North Dakota Law Review

Volume 84 | Number 2 Article 8

1-1-2008

North Dakota Supreme Court Review

North Dakota Law Review Associate Editors

NORTH DAKOTA SUPREME COURT REVIEW

The Supreme Court Review briefly 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 affected earlier interpretations of North Dakota law, and other potential cases of interest. The following topics are included in the Review:

ADMINISTRATIVE LAW—WORKERS COMPENSATION—OFFSETS WITH OTHER BENEFITS

TEDFORD V. WORKFORCE SAFETY & INSURANCE

Workforce Safety and Insurance (WSI) appealed an amended district court judgment.[1] The district court judgment reversed "WSI's decision to offset Richard Tedford's federal social security retirement benefits against his worker's compensation disability benefits."[2] The judgment also affirmed an order that awarded Tedford both attorney fees and costs pursuant to Section 28-32-50 of the North Dakota Century Code.[3] On appeal, Tedford sought attorney fees and costs pursuant to Section 28-32-50.[4] The North Dakota Supreme Court affirmed the district court's decision in holding that WSI erred in its decision to offset Tedford's social security benefits against his workers compensation benefits.[5] However, the court reversed the district court's award of attorney fees and costs to Tedford, instead finding that the district court erred in its determination that WSI had acted without substantial justification.[6] Finally, the North Dakota Supreme Court denied Tedford's motion on appeal seeking attorney fees and costs.[7]

In 1985, Tedford applied for workers compensation benefits after injuring his back.[8] WSI accepted Tedford's claim awarding him both medical expenses and disability benefits.[9] Since April of 1989, Tedford received

1. Tedford v. Workforce Safety & Ins., 2007 ND 142, ¶ 1, 738 N.W.2d 29, 30.
2. *Id.* at 31.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* ¶ 2.
9. *Id.*

temporary total disability benefits.[10] In June of 1990, WSI began paying Tedford permanent total disability benefits upon a determination that Tedford was permanently and totally disabled.[11] In 1989, "Tedford also began receiving federal social security disability benefits" (SSDI).[12] As required under Section 65-05-09.1, the amount of Tedford's SSDI benefits was offset against the temporary total disability benefits he received.[13]

Upon the change in classification of his disability status from temporary to permanent in June of 1990, WSI continued to offset his SSDI benefits.[14] Then, when Tedford reached his retirement age of 65 years and 2 months, his SSDI benefits were converted to social security retirement benefits automatically.[15] Following this conversion, WSI sought to offset Tedford's retirement benefits against his permanent total disability benefits by issuing an order.[16] Tedford requested that WSI's order be reconsidered upon which an administrative law judge (ALJ) recommended that WSI's order to offset retirement benefits be reversed.[17] WSI rejected the ALJ's recommendation and issued an order requiring that "Tedford's social security retirement benefits be offset against his permanent total disability benefits."[18]

Tedford appealed WSI's decision to the district court.[19] Initially, the district court found that WSI's decision to offset the benefits was not an error and affirmed the order.[20] Tedford made a motion to amend the judgment, which was heard by a different judge.[21] The second judge reversed WSI's order finding that WSI was not allowed to offset Tedford's benefits and instead directed that as of August 1, 2003, Tedford was to receive his full total disability benefits.[22] Tedford also sought attorney fees and costs pursuant to Section 28-32-50 of the North Dakota Century Code.[23] Upon determining that WSI's legal arguments were not substantially justified, Tedford was awarded both attorney fees and costs.[24]

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10. *Id.*
11. *Id.*
12. *Id.* ¶ 3.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* ¶ 4.
17. *Id.*
18. *Id.*
19. *Id.* ¶ 5.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* ¶ 6.
24. *Id.*

In its decision, the North Dakota Supreme Court noted that it reviews an administrative agency decision in the same manner that district courts review them pursuant to Section 28-32-46.[25] On appeal, the case only presents questions of law, not of fact, therefore Sections 28-32-46 and 28-32-49 provide that unless the agency order is not in accordance with law, the court must affirm the order.[26]

On appeal, WSI argues that its decision to offset Tedford's social security benefits against his disability benefits through workers compensation was not an error.[27] The parties did not dispute that Tedford was determined to be totally disabled in April of 1989, at which time WSI had the authority to offset his SSDI benefits against his workers compensation disability benefits.[28] WSI did not have the authority to offset Tedford's social security retirement benefits against his disability benefits at that time, however.[29]

In 1989, the North Dakota Legislature authorized the offsetting of the social security retirement benefits of injured employees against the employees permanent total disability benefits through its enactment of Section 65-05-09.2.[30] This statute specifically provided that it was effective for workers that retired on or after July 1, 1989.[31] Following this enactment, in *Kallhoff v. North Dakota Worker's Compensation Bureau*,[32] the North Dakota Supreme Court considered whether the offset statute applied to an employee whose federal SSDI benefits were converted to retirement benefits after July 1, 1989, but who had been found totally disabled and began receiving benefits before July 1, 1989.[33] In *Kallhoff*, the court held that WSI was not allowed to offset Kallhoff's retirement benefits against his workers compensation disability benefits under Section 65-05-09.2.[34] The court determined that workers receiving total disability benefits anticipated and relied on their receipt of unreduced benefits.[35] The court further noted that legislative history indicates that the legislature did not want to impact the expectation of these workers.[36] Instead, the court noted that the

25. *Id.* ¶ 7, 738 N.W.2d at 32.
26. *Id.*
27. *Id.* ¶ 8.
28. *Id.* ¶ 9.
29. *Id.*
30. *Id.* ¶ 10.
31. *Id.* (citing N.D. CENT. CODE § 65-05-09.2 (1989)).
32. 484 N.W.2d 510 (N.D. 1992).
33. *Tedford*, ¶ 11, 738 N.W.2d at 32.
34. *Id.* ¶ 12.
35. *Id.*
36. *Id.* (citing *Kallhoff*, 484 N.W.2d at 514).

legislature was concerned with the protection of the workers' reliance interest because it did not provide that it expressly intended to adversely affect disabled workers of the type at issue.[37] Therefore, the court held that Section 65-05-09.2 only applied to workers that were qualified to receive workers compensation disability benefits and who turned sixty-five on or after July 1, 1989.[38]

In 1993, the legislature amended Section 65-05-09.2 to provide for the "offset of social security retirement benefits against the benefits of certain totally disabled claimants."[39] However, the legislature also provided that claimants receiving benefits that were offset by SSDI benefits would continue to receive at least the same aggregate amount of benefits.[40] Additionally, in 1995, the legislature enacted Section 65-05-09.3(2) and created a presumption that disabled employees eligible for social security retirement benefits were found to be retired and ineligible for workers compensation disability benefits.[41]

In *Gregory v. North Dakota Workers Comp. Bureau*,[42] the North Dakota Supreme Court considered applying this presumption in the case of an employee who was totally disabled prior to the statute's enactment.[43] The court affirmed the district court judgment which had reversed an order by WSI that discontinued Gregory's disability benefits and ordered a reinstatement of the benefits.[44] The court relied on *Kallhoff* in its analysis of whether WSI had a valid obligation to pay Gregory full disability benefits past the age of 65.[45] The court found that Gregory had a reliance interest in full disability benefits beyond the age of 65 and that WSI had a valid obligation to pay those benefits.[46]

Ultimately, the rule derived from *Kallhoff* and *Gregory* by the North Dakota Supreme Court is that injured claimants that receive total disability benefits before the enactment of the statutory retirement offset or retirement presumption have a reliance interest in continued disability benefits and the WSI has a valid obligation to pay these continued disability benefits.[47] Therefore, these provisions may not be applied to such claimants and any

37. *Id.* at 33.
38. *Id.*
39. *Id.* ¶ 13.
40. *Id.* (citing 1993 N.D. Sess. Laws ch. 614, § 10).
41. *Id.* (citing 1995 N.D. Sess. Laws ch. 623, § 1).
42. 1998 ND 94, 578 N.W.2d 101.
43. *Tedford*, ¶ 14, 738 N.W.2d at 33.
44. *Id.* ¶ 15 (citing *Gregory*, ¶ 34, 578 N.W.2d at 110).
45. *Id.* ¶ 16.
46. *Id.* at 33-34.
47. *Id.* ¶ 17, 738 N.W.2d at 34.

statutory amendments do not apply retroactively to either abrogate or change the obligation of WSI to pay these benefits.[48]

In the present case, WSI argued that the decisions in *Kallhoff* and *Gregory* did not apply because unlike Tedford's situation which involved a guaranteed continuation of benefits in an amount at least equal to that received prior to the offset, these cases involved a complete discontinuation of all disability benefits.[49] However, the North Dakota Supreme Court noted that the question at issue was not whether Tedford could still collect benefits.[50] Instead, at issue was what Tedford had a right to expect and what WSI had an obligation to pay upon Tedford becoming totally disabled in April of 1989, prior to both the 1989 and 1993 amendments.[51]

When Tedford was determined to be totally disabled in April of 1989, the retirement offset provision did not exist, so Tedford had a right to expect to receive full disability benefits and WSI had a valid obligation to pay these benefits.[52] However, an artificial offset provision had been applied to reduce Tedford's benefits from WSI.[53] If that artificial offset provision had not been applied to his benefits, Tedford would have expected to receive and would have received full disability benefits.[54] Therefore, upon reaching retirement age, Tedford had a reasonable expectation that the offset provision would end and he would receive his full benefits.[55]

The court also noted that WSI had a valid obligation to pay Tedford's full benefits without an offset when Tedford's SSDI benefits automatically converted to retirement benefits upon reaching the age of retirement.[56] Based on these determinations, the court found that the mere fact the 1993 amendments to Section 65-05-09.2 enabled Tedford to continue to receive the same amount of benefits, did not lead to a different result than that reached in *Kallhoff* and *Gregory*.[57] Ultimately, the court held that *Kallhoff* and *Gregory* controlled and that Section 65-05-09.2 did not reduce Tedford's claim for full disability benefits.[58]

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48. *Id*.
49. *Id*. ¶ 18.
50. *Id*. ¶ 19.
51. *Id*.
52. *Id*.
53. *Id*. ¶ 20, 738 N.W.2d at 35.
54. *Id*.
55. *Id*.
56. *Id*.
57. *Id*.
58. *Id*. ¶ 22.

On appeal, WSI also argued that the district court's decision that "WSI's legal arguments were not substantially justified" and its award of attorney fees and costs under Section 28-32-50(1) were erroneous.[59] Under Section 28-32-50(1), if an administrative agency acts without substantial justification, a court must award reasonable attorney fees and costs to the prevailing claimant.[60] The North Dakota Supreme Court has concluded that Section 28-32-50 "applies to WSI if it denies or reduces an employee's benefits without substantial justification."[61]

In *Lamplighter Lounge, Inc. v. State ex rel. Heitkamp*,[62] the court summarized the standard for determining "substantial justification" under Section 28-32-50.[63] In defining "substantial justification," the North Dakota Supreme Court has looked to the United States Supreme Court's definition of "substantially justified."[64] This definition focuses on a justification that would satisfy a reasonable person.[65] In this context, a party's position may be incorrect yet still be found to be substantially justified if a reasonable person could find that it has a reasonable basis in law and fact.[66]

In *Rojas v. Workforce Safety & Insurance*,[67] the court further explained the application of Section 28-32-50 by indicating that it only applies in rare situations when WSI acts without substantial justification.[68] The court noted that the purpose of the statute was to provide relief at the state level that is the same as that provided by Congress through the Equal Access to Justice Act (EAJA).[69] Analogous to its federal counterpart, which places the burden on the government, the court has placed the burden under this statute on the agency "to prove it acted with substantial justification."[70]

Generally, when construing the EAJA, federal courts have found that the acceptance of the government's position by another federal judge is persuasive evidence of the position's substantial justification.[71] Furthermore, the North Dakota Supreme Court has recognized that the WSI's ability to

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59. *Id.* ¶ 23.
60. *Id.* ¶ 24.
61. *Id.* at 35-36 (citing Rojas v. Workforce Safety & Ins., 2006 ND 221, ¶ 16, 723 N.W.2d 403, 407).
62. 523 N.W.2d 73 (N.D. 1994).
63. *Tedford*, ¶ 25, 738 N.W.2d at 36 (citing *Lamplighter*, 523 N.W.2d at 75).
64. *Id.*
65. *Id.* (citing Aggie Investments G.P. v. Public Serv. Comm'n, 470 N.W.2d 805, 814 (N.D. 1991)).
66. *Id.*
67. 2006 ND 221, 723 N.W.2d 403.
68. *Tedford*, ¶ 26, 738 N.W.2d at 36 (citing *Rojas*, ¶ 17, 723 N.W.2d at 407).
69. *Id.*
70. *Id.* (citing *Rojas*, ¶ 17, 723 N.W.2d at 407-08).
71. *Id.* ¶ 27, 738 N.W.2d at 37.

convince a district judge of its position's correctness provides strong indication that the position would be accepted by a reasonable person as correct and therefore be substantially justified.[72] However, even though this acceptance of the agency or the government's position serves as evidence of substantial justification, this evidence is not dispositive and an analysis of the government or agency's position is still required.[73] The district court's determination of whether the agency acts with substantial justification is discretionary and an abuse of discretion standard is employed on appeal.[74]

In the present case, the North Dakota Supreme Court held that the district court's decision that WSI's actions were not substantially justified amounted to an abuse of discretion.[75] The lower court proceedings were based on unsettled areas of law and WSI presented facially reasonable arguments as to the interpretation of the statute.[76] Furthermore, the first district court decision accepted WSI's position, which constituted persuasive evidence that the position would be found to have a reasonable basis in law and fact by a reasonable person.[77] Therefore, the court found that the district court's decision that WSI's position was not substantially justified and the court's award of attorney fees and costs under Section 28-32-50(1) were an abuse of discretion.[78]

The court denied Tedford's motion on appeal for attorney fees and costs under Section 28-32-50(1) and found the parties' remaining arguments on appeal without merit.[79] Ultimately, the court "affirm[ed] the amended judgment, reverse[d] the district court's order awarding Tedford attorney fees and costs under [section] 28-32-50(1), and den[ied] Tedford's motion for attorney fees and costs under [section] 28-32-50(1) for the appeal."[80]

Justice Kapsner dissented from the majority's opinion.[81] Justice Kapsner noted that the *Kallhoff* court refused to apply Section 65-05-09.2

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72. *Id*. (citing *Rojas*, ¶ 17, 723 N.W.2d at 407).

