated, it has a duty to ascertain the legislature's intent.[283] The court construes the words of a statute in their plain, ordinary, and commonly understood sense.[284] Because the State advocated an expansive interpretation of "child" to include unborn children, the court reviewed extrinsic evidence to further interpret and construe the statute and to determine whether the State's interpretation was consistent with legislative intent.[285]

The first extrinsic evidence the court examined was legislative history.[286] The legislative history of section 19-03.1-22.2 did not indicate that the state legislature intended the statute to apply to unborn children.[287] The legislative history did explain that the law was modeled after a Utah statute, but neither the Utah Court of Appeals nor the Supreme Court of Utah has analyzed whether the Utah statute applies to an unborn child.[288]

The court next looked to the Code itself.[289] Section 14-10-01 of the North Dakota Century Code states, "Minors are persons under eighteen years of age. In this code, unless otherwise specified, the term 'child' means 'minor.' Age must be calculated from the first minute of the day on which persons are born to the same minute of the corresponding day completing the period of minority."[290] Thus, the court stated, whether the legislature used "child" or "minor" is irrelevant, because the terms are equivalent under the Code.[291] Additionally, the court stated, the legislature

279. *Id.*
280. *Id.* ¶ 1.
281. *Id.* ¶ 6 (citing Grey Bear v. N.D. Dep't of Human Servs., 2002 ND 139, ¶ 7, 651 N.W.2d 611).
282. *Id.* ¶ 7, 763 N.W.2d at 471 (citing N.D. CENT. CODE § 19-03.1-22.2(1)(b)).
283. *Id.* ¶ 8.
284. *Id.*
285. *Id.* ¶ 9.
286. *Id.* ¶ 10.
287. *Id.*
288. *Id.* ¶ 11.
289. *Id.* ¶ 12, 763 N.W.2d at 472.
290. *Id.* ¶ 13 (citing N.D. CENT. CODE § 14-10-01).
291. *Id.*

provided that the age of a child is calculated from the day on which the child is born, and thus an unborn child is neither a child nor a minor.[292]

The court next distinguished *Hopkins* from the case at hand.[293] In *Hopkins*, the court held that North Dakota's wrongful-death statute authorized a claim to be brought against one whose tortious conduct caused the death of a viable unborn child—thus, an unborn child has rights against a third party in a wrongful-death action.[294] However, the court stated, *Hopkins* does not necessarily imply that an unborn child has rights against the mother.[295] In *Hopkins*, the statute interpreted was remedial, and thus the court construed it liberally.[296] The child endangerment statute, by contrast, is criminal, and criminal statutes are strictly construed in favor of the defendant and against the government.[297]

Additionally, following *Hopkins*, the legislature enacted chapter 12.1-17.1 of the North Dakota Century Code, which recognized the rights of unborn children against actions of third parties.[298] This, the court stated, makes it clear that when the legislature intends to cover unborn children, it does so expressly.[299] Chapter 12.1-17.1 makes it a crime for a person to commit several acts (such as murder and assault) against an unborn child, but the legislature determined that for purposes of that statute, "person" does not include the pregnant woman.[300] Thus, the mother of an unborn child cannot be charged with a crime against her unborn child under chapter 12.1-17.1.[301]

Therefore, the court stated, its holding that a pregnant woman cannot be charged for a crime allegedly committed against her unborn child under section 19-03.1-22.2(1)(b) coincides with both *Hopkins* and chapter 12.1-17.1.[302] The court concluded by holding section 19-03.1-22.2 of the North Dakota Century Code does not apply to an unborn child.[303] The court reversed and remanded the district court order to allow Geiser an opportunity to withdraw her guilty plea to the charge of endangerment of a child.[304]

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292. *Id.*
293. *Id.* ¶¶ 14-16, 763 N.W.2d at 472-73.
294. *Id.* ¶ 15, 763 N.W.2d at 472.
295. *Id.*
296. *Id.* ¶ 16, 763 N.W.2d at 473.
297. *Id.*
298. *Id.* ¶ 17.
299. *Id.*
300. *Id.* ¶ 18.
301. *Id.*
302. *Id.* ¶ 19.
303. *Id.* ¶ 21, 763 N.W.2d at 474.
304. *Id.*

Justice Sandstrom specially concurred.[305] He agreed with the majority that the conviction must be set aside, writing that under the separation of powers system, it is not the role of the court to criminalize what the legislature has not clearly made criminal.[306] He disagreed, however, with the majority that the court should rely on section 14-10-01 of the North Dakota Century Code for its definition of a "child."[307] The introductory language of that section, he wrote, specifically provides that it applies only if no other definition is supplied.[308] In the case at hand, section 19-03.1-22.2 provides that "'child' means an individual who is under the age of eighteen years."[309]

Justice Sandstrom further stated that extensive review of the legislative history of section 19-03.1-22.2 reflected no discussion of the application of that statute to unborn children.[310] Additionally, the legislature specifically excluded the mother from the application of section 12.1-17.1-01(2), the statute relating to conduct causing the death of an unborn child.[311]

Justice Sandstrom then noted that the great majority of states which have decided the issue at hand have determined that similar statutes do not apply to unborn children.[312] He concluded that lenity requires deference to the accused when the scope of a statute does not clearly apply, and agreed that the criminal judgment must be reversed.[313]

305. *Id.* ¶ 23 (Sandstrom, J., concurring).
306. *Id.*
307. *Id.* ¶ 24.
308. *Id.*
309. *Id.* (citing N.D. CENT. CODE § 19-03.1-22.2).
310. *Id.* ¶ 25.
311. *Id.* (citing N.D. CENT. CODE § 12.1-17.1-01(2)).
312. *Id.* ¶ 26.
313. *Id.* ¶¶ 27, 28, 763 N.W.2d at 475.

CRIMINAL LAW—SEARCH AND SEIZURE—GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE

STATE V. LUNDE

In *State v. Lunde*,[314] Marcus Lunde appealed from a criminal judgment entered upon his conditional plea of guilty to possession of marijuana with intent to deliver, possession of a controlled substance, and two counts of possession of drug paraphernalia.[315] The North Dakota Supreme Court, holding that the district court erred in applying the good faith exception to the exclusionary rule, reversed and remanded to allow Lunde to withdraw his guilty plea.[316]

In August 2006, a magistrate found probable cause existed and issued a search warrant for Lunde's West Fargo apartment, based on an application and affidavit submitted by Officer Jason Hicks of the West Fargo Police Department.[317] In his affidavit, Officer Hicks detailed information he had received from other law enforcement officials.[318] The affidavit stated that on August 3, 2006, Officer Hicks had spoken with Special Agent Donald Burns of the Central Minnesota Drug Task Force.[319] Burns told Officer Hicks that he and Detective Chuck Anderson of the Clay County Sheriff's Department had spoken to a confidential informant whose name and identity were known to both Burns and Anderson.[320] The confidential informant told Burns and Anderson that the informant had associated with two individuals in a drug trafficking organization, one of whom was a suspect in a federal narcotics case in Minnesota and another who was known as "Slim."[321] The informant later identified Slim as Lunde.[322] The informant also told Burns and Anderson that he had met with Slim in the parking lot of Slim's West Fargo apartment, where the informant said he transferred money gram receipts from drug transactions to and from Slim.[323] The informant stated that Slim was involved in selling marijuana and methamphetamine, that the informant often collected drug debts and kept a debt ledger