73. *Id*.

74. *Id*. ¶ 26, 738 N.W.2d at 36-37 (citing *Rojas*, ¶ 18, 723 N.W.2d at 408; Hamich, Inc. v. State, 1997 ND 110, ¶ 44, 564 N.W.2d 640, 650; Lamplighter Lounge, Inc. v. State *ex rel*. Heitkamp, 523 N.W.2d 73, 75 (N.D. 1994)).

75. *Id*. ¶ 28, 738 N.W.2d at 37.

76. *Id*.

77. *Id*.

78. *Id*. ¶ 29.

79. *Id*. ¶¶ 30-31.

80. *Id*. ¶ 31.

81. *Id*. ¶ 34, 738 N.W.2d at 38 (Kapsner, J., dissenting).

of the North Dakota Century Code because of an ambiguity in the statute.[82] Justice Kapsner indicated that the legislature has since clearly stated that it intends to apply this section to individuals in Tedford's situation.[83]

In her dissent, Justice Kapsner also disagreed with the majority in its determination that *Gregory* resulted in an impediment to the application of Section 65-05-09.2.[84] The decision in *Gregory* held that disability benefits could not be terminated under Section 65-05-09.3, but the application of Section 65-05-09.2 to Tedford did not terminate his benefits.[85]

Justice Kapsner further contended that Tedford did not provide any authority upon which to prove that it was not permissible for the offset provision to be applied to his benefits.[86] After all, as Justice Kapsner noted, Tedford would receive the same amount of money he had been receiving—when his disability benefits were offset by his social security disability benefits—when his social security retirement benefits were offset.[87] Therefore, unlike the majority, Justice Kapsner would instead reverse the district court's decision and reinstate the WSI's decision to "offset Tedford's social security retirement benefits against his disability benefits under [Section] 65-05-09.2."[88]

82. *Id.* ¶ 35 (citing Kallhoff v. N.D. Workers' Comp. Bureau, 484 N.W.2d 510, 514 (N.D. 1992)).
83. *Id.* ¶ 36.
84. *Id.* ¶ 37.
85. *Id.*
86. *Id.* ¶ 38.
87. *Id.*
88. *Id.*

CIVIL PROCEDURE—MOTIONS FOR A NEW TRIAL—ARTICULATING THE CORRECT LEGAL STANDARD *GISVOLD V. WINDBREAK, INC.*

In *Gisvold v. Windbreak, Inc.*,[89] Joelle Gisvold appealed a district court's decision to deny her motion for a new trial and dismiss her negligence action against Windbreak, Inc.[90] The decision arose after a jury failed to find Windbreak, Inc. at fault for Gisvold's injuries.[91] The North Dakota Supreme Court reversed and remanded the case to the district court for reconsideration under the correct standard, because the court could not determine if the correct legal standard had been applied.[92]

While at the Windbreak Saloon & Casino in Fargo, Gisvold claimed that she slipped and fell while dancing, which resulted in serious injuries to her right wrist.[93] Gisvold argued that Windbreak, the owner and operator of the saloon and casino, breached its duty to its customers to provide a safe dance floor based on the Windbreak's manager's admission that he used too much wax on the floor, which caused it to become slippery.[94] Gisvold further claimed that Windbreak failed to warn customers of this dangerous condition.[95]

In its defense, Windbreak asserted that it was not liable for the injuries Gisvold sustained because it did not breach its duty of care.[96] Windbreak claimed that its manager did not use excessive wax on the floor.[97] Furthermore, Windbreak argued that the manager's testimony regarding the amount of wax used was impeached because the manager quit working for Windbreak and believed that Windbreak owed him money that he did not receive.[98]

A jury found that Windbreak was not at fault for the damages being claimed by Gisvold and Gisvold moved for a new trial pursuant to Rule 59(b)(6) of the North Dakota Rules of Civil Procedure.[99] Gisvold claimed

89. 2007 ND 54, 730 N.W.2d 597.
90. *Gisvold*, ¶ 1, 730 N.W.2d at 597.
91. *Id.*
92. *Id.*
93. *Id.* ¶ 2.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* ¶ 3.

that the jury's special verdict was not justified by sufficient evidence, but the district court denied the motion.[100]

Upon appeal, Gisvold contended that the district court abused its discretion when it denied her motion for a new trial.[101] Gisvold argued that this denial was "arbitrary, unconscionable, and unreasonable" because the court said it would have granted judgment for her, did not weigh the evidence, and did not judge the witness' credibility pursuant to Rule 59(b)(6).[102] Gisvold claimed that the district court should have exercised its independent legal discretion and that the evidence only supported a verdict in her favor.[103] Windbreak contended, however, that even if the court asserted it would have reached a different result than the jury, the court still found that the verdict was supported by the evidence.[104]

The North Dakota Supreme Court noted that the standard for a district court's consideration of motions for new trials has lacked precision in the past.[105] Therefore, the court used this decision to "articulate and clarify" the correct legal standard for this consideration.[106] The standard is as follows:

> [A] district court considering a motion for a new trial based on insufficiency of the evidence may not substitute its own judgment for that of the jury, or act as a thirteenth juror when the evidence is such that different persons would naturally and fairly come to different conclusions, but may set aside a jury verdict when, in considering and weighing all the evidence, the court's judgment tells it the verdict is wrong because it is manifestly against the weight of the evidence.[107]

In this case, the district court did not issue a written memorandum pursuant to Rule 59(f) of the North Dakota Rules of Civil Procedure, which concisely stated the grounds upon which its ruling was based.[108] Instead, the district court denied Gisvold's motion orally.[109] The hearing transcript of the district court's decision technically complied with the written memorandum requirement under Rule 59(f); however, this rule also

100. *Id.*
101. *Id.* ¶ 4.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* ¶ 11, 730 N.W.2d at 601.
106. *Id.*
107. *Id.*
108. *Id.* ¶ 16, 730 N.W.2d at 603.
109. *Id.*

requires that the grounds upon which the decision was based be concisely stated.[110]

The North Dakota Supreme Court ultimately concluded that the district court's statements manifested uncertainty with regard to the correct legal standard.[111] Some of the district court's statements appeared to support the verdict and to suggest that Gisvold failed to meet her burden of proof in establishing negligence on the part of Windbreak.[112] Other statements, however, appeared to indicate that the district court incorrectly applied the standard for the consideration of a motion for a new trial.[113] Finally, some of the district court's statements reflected uncertainty as to the correct standard to apply in the consideration of a motion for a new trial under Rule 59(b)(6) and the court's oral decision failed to sufficiently explain the court's reasoning in the denial of Gisvold's motion.[114]

The court was unable to determine if the correct legal standard had been applied in the district court's denial of Gisvold's motion for a new trial.[115] Therefore, the court reversed the district court's denial and remanded the case to reconsider the motion for a new trial pursuant to the correct legal standard.[116]

Justice Sandstrom concurred and dissented with the majority's opinion in the case.[117] He concurred with the majority's articulation of the standard upon which a new trial will be granted, but believed the district court applied the correct standard.[118] Ultimately, he would have affirmed the district court decision because it appeared that "any alternative standard potentially applied by the district court [would be] more favorable to the appellant than the correct standard."[119]

110. *Id.*
111. *Id.* ¶ 17.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* ¶ 18, 730 N.W.2d at 604.
116. *Id.*
117. *Id.* ¶ 22.
118. *Id.*
119. *Id.*

CIVIL PROCEDURE—PRETRIAL JUDGMENTS—DEFAULT JUDGMENTS

IN RE J.C.

In *In re J.C.*,[120] Z.C. appealed a juvenile court order, which found her in default for not appearing at a hearing regarding her parental rights and terminated her parental rights to J.C.[121] The North Dakota Supreme Court held that the juvenile court's denial of Z.C.'s motion to continue was not an abuse of discretion.[122] However, the court found that the juvenile court erred in its termination of Z.C.'s parental rights because it did not hear any evidence that supported the termination.[123] Therefore, the court reversed the termination order of Z.C.'s parental rights and remanded the case.[124]

A social worker with the Cass County Social Services filed a petition to terminate the parental rights of Z.C. to J.C., her 11-year old son, in June of 2006.[125] Following the filing of the petition for termination of parental rights, Z.C. motioned "to put the true facts as have been testified to repeatedly."[126] Z.C. was then appointed counsel and mailed an order on August 14, 2006, which set the trial date on the petition for September 29, 2006.[127] Z.C. did not appear at the trial and her counsel asked to be discharged upon moving for a seven- to ten-day continuance to appoint new counsel.[128] The juvenile court referee denied the motion for a continuance and found Z.C. in default.[129] The referee reasoned that the best interests of J.C. would not be best served by a continuance, nor would it improve Z.C.'s ability to appear or present a case.[130] During the hearing, J.C.'s father consented to the termination of his parental rights and the referee ultimately terminated both parents' rights to J.C.[131]

On appeal, Z.C. argued that the juvenile court's decision to deny her motion for a continuance to appoint new counsel constituted an abuse of discretion.[132] Z.C. claimed that despite the likelihood that the continuance

120. 2007 ND 11, 736 N.W.2d 451.
121. *J.C.*, ¶ 1, 736 N.W.2d at 452.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* ¶ 2.
126. *Id.* ¶ 3.
127. *Id.*
128. *Id.*
129. *Id.* ¶ 4.
130. *Id.* at 454.
131. *Id.*
132. *Id.* ¶ 5.

would have lasted longer than seven to ten days, the denial of this continuance was an abuse of discretion because the proceeding regarded the termination of parental rights.[133] However, Z.C. received notice over a month before the scheduled start date of the trial on August 14, 2006, yet did not act until the actual start date of September 29, 2006.[134] Therefore, the North Dakota Supreme Court concluded that the juvenile court referee's decision to deny the continuance was "not unreasonable, arbitrary, or unconscionable and was not an abuse of discretion."[135]

In her second argument on appeal, Z.C. contended that it was an error for the juvenile court referee to find her in default and to terminate her parental rights "without hearing any evidence to support the allegations in the petition."[136] Z.C. claimed that the court instead relied on the allegations included in the petition and argued that pleadings did not constitute proof.[137] In response, the State asserted that the three requirements for the termination of parental rights under Section 27-20-44(1)(b)(1) of the North Dakota Century Code were clearly and convincingly supported by the evidence.[138] Furthermore, the State averred that Section 27-20-44(1)(b)(2) allowed the termination of parental rights because J.C. had been out of his parents' home for "450 of the previous 660 nights."[139]

Section 27-20-44(1)(b)(1) of the North Dakota Century Code provides that parental rights may be terminated if the State proves by clear and convincing evidence that: "(1) the child is deprived; (2) the causes and conditions of that deprivation are likely to continue; and (3) the child is suffering, or is likely to suffer, serious physical, mental, moral, or emotional harm."[140] With regard to this provision, the North Dakota Supreme Court has noted that judicial notice may not be taken of testimony from proceedings where termination was not an issue.[141] However, when a termination of parental rights results from a culmination of prior proceedings, the court does not have to operate in a vacuum as to the results of the prior proceedings and "may take judicial notice of orders in prior proceedings.[142] The court further noted that a court may also terminate parental rights pursuant to Section 27-20-44(1)(b)(2) if "the child is deprived and in foster

133. *Id.*
134. *Id.* ¶ 7.
135. *Id.*
136. *Id.* ¶ 8, 736 N.W.2d at 455.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* ¶ 9 (citing *In re* D.M., 2007 ND 62, ¶ 7, 730 N.W.2d 604, 606).
141. *Id.*
142. *Id.*

care or in the control, care, and custody of the state for 450 of the previous 660 nights."[143]

In making its decision, the North Dakota Supreme Court noted that it had not yet adopted procedural rules specific to juvenile proceedings.[144] However, the court looked to its procedures regarding the default of parties that have appeared, which require "sufficient proof to enable a court to determine and grant the relief, if any, to which the plaintiff may be entitled."[145] In this case, the court found that no evidentiary basis was present to support the termination of parental rights by the juvenile court referee.[146] Therefore, the court held that the juvenile court's treatment of the proceeding as a default and the termination of Z.C.'s parental rights were errors because no evidentiary support was present in the record to satisfy the statutory requirements for termination under Section 27-20-44(1)(b)(1) or (2).[147] The North Dakota Supreme Court thereby reversed the order, which terminated Z.C.'s parental rights, and remanded the case for proceedings consistent with its opinion.[148] Finally, the court also directed that the juvenile court hold a hearing within thirty days of the mandate of this case.[149]

Chief Justice VandeWalle concurred in the opinion to address judicial notice, pursuant to Rule 201 of the Federal Rules of Evidence.[150] He concurred specially to note that some of the court's prior opinions created the impression that "a less formal procedure than that set forth in Rule 201 [of the Rules of Evidence] allowed the trial court to consider prior proceedings."[151] This opinion illustrated, however, that Rule 201's application of judicial notice is more than a mere mechanic exercise.[152] After all, if a trial judge fails, under Rule 201, to take formal notice of prior proceedings, "those proceedings will not become part of the record for review on appeal."[153] Based on this standard, Chief Justice VandeWalle believed it would be inappropriate to bring the prior proceedings' record before the

143. *Id.* ¶ 10 (citing *In re* F.F., 2006 ND 47, ¶ 18, 711 N.W.2d 144, 149).
144. *Id.* ¶ 13, 736 N.W.2d at 456.
145. *Id.*
146. *Id.* ¶ 14.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* ¶ 17.
151. *Id.* ¶ 18, 736 N.W.2d at 456-57.
152. *Id.* ¶ 19, 736 N.W.2d at 457.
153. *Id.* ¶ 20.

court.[154] He thought the record was unclear as to whether the juvenile court considered the prior proceedings that led to the termination.[155]

CONTRACT LAW—CONTRACT INTERPRETATION—FRANCHISE AGREEMENTS

CAPITAL ELECTRIC COOPERATIVE, INC. V. CITY OF BISMARCK

Capital Electric Cooperative and Montana-Dakota Utilities Company (MDU) argued that they were allowed to provide electric service to certain customers in the City of Bismarck.[156] Capital Electric appealed a court judgment which denied appeal of a Bismarck City Commission decision.[157] The Bismarck City Commission decision held that Bismarck's electric distribution franchise agreements allowed MDU, not Capital Electric, to provide electric services to customers in the Boulder Ridge First Addition in northwest Bismarck.[158] MDU appealed a district court judgment affirming a Public Service Commission (PSC) decision ordering MDU not to provide Boulder Ridge electric services.[159] The North Dakota Supreme Court held that both utility companies are authorized by their franchise agreement to provide electric services to Boulder Ridge and that PSC's decision controls the distribution of services in Boulder Ridge.[160] The court reversed the judgment in Capital Electric's appeal and affirmed the judgment in MDU's appeal.[161]

Bismarck, a home rule city with an ordinance requiring electric service providers to have a franchise to provide services within the city, adopted a resolution in 1987 which renewed a twenty-year non-exclusive franchise allowing MDU to operate an electric distribution system in Bismarck as "now, or hereafter constituted."[162] MDU's franchise did not have any geographical limitations.[163]

Bismarck granted a twenty-year non-exclusive franchise to Capital Electric in 1973 and 1993; Capital Electric's franchise was different from MDU's because it included a geographic limitation.[164] The limitation restricted the franchise "to areas within the city described in the Area Service

154. *Id.*
155. *Id.*
156. Capital Elec. Coop. v. Bismarck, 2007 ND 128, ¶ 1, 736 N.W.2d 788, 790.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* ¶ 2.
163. *Id.*
164. *Id.* ¶ 3.

Agreement Dated July 5, 1973."[165] The agreement provided that MDU would serve customers within an area bound by a heavy dashed black line on an attached map; MDU would continue to serve areas surrounding and encompassing the City of Bismarck.[166] The agreement further provided that Capital Electric would continue to serve its existing customers within the black dashed line and serve new customers outside the heavy dashed black line.[167] Additionally, Capital Electric would serve rural areas not receiving central station services and other areas specifically identified in the agreement.[168] The agreement was subject to cancellation by either party upon twelve months notice.[169]

The Boulder Ridge First Addition was annexed in April 2005.[170] Capital Electric provided electric service to at least part of Boulder Ridge prior to the annexation.[171] The Boulder Ridge area is outside of the heavy dashed black line on the map attached to the service agreement and was located in Capital Electric's principal service area under the agreement.[172] After the annexation, both MDU and Capital Electric sought to provide electric service to the new customers in Boulder Ridge.[173]

MDU petitioned the Bismarck City Commission (Commission) in August 2006 for a declaration of MDU's franchise right to provide electric service to Boulder Ridge.[174] The Commission issued findings of fact and conclusions of law in November 2005 on MDU's petition after the hearing, but before a subsequent special meeting.[175] The Commission concluded that it was authorized to resolve the franchise questions and related issues.[176]

The Commission explained that both MDU and Capital Electric offered different opinions on the meaning of the franchises and the area service agreement and the Commission held that the area service agreement was ambiguous.[177] The Commission considered extrinsic evidence that indicated the parties' intent that Capital Electric have a limited presence in the

165. *Id.*
166. *Id.* ¶ 4, 736 N.W.2d at 791.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* ¶ 5, 736 N.W.2d at 792.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* ¶ 6.
175. *Id.*
176. *Id.*
177. *Id.*

city and that MDU was to be the primary electric service supplier.[178] From this evidence, the Commission concluded that MDU was meant to remain the primary electric provider in the city for all customers except for Capital Electric's existing customers.[179] The Commission did not believe that the attached map was meant to be in place for forty years without amendment because if that were the case Capital Electric would be the exclusive provider for all new areas added to the city outside the lines in the original Area Service Agreement.[180] Instead, the lines on the Area Service Agreement were supposed to move outward as Bismarck grew.[181] Based upon these findings, the Bismarck City Commission held that MDU was to provide electric service to new Boulder Ridge customers and existing customers were to remain with Capital Electric.[182]

Capital Electric brought a declaratory judgment action against Bismarck, MDU, and the PSC in November 2005 seeking a declaration of Capital Electric's franchise rights.[183] The district court held that declaratory relief was not an available remedy and treated Capital Electric's action as an appeal.[184] The judge held in a March 2006 decision that Bismarck's interpretation of the franchise was "not arbitrary, capricious or unreasonable."[185] The court then dismissed Capital Electric's declaratory judgment action and denied Capital Electric's appeal in June 2006.[186]

In September 2005, Capital Electric filed a separate complaint with the PSC against MDU under Section 49-03-01.3 of the North Dakota Century Code's Territorial Integrity Act.[187] In the complaint, Capital Electric sought to enjoin MDU from providing electric services to Boulder Ridge.[188] In a June 2006 split decision, the PSC found that MDU's extension of its facilities into Boulder Ridge "interfered with and constituted an unreasonable duplication of Capital Electric's available [Boulder Ridge] facilities and services."[189] The PSC ordered MDU to stop extending its electric services in Boulder Ridge.[190] The PSC further ordered that MDU stop

178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 793.
183. *Id.* ¶ 7.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* ¶ 8.
188. *Id.*
189. *Id.*
190. *Id.*

providing service to Boulder Ridge customers and sell its Boulder Ridge electric distribution facilities to Capital Electric.[191] The district court affirmed PSC's decision in October 2006.[192] The North Dakota Supreme Court stayed the October 2006 PSC decision and consolidated it with Capital Electric's appeal.[193]

Capital Electric argued in its appeal that the district court erred when deciding that declaratory relief was not an available remedy in the challenge of the Bismarck decision.[194] Capital Electric cited Section 32-23-02 of the North Dakota Century Code which authorizes a declaratory judgment action for the construction of a franchise.[195] Additionally, Capital Electric argued that the district court erred by treating the declaratory judgment action as an appeal because no statutes authorize an appeal and, in the absence of statutory authorization, declaratory relief is available to challenge the Bismarck interpretation of the franchise.[196] Finally, Capital Electric argued that it was authorized by its franchise to "provide electric services to areas within its principal service area, which is [the area] outside the heavy dashed black line on the map attached to the area service agreement," even as those areas were annexed to Bismarck.[197]

In response, Bismarck and MDU argued that Capital Electric was not seeking a declaratory relief because such a claim must seek a declaration of rights before the rights have been violated.[198] Instead, Capital Electric was challenging Bismarck's interpretation of the franchises.[199] MDU and Bismarck additionally argued that the line on the map was intended to move outward with new areas and that MDU should have exclusive rights to the new customers in Boulder Ridge.[200] Bismarck and MDU also argued that the appeal was authorized by Section 27-05-06(4) and chapter 28-34 of the North Dakota Century Code.[201] Finally, Bismarck and MDU argued that Capital Electric was not prejudiced by the district court's decision to treat the claim as an appeal because the standard of arbitrary, capricious and

191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* ¶ 10.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* ¶ 11, 736 N.W.2d at 794.
199. *Id.*
200. *Id.*
201. *Id.*

unreasonable was the same in either an appeal or a declaratory judgment action.[202]

The court explained that municipalities possess only those powers granted by either the North Dakota Constitution, statute or as necessarily implied from an express grant.[203] The court then established Bismarck's authority to grant franchises under article seven, Section 11 of the North Dakota Constitution.[204] This constitutional provision gives Bismarck the power to franchise the construction and operation of public utilities and restricts the legislature from abridging such power.[205] Furthermore, Section 40-05-01(57) of the North Dakota Century Code authorizes the municipality governing body to grant and extend franchises for periods of time not to exceed twenty years subject to the regulatory powers of the governing body.[206] In this case, the court explained that if both MDU and Capital Electric had franchise rights to Boulder Ridge, the PSC had authority to decide whether the services of one would unreasonably duplicate the services of the other under Section 49-03-01.3.[207]

The court used concepts of contract law in its analysis of Capital Electric's appeal.[208] The court explained that a franchise is a contract and the interpretation of a contract is a question of law that is independently examined and interpreted on appeal to determine if it was erroneously construed.[209] The court then offered the statutory basis of contract interpretation in North Dakota.[210] The court explained that unless otherwise provided, public and private contracts are interpreted by the same rules of interpretation.[211] Furthermore, the contract's language governs its interpretation unless the contract is unclear, ambiguous or absurd.[212] The purpose of interpreting the contract is to determine the parties' intent at the time they signed the contract based upon the writing itself, if possible.[213] Words in the contract are considered in their ordinary and popular sense.[214] If the contract is found to be ambiguous, extrinsic evidence can be considered to

202. *Id*.
203. *Id*. ¶ 12.
204. *Id*.
205. *Id*.
206. *Id*.
207. *Id*. ¶ 13; Cass County Elec. Coop v. N.S.P., 419 N.W.2d 181, 187 (ND 1988); N.S.P. v. P.S.C., 452 N.W.2d 340, 345 (ND 1990).
208. *Capital Elec*., ¶¶ 15-17, 736 N.W.2d at 795.
209. *Id*. ¶ 15.
210. *Id*. ¶ 16.
211. *Id*.
212. *Id*.
213. *Id*.
214. *Id*.

show intent for an ambiguity, but not to contradict the written language.[215] After establishing these principles, the court analyzed Capital Electric's claim.[216]

The court did not decide whether the district court erred when treating the action as an appeal; instead the court found that the district court incorrectly interpreted the controlling law regarding Capital Electric's franchise.[217] For this reason, the court concluded that Bismarck's interpretation was arbitrary, capricious and unreasonable.[218] The court began by examining the language of the agreement between MDU and Capital Electric.[219] The plain language of the agreement allowed Capital Electric to serve new customers within the heavy dashed black line and provided that Capital Electric's principal service area was the area outside the heavy dashed black line, which included Boulder Ridge.[220] Bismarck interpreted the agreement to mean MDU was the main provider within Bismarck and that the lines would move outward as Bismarck grew.[221] Furthermore, the court noted that Bismarck said it did not intend for Capital Electric to be the exclusive electric supplier for new areas of town, but that MDU would serve in that capacity.[222]