314. 2008 ND 142, 752 N.W.2d 630.
315. *Lunde*, ¶ 1, 752 N.W.2d at 632.
316. *Id.*
317. *Id.* ¶¶ 2, 7, 752 N.W.2d at 632-33.
318. *Id.* ¶ 2, 752 N.W.2d at 632.
319. *Id.* ¶ 3.
320. *Id.*
321. *Id.*
322. *Id.*
323. *Id.* at 632-33.

for Slim, and that the informant would return the money collected to Slim's apartment.[324]

Officer Hicks' affidavit went on to state that on August 2, 2006, he had spoken with Anderson, because Anderson was attempting to identify Slim.[325] Officer Hicks had information about a person who might be Slim—on July 21, 2006, the West Fargo Police Department assisted the Moorhead Police Department in attempting to locate "CJ," and a Moorhead Police Department detective had received an anonymous tip that CJ was staying with Lunde at his apartment in West Fargo.[326] The affidavit stated that Lunde allowed the officers to check the apartment for CJ and that Lunde told officers he had not seen CJ since July 16, 2006.[327]

The affidavit also stated that on July 20, 2006, Burns had conducted an interview of a "cooperating individual" who was "fully identified" by Burns, but who wished to remain anonymous.[328] According to the affidavit, the cooperating individual had lived with a person who associated with Slim and believed Slim to be involved in trafficking controlled substances.[329] Also according to the affidavit, Burns reviewed the electronic telephone listing of a cellular telephone taken from a suspect in a large federal narcotics case at the time of his arrest.[330] The listing included a cell phone number for Slim.[331]

On the basis of Officer Hicks' affidavit, the magistrate found probable cause and issued a search warrant for Lunde's apartment.[332] On August 3, 2006, Lunde was charged with various drug crimes as a result of the search warrant's execution.[333] In January 2007, Lunde moved the district court to suppress the evidence from his residence, contending that the search warrant was not supported by probable cause, in violation of the Fourth Amendment and Article 1, Section 8 of the North Dakota Constitution.[334] The district court denied the motion, holding that while there was no probable cause for the search warrant, the good faith exception applied.[335]

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324. *Id.* at 633.
325. *Id.* ¶ 4.
326. *Id.*
327. *Id.*
328. *Id.* ¶ 5.
329. *Id.*
330. *Id.* ¶ 6.
331. *Id.*
332. *Id.* ¶ 7.
333. *Id.*
334. *Id.* ¶ 8.
335. *Id.* at 634.

In May 2007, Lunde entered a conditional guilty plea, reserving his right to appeal the denial of his motion to suppress.[336] The North Dakota Supreme Court reversed and remanded to allow Lunde to withdraw his guilty plea, finding the district court erred in applying the good faith exception to the exclusionary rule.[337]

The North Dakota Supreme Court began its analysis by stating that it will reverse a district court's denial of a suppression motion where the decision lacks sufficient competent evidence fairly capable of supporting its findings, and where the decision is contrary to the manifest weight of the evidence.[338] Whether probable cause exists to issue a search warrant is a question of law, and thus fully reviewable on appeal.[339]

The court, viewing the totality of the circumstances and not looking beyond the four corners of the affidavit, agreed with the district court that probable cause did not exist to support the issuance of the search warrant for Lunde's apartment.[340] However, the court found insufficient competent evidence existed to support the district court's decision that a good faith exception applied to the state's exclusionary rule.[341]

In arriving at its conclusion, the court first stated that it has not yet decided whether North Dakota's constitution precludes recognition of the good faith exception to the exclusionary rule.[342] Generally, the exclusionary rule requires suppression of evidence that is seized in violation of the Fourth Amendment's prohibition against unreasonable searches and seizures.[343] Various exceptions to the exclusionary rule apply, however, including the good faith exception, recognized by the United States Supreme Court in *United States v. Leon*.[344] Under the good faith exception, evidence is not excluded when an officer has acted in good faith upon objectively reasonable reliance on the issuing magistrate's probable cause determination.[345]

In *State v. Herrick*,[346] the North Dakota Supreme Court recognized four situations in which the good faith exception does not apply, because an officer's reliance on a warrant is not objectively reasonable: (1) when the is-

336. *Id.* ¶ 9.
337. *Id.* ¶ 1, 752 N.W.2d at 632.
338. *Id.* ¶ 10, 752 N.W.2d at 634.
339. *Id.*
340. *Id.* ¶¶ 12, 13, 752 N.W.2d at 635.
341. *Id.* ¶ 13.
342. *Id.* ¶ 14.
343. *Id.* ¶ 15, 752 N.W.2d at 636.
344. *Id.*(citing U.S. v. Leon, 488 U.S. 897 (1984)).
345. *Id.*
346. 1999 ND 1, 588 N.W.2d 847.

suing magistrate was misled by false information intentionally or negligently given by the affiant; (2) when the magistrate totally abandoned her cial role and failed to act in a neutral and detached manner; (3) when the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) when a reasonable law enforcement officer could not rely on a facially deficient warrant.[347] In *Herrick*, the court applied the *Leon* good faith exception to a statutory violation of the North Dakota Century Code.[348] Because the issue before the court in *Herrick* was a statutory violation, rather than a violation of the state constitution, the court did not rule on whether the state recognizes a good faith exception to North Dakota's exclusionary rule.[349]

In *Lunde*, the court continued to leave the question open, holding that insufficient competent evidence existed to support the district court's decision that a good faith exception applied.[350] Thus, the court did not address whether North Dakota's constitution precludes recognition of a good faith exception to the state's exclusionary rule.[351] The court held that Officer Hicks's affidavit supplied merely a tenuous and conclusory suggestion that Lunde was involved in criminal activity.[352] Furthermore, the court stated, the warrant was based upon stale information from an uncorroborated confidential informant who was part of the criminal milieu.[353] The affidavit failed to establish a fair probability that evidence would be found in the places to be searched.[354]

Because the North Dakota Supreme Court concluded that the good faith exception did not apply, the court did not address whether North Dakota's constitutional protection against unreasonable searches and seizures precludes recognition of the good faith exception to the state's exclusionary rule.[355] The court reversed the criminal judgment and remanded to the district court to permit Lunde to withdraw his conditional guilty plea.[356]

Justice Sandstrom dissented.[357] He wrote that probable cause was established; there is a good faith exception under the North Dakota Constitution; and, if there was not probable cause for the issuance of the

347. *Lunde*, ¶ 16, 752 N.W.2d at 636 (citing State v. Herrick, 1999 ND 1, 588 N.W.2d 847).
348. *Id.* ¶ 17, 752 N.W.2d at 636-37.
349. *Id.*, 752 N.W.2d at 637.
350. *Id.* ¶ 19.
351. *Id.*
352. *Id.* ¶ 20.
353. *Id.*
354. *Id.*, 752 N.W.2d at 637-38.
355. *Id.* ¶ 25, 752 N.W.2d at 638.
356. *Id.* ¶ 26, 752 N.W.2d at 639.
357. *Id.* ¶ 28 (Sandstrom, J., dissenting).

search warrant, there was substantial indicia of probable cause and good faith reliance on the warrant by law enforcement—thus the good faith exception would apply.[358]

Justice Crothers also dissented.[359] While he agreed with Justice Sandstrom that a good faith exception to the exclusionary rule exists under the North Dakota Constitution and that it applied in *Lunde*, he did not agree that the search was supported by probable cause.[360]

358. *Id.* ¶ 32.
359. *Id.* ¶ 40, 752 N.W.2d at 640 (Crothers, J., dissenting).
360. *Id.* ¶ 41.