With these considerations, the court found that Bismarck's interpretation of the franchise ignored the plain meaning of the agreement.[223] Nothing in the plain language allowed either entity to be the exclusive provider of electric services in Boulder Ridge upon annexation; instead the plain language gave both providers a non-exclusive franchise.[224] The geographical limitation in Capital Electric's franchise and attached map specifically authorized Capital Electric to serve Boulder Ridge.[225] Furthermore, the court explained that nothing in the plain language suggested that the lines on the map were meant to grow as the city grew.[226] Instead, the service agreement specified that if the agreement was canceled by the other party, "all privileges, rights, obligations and restrictions as therein stated

215. *Id.* ¶ 17, 736 N.W.2d at 796.
216. *Id.* ¶ 22, 736 N.W.2d at 797.
217. *Id.* ¶ 21, 736 N.W.2d at 796.
218. *Id.*
219. *Id.* ¶ 22, 736 N.W.2d at 797.
220. *Id.*
221. *Id.* ¶ 23.
222. *Id.*
223. *Id.* ¶ 24, 736 N.W.2d at 798.
224. *Id.*
225. *Id.*
226. *Id.*

shall continue to apply to both."[227] Bismarck's reliance upon extrinsic evidence from the 1960s was misplaced in proving the intent in 1973 and 1993 because evidence should show the intent at the time of contracting.[228] Capital Electric did not receive its franchise from Bismarck in the 1960s; it received it in 1973.[229]

The North Dakota Supreme Court concluded that the non-exclusive franchises when considered as a whole within the area service agreement, authorized both Capital Electric and MDU to provide services to Bismarck "now, or hereafter constituted."[230] The court explained that Capital Electric was not restricted from serving Boulder Ridge by its franchise.[231] The effect of both Capital Electric and MDU's franchises to serve Boulder Ridge constituted an unreasonable duplication and was subject to the PSC under Section 49-03-01.3 of the North Dakota Century Code.[232]

The Court held that in the absence of explicit language providing otherwise, interpretation favors the public interest in preventing unreasonable duplication of facilities while recognizing a municipality's constitutional right to grant a franchise.[233] In this case, Bismarck exercised its constitutional right by granting both Capital Electric and MDU a franchise for Boulder Ridge.[234] The court concluded that Bismarck erred in construing the franchise to preclude Capital Electric from providing electric service to Boulder Ridge.[235] The court held that both Capital Electric and MDU had franchises to serve Boulder Ridge and reversed the district court's judgment in Capital Electric's appeal.[236]

The court rejected many of the arguments in MDU's appeal because these arguments were founded upon the premise that Capital Electric did not have a right to serve Boulder Ridge.[237] Because both MDU and Capital Electric had a right to provide service, the PSC had jurisdiction under Section 49-03-01.3 of the North Dakota Century Code.[238] The court explained that when determining interference with existing services, the PSC must look to the existing electric facilities that the rural electric cooperative and

227. *Id*.
228. *Id*. ¶ 25.
229. *Id*.
230. *Id*. ¶ 27, 736 N.W.2d at 799.
231. *Id*.
232. *Id*.
233. *Id*.
234. *Id*.
235. *Id*. at 798.
236. *Id*.
237. *Id*. ¶ 28, 736 N.W.2d at 799.
238. *Id*.

the public utility have in the area and determine whether there is a an unreasonable duplication of capital-intensive facilities and services by the other entity.[239] After examining the facilities and services that Capital Electric had provided Boulder Ridge, the court held that a reasonable mind could have found that PSC's findings were supported by the evidence and the record.[240] Therefore, the court ultimately affirmed the district court judgment affirming the PSC decision.[241]

CRIMINAL LAW—ELEMENTS OF THE OFFENSE & LESSER INCLUDED OFFENSES

STATE V. ROGERS

Joseph Rogers appealed a criminal judgment finding him guilty of sexual assault and criminal trespass.[242] The North Dakota Supreme Court's holding consisted of two parts. First, the court found that Rogers' sexual assault conviction under Section 12.1-20-07(1)(b) of the North Dakota Century Code was not supported by sufficient evidence of a mental disease or defect.[243] The court therefore reversed the guilty verdict as to the sexual assault charge and remanded the case to dismiss count two of the information.[244] Second, the court agreed with the district court's decision to prohibit a "lesser-included jury instruction" as to the criminal trespass charge.[245] As a result, the court affirmed the district court's criminal judgment based upon the guilty verdict for the criminal trespass charge.[246]

From the evening of July 20, 2004 through the morning of July 21, 2004, Rogers was employed at a Minot hotel, where the victim was a guest.[247] After going to a few bars, the victim returned to the hotel and did not have her hotel room key.[248] Rogers walked her to her room and opened the door using the hotel's master key.[249] The hotel's master key accessed the victim's room four additional times in the early morning.[250] The victim's testimony indicated that "she had no memory from the time she

239. *Id.* ¶ 33, 736 N.W.2d at 800.
240. *Id.* ¶ 35, 736 N.W.2d at 802.
241. *Id.*
242. State v. Rogers, 2007 ND 68, ¶ 1, 730 N.W.2d 859, 860.
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.* ¶ 2.
248. *Id.*
249. *Id.*
250. *Id.*

entered her hotel room to some point in the morning when she saw Rogers adjusting his clothing."[251]

Rogers claimed that when the victim returned to the hotel, she talked to him, including asking him to order a pizza, and they smoked cigarettes together.[252] According to Rogers, the victim hugged and kissed him, then invited him to her hotel room where they engaged in sexual intercourse.[253] Rogers further alleged that the victim instructed him to return to her room to wake her later in the morning.[254] Rogers stated that he returned to her room, where he shook her and touched her private areas while she was asleep.[255]

Following these events, Rogers was charged with the offenses of sexual assault and criminal trespass.[256] During his jury trial, Rogers was convicted of a class C felony sexual assault pursuant to Section 12.1-20-07(b) and a class C felony criminal trespass pursuant to Section 12.1-22-03(1) of the North Dakota Century Code.[257]

On appeal, Rogers made two arguments.[258] First, Rogers argued that the guilty verdict for the class C felony sexual assault charge was not supported by sufficient evidence.[259] Second, Rogers argued that the trial court's decision to "allow a lesser-included jury instruction on the criminal trespass charge" was incorrect.[260]

Rogers's first argument alleged that he could not be convicted of a class C felony sexual assault charge under Section 12.1-20-07(1)(b) because there was insufficient evidence that "the victim suffered from a mental disease or defect."[261] The State argued instead that the victim's intoxication constituted a mental disease or defect.[262] Section 12.1-20-07(1)(b) of the North Dakota Century Code provides:

> 1. A person who knowingly has sexual contact with another person, or who causes another person to have sexual contact with that person, is guilty of an offense if:

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251. *Id.*
252. *Id.* ¶ 3, 730 N.W.2d at 861.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.* ¶ 4.
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.* ¶ 5.
262. *Id.*

> . . .
>
> b. That person knows or has reasonable cause to believe that the other person suffers from a mental disease or defect which renders that other person incapable of understanding the nature of that other person's conduct[.][263]

This section fails to define "mental disease or defect."[264]

The State argued that the victim's intoxication, which led to unconsciousness, constituted a mental disease or defect.[265] The trial court's jury instruction specifically stated that intoxication in and of itself did not constitute a mental disease or defect.[266] Neither Rogers nor the State objected to this jury instruction itself and the jury instruction became the law of the case.[267] Therefore, under Section 12.1-20-07(1)(b), Rogers could not be found guilty of sexual assault by a rational factfinder and the North Dakota Supreme Court reversed his conviction of class C felony sexual assault pursuant to Section 12.1-20-07(1)(b).[268] Furthermore, the court noted that the State could not retry Rogers for sexual assault under the statute based on the principles of double jeopardy and remanded the case to the district court to dismiss the sexual assault charge in the information.[269]

As to his second argument on appeal, Rogers claimed that "he should have received a lesser-included offense jury instruction on the class A misdemeanor criminal trespass charge."[270] Rogers was convicted of class C felony criminal trespass under Section 12.1-22-03(1), which states that "knowing that he is not licensed or privileged to do so, he enters or remains in a *dwelling* or in highly secured premises."[271] Rogers argued that he was guilty of a lesser charge pursuant to Section 12.1-22-03(2)(a) of the North Dakota Century Code because the victim's hotel room constituted an occupied structure, not a dwelling.[272]

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263. N.D. CENT. CODE § 12.1-20-07(1)(b) (2001).

264. *Rogers*, ¶ 9, 730 N.W.2d at 862.

265. *Id.*

266. *Id.* This provision was in accordance with Section 12.1-04-02, which states that "[i]ntoxication does not, in itself, constitute mental disease or defect." *Id.* (quoting N.D. CENT. CODE § 12.1-04-02 (1997)).

267. *Id.* ¶ 10, 730 N.W.2d at 863. "Unchallenged jury instructions become the law of the case." *Id.* (quoting State v. Wolff, 512 N.W.2d 670, 675 (N.D. 1994)).

268. *Id.* ¶¶ 10-11.

269. *Id.* ¶ 11. If Rogers was prosecuted again under Section 12.1-20-07, it would "place Rogers in jeopardy again for sexual assault." *Id.*

270. *Id.* ¶ 13.

271. *Id.* ¶ 12 (quoting N.D. CENT. CODE § 12.1-22-03(1) (2001)) (emphasis added).

272. *Id.* ¶ 13. Section 12.1-22-06(4)(a)-(b) defines an "occupied structure" as "[a] structure or vehicle . . . [w]here any person lives or carries on business or other calling; or . . . [w]hich is

The North Dakota Supreme Court concluded that the term "dwelling" includes a hotel room because the definition of dwelling includes a place of lodging.[273] Furthermore, the court determined that Section 12.1-22-03(2)(a) is not a lesser-included offense of Section 12.1-22-03(1).[274] To be a lesser included offense, "it must be impossible to commit the greater offense without committing the lesser."[275] In this case, it would not be impossible for the "'greater' offense of trespassing in a dwelling or highly secured premises [to take place] without committing the 'lesser' offense of trespassing in any building, occupied structure, or storage structure."[276] Therefore, the district court's decision to not permit the lesser-included jury instruction was not an error and the North Dakota Supreme Court affirmed Rogers' conviction for criminal trespass.[277]

Ultimately, the North Dakota Supreme Court reversed Rogers' conviction of class C felony sexual assault under Section 12.1-20-07(1)(b) and remanded the case for the dismissal of count two of the Information.[278] As to the charge of criminal trespass, the North Dakota Supreme Court affirmed the district court's conviction.[279]

CRIMINAL LAW—MOTOR VEHICLES—SOBRIETY CHECKPOINTS

STATE V. HAHNE

In *State v. Hahne*,[280] the State of North Dakota appealed a district court order that suppressed evidence in the case of Denise Hahne, who had been charged with driving under the influence of alcohol.[281] The North Dakota Supreme Court found that the district court's decision was based on an erroneous view of the law, specifically "that law enforcement must provide motorists with an opportunity to avoid temporary checkpoints."[282] The

used for overnight accommodation of persons." *Id.* (quoting N.D. CENT. CODE § 12.1-22-06(4)(a)-(b)).

273. *Id.* ¶ 12. The language of Section 12.1-05-12(2) defines "dwelling" as "any building or structure, though movable or temporary, or a portion thereof, which is for the time being a person's home or place of lodging." *Id.* (quoting N.D. CENT. CODE § 12.1-05-12(2) (2001)).

274. *Id.* ¶ 15, 730 N.W.2d at 864.

275. *Id.* ¶ 14, 730 N.W.2d at 863 (quoting State v. Keller, 2005 ND 86, ¶ 31, 695 N.W.2d 703, 711).

276. *Id.* ¶ 15, 730 N.W.2d at 864.

277. *Id.*

278. *Id.* ¶ 16.

279. *Id.*

280. 2007 ND 116, 736 N.W.2d 483.

281. *Hahne*, ¶ 1, 736 N.W.2d at 484.

282. *Id.*

court therefore reversed the suppression order and remanded the case to the district court to apply the appropriate legal standard.[283]

On August 18, 2006 in Bismarck, the State Highway Patrol operated a sobriety checkpoint located at the East Main and Bismarck Expressway intersection.[284] After failing to stop at the checkpoint, Hahne received a citation at 9:50 p.m. from the State Highway Patrol for driving under the influence of alcohol.[285]

Following a hearing, the district court found that the Highway Patrol officers "followed a well prepared operational order," but suppressed all of the evidence obtained by Hahne's stop.[286] The district court based this suppression on its finding that no safe and legal way to avoid the checkpoint was available.[287] The State appealed the district court's suppression order.[288]

Upon appeal, the State argued that the district court erred in suppressing evidence of Hahne's intoxication because the decision was based solely on drivers' ability to see and avoid checkpoints, implying that checkpoints must provide a means by which motorists can avoid them.[289] The State further claimed that this ruling hindered the purpose of sobriety checkpoints, which is "to reduce alcohol-related fatalities on [] roadways."[290]

The issue before the North Dakota Supreme Court was "whether the district court, in granting Hahne's motion to suppress evidence, relied on an erroneous assumption that law enforcement must, as a matter of law, provide a legal opportunity for motorists to avoid such checkpoints."[291] The court noted that "[a] Fourth Amendment 'seizure' occurs when a vehicle is stopped by police at a checkpoint"[292] and relied upon the United

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283. *Id.*

284. *Id.* ¶ 3.

285. *Id.* ¶¶ 2-3. At the site of the citation, officers obtained a blood alcohol level of .092 percent from Hahne; following a later blood draw, she was found to have a blood alcohol level of 0.13 percent. *Id.* ¶ 2.

286. *Id.* ¶ 3.

287. *Id.* Instead, upon notice of the checkpoint, the court found that the only outlet was a potentially dangerous "U-turn at night on a curving road with a 50 m.p.h. speed limit." *Id.*

288. *Id.* ¶ 4, 736 N.W.2d at 485. The district court had jurisdiction in the case pursuant to Section 39-20-06 of the North Dakota Century Code. *Id.* ¶ 5.

289. *Id.* ¶ 6.

290. *Id.* Hahne also contended, for the first time on appeal, that the State did not prove the effectiveness of the checkpoint. *Id.* However, the North Dakota Supreme Court did not address the issue because it was raised for the first time on appeal and therefore not properly preserved. *Id.* ¶ 7, 736 N.W.2d at 486.

291. *Id.* ¶ 8.

292. *Id.* ¶ 6, 736 N.W.2d at 485 (quoting State v. Albaugh, 1997 ND 229, ¶ 6, 571 N.W.2d 345).

States Supreme Court decision of *Michigan Dep't of State Police v. Sitz*[293] in its decision.[294]

In *Sitz*, the United States Supreme Court applied the three-part balancing test established in *Brown v. Texas*[295] in finding a Michigan sobriety checkpoint program constitutional.[296] The three-part balancing test includes: "(1) 'a weighing of the gravity of the public concerns served by the seizure,' (2) 'the degree to which the seizure advances the public interest,' and (3) 'the severity of the interference with individual liberty.'"[297] As to the first factor of the *Brown* test, *Sitz* recognized that the problem of drunk driving and the importance of a State's interest in eliminating that problem could not be disputed.[298]

The *Sitz* Court found that the second factor of the *Brown* test had also been met.[299] This factor, which requires an analysis of "the degree to which the seizure advances the public interest," was essentially characterized by the Court as requiring an analysis of the "effectiveness" of the checkpoint.[300] The *Sitz* Court determined that this effectiveness analysis does not necessitate a searching examination to the extent present in the case, which required a determination of the "ratio between the number of cars stopped and the number of actual arrests."[301] Instead, the Court found that in the case of a Fourth Amendment analysis, deference will be given to the manner in which a checkpoint is executed.[302]

Finally, as to the third factor in the *Brown* test, the *Sitz* Court concluded that the intrusion resulting from the checkpoint at issue was slight.[303] The Court acknowledged that the intrusion had an objective component—comprised of the stop's duration and the interrogation's intensity—and a subjective component—characterized as the fear and surprise that the stop causes in law-abiding motorists.[304] The Court focused

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293. 496 U.S. 444 (1990).

294. *Hahne*, ¶ 9, 736 N.W.2d at 486.

295. 443 U.S. 47 (1979).

296. *Hahne*, ¶ 9, 736 N.W.2d at 486.

297. *Id.* (quoting *Brown*, 443 U.S. at 50-51). The central concern in balancing these factors is "assuring that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *Id.* (quoting *Brown*, 443 U.S. at 51). Therefore, this concern requires that a sobriety checkpoint be "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Id.*

298. *Id.* ¶ 10 (citing *Sitz*, 496 U.S. at 451).

299. *Id.* ¶ 11 (citing *Sitz*, 496 U.S. at 453-54).

300. *Id.*

301. *Id.*

302. *Id.* at 486-87.

303. *Id.* ¶ 12, 736 N.W.2d at 487 (citing *Sitz*, 496 U.S. at 451).

304. *Id.* (citing *Sitz*, 496 U.S. at 451-52).

on the subjective component and ultimately determined that this intrusion was minimal because the stop was executed by uniformed officers who were following pre-established guidelines.[305]

In making this determination, the *Sitz* majority noted that the Michigan courts had misread the Court's previous decisions.[306] With regard to the subjective intrusion, the lower courts had focused on the fear and surprise that resulted when drunk drivers became aware of the possibility of being stopped at a sobriety checkpoint.[307] The Court, however, noted that the fear and surprise that is to be taken into consideration is the fear and surprise experienced by law-abiding motorists as a result of the stop.[308] Ultimately, the *Sitz* Court held that stationary checkpoints, which are visible to motorists from a distance and operated by uniformed officers pursuant to established guidelines, do not generate an undue amount of fear or surprise to law-abiding motorists.[309] Therefore, these checkpoints do not result in an unconstitutional subjective intrusion of a motorist's personal liberties.[310]

In addition to its analysis of *Sitz*, the North Dakota Supreme Court also referred to *City of Bismarck v. Uhden*[311] in its decision.[312] The court noted that its decision in *Uhden* "did not challenge the constitutionality of the checkpoint on the basis of the degree of intrusion into his individual liberty."[313] However, the decision addressed how a checkpoint's visibility may affect an intrusion by noting that this factor is not conclusive in and of itself, but is instead "one relevant factor in the analysis of the stop."[314]

In *Hahne*, the North Dakota Supreme Court determined that the district court's decision that a checkpoint was invalid because it failed to provide a safe and legal means of avoidance, implied that as a matter of law, law enforcement was required to provide motorists a way by which to avoid these checkpoints or roadblocks.[315] Based on *Sitz* and its progeny, the court held that avoidability is not wholly determinative of the "constitutional reasonableness of a checkpoint."[316] Instead, it is one factor to be considered in the

305. *Id.* (citing *Sitz*, 496 U.S. at 453).
306. *Id.* (citing *Sitz*, 496 U.S. at 452).
307. *Id.*
308. *Id.*
309. *Id.* (citing *Sitz*, 496 U.S. at 453).
310. *Id.* (citing *Sitz*, 496 U.S. at 452).
311. 513 N.W.2d 373 (N.D. 1994).
312. *Hahne*, ¶ 13, 736 N.W.2d at 488.
313. *Id.*
314. *Id.* (quoting *Uhden*, 513 N.W.2d at 378 n.8).
315. *Id.* ¶ 14.
316. *Id.* ¶ 15.

evaluation of the intrusion upon individual motorists' personal liberty.[317] Therefore, the district court decision was reversed and remanded to determine "whether the checkpoint Hahne encountered was constitutionally reasonable."[318]

CRIMINAL LAW—NIGHTTIME WARRANTS—INEFFECTIVE ASSISTANCE OF COUNSEL

ROTH V. STATE

Todd A. Roth appealed a district court order denying his application for post-conviction relief.[319] Roth argued that his trial and appellate counsel were plainly ineffective for not challenging the nighttime provision in a warrant permitting the search of his home.[320]

Roth was charged with possession of methamphetamine, possession of drug paraphernalia, and the manufacture of a controlled substance by the State after law enforcement searched his home with a warrant during the early morning hours of August 28, 2002.[321] Roth's counsel filed a motion to suppress all evidence discovered in the search arguing that the warrant was not supported by probable cause and contained an invalid no-knock provision.[322] The district court denied the motion.[323] Roth then entered a conditional guilty plea to the charges, but reserved his right to appeal the suppression motion determination.[324] Roth, retaining his trial counsel to represent him on appeal, again argued to the North Dakota Supreme Court that the warrant lacked probable cause and that the no-knock provision was invalid, but the Court affirmed the original judgment.[325]

Roth filed an application for post conviction relief in January 2005.[326] In his application, Roth raised multiple issues related to the legality of the search and claimed that he received ineffective assistance of counsel.[327] The district court concluded that these issues were already raised on direct appeal and rejected his application for post-conviction relief.[328] Roth appealed this judgment and the North Dakota Supreme Court reversed the

317. *Id.*
318. *Id.* ¶ 16.
319. Roth v. State, 2007 ND 112, ¶ 1, 735 N.W.2d 882, 886.
320. *Id.*
321. *Id.* ¶ 2.
322. *Id.*
323. *Id.*
324. *Id.*
325. *Id.* ¶ 3.
326. *Id.* ¶ 4.
327. *Id.*
328. *Id.*

district court order denying post-conviction relief.[329] The court held that Roth was barred from raising issues directly related to the issuance and execution of the search warrant, but that the district court should have considered the merits of his ineffective assistance of counsel claim.[330] The court remanded the case to the district court to examine this claim.[331]

The district court considered Roth's claim of ineffective assistance of counsel on remand by examining the record.[332] Roth argued that his counsel failed to raise the issue of whether the police exercised the no-knock provision of the warrant.[333] He further argued that his counsel failed to challenge the nighttime provision of the search warrant both at the suppression hearing and on direct appeal.[334]

The district court found that Roth's counsel was not ineffective as to the issue of whether law enforcement entered using the no-knock provision because he adequately raised the issue in his suppression motion reply brief.[335] The district court found that Roth's counsel did not challenge the validity of the nighttime provision of the search warrant, but the court did not decide whether the provision was supported by probable cause.[336] Instead, the district court found that the evidence would have been admissible regardless because of the inevitable discovery doctrine.[337] For this reason, the district court concluded that Roth did not prove that the evidence obtained from the nighttime search would be suppressed if his counsel had acted differently.[338] Therefore, the district court determined that Roth did not prove his claim of ineffective assistance of counsel and his application for post-conviction relief was denied.[339] Roth renewed his appeal on the grounds that his counsel failed to challenge the legality of the nighttime search warrant.[340]

The Sixth Amendment of the United States Constitution guarantees criminal defendants the right to effective assistance of counsel.[341] The issue of ineffective assistance of counsel is a mix of both questions of law and of

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329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.* ¶ 5.
333. *Id.*
334. *Id.*
335. *Id.* ¶ 6, 735 N.W.2d at 887.
336. *Id.*
337. *Id.*
338. *Id.*
339. *Id.*
340. *Id.*
341. *Id.* ¶ 7.

fact.[342] The petitioner bears a heavy burden to prevail in a post-conviction claim of ineffective assistance of counsel.[343] The petition must show that the counsel's representation fell below an objective standard of reasonableness and that the petitioner was prejudiced by counsel's deficient performance.[344]

To meet the first prong, the petitioner must surpass a strong presumption that his representation fell within range of reasonable performance considering the circumstances of the case and show that the errors were so egregious as to not comply with the standards set forth by the prevailing professional standards and thus the Constitution.[345] To meet the second prong, the petitioner must show that the results would have been different but for the unprofessional errors of counsel.[346] Failure to file a pretrial suppression motion is not per se ineffective assistance of counsel; instead the petitioner must show actual prejudice.[347]

Roth argued that he would have prevailed on the suppression motion if his counsel had raised the issue of whether it was supported by probable cause and that the court erroneously applied the inevitable discovery doctrine in the case.[348] The North Dakota Supreme Court examined Roth's claim that he would have prevailed if his attorney had raised the probable cause issue to determine whether he suffered actual prejudice because of his attorney's actions.[349] Rule 41(c)(1)(E) of the North Dakota Rules of Criminal Procedure allows a magistrate to issue a nighttime search warrant only if there is a showing of probable cause to justify the night search.[350] This heightened burden arises because a nighttime search is a greater intrusion than a daytime search.[351]

The court has allowed nighttime searches in situations when evidence can be quickly destroyed if the warrant is not promptly executed.[352] The burden requires an officer to allege facts beyond the evidence's existence.[353] The fact that drugs are easily disposed of or that a suspect holds

342. *Id.* ¶ 11, 735 N.W.2d at 888.
343. *Id.* ¶ 7, 735 N.W.2d at 887.
344. *Id.*
345. *Id.* ¶ 8.
346. *Id.* ¶ 9.
347. *Id.* ¶ 10, 735 N.W.2d at 888.
348. *Id.* ¶ 12.
349. *Id.* ¶ 17, 735 N.W.2d at 890.
350. *Id.* ¶¶ 19-20.
351. *Id.*
352. *Id.* ¶ 22, 735 N.W.2d at 891.
353. *Id.* ¶ 21, 735 N.W.2d at 890.

odd hours are not sufficient to meet the burden of a nighttime warrant.[354] Instead, the court has held that the necessity for a nighttime search exists "where there is a reasonable possibility that the fruits, instrumentalities or evidence of crime sought would not be expected to be at the searched premises during the day or might be removed or dissipated if the search is delayed."[355]

To establish probable cause, Deputy Bitz told the magistrate specific information received from a confidential source who had been at Roth's residence and provided information about how Roth manufactured methamphetamine.[356] Upon this information, law enforcement conducted additional surveillance that connected Roth to Perry Anderson, a person suspected of involvement in drug use and trafficking.[357] This information contained in the affidavit was sufficient probable cause to justify the nighttime warrant's probable cause requirement.[358] Additionally, the nighttime search was necessary to allow law enforcement to catch Roth while in the process of producing methamphetamine.[359]