CRIMINAL LAW—WITHDRAWAL OF GUILTY PLEAS—ESTABLISHING A FAIR AND JUST REASON

STATE V. LIUM

In *State v. Lium*,[361] Travis Lium appealed a district court order on remand denying his motion to withdraw his guilty plea.[362] The North Dakota Supreme Court affirmed, holding the district court did not abuse its discretion when it held that Lium failed to establish a fair and just reason to allow him to withdraw his guilty plea.[363]

Lium was charged with attempted murder, a class A felony, in June 2006.[364] In February 2007, under a written plea agreement, he entered *Alford* pleas to one count of aggravated assault and one count of reckless endangerment, both class C felonies.[365] The plea agreement stated that the State would ask the district court to impose a five-year sentence for each charge, with the time to be served consecutively.[366] Also under the plea agreement, Lium could argue for a lesser sentence, but for no less incarceration than seven and a half years.[367]

At Lium's change-of-plea hearing, the district court informed Lium that he would waive his rights by pleading guilty.[368] The district court also confirmed that Lium understood the plea agreement and the elements of the charges against him and that Lium had reviewed the plea agreement with his attorney.[369] Furthermore, Lium stated that no threats had been made to induce him to enter the plea.[370] The district court then accepted Lium's guilty pleas and ordered a presentence investigation.[371]

On February 23, 2007, Lium wrote a letter to the district court, stating that he wanted to rescind his earlier pleas and that he wanted either a new attorney or perhaps to represent himself.[372] Before sentencing, Lium obtained new counsel and moved to withdraw his guilty plea.[373] He claimed

361. 2008 ND 232, 758 N.W.2d 711.
362. *Lium*, ¶ 1, 758 N.W.2d at 713.
363. *Id.*
364. *Id.* ¶ 2.
365. *Id.* (citing North Carolina v. Alford, 400 U.S. 25 (1970)).
366. *Id.*
367. *Id.*
368. *Id.* ¶ 3.
369. *Id.*
370. *Id.*
371. *Id.*, 758 N.W.2d at 713-14.
372. *Id.* ¶ 4, 758 N.W.2d at 714.
373. *Id.* ¶ 5.

that his former attorney had threatened to withdraw if he did not plead guilty, that he was innocent, and that he had a defense to the charges.[374] The district court denied Lium's motion to withdraw his pleas, concluding that the pleas were voluntary and intelligent and that withdrawal was not necessary to correct a manifest injustice.[375] Lium appealed to the North Dakota Supreme Court, which remanded the case to the district court to determine whether a fair and just reason existed to allow Lium to withdraw his pleas.[376]

On remand, based on a review of the file, transcript, counsels' arguments and motions, and Lium's supporting affidavit, the district court again denied Lium's motion to withdraw his guilty plea.[377] The district court concluded that Lium failed to establish a fair and just reason to allow withdrawal.[378]

Lium appealed to the North Dakota Supreme Court, contending four fair and just reasons existed to allow him to withdraw his guilty plea—that he asserted his innocence through his post-plea district court filings and the nature of his *Alford* plea; that he asserted a legal defense to the charge when he informed the district court he was defending himself; that he informed the district court that his plea was coerced; and that he informed the district court that his prior attorney had given ineffective assistance of counsel.[379]

In its analysis, the North Dakota Supreme Court first laid out Rule 32(d) of the North Dakota Rules of Criminal Procedure, which governs the withdrawal of a guilty plea.[380] Under that rule, after a guilty plea is accepted, but before sentencing (such as in Lium's case), the defendant may withdraw a guilty plea if necessary to correct a manifest injustice or, if allowed in the court's discretion, for any fair and just reason, unless the prosecution has been prejudiced by reliance on the plea.[381] The court went on to state that the "fair and just" reason for withdrawal of a guilty plea involves a lesser showing than is required to establish "manifest injustice."[382]

Rule 32(d) is meant to be construed liberally in favor of the defendant, but withdrawal is not a matter of right.[383] Once a defendant establishes a fair and just reason, the burden shifts to the State to establish that it would

374. *Id.*
375. *Id.* ¶ 6.
376. *Id.* ¶ 7.
377. *Id.* ¶ 8.
378. *Id.*
379. *Id.* ¶ 9, 758 N.W.2d at 715.
380. *Id.* ¶ 10 (citing N.D. R. CRIM. P. 32(d)).
381. *Id.* ¶ 11.
382. *Id.* (citing State v. Lium, 2008 ND 33, 744 N.W.2d 775).
383. *Id.* ¶¶ 12, 13.

be prejudiced by granting leave to withdraw.[384] The North Dakota Supreme Court will not reverse the district court's determination of whether a fair and just reason exists, unless the district court abuses its discretion.[385]

The state supreme court recognized that the fair and just reason standard is not well understood.[386] Thus, the court laid out nine factors that a district court may consider in determining whether a fair and just reason exists to withdraw a guilty plea before sentencing: (1) the amount of time that has passed between the entry of the plea and the motion to withdraw; (2) defendant's assertion of innocence or a legally cognizable defense to the charge; (3) prejudice to the government; (4) whether the plea was knowing and voluntary; (5) whether the plea was made in compliance with Rule 11 of the North Dakota Rules of Criminal Procedure; (6) whether adequate assistance of counsel was available to the defendant; (7) the plausibility of the reason for seeking to withdraw; (8) whether a plea withdrawal would waste judicial resources; and (9) whether the parties reached or breached a plea agreement.[387] The factors are not an exclusive list, however, and other factors, depending on the circumstances, may be relevant.[388]

The North Dakota Supreme Court stated that the district court did not abuse its discretion in denying Lium's motion to withdraw his guilty plea, as it made specific findings on Lium's assertion of innocence, his assertion of a legal defense to the charge, the knowing and voluntary nature of his plea, the quality of the legal assistance he received, and the benefit he received from entering the plea agreement.[389] The court went through each of the four factors in turn.