The court concluded that because there was sufficient probable cause for a nighttime search, Roth would not have prevailed had his counsel raised the probable cause issue.[360] Because he would not have prevailed even if the issue had been raised, Roth did not suffer actual prejudice as required for ineffective assistance of counsel actions.[361]

The court then examined whether the evidence would have been admissible under the good faith exception to the exclusionary rule if no probable cause existed.[362] The exclusionary rule applies to violations of Rule 41(c) of the North Dakota Rules of Criminal Procedure.[363] If the exclusionary rule applies, the court must determine whether the good faith exception is applicable.[364]

The good faith exception holds that suppression is an inappropriate remedy for an illegal search if the law enforcement officer's reliance upon

354. *Id*.
355. *Id*. ¶ 22, 735 N.W.2d 891 (quoting State v. Richardson, 904 P.2d 886, 890 (Haw. 1995)).
356. *Id*. ¶ 26, 735 N.W.2d at 892.
357. *Id*.
358. *Id*. ¶ 27, 735 N.W.2d at 892-93.
359. *Id*.
360. *Id*. ¶ 29, 735 N.W.2d at 893.
361. *Id*.
362. *Id*. ¶ 31.
363. *Id*.
364. *Id*. ¶ 32, 735 N.W.2d at 894.

the search warrant was objectively reasonable.[365] A good faith exception inquiry asks whether a reasonably well-trained officer would know that the search was illegal despite receiving authorization from a magistrate.[366] There are four specific exceptions to the good faith exception; these exceptions provide that reliance is not objectively reasonable:

> (1) When the issuing magistrate was mislead by false information intentionally or negligently given by the affiant; (2) when the magistrate totally abandoned her judicial 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.[367]

The court held that the good faith exception applied because there was no evidence that any of these exceptions applied.[368] Nothing in the record indicated that the issuing magistrate was misled or failed to act in a neutral manner.[369] The warrant was not facially deficient; Deputy Bitz presented particular facts in the supporting affidavit gathered from both an informant and surveillance.[370] Ultimately, even if there was no probable cause, Deputy Bitz's reliance upon the issuing magistrate's determination for a night-time warrant was justified and the good faith exception would apply.[371]

The court concluded that Roth would not have prevailed even if his counsel had raised the issue of probable cause because the police had enough proof to meet their probable cause burden.[372] But, even if the police did not meet the probable cause burden, the good faith exception would have applied.[373] Because Roth would have been unsuccessful even if the issue had been raised, he did not suffer actual prejudice and therefore did not receive ineffective assistance of counsel.[374]

Justice Maring dissented from the majority's opinion and argued that Roth suffered actual prejudice because there was not probable cause and the

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365. *Id.*
366. *Id.*
367. *Id.* (quoting State v. Herrick, 1999 ND 1, ¶ 15, 588 N.W.2d 847, 850).
368. *Id.* ¶ 33, 735 N.W.2d at 894.
369. *Id.*
370. *Id.*
371. *Id.*
372. *Id.* ¶ 34, 735 N.W.2d at 895.
373. *Id.* ¶¶ 33-34, 735 N.W.2d at 894-95.
374. *Id.* ¶ 34, 735 N.W.2d at 895.

good faith exception would not have applied.[375] Justice Maring argued that nighttime search warrants are allowed in situations in which evidence would be disposed of by morning, by use, sale, or removal form the property.[376] The affidavit did not put forth any facts that indicated that the methamphetamine was being produced at night.[377] Furthermore, no facts were put forth that claimed that the methamphetamine would be destroyed, removed or hidden by morning.[378] Justice Maring rejected the majority's holding because the mere suspicion that one of the exigencies may happen is not enough to justify a nighttime search warrant and does not meet the requirement of probable cause.[379]

Justice Maring also rejected the majority's view that the good faith exception would apply.[380] Justice Maring believed the warrant was facially deficient because it lacked any facts which would support probable cause.[381] According to Justice Maring, Deputy Bitz knew that his affidavit did not provide any facts proving that the evidence would be removed or destroyed if the search waited until morning and therefore knew that the probable cause required for a nighttime search was insufficient.[382] For this reason, Justice Maring argued that the good faith exception did not apply.[383] Because the nighttime search warrant lacked probable cause and the good faith exception did not apply, Justice Maring concluded that the court should have reversed the order denying Roth's motion for post-conviction relief because he did not receive effective assistance of counsel.[384]

CRIMINAL LAW—PROCEDURE—USE OF RESTRAINTS ON CRIMINAL DEFENDANTS

STATE V. KUNZE

In *State v. Kunze*,[385] David Kunze appealed a district court judgment convicting him of assaulting a correctional officer.[386] Kunze argued that the district court's order to physically restrain him with handcuffs and a waist belt during his jury trial, violated his constitutional right to a fair and

375. *Id.* ¶ 36.
376. *Id.* ¶ 43, 735 N.W.2d at 896.
377. *Id.* ¶ 47, 735 N.W.2d at 898.
378. *Id.*
379. *Id.* ¶ 58, 735 N.W.2d at 901.
380. *Id.* ¶ 62, 735 N.W.2d at 901-02.
381. *Id.*
382. *Id.* ¶ 70, 735 N.W.2d at 903.
383. *Id.*
384. *Id.* ¶ 71
385. 2007 ND 143, 738 N.W.2d 472.
386. *Kunze*, ¶ 1, 738 N.W.2d at 473.

impartial trial.[387] The North Dakota Supreme Court held that the district court's order to restrain Kunze was not an abuse of discretion and affirmed the district court's decision.[388]

On August 12, 2005, Kunze was an inmate at the North Dakota State Penitentiary in the administrative segregation unit.[389] He was confined in a single-person cell and at approximately 1:00 p.m. that day, his cell was searched by four correctional officers.[390] During the search, the officers found and confiscated magazines, which belonged to another inmate, in violation of penitentiary policy.[391] As a result, Kunze was angry and upset and a scuffle occurred, during which an officer suffered a hand injury that drew blood.[392]

Prior to his trial, the State sought to have Kunze physically restrained while the trial was in progress.[393] The State argued that this request was justified based on the nature of Kunze's charged offense involving a violent act against an officer; "Kunze's history of assaults and escapes from custody"; Kunze's substantial record of threats and assaults upon prison guards and other individuals in the penitentiary; and, the highly restrained method required to transport Kunze to and from the penitentiary due to his past records of escapes and alleged assaultive behavior.[394] When Kunze was transported to and from the penitentiary, he was restrained through the use of leg irons and a belly chain and moved by at least three officers, "two to hold him and one to act as a 'chase person.'"[395] However, upon cross examination, an officer acknowledged that Kunze was not violent the three times he transported him and did not cause any problems while unshackled to change clothing for trial.[396]

In response to the State's claims, Kunze argued that the use of restraints would imply to the jury that the trial was essentially a "foregone conclusion."[397] Additionally, Kunze noted that it was in his best interests not to be violent in the courtroom because it would lead to another charge and assured his counsel that no problems would occur.[398] Finally, Kunze

387. *Id.*
388. *Id.*
389. *Id.* ¶ 2, 735 N.W.2d at 473-74.
390. *Id.* at 474.
391. *Id.*
392. *Id.*
393. *Id.* ¶ 3.
394. *Id.* ¶¶ 3-4.
395. *Id.* ¶¶ 4-5.
396. *Id.* ¶ 5, 735 N.W.2d at 475.
397. *Id.* ¶ 6.
398. *Id.*

spoke on his own behalf claiming that he had never attacked or threatened anyone at the penitentiary.[399]

Without providing an explanation for its decision, the district court granted the State's request to restrain Kunze based on the evidence and the parties' arguments, but did not require leg restraints.[400] Following this decision, the jury trial began.[401] The State presented evidence from the officers involved in the incident, who claimed that following the confiscation of the magazines, Kunze became upset and yelled obscenities.[402] Then, Kunze aggressively approached an officer, who then pushed Kunze back into the cell, "with his hands on Kunze's shoulder and chest."[403] One officer then testified that Kunze turned his head and grazed an officer's hand with his teeth, which broke the skin and drew blood, and kicked the officer.[404] The other officers supported this testimony.[405]

Following the State's presentation of its case, Kunze presented evidence in his defense to contradict the officers' testimony.[406] He called an inmate to the stand who had witnessed part of the incident and claimed that Kunze did not have his false teeth in his mouth at the time that he allegedly bit the officer.[407] Additionally, the inmate claimed that the officers began "roughing Kunze up" when he was handcuffed outside his cell.[408] However, the inmate could not see in Kunze's cell and thereby had no knowledge regarding whether Kunze bit or kicked an officer.[409] Kunze also testified on his own behalf, claiming that he did not resist returning to his cell and was shoved by an officer.[410] Kunze claimed that the marks on the officer's hand may have occurred when Kunze raised his cuffed hands to block the officer's hands and defend himself.[411]

Based on the evidence presented, Kunze was convicted by the jury of assaulting a correctional officer.[412] Upon appeal of this decision, Kunze argued that district court violated his constitutional right to a fair and impartial trial by requiring his physical restraint by handcuffs and a waist

399. *Id.*
400. *Id.* ¶ 7.
401. *Id.* ¶ 8.
402. *Id.*
403. *Id.*
404. *Id.*
405. *Id.* ¶ 9.
406. *Id.* ¶ 10.
407. *Id.* at 475-76.
408. *Id.* at 476.
409. *Id.*
410. *Id.* ¶ 11.
411. *Id.*
412. *Id.* ¶ 12.

belt during his jury trial.[413] The North Dakota Supreme Court reviewed the case under an abuse of discretion standard of review.[414]

In reaching its decision, the North Dakota Supreme Court looked to its recent decision in *In re R.W.S.*,[415] and *Deck v. Missouri,*[416] a recent United States Supreme Court decision.[417] *R.W.S.* involved a juvenile; however, certain principles set forth in the case were applicable.[418] In *Deck*, which was relied upon in the *R.W.S.* decision, the United States Supreme Court held that in general, the United States Constitution "prohibits the use of visible shackles on a convicted offender during the penalty phase of a capital case."[419] However, the use of shackles can be justified if an essential state interest is present and specific to the particular defendant on trial, such as security.[420]

The Supreme Court has acknowledged that the use of physical restraints on criminal defendants results in prejudice.[421] This sight of a defendant in shackles can cause the jury to see the defendant as a dangerous, guilty individual from the beginning of the trial, thereby undermining the presumption of innocence in the factfinding process.[422]

Additionally, the Fifth and Fourteenth Amendments prohibit the use of restraints that are visible to a jury.[423] However, this right is not absolute and can be overcome by a trial court's determination that the restraints are justified by an essential state interest specific to a particular trial, such as security or escape prevention.[424] Therefore, before restraints may be used on a defendant, a trial court must make a case-specific determination, which takes into account the "special circumstances and particular concerns related to the defendant on trial."[425] In *R.W.S.*, the North Dakota Supreme Court noted some factors that a trial court should take into account, namely the defendant's physical condition, temperament, and record; the desperateness of the defendant's situation; the security of the courtroom and

413. *Id.* ¶ 13.
414. *Id.* ¶ 14.
415. 2007 ND 37, 728 N.W.2d 326.
416. 544 U.S. 622 (2005).
417. *Kunze*, ¶ 15, 738 N.W.2d at 476.
418. *Id.*
419. *Id.* (citing *Deck*, 544 U.S. at 624).
420. *Id.*
421. *Id.* ¶ 16.
422. *Id.* at 476-77 (citing Roche v. Davis, 291 F.3d 473, 482-83 (7th Cir. 2002); Kennedy v. Cardwell, 487 F.2d 101, 111 (6th Cir. 1973)).
423. *Id.* ¶ 17, 738 N.W.2d at 477 (citing *Deck*, 544 U.S. at 629).
424. *Id.* (citing *Deck*, 544 U.S. at 628-29, 33; *In re* R.W.S., 2007 ND 37, ¶ 11, 728 N.W.2d 326).
425. *Id.* ¶ 18.

courthouse; and the availability and adequacy of less prejudicial means of security.[426]

In making its determination, an evidentiary hearing may take place to resolve factual disputes, but is not required.[427] If a trial court determines that restraints are necessary, only those restraints that are necessary are allowed to limit potential prejudice.[428] The trial court should contemplate whether less restrictive or prejudicial methods could be used.[429] Furthermore, to provide for potential appellate review, the trial court must, at a minimum, articulate its reasons for restraining the defendant on the record.[430]

The district court held an evidentiary hearing immediately prior to Kunze's trial regarding the use of restraints and determined, based on the evidence presented, that handcuffs and waist restraints were appropriate.[431] The district court did not articulate its reasoning as to the appropriateness of the restraints on the record.[432] However, the justification for added security measures was apparent on the record and the court tried to minimize prejudice by requiring that the waist restraint be placed beneath Kunze's clothing.[433]

The North Dakota Supreme Court noted that its decision in *R.W.S.* had not been decided at the time of Kunze's trial.[434] Therefore, the district court did not have this decision to use as guidance in its determination of the appropriateness of the restraints.[435] The court further acknowledged that in the wake of *R.W.S.*, district courts are required to make case-specific findings and explain, in more detail than present in this case, the rationale for the decision to use restraints.[436] However, the North Dakota Supreme Court held that the record contained sufficient facts and reasoning to justify the district court's imposition of restraints, thereby affirming the district court's judgment.[437]

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426. *Id.* (citing *R.W.S.*, ¶ 16, 728 N.W.2d at 330-31).

427. *Id.* ¶ 20, 738 N.W.2d at 478.

428. *Id.* ¶ 19, 738 N.W.2d at 477 (citing United States v. Zuber, 118 F.3d 101, 103 (2d Cir. 1997); Hameed v. Mann, 57 F.3d 217, 222 (2d Cir. 1995)).

429. *Id.* ¶ 21, 738 N.W.2d at 478.

430. *Id.*

431. *Id.* ¶ 22.

432. *Id.* ¶ 23.

433. *Id.*

434. *Id.*

435. *Id.* ¶ 25.

436. *Id.* ¶ 24

437. *Id.* ¶ 25, 738 N.W.2d at 479.

CRIMINAL LAW—SEXUAL ASSAULT—DETERMINING THE EXTENT OF FORCE REQUIRED

STATE V. VANTREECE

A jury found Alexander Vantreece guilty of gross sexual imposition pursuant to Section 12.1-20-03(1)(a) of the North Dakota Century Code and a criminal judgment was entered against him, which he appealed.[438] The North Dakota Supreme Court held that substantial evidence had not been presented upon which the jury could reasonably find that "Vantreece compelled the complainant to submit to a sexual act by force."[439] Therefore, the court reversed the criminal judgment and remanded the case to enter the judgment of acquittal.[440]

The incident upon which Vantreece was charged occurred at his ex-wife's apartment during the morning of August 15, 2005.[441] The complainant was the sister-in-law of Vantreece's ex-wife and knew Vantreece.[442] When the incident occurred, the complainant and her infant son were visiting Vantreece's ex-wife.[443] Vantreece's ex-wife went to run errands and took the complainant's son with her, while the complainant remained at the ex-wife's apartment.[444] After the ex-wife left, the complainant laid down in a bedroom and was having trouble falling asleep when Vantreece entered the room.[445] Vantreece tried to put the complainant to sleep by laying down next to her and rocking her, which he had done on prior occasions.[446] Vantreece then left the room but returned a few minutes later.[447] The complainant pretended to be asleep as Vantreece laid down behind her facing in the same direction.[448]

The complainant then alleged that Vantreece cut a hole in the pajama pants she was wearing.[449] The complainant did not say anything to Vantreece and testified that Vantreece attempted to penetrate her vagina with his penis but was unsuccessful.[450] He then left the room; when he returned, he pulled her pants down further and again unsuccessfully attempted

438. State v. Vantreece, 2007 ND 126, ¶ 1, 736 N.W.2d 428, 429.
439. *Id.*
440. *Id.*
441. *Id.* ¶¶ 2-3.
442. *Id.* at 429-30.
443. *Id.* at 429.
444. *Id.* ¶ 3.
445. *Id.* at 429-30.
446. *Id.* at 430.
447. *Id.*
448. *Id.*
449. *Id.*
450. *Id.*

to penetrate her again while she continued to pretend to sleep.[451] Vantreece left the room once again and when he returned a few seconds later, he successfully penetrated her vagina with his penis, which the complainant testified felt lubricated.[452] According to the complainant, Vantreece then wiped her off with tissues, pulled her pants up and exited the room.[453] The complainant continued to feign sleep and waited approximately fifteen minutes before leaving the room so Vantreece would not know that she was awake.[454] The complainant then went outside, where she was joined by Vantreece.[455] The two of them had a cigarette together and Vantreece told her that his ex-wife wanted the complainant to take a shower before she returned home.[456] The complainant took a shower but only washed her hair in order to preserve the evidence.[457] The complainant then informed Vantreece's ex-wife about what had happened and his ex-wife drove the complainant to the hospital where she was examined.[458]

The Fargo Police Department conducted an investigation and initially charged Vantreece with gross sexual imposition pursuant to Section 12.1-20-03(1)(e) of the North Dakota Century Code.[459] This class A felony charge was based on the allegation that Vantreece engaged "in a sexual act with a person who suffer[ed] from a mental disease or defect rendering her incapable of understanding the nature of her conduct."[460] However, this charge was later amended to charge Vantreece pursuant to Section 12.1-20-03(1)(a), which provided that he "engaged in a sexual act with another, or caused another to engage in a sexual act, [by] compell[ing] the victim to submit by force."[461] Following a jury trial, Vantreece was found guilty and convicted of "'class A' felony gross sexual imposition."[462]

On appeal, Vantreece argued that the gross sexual imposition charge was not supported by sufficient evidence.[463] Vantreece claimed that the prosecutor overreached by repeatedly suggesting that the mental disease or defect of the complainant was the key element at issue.[464]

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451. *Id.*
452. *Id.*
453. *Id.*
454. *Id.* ¶ 4.
455. *Id.*
456. *Id.*
457. *Id.*
458. *Id.*
459. *Id.* ¶ 5.
460. *Id.*
461. *Id.*
462. *Id.* ¶ 6, 736 N.W.2d at 431.
463. *Id.* ¶ 8.
464. *Id.* ¶ 9.

The record contained evidence indicating that the defendant knew of the complainant's mental limitations.[465] Vantreece told a Fargo Police Department detective that he knew that the complainant was "a vulnerable adult" with the "education of an eighth grader."[466] However, Vantreece argued that the prosecutor's argument as to the complainant's mental abilities was both prejudicial and irrelevant.[467] He founded this argument on the fact that he was charged with engaging in a sex act by force, not engaging in a sex act with a person suffering from a mental disease or defect.[468]

The North Dakota Supreme Court acknowledged that Vantreece correctly noted that the prosecutor bore the burden of proving that the victim had been compelled to submit through force.[469] However, the court concluded that the prosecutor's argument was not improper or prejudicial because the record contained evidence pertaining to the "complainant's diminished mental capacity."[470] The court further noted that evidence of a complainant's mental capacity was relevant in determining the amount of force necessary to compel the victim to engage in a sexual act.[471]

Vantreece next argued that there was insufficient evidence of force to convict him of compelling the complainant by force to engage in a sexual act pursuant to Section 12.1-20-03(1)(a) of the North Dakota Century Code.[472] This section of the code provides that a person is guilty of an offense if he or she "compels the victim to submit by force or by threat of imminent death, serious bodily injury, or kidnap[p]ing, to be inflicted on any human being."[473]

In its decision, the North Dakota Supreme court stressed that the State was required to prove that Vantreece compelled the complainant to have sex with him by exerting force upon her.[474] If the State failed to establish force, Vantreece would not be guilty of a crime under Section 12.1-20-03(1)(a).[475] The court further noted that mere evidence of the complainant's acquiescence in the sexual act, based on her past acquiescence in sexual advances, was not sufficient to meet this burden of proof.[476]

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465. *Id.* ¶ 11, 736 N.W.2d at 432.
466. *Id.*
467. *Id.*
468. *Id.*
469. *Id.*
470. *Id.* ¶ 12.
471. *Id.*
472. *Id.* ¶ 13.
473. *Id.* (quoting N.D. CENT. CODE § 12.1-20-03(1)(a) (2001)).
474. *Id.* ¶ 21, 736 N.W.2d at 435.
475. *Id.*
476. *Id.*

In the present case, the record lacked sufficient evidence to establish that Vantreece compelled the complainant to have sex with him by exerting physical action or force over her.[477] Although Vantreece ripped a hole in the complainant's pants, he left the room two times before finally having sex with her.[478] Under these circumstances, the mere evidence that Vantreece ripped a hole in the complainant's pants was not a sufficient finding of force by which to compel the complainant to submit to engaging in a sexual act.[479]

The North Dakota Supreme Court compared this case to *Jiminez v. State*,[480] a Texas Court of Appeals case, which reversed a sexual assault conviction.[481] Similar to the present case, the complainant in *Jiminez* feigned sleep during an alleged sexual assault.[482] The trial court in *Jiminez* found the alleged attacker guilty, but the conviction was reversed by the appellate court.[483] On appeal, the court found an absence of threats or the use of force or violence, because the attacker fled immediately upon hearing the complainant cough and realizing that the complainant may be aware of what was happening.[484] Furthermore, as in the present case, no evidence was presented as to the use of force or threats of force or violence on the part of the alleged attacker.[485]

The court also looked to the Michigan Supreme Court case of *People v. Patterson*,[486] in which a sexual assault conviction was reversed based on insufficient evidence of force or coercion.[487] In *Patterson*, the defendant touched the complainant without her consent while she was sleeping.[488] The Michigan Supreme Court refused to expand the definition of force to include this type of conduct because this type of conduct was already provided for under a different section of the statute.[489] The court explained that the legislature's intention in making the statute at issue in the case was to distinguish between sexual assaults involving force or coercion and those involving physically and mentally incapacitated victims.[490]

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477. *Id.* ¶ 22.
478. *Id.*
479. *Id.*
480. 727 S.W.2d 789 (Tex. Ct. App. 1987).
481. *Vantreece*, ¶ 23, 736 N.W.2d at 435.
482. *Id.*
483. *Id.*
484. *Id.*
485. *Id.* ¶¶ 24-25.
486. 410 N.W.2d 733 (Mich. 1987).
487. *Vantreece*, ¶ 25, 736 N.W.2d at 436.
488. *Id.* (citing *Patterson*, 410 N.W.2d at 743).
489. *Id.*
490. *Id.* at 436-37.

Unlike *Patterson*, the complainant in the present case was not actually asleep, she pretended to be asleep.[491] Furthermore, the complainant admitted that Vantreece did not threaten her, force her down or restrain her to prevent her from moving or fleeing.[492] Instead, the sexual act was accomplished by Vantreece without compelling the complainant through the use of force or threats.[493] In this case, the prosecutor could have chosen to charge Vantreece under either Section 12.1-20-07(1)(a) or 12.1-20-03(1)(a)(c) of the North Dakota Century Code, neither of which requires a finding of force.[494] However, through its discretion, the prosecutor chose to charge Vantreece under Section 12.1-20-03(1)(a), which required that it be proven that Vantreece compelled the complainant to submit to the sexual act by force.[495]

The North Dakota Supreme Court noted that Vantreece may have willfully taken advantage of the complainant, whom he knew to be vulnerable.[496] However, the State failed to present substantial evidence upon which it could be reasonably concluded that Vantreece compelled the complainant to submit to a sexual act by force or threat under Section 12.1-20-03(1)(a).[497] Therefore, the court reversed the criminal judgment against Vantreece and remanded the case for the entry of the judgment of acquittal.[498]

Justice Crothers concurred with the majority's decision.[499] In his concurrence, Justice Crothers outlined North Dakota's sexual offense statutory scheme in Section 12.1-20 of the North Dakota Century Code.[500] Within this statutory scheme, Justice Crothers noted that the act of using force to compel a victim to submit is perceived as more serious than many other sexual offenses.[501] Justice Crothers noted, in agreement with the majority, that the mere ripping of the complainant's pants was not sufficient evidence of the use of force to compel the complainant to submit.[502] Justice Crothers further acknowledged that a decision in the alternate would essentially nullify the legislature's intent to increase the punishment for sexual

491. *Id.* ¶ 26, 736 N.W.2d at 437.
492. *Id.*
493. *Id.*
494. *Id.* ¶ 27.
495. *Id.*
496. *Id.*
497. *Id.* ¶ 28.
498. *Id.*
499. *Id.* ¶ 30 (Crothers, J., concurring).
500. *Id.* ¶¶ 31-35, 736 N.W.2d at 437-38.
501. *Id.* ¶ 36, 736 N.W.2d at 438.
502. *Id.* ¶ 37, 736 N.W.2d at 439.

offenses based on the level or type of violence accompanying the offense.[503]

Justice Kapsner dissented with the majority's decision and was joined by Justice Maring in her conclusion that the force involved in the nonconsensual sexual penetration that occurred was sufficient under Section 12.1-20-03(1)(a).[504] Justice Kapsner noted that "force" is defined by statute as "physical action" and the State need only meet this definition, not prove threat of death or other serious bodily injury.[505]