First, the district court reviewed the record and made a credibility determination that Lium did not attempt to withdraw his guilty plea because he was innocent, but rather because he wanted a less severe penalty.[390] The North Dakota Supreme Court stated it would not second-guess the district court's credibility determinations or re-weigh the evidence, and thus the district court did not err in finding Lium did not adequately assert his innocence.[391]

Second, the district court found Lium did not adequately raise a legal defense.[392] While Lium contended on appeal that he was acting in self-

384. *Id.* ¶ 13, 758 N.W. 2d at 716.
385. *Id.* ¶ 14.
386. *Id.* ¶ 15.
387. *Id.* ¶ 17, 758 N.W.2d at 716-17.
388. *Id.* at 717.
389. *Id.* ¶ 18.
390. *Id.* ¶ 19.
391. *Id.*
392. *Id.* ¶ 20.

defense when he stabbed the victim, he did not argue such a claim in the brief in support of his motion to withdraw his guilty plea, the accompanying affidavit, or at the hearing for his motion to withdraw his guilty plea.[393] Instead, he asserted the claim of self-defense only in a post-plea letter to the court.[394] Thus, the state supreme court held the record supported the district court's finding that Lium did not raise any legal defenses.[395]

Third, the district court found Lium was not coerced into pleading guilty, but rather voluntarily pled guilty to the lesser charges.[396] The North Dakota Supreme Court found the district court reasonably concluded, based on the evidence and the defendant's demeanor, that Lium took the plea agreement not because he felt threatened by his attorney, but rather to avoid a greater penalty.[397] Thus, the state supreme court held the district court did not err in its finding.[398]

Fourth and finally, the district court found unsupported Lium's claim that his attorneys provided ineffective assistance of counsel.[399] The district court concluded, based on the record, that the counsel Lium received was "to his benefit," that he was represented by "seasoned counsel," and that the reduced charges negotiated by his attorneys greatly reduced the potential time of incarceration.[400] Thus, Lium neither demonstrated that his counsel's performance fell below an objective standard of reasonableness nor demonstrated that, but for the unprofessionalism, the result of the proceeding would have been different.[401] The state supreme court held that the district court did not err in its determination that Lium failed to establish that his attorney provided ineffective assistance of counsel.[402]

Based on the four factors above, the North Dakota Supreme Court concluded that Lium did not establish a fair and just reason for withdrawing his plea.[403] It held that the district court did not abuse its discretion in denying Lium's motion to withdraw his guilty plea and thus affirmed the district court's order.[404]

393. *Id.* at 718.
394. *Id.*
395. *Id.*
396. *Id.* ¶ 21.
397. *Id.*
398. *Id.*
399. *Id.* ¶ 22.
400. *Id.*
401. *Id.* at 718-19.
402. *Id.* at 719.
403. *Id.* ¶ 23.
404. *Id.*

FAMILY LAW—DIVORCE—REHABILITATIVE SPOUSAL SUPPORT

SOLEM V. SOLEM

In *Solem v. Solem*,[405] the North Dakota Supreme Court held the fact that an award of rehabilitative spousal support is to last longer than the length of the marriage does not, alone, indicate the award is clearly erroneous.[406] In *Solem*, Scott Solem appealed a divorce judgment awarding Erica Solem spousal support.[407]

Scott Solem argued that the trial court's award of spousal support to Erica Solem was clearly erroneous as to amount and duration.[408] The North Dakota Supreme Court stated that the trial court properly analyzed the *Ruff-Fischer* guidelines, which are applied when one party is required to pay spousal support to the other party, in its judgment.[409] The trial court examined the parties' ages, earning abilities, needs, physical health, and the length of the marriage.[410] The trial court also awarded Scott Solem more assets, which would help him retain his greater earning capacity, but less net equity.[411] The trial court did not specifically address the conduct of the parties, but the North Dakota Supreme Court stated that trial courts are not required to make a specific finding on each factor.[412]

Scott Solem also contended that the trial court did not have a basis for awarding spousal support for ten years, as the duration of the marriage was nine years.[413] The North Dakota Supreme Court stated that while there must be some factual basis in the record for the length of time support is awarded, a trial court is not required to articulate why it awards spousal support for a specific length of time.[414] The court concluded there was a factual basis in the record for the ten-year duration of spousal support, and held the fact that the award of rehabilitative spousal support was to last longer than the length of the marriage did not, alone, indicate the award was clearly erroneous.[415]

405. 2008 ND 211, 757 N.W.2d 748.
406. *Solem*, ¶ 9, 757 N.W.2d at 752.
407. *Id.* ¶ 1, 757 N.W.2d at 750.
408. *Id.* ¶ 5.
409. *Id.* ¶ 6, 757 N.W.2d at 751.
410. *Id.*
411. *Id.*
412. *Id.* ¶¶ 7, 8.
413. *Id.* ¶ 9, 757 N.W.2d at 751-52.
414. *Id.* at 752.
415. *Id.*

The state supreme court also concluded that while the division of property was not equal, it was equitable, and the trial court explained the disparity.[416] Thus, the trial court's spousal support determination was not clearly erroneous, even considering the unequal distribution of property.[417] Finally, the court concluded evidence established Erica Solem proved her standard of living at trial, thus supporting the trial court's determination of spousal support.[418]

The North Dakota Supreme Court affirmed, holding the fact that an award of rehabilitative spousal support is to last longer than the length of the marriage does not, alone, indicate the award is clearly erroneous.[419]

416. *Id.* ¶ 13, 757 N.W.2d at 753.
417. *Id.*
418. *Id.* ¶ 15, 757 N.W.2d at 754.
419. *Id.* ¶ ¶ 9, 20, 757 N.W.2d at 752, 755.

FAMILY LAW—DIVORCE—SUBJECT MATTER JURISDICTION

KELLY V. KELLY

In *Kelly v. Kelly*,[420] Richard Kelly appealed a district court judgment granting him a divorce from Karol Kelly, but concluding that the district court lacked subject matter jurisdiction over the incidents of the marriage.[421] The North Dakota Supreme Court reversed and remanded, holding the district court had concurrent subject matter jurisdiction with the tribal court to adjudicate the incidents of the marriage.[422]

Richard Kelly sought a divorce from Karol Kelly in state district court.[423] Richard Kelly is a non-Indian.[424] Karol Kelly and G.K., the parties' daughter, are enrolled members of the Standing Rock Sioux Tribe, and Karol Kelly owned non-trust farm and ranch land on the Standing Rock Reservation.[425] Richard and Karol Kelly married in Las Vegas, Nevada.[426] Their daughter was conceived and born off of the reservation.[427] The family lived together on the reservation until Richard Kelly left the home and moved to Bismarck.[428] Richard Kelly commenced a divorce action in state court in December 2006.[429] Karol Kelly answered and filed a counterclaim, requesting that she be granted a divorce, that she receive child custody, child support, spousal support, and attorney fees, and that the court make an equitable division of property.[430] Richard Kelly contended the parties attempted to reconcile, and Karol Kelly and their daughter lived with him in Bismarck from March through June of 2007.[431]

In December 2007, the district court awarded Richard Kelly holiday visitation with G.K.[432] In January 2008, Karol Kelly commenced a separate divorce action in tribal court and served a motion in the pending state court action seeking dismissal of that action based on a lack of subject matter

420. 2009 ND 20, 759 N.W.2d 721.
421. *Kelly*, ¶ 1, 759 N.W.2d at 722.
422. *Id.*
423. *Id.* ¶ 2.
424. *Id.*
425. *Id.* ¶¶ 2, 3.
426. *Id.* ¶ 4.
427. *Id.*
428. *Id.*
429. *Id.* ¶ 5.
430. *Id.*
431. *Id.*
432. *Id.* ¶ 6.

jurisdiction.[433] She asserted for the first time that the tribal court had exclusive jurisdiction in the matter.[434]

The district court first held that it lacked subject matter jurisdiction and dismissed the action in its entirety.[435] After Richard Kelly filed a motion for reconsideration, however, the district court issued an Order Upon Reconsideration, holding it had jurisdiction to dissolve the marriage but lacked jurisdiction over the incidents of the marriage.[436] The district court then granted Richard Kelly a divorce from Karol Kelly, but dismissed the rest of the action.[437]

The North Dakota Supreme Court noted that state court jurisdiction over certain claims is prohibited if it would "undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."[438] The court also noted that the Indian Child Welfare Act (ICWA), which creates exclusive jurisdiction in the tribal court for certain child custody proceedings involving an Indian child, does not apply to an award of custody to a parent in a divorce proceeding.[439] The exclusion, the court stated, recognizes the concurrent jurisdiction of state and tribal courts in such cases.[440]

The court distinguished *Byzewski v. Byzewski*,[441] which concluded that the district court's exercise of jurisdiction over child custody and support in a state divorce action infringed on the right of the reservation Indians to make and be ruled by their own laws.[442] The court held the case at hand differed from *Byzewski* in two main areas.[443] First, the court stated that under the current case, many critical incidents of the marriage occurred off the reservation, such as where the marriage occurred, where the child was conceived and born, where Richard Kelly moved while the marriage was still ongoing, and where the parties owned property and a business.[444] Second, the court noted that under the current case, the state court action was first in

433. *Id.*
434. *Id.* at 722-23.
435. *Id.* ¶ 7, 759 N.W.2d at 723.
436. *Id.*
437. *Id.*
438. *Id.* ¶ 11, 759 N.W.2d at 724 (quoting Williams v. Lee, 358 U.S. 217, 223 (1959)).
439. *Id.* ¶ 12.
440. *Id.*
441 429 N.W.2d 394 (N.D. 1988).
442. *Kelly,* ¶¶ 13-14, 759 N.W.2d at 724-25 (citing Byzewski v. Byzewski, 429 N.W.2d 394 (N.D. 1988)).
443. *Id.* ¶ 16, 759 N.W.2d at 725.
444. *Id.*

time and had been ongoing for more than a year when Karol Kelly first attempted to invoke the jurisdiction of the tribal court.[445]

The North Dakota Supreme Court also recognized that the state, as well as the tribe, has a significant interest in cases involving family issues and child welfare.[446] In cases with off-reservation impact or cases that occur off of the reservation, state courts thus have concurrent jurisdiction with tribal courts.[447] The court held that numerous factors supported the district court's authority to exercise concurrent jurisdiction.[448]

The district court was also required, however, to apply the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) when determining jurisdiction of the child custody issue.[449] On remand, then, the state supreme court directed the district court to give the parties an opportunity to present evidence relevant to the jurisdictional facts and to determine whether the state, the reservation, or neither was the child's home state for purposes of UCCJEA analysis.[450]

The North Dakota Supreme Court concluded by stating the district court erred in determining it lacked subject matter jurisdiction to adjudicate the incidents of the marriage.[451] It reversed and remanded for further proceedings in accordance with its opinion.[452]

445. *Id.*, 759 N.W.2d at 725-26.
446. *Id.* ¶ 17, 759 N.W.2d at 726.
447. *Id.*
448. *Id.* ¶ 18.
449. *Id.* ¶ 19, 759 N.W.2d at 727.
450. *Id.* ¶ 21, 759 N.W.2d at 728.
451. *Id.* ¶ 24.
452. *Id.*

PARTNERSHIPS—LIMITED PARTNER RIGHTS AND DUTIES

RED RIVER WINGS, INC. V. HOOT, INC.

In *Red River Wings, Inc. v. Hoot, Inc.*,[453] the majority limited partners in two limited partnerships appealed from a judgment awarding damages and attorney fees to the minority of the limited partners.[454] The majority partners also appealed the district court's dismissal of the majority's claims against persons and entities involved in a business dispute over two Hooters franchise restaurants in Canada.[455] The North Dakota Supreme Court affirmed the district court's finding that the partnerships were dissolved ninety days after removing the general partner of both partnerships.[456] The court also affirmed the district court's holding that the majority partners were liable for breach of fiduciary duties.[457] The court reversed and remanded for proper determination of damages, including prejudgment interest against the company providing management services to the partnerships.[458] Finally, the court reversed the district court's dismissal of the management company's counterclaim for intentional interference with contractual relations.[459]

In the mid-1990s, Thomas Lavelle, a Fargo restaurant manager, was informed of a series of potential business ventures when Hooters of America sought to expand into Canada.[460] Lavelle entered into a franchise agreement with Hooters of America to establish a Hooters restaurant in Edmonton, Alberta, along with purchase options for future Canadian restaurants.[461] Canadian Wings Investment Limited Partnership (Canadian Wings) was formed to finance and organize the Edmonton restaurant venture.[462] Lavelle operated under Red River Wings, Inc. (Red River Wings) as general partner of Canadian Wings.[463] Lavelle, as sole shareholder of LTM, Ltd. (LTM), also provided management services for the restaurant.[464] Ownership units of Canadian Wings were sold to various

453. 2008 ND 117, 751 N.W.2d 206.
454. *Red River Wings, Inc.*, ¶ 1, 751 N.W.2d at 212.
455. *Id.*
456. *Id.* ¶¶ 19-20, 751 N.W.2d at 217.
457. *Id.* ¶ 22, 751 N.W.2d at 217-18.
458. *Id.* ¶¶ 44, 60, 751 N.W.2d at 224, 227.
459. *Id.* ¶ 57, 751 N.W.2d at 227.
460. *Id.* ¶ 2, 751 N.W.2d at 212.
461. *Id.*
462. *Id.* ¶ 3.
463. *Id.*
464. *Id.*

investors, including ME Investments, LLP (ME Investments).[465] Louis Emerson and Arthur Stern received fees and profits-only interests as special limited partners for their services in the endeavor.[466] Lavelle borrowed money to construct the Edmonton Hooters restaurant and the limited partners received healthy returns.[467]

Shortly after the Edmonton restaurant was finished, Lavelle undertook to establish a second Hooters restaurant in Winnipeg, Manitoba.[468] This venture was structured in the same manner as the Edmonton restaurant, with Manitoba Wings Investment Limited Partnership (Manitoba Wings) obtaining ownership of the establishment.[469] Emerson and Stern received similar profits-only interests and many of the same investors joined, including ME Investments.[470] The investors received lower returns from the Winnipeg restaurant.[471]

By early 1998, Lavelle's business relationship with Stern, Emerson, and ME Investments began to deteriorate due to alleged poor management by Lavelle and the lower-than-expected returns from the Winnipeg restaurant.[472] In May 1998, ME Investments, Stern, Emerson, and other majority limited partners met to address their concerns.[473] After no wrongdoing was discovered, the majority limited partners nevertheless decided to take over management of the two partnerships and sought to remove Red River Wings as general partner.[474]

In October 1998, the majority limited partners, without notice to the minority partners, removed Red River Wings as the general partner of both partnerships.[475] Hoot, Inc. (Hoot) was formed to take over as general partner.[476] The majority partners also terminated the management contracts with LTM.[477] Although Lavelle offered to alter the distribution allocations in favor of the majority partners and despite protests by the minority limited partners, the takeover was completed.[478] Stern and Emerson proceeded to

465. *Id.* at 212-13.
466. *Id.* at 213.
467. *Id.* ¶ 4.
468. *Id.* ¶ 5.
469. *Id.*
470. *Id.*
471. *Id.*
472. *Id.* ¶ 6.
473. *Id.* ¶ 7.
474. *Id.* at 213-14.
475. *Id.* ¶ 8, 751 N.W.2d at 214.
476. *Id.*
477. *Id.*
478. *Id.*

physically take control of the two restaurants, with expenses paid by the partnerships.[479]

The majority partners sued Lavelle, Red River Wings, LTM, and others in federal court, seeking damages.[480] The suit was dismissed, without prejudice, after two years of litigation and $350,000 in fees and costs.[481] Despite the objections of the minority partners, the majority partners voted to continue the lawsuit against Lavelle as a partnership claim and for the partnerships to assume the costs of the litigation.[482] The minority partners then successfully obtained a temporary restraining order to prevent the majority partners from taking the funds from the partnership.[483] After a receiver was appointed for both partnerships, Hooters of America demanded that Lavelle be involved in the franchise.[484] The majority partners refused to compromise, and Hooters of America terminated the franchises and issued them to Lavelle personally.[485] The remaining assets of the partnerships were then liquidated and sold at a judicially approved sale to Lavelle.[486]

The minority limited partners sued the majority limited partners derivatively and individually for breach of the partnership agreements and breach of fiduciary duties, and sought dissolution and accounting of the partnerships.[487] The majority limited partners refiled their dismissed federal court action against Red River Wings, Lavelle, and LTM in state court.[488] Lavelle, through Red River Wings, also sued Hoot for damages for wrongfully withholding distributions.[489] The cases were consolidated, and the district court awarded damages to the minority partners and Lavelle for breach of fiduciary duties and awarded partial attorney fees.[490] The majority group's claims were dismissed, and LTM and Lavelle were awarded damages for services provided prior to the takeover.[491]

The first issue the North Dakota Supreme Court addressed was whether the district court erred in holding as a matter of law that Canadian Wings and Manitoba Wings were dissolved when the majority partners voted to

479. *Id.* ¶ 9.
480. *Id.* ¶ 11.
481. *Id.*
482. *Id.*
483. *Id.* ¶ 12, 751 N.W.2d at 215.
484. *Id.*
485. *Id.*
486. *Id.*
487. *Id.* ¶ 13.
488. *Id.*
489. *Id.*
490. *Id.* ¶ 13-14.
491. *Id.* ¶ 14.

remove Red River Wings as general partner.[492] Under the terms of the partnership agreements, the general partner could be removed, with or without cause, by a vote of fifty-one percent of the limited partners.[493] However, the agreement only provided for the appointment of a successor general partner in the event of resignation, dissolution, or bankruptcy of the general partner, not in the case of removal.[494] The Supreme Court held that although the majority partners had authority to remove Red River Wings as general partner, the agreements did not address the appointment of a successor in doing so.[495]

Under the statute in effect at the time, after removal of a general partner, the limited partners had ninety days to unanimously appoint a successor general partner.[496] Failure to do so resulted in statutory dissolution.[497] The court held that the agreements and law in effect at the time were clear and unambiguous.[498] Since there was no unanimous written consent of all limited partners within ninety days to appoint a new general partner, the partnerships were dissolved.[499] The court affirmed the district court's holding of dissolution, but determined that it had erred in placing the date of dissolution as October 25, 1998.[500] Instead, the dissolution occurred when the ninety-day period expired on January 23, 1999.[501]

The court next turned to the majority partners' arguments that the district court erred in finding them liable for breach of fiduciary duties.[502] The majority partners first argued that they could not be held liable in this case because under the statute in effect at the time, a limited partner could not be liable for the obligations of a limited partnership unless the limited partner participated in the control of the business.[503] In rejecting this argument, the court contrasted obligations owed to the partnership with fiduciary duties.[504] The court held that the statutory fiduciary duties imposed on part-

492. *Id.* ¶ 15.
493. *Id.* ¶ 17, 751 N.W.2d at 216.
494. *Id.*
495. *Id.* ¶ 18, 751 N.W.2d at 216-17.
496. *Id.* ¶ 19, 751 N.W.2d at 217 (quoting N.D. CENT. CODE § 45-10.1-26(3) (2003) (repealed 2005)).
497. *Id.*
498. *Id.* ¶ 20.
499. *Id.*
500. *Id.*
501. *Id.*
502. *Id.* ¶ 22, 751 N.W.2d at 217-18.
503. *Id.* ¶ 23, 751 N.W.2d at 218 (quoting N.D. CENT. CODE § 45-10.1-22(1) (2003) (repealed 2005)).
504. *Id.* ¶ 24.

ners are the duties of loyalty and care and the obligations of good faith and fair dealing.[505]

The court next addressed whether the majority limited partners breached their fiduciary duties.[506] Specifically, the district court found that the majority limited partners breached fiduciary duties when they attempted to take over the businesses and install Hoot as general partner.[507] The Supreme Court reviewed the record and held that the district court's holding was not clearly erroneous.[508] The evidence showed that the majority group planned a takeover and proceeded in a reckless manner.[509] Specifically, the majority limited partners ignored their attorneys' advice to obtain unanimous consent for the appointment of a new general partner, failed to obtain consent and give notice to Hooters of America to replace Red River Wings, hired two replacement management companies without notice or vote, directly controlled Hoot and the partnerships, and refused to surrender control to the court-appointed receiver.[510] The court, therefore, upheld the district court's findings that the majority group took control and dominated the partnerships for their own interests and violated their fiduciary duties.[511]

The court further held that the district court did not err in holding Kesselring and Leno individually responsible.[512] The court explained that the "limited partnership veils" of Canadian Wings and Manitoba Wings did not need to be "pierced" in order to hold them individually liable.[513] Similar to shareholders in a close corporation, majority limited partners who controlled or acted in concert with the general partner can be held personally liable for damages and breach of fiduciary duties.[514] Furthermore, since Emerson, Stern, and ME Investments, through Kesselring and Leno, participated in the takeover, the district court did not err in finding that ME Investments was a mere alter ego of Kesselring and Leno.[515] The court applied the principle for piercing a corporate veil that if unity of interest and ownership between the corporation and its equitable owner make the entity nonexistent, the corporate structure is abandoned.[516] Given the evidence of

505. *Id.*, 751 N.W.2d at 218-19 (quoting N.D. CENT. CODE § 45-16-04 (2007)).
506. *Id.* ¶ 27, 751 N.W.2d at 219.
507. *Id.* ¶ 29, 751 N.W.2d at 220.
508. *Id.* ¶ 30.
509. *Id.*
510. *Id.*
511. *Id.* ¶ 31, 751 N.W.2d at 220-21.
512. *Id.* ¶ 34, 751 N.W.2d at 221.
513. *Id.* ¶ 33.
514. *Id.* (citing Schumacher v. Schumacher, 469 N.W.2d 793, 798-99 (N.D. 1991)).
515. *Id.* ¶¶ 33, 34.
516. *Id.* ¶ 34.

Kesselring and Leno's level of participation in the takeover, the district court did not err in holding them personally liable.[517]

The Supreme Court also upheld the district court's finding that Kesselring and Leno's actions were not protected by the business judgment rule, because they acted recklessly, with bad faith, and to further the majority group's own interests.[518] The business judgment rule prohibits judicial inquiry into actions of corporate directors taken in good faith and with honest judgment to further corporate purposes.[519] The rule does not protect self-dealing, willful misconduct, or gross negligence.[520] The evidence showed the majority partners acted recklessly in installing Hoot as the general partner without unanimous consent.[521] The majority group acted in bad faith by failing to relinquish control to the receiver and by concocting reasons for removing Red River Wings and terminating the contracts with LTM after the fact in order to justify their actions.[522] Since these actions were taken for the self-interest of the majority partners, the district court did not err in rejecting their business judgment rule argument.[523]

The Supreme Court next addressed the majority group's contention that the district court erred in dismissing their claims against Lavelle and Red River Wings for breach of fiduciary duty, breach of contract, and fraud.[524] Among the majority partners contentions were that Lavelle and Red River Wings plundered partnership property and opportunities, wrongfully inflated compensation, made an unapproved advance to an unrelated restaurant, comingled funds, and took advantage of the partners in bad faith by usurping profits.[525] The Supreme Court agreed with the district court that there was no credible evidence to support these claims.[526] Instead, the record contained evidence that the partnership funds were accounted for and used for the benefit of partnership purposes.[527] The court made it clear that the task of weighing the evidence and judging credibility of witnesses fell

517. *Id.*
518. *Id.* ¶ 37, 751 N.W.2d at 222.
519. *Id.* ¶ 36, 751 N.W.2d at 221-22 (quoting In re Conservatorship of Sickles, 518 N.W.2d 673, 681 (N.D. 1994)).
520. *Id.*, 751 N.W.2d at 222 (quoting *Sickles*, 518 N.W.2d at 680-81).
521. *Id.* ¶ 37.
522. *Id.*
523. *Id.*
524. *Id.* ¶ 38.
525. *Id.* ¶ 39, 751 N.W.2d at 222.
526. *Id.* ¶ 40, 751 N.W.2d at 223.
527. *Id.*

on the trier of fact, and that it is not the role of the reviewing court to reweigh credibility or resolve conflicts in the evidence.[528]

The court then turned to the district court's calculation of damages.[529] The district court awarded derivative damages based on an analysis by the minority group's expert who calculated the reasonable profits and distributions that could have been realized absent the breach of fiduciary duties and dissolution.[530] This calculation was based on prior performance of the partnerships, projected profits, and the value of the partnerships as of the date of the takeover.[531] The Supreme Court stressed that recoverable damages include the value of the profits which would have otherwise been received, including anticipated profits.[532] Further, a reviewing court will not reverse an award of damages unless it is clearly erroneous or outside the range of the evidence presented.[533] The court determined the method used to determine damages for lost profits was neither unreasonable nor speculative.[534] However, since it previously concluded that the date of dissolution was January 23, 1999, rather than October 25, 1998, the court reversed and remanded in order to calculate damages according to the later date.[535] The court also summarily affirmed the district court's award of distributions to Red River Wings from Hoot, because Red River Wings did not fulfill its obligation under the partnership agreements to contribute one percent of the total capital raised by the partnerships.[536]

The district court awarded the minority limited partners $104,130 in attorney fees.[537] Although the minority group requested $222,734, the district court disallowed any attorney fees accumulated before the case was filed on September 26, 2002.[538] The North Dakota Supreme Court affirmed and recognized that the derivative claims in the matter were intertwined with other asserted claims.[539] Because not all of the efforts were directly or indirectly related to the derivative matters, the court determined that these fees, along with duplicative and unreasonable efforts, were not recoverable, and that the district court did not abuse its discretion in limiting the award.[540]

528. *Id.* (citing McKechnie v. Berg, 2003 ND 136, ¶ 19, 667 N.W.2d 628, 634).
529. *Id.* ¶ 41.
530. *Id.* ¶ 43, 751 N.W.2d at 223-24.
531. *Id.*, 751 N.W.2d at 224.
532. *Id.* ¶ 42, 751 N.W.2d at 223 (quoting N.D. CENT. CODE 32-03-20 (2007)).
533. *Id.*
534. *Id.* ¶ 44, 751 N.W.2d at 224.
535. *Id.*
536. *Id.* ¶¶ 45, 47.
537. *Id.* ¶ 48, 751 N.W.2d at 224-25.
538. *Id.* ¶¶ 48, 50, N.W.2d at 225.
539. *Id.* ¶ 50.
540. *Id.* ¶¶ 50, 51.

The Supreme Court of North Dakota next addressed LTM's argument that the district court erred in dismissing its counterclaim against the majority group for terminating its management contracts with Canadian Wings and Manitoba Wings.[541] LTM asserted intentional interference with its contractual relationship.[542] This required LTM to prove that the contracts were breached and that the majority group instigated the breaches without justification.[543] The management agreements between LTM and the two partnerships provided for termination only with cause constituting fraud, felonious conduct, dishonesty, willful misconduct, gross negligence, or material breach of the agreement.[544] The district court found that the reasons put forth by the majority partners for terminating the agreements were concocted from information received after termination and that no cause existed.[545] However, the lower court dismissed LTM's counterclaim, reasoning the dissolution destroyed the objective of the management contracts.[546]

The Supreme Court found that neither the doctrine of frustration of purpose nor the doctrine of impossibility applied, because the frustration or impossibility was caused by the majority group.[547] Just as a party to a contract who causes frustration or impossibility cannot rely on the doctrines as defenses to a breach of contract, third parties who cause the frustration or impossibility cannot rely on the defenses in an action for intentional interference with a contractual relationship.[548] Therefore, since the majority limited partners caused the dissolution of the partnerships, the dissolution could not be used as a defense to LTM's counterclaim.[549] The state supreme court reversed the district court's dismissal of LTM's counterclaim and remanded for findings on whether the majority group should be liable for damages for intentional interference with the contract.[550]

The final issue presented to the court was whether the district court erred in awarding LTM prejudgment interest for unpaid management fees at a rate of three percent.[551] The North Dakota Supreme Court stated that interest on LTM's unpaid management fees should have started accumulating

541. *Id.* ¶ 52.
542. *Id.*
543. *Id.* ¶ 53, 751 N.W.2d at 225-26 (citing Van Sickle v. Hallmark & Assocs., Inc., 2008 ND 12, ¶ 24, 744 N.W.2d 532, 540).
544. *Id.* ¶ 54, 751 N.W.2d at 226.
545. *Id.* ¶ 55.
546. *Id.*
547. *Id.* ¶ 56, 751 N.W.2d at 226-27.
548. *Id.*, 751 N.W.2d at 227.
549. *Id.*
550. *Id.* ¶ 57.
551. *Id.* ¶ 58.

when the contracts with the partnerships were terminated.[552] Further, the statutory interest rate for any legal indebtedness, when not specified in the agreement, is six percent, rather than three percent.[553] The Supreme Court reversed and remanded for calculation of prejudgment interest accordingly.[554]

In *Red River Wings, Inc.*, the North Dakota Supreme Court reversed the district court's dismissal of LTM's counterclaim for intentional interference with contractual relations and remanded for further findings.[555] The court reversed and remanded the award of derivative damages resulting from the dissolution of the limited partnerships on an earlier date.[556] The court also reversed and remanded for entry of an order awarding prejudgment interest to LTM at six percent from the date the management contracts were terminated.[557] In all other respects, the district court was affirmed.[558]

552. *Id.* ¶ 59.
553. *Id.* (quoting N.D. CENT. CODE § 47-14-05 (2007)).
554. *Id.* ¶ 60.
555. *Id.* ¶ 57.
556. *Id.* ¶ 44, 751 N.W.2d at 224.
557. *Id.* ¶ 60, 751 N.W.2d at 227.
558. *Id.* ¶ 61.

TORT LAW—WRONGFUL DEATH ACTION—DECEDENT'S CHILDREN ENTITLED TO SEEK RECOVERY OF DAMAGES

WEIGEL V. LEE

In *Weigel v. Lee*,[559] decedent's children appealed the district court's dismissal of their wrongful death claims, arguing that the district court misconstrued the wrongful death statutes.[560] The North Dakota Supreme Court reversed and remanded, holding that a decedent's children are able to seek recovery of non-economic damages in a wrongful death action.[561]

On May 6, 2004, Darlyne Rogers went to the emergency room of St. Luke's Hospital in Crosby, North Dakota, where X-rays revealed she suffered from pneumonia and a bowel obstruction.[562] Rogers was subsequently transferred to Trinity Hospital in Minot, North Dakota, as Dr. Lane Lee's patient.[563] Although she was critically ill, Rogers was admitted to a room on the "regular" floor of the hospital.[564] Several hours later, she began vomiting bodily waste and aspirating it into her lungs.[565] She ultimately died.[566]

Rogers' adult children—Darla Weigel, Melody Frieson, Diana Seney, and Lorna Strand—brought suit against Dr. Lee and Trinity Hospital, alleging negligence.[567] Ultimately, after blending wrongful death actions, survival actions, and loss of consortium claims arising out of personal injury actions, the district court dismissed the children's claim, finding no recovery was proper.[568]

The North Dakota Supreme Court reversed, holding that the district court erred when it blended three distinct claims for tortious conduct: 1) loss of consortium claims arising out of personal injury actions, 2) survival actions, and 3) wrongful death actions.[569] The court then distinguished each claim using statutory interpretation, a question of law that is fully reviewable on appeal.[570]

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559. 2008 ND 147, 752 N.W.2d 618.
560. *Weigel*, ¶ 1, 752 N.W.2d at 619.
561. *Id.*
562. *Id.* ¶ 2, 752 N.W.2d at 619-20.
563. *Id.* at 620.
564. *Id.*
565. *Id.*
566. *Id.*
567. *Id.* ¶¶ 1, 3, 752 N.W.2d at 619-20.
568. *Id.* ¶¶ 6, 7, 752 N.W.2d at 620-21.
569. *Id.* ¶ 9, 752 N.W.2d at 621.
570. *Id.* ¶¶ 8, 9.

First, the court stated, English common law recognized an action for loss of consortium arising out of tortious conduct that resulted in personal injury.[571] In *Hastings v. James River Aerie No. 2337*,[572] the court recognized that both spouses have a right to recover for loss of consortium, but the court refused to extend that type of recovery to children.[573] Here, however, the court noted that the refusal to extend recovery was inapplicable, as the decedent's children brought a wrongful death claim, not a claim for loss of consortium arising out of tortious conduct that resulted in personal injury.[574]

Second, the court reviewed survival actions.[575] Section 28-01-26.1 of the North Dakota Century Code provides, "No action or claim for relief, except for breach of promise, alienation of affections, libel, and slander, abates by the death of a party or of a person who might have been a party had such death not occurred."[576] Survival statutes are meant to permit recovery by the representatives of the deceased for damages the deceased could have recovered if he or she had lived.[577] Again, the court noted, the decedent's children in the case at issue brought a wrongful death claim, not a survival action, so the law concerning survival actions was inapplicable.[578]

Third and finally, the North Dakota Supreme Court reviewed chapter 32-21 of the North Dakota Century Code, which provides for wrongful death actions.[579] The decedent's children offered the wrongful death act as the legal basis for their claim, and the court concluded that they were entitled to seek compensation for Rogers' wrongful death.[580] The court wrote that contemporary wrongful death statutes tend to address a broader scope of injuries, including those considered non-pecuniary.[581] Chapter 32-21 of the North Dakota Century Code states:

> Whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would have entitled the party injured, if death had not ensued, to

571. *Id.* ¶ 10.
572. 246 N.W.2d 747 (N.D. 1976).
573. *Weigel*, ¶ 10, 752 N.W.2d at 621 (citing Hastings v. James River Aerie No. 2337, 246 N.W.2d 747, 749 (N.D. 1976)).
574. *Id.*
575. *Id.* ¶ 12.
576. *Id.* (citing N.D. CENT. CODE § 28-01-26.1).
577. *Id.* at 621-22.
578. *Id.* at 622.
579. *Id.* ¶ 13.
580. *Id.*
581. *Id.* ¶ 14.

> maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation, limited liability company, or company which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or of the tort-feasor, and although the death shall have been caused under such circumstances as amount in law to felony.[582]

This statute, the court wrote, is not a survival statute intended to increase the estate of the deceased, but rather a wrongful death statute, with damages based on the loss suffered by the beneficiaries, not the loss sustained by decedent's estate.[583] Compensable damages available in wrongful death actions are both economic, including those for medical expenses, loss of earnings, and burial costs, and noneconomic, including damages for pain and suffering, mental anguish, loss of society and companionship, and loss of consortium.[584]

Intended recipients under the wrongful death act are "the decedent's heirs at law."[585] The court clarified that "heirs at law" for purposes of the wrongful death statute are "those persons who by the laws of descent would succeed to the property of the decedent in case of intestacy, but in addition, that if members of a preferred class are precluded from recovery for reasons other than death those next entitled to inherit may be considered beneficiaries."[586]

The court also clarified that persons entitled to recover damages under the wrongful death act should not be confused with persons statutorily authorized to bring an action.[587] Section 32-21-03 of the North Dakota Century Code states that the action shall be brought by the following persons in the order named:

1. The surviving husband or wife, if any.
2. The surviving children, if any.
3. The surviving mother or father.
4. A surviving grandparent.
5. The personal representative.

582. *Id.* ¶ 15 (citing N.D. CENT. CODE § 32-21-01).
583. *Id.*
584. *Id.* ¶ 16, 752 N.W.2d at 623.
585. *Id.* ¶ 17.
586. *Id.* (citing Broderson v. Boehm, 253 N.W.2d 864, 869 (N.D. 1977)).
587. *Id.* ¶ 18, 752 N.W.2d at 623.

> 6. A person who has had primary physical custody of the decedent before the wrongful act.
>
> If any person entitled to bring the action refuses or neglects so to do for a period of thirty days after demand of the person next in order, that person may bring the action.[588]

The court went on to state that the distinction between persons eligible to seek damages from wrongful death actions and those entitled to bring such actions is important, because the trial judge must split recovery among eligible heirs.[589] Overlap may exist between plaintiffs bringing the action and those entitled to damages, but the court emphasized that those able to bring the action do not have an absolute right to the damages recovered; they must instead bring the action in a representative capacity for the exclusive benefit of those entitled to recover.[590] Thus, surviving children are eligible to bring a wrongful death action under section 32-21-03(2) of the North Dakota Century Code if the decedent had no eligible spouse or if the spouse fails to bring an action for thirty days after the children make a demand—a separate issue from that of whether children can recover damages in a wrongful death action.[591]

The North Dakota Supreme Court reversed and remanded, concluding that a decedent's children are entitled to seek recovery of damages in a wrongful death action.[592]

588. *Id.* (citing N.D. CENT. CODE §32-21-03).
589. *Id.*
590. *Id.* at 624.
591. *Id.*
592. *Id.* ¶ 20.