In her dissent, Justice Kapsner further indicated that the evidence was sufficient to uphold the jury verdict.[506] Justice Kapsner noted that a rational factfinder could have concluded that Vantreece's physical actions, including ripping the complainant's pants, forcing himself upon her without consent and lubricating himself, met Section 12.1-20-03(1)(a)'s requirements.[507] Justice Kapsner further argued that the cases relied upon by the majority for their factual similarities are unpersuasive based on legal dissimilarities.[508] In *Jiminez*, the appellate court relied on the definition of force as provided in case law, while the jury in the present case was instructed to apply the statutory definition of force.[509] Additionally, in *Patterson*, Michigan's statutory definition of force is quite dissimilar from North Dakota's statutory definition, so as to preclude any persuasive effect of the case.[510]

Justice Kapsner indicated that the majority decision created a dangerous legal precedent by either requiring that it be proven that the victim resisted the attacker or that the force used by the attacker was meant to overcome the victim.[511] Justice Kapsner argued that the force present in this case, the penetration of a non-consenting victim, constituted sufficient force.[512] Justice Kapsner further noted that the determination of sufficiency of the force was an issue for the jury to decide and that the charge of gross sexual imposition is not based on the victim's resistance, but is instead based on the attacker's conduct.[513] Furthermore, requiring a victim to resist an attacker could lead to death or serious bodily injury and an attacker's

503. *Id.*
504. *Id.* ¶ 39 (Kapsner, J., dissenting); *id.* ¶ 50, 736 N.W.2d at 441 (Maring, J., concurring).
505. *Id.* ¶ 40.
506. *Id.* ¶ 41.
507. *Id.* at 440.
508. *Id.* ¶ 42.
509. *Id.* ¶ 43.
510. *Id.* ¶ 44.
511. *Id.* ¶ 47, 736 N.W.2d at 441.
512. *Id.*
513. *Id.*

conduct should not be excused simply because the victim does not protect herself as a reasonable person would have in the eyes of the court.[514]

Finally, Justice Kapsner stressed that the court's use of the word "acquiesce" implied that a woman who pretends to sleep during a sexual assault will not be found to be victimized unless she does more.[515] Justice Kapsner argued that a sleeping woman should not be allowed to be victimized simply because she is acquiescing.[516] Additionally, the determination of whether or not a victim has in fact been victimized should remain within the province of the jury as the fact-finders.[517] In this case, the jury found that the complainant did not acquiesce in engaging in the sexual act with Vantreece; instead, she was compelled to do so.[518] Therefore, Justice Kapsner argued that there was sufficient evidence to support Vantreece's conviction for gross sexual imposition and would have affirmed the judgment of the district court.[519]

CRIMINAL LAW—SEXUAL ASSAULT—RETROACTIVE APPLICATION OF AN ELEMENT OF AN OFFENSE

STATE V. FLATT

Lucas Flatt appealed a district court judgment and order denying his motion to vacate a jury verdict for gross sexual imposition and dismiss the charge.[520] Flatt argued that a different version of the law should have been applied by the district court.[521] The North Dakota Supreme Court concluded that Flatt had been appropriately charged based on the law that was in effect when the crime took place, thereby affirming the district court's decision.[522]

On June 25, 2005, Flatt was charged under Section 12.1-20-03(3) of the North Dakota Century Code with gross sexual imposition.[523] The charge stemmed from an incident that took place on December 27, 2004 whereby "Flatt engaged in a sexual act with a woman who was under

514. *Id.*
515. *Id.* ¶ 48.
516. *Id.*
517. *Id.*
518. *Id.*
519. *Id.* ¶ 49.
520. State v. Flatt, 2007 ND 98, ¶ 1, 733 N.W.2d 608, 608.
521. *Id.*
522. *Id.*
523. *Id.* ¶ 2, 733 N.W.2d at 609.

fifteen years old."[524] In the Information, Flatt was charged under the law in effect at the time the crime occurred.[525]

The gross sexual imposition law was subsequently amended on April 12, 2005 and became effective on August 1, 2005.[526] The amended version of Section 12.1-20-03(3) provided an increased offense gradation from "a class A felony to a class AA felony if the actor was more than five years older than the victim at the time of the crime."[527] Section 12.1-20-01(3) was also amended by the North Dakota Legislature to provide that if an act's criminality depends on the age of the victim, the actor is only guilty of an offense if the actor was more than four years older than the victim when the crime occurred.[528] This new provision thereby limited the conduct that can be classified as criminal and the determination of the age of the actor in relation to the victim were required to establish that a criminal act occurred and determined the gradation of the offense.[529] The information was not amended to reflect these amendments.[530]

On January 13, 2006, the jury returned a guilty verdict against Flatt.[531] On March 28, 2006, Flatt filed a motion to dismiss under Rule 12(b)(3)(B) of the North Dakota Rules of Criminal Procedure.[532] Flatt claimed that through its amendments, the legislature changed the crime's penalty and added an additional element, specifically the relation between Flatt's age and the victim's age.[533] Flatt argued that the amended law should be applied retroactively and that the State must prove and the jury must find that Flatt was more than four years older than the victim to convict him of the crime of gross sexual imposition.[534] Because the jury did not find Flatt's age in relation to the victim's, Flatt argued that the information had to be dismissed.[535] Further, the motion indicated that Flatt was "more than four, but less than five years older than the victim."[536] The district court

524. *Id.*
525. *Id.*
526. *Id.* ¶ 3.
527. *Id.* The new version also provided a decreased offense gradation from "a class A felony to a class C felony if the actor was more than four, but less than five years older than the victim at the time of the crime." *Id.*
528. *Id.*
529. *Id.* ¶ 7, 733 N.W.2d at 610.
530. *Id.* ¶ 3, 733 N.W.2d at 609.
531. *Id.* ¶ 4.
532. *Id.*
533. *Id.*
534. *Id.*
535. *Id.*
536. *Id.*

denied the motion on June 20, 2006 and entered its judgment on October 31, 2006, thereby sentencing Flatt to a class C felony.[537]

On appeal to the North Dakota Supreme Court, Flatt argued that his case must be dismissed based on the State's failure to prove an essential element of the offense to the jury, his age in relation to the victim's age.[538] Conversely, the State argued that the amendment's age-in-relation-to-the-victim-provision is not an essential element of the offense; instead, it is merely a mitigating factor.[539]

The North Dakota Supreme Court concluded that the provision was an essential element of the offense of gross sexual imposition, but was not an element on the date that Flatt's offense was committed because it was prior to the amendment's effective date.[540] Pursuant to Section 12.1-20-03(1)(d) of the North Dakota Century Code in effect prior to the 2005 amendments, the State was required to allege and prove that: "(1) on or about the date alleged in the information, in the county and state alleged in the information, the defendant willfully engaged in a sexual act with the victim, and (2) the victim was less than fifteen years old."[541] Following the effective date of the 2005 amendments, the age-in-relation-to-the-victim provision was added to the general provisions of sex crimes, specifically Section 12.1-20-01.[542] Through the inclusion of this provision, the amendments essentially added a new element to Section 12.1-20-03(1)(d), which a jury must find proven beyond a reasonable doubt.[543]

Because the age-in-relation provision was construed as an essential element of the crime, the court had to determine whether the amendments applied in Flatt's case.[544] Therefore, the issue before the court was one of both legislative intent and statutory construction.[545] The court found that Flatt's claim failed because elements of an offense could not be retroactively applied without the legislature's express approval.[546]

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537. *Id.* The State conceded it was appropriate to sentence Flatt to a class C felony in light of the 2005 legislative amendments. *Id.*

538. *Id.* ¶ 6, 733 N.W.2d at 610.

539. *Id.*

540. *Id.*

541. *Id.* ¶ 7 (citing N.D. CENT. CODE § 12.1-20-03(1)(d) (1997)).

542. *Id.*

543. *Id.* The North Dakota Legislature further amended the sex crimes chapter of the North Dakota Century Code in 2007. *Id.* at 610 n.2. These 2007 amendments specifically amended both the age-in-relation-to-the-victim and the minimum offense gradation provisions. *Id.*

544. *Id.* ¶ 8, 733 N.W.2d at 611.

545. *Id.*

546. *Id.*

Generally, statutory provisions are not retroactively applied without the legislature's express approval or declaration of such application.[547] Retroactive application is disfavored because it places new legal responsibilities on past conduct.[548] However, in *State v. Cummings*,[549] the North Dakota Supreme Court created an exception to the general rule against retroactivity when it is necessary to prevent an unjust result.[550]

In Flatt's case, a lesser penalty of a class C felony was imposed on Flatt in accordance with the *Cummings* exception.[551] In the alternative, Flatt argued that the exception required that an essential element be retroactively applied to his case.[552] The North Dakota Supreme Court disagreed with this argument by refusing to expand the narrow exception it created in *Cummings* to "include the retroactive application of an additional element of the offense" without an express declaration of the legislature's intent to do so.[553] Instead, the court held that "a defendant is properly charged with a crime when the charging document alleges each and every essential element of the offense in effect *on the date the crime occurred*."[554]

Finally, Flatt argued that he was entitled to relief through an arrest of judgment or a dismissal of his case.[555] However, the North Dakota Supreme Court did not reach this issue.[556] The court concluded that the Information properly charged Flatt with the correct elements of the offense as of the date of the offense.[557] Therefore, the North Dakota Supreme Court affirmed the district court's decision and order denying Flatt's motion to dismiss.[558]

Justice Sandstrom specially concurred in the decision to address the judicial branch's claimed unconstitutional invasion of the legislative branch.[559] Justice Sandstrom noted that Section 1-02-10 of the North Dakota Century Code requires an express declaration by the legislature to

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547. *Id.* ¶ 9. Section 1-02-10 of the North Dakota Century Code specifically provides that "[n]o part of this code is retroactive unless it is expressly declared to be so." N.D. CENT. CODE § 1-02-10 (2007). Cases of retroactive statutory application arise when a statute is applied to a cause of action which arose prior to the statute's effective date. *Flatt*, ¶ 9, 733 N.W.2d at 611.

548. *Flatt*, ¶ 9, 733 N.W.2d at 611.

549. 386 N.W.2d 468 (N.D. 1986).

550. *Flatt*, ¶ 10, 733 N.W.2d at 611. *See Cummings*, 386 N.W.2d at 471 (carving out an exception to the general prohibition against retroactive statutory application).

551. *Flatt*, ¶ 11, 733 N.W.2d at 611-12.

552. *Id.* ¶ 12.

553. *Id.*

554. *Id.* (emphasis added).

555. *Id.* ¶ 13.

556. *Id.*

557. *Id.* at 612-13.

558. *Id.* ¶ 14, 733 N.W.2d at 613.

559. *Id.* ¶ 16.

apply any part of the code retroactively.[560] However, the majority referenced an exception to this general bar against retroactivity even though no constitutional infirmity has been cited regarding Section 1-02-10.[561] As a result, the court does not have the authority to create an exception effectively amending Section 1-02-10; if the section is to be changed, it is the function of the legislature to do so.[562] For the court to act otherwise would be a violation of the basic principle of separation of powers.[563]

CRIMINAL LAW—STATUTORY CONSTRUCTION AND INTERPRETATION—DEFINING "INVOLVED" DISTRIBUTION

STATE V. DENNIS

In *State v. Dennis*,[564] Douglas Dennis appealed a conditional plea of guilty for "[the] possession of marijuana with intent to deliver within one thousand feet of a school."[565] The Supreme Court of North Dakota held that under the plain language of Section 19-03.1-23.1(1)(a) of the North Dakota Century Code, enhancement only exists for the offense of "manufacture and distribution of a controlled substance within one thousand feet of a school."[566] The court reversed the district court's judgment and remanded the case for resentencing as a class B felony pursuant to Section 19-03.1-23(1)(b) of the North Dakota Century Code.[567]

Following a search of his residence, Dennis was arrested in February of 2006 for possession and intent to distribute marijuana within one thousand feet of a school.[568] Prior to the arrest, Detective Paul Olson applied for a search warrant to search Dennis' residence near Grimsrud Elementary School.[569] At the probable cause hearing, Detective Olson testified that probable cause for the search warrant was based on tips and surveillance of Dennis' residence.[570] Initially, Detective Olson received a tip that Dennis was selling large amounts of marijuana from his residence.[571] Detective

560. *Id.* ¶ 17 (citing N.D. CENT. CODE § 1-02-10 (2007)).
561. *Id.* ¶¶ 18, 22.
562. *Id.* ¶ 22.
563. *Id.* ¶¶ 20, 22.
564. 2007 ND 87, 733 N.W.2d 241.
565. *Dennis*, ¶ 1, 733 N.W.2d at 242.
566. *Id.*
567. *Id.*
568. *Id.* ¶ 2-3.
569. *Id.* ¶ 3.
570. *Id.*
571. *Id.*

Olson received an additional tip that a "'shipment' had arrived at Dennis' home."[572] Officers also conducted surveillance of Dennis' residence.[573]

Based upon the foregoing tips and surveillance, Detective Olson's search warrant application for Dennis' residence was granted.[574] Upon searching Dennis' residence, officers found less than one hundred grams of marijuana consisting of eighteen individually wrapped bags, each of which contained nearly thirty grams of the drug.[575] Additionally, the officers found "cash, money orders, smoking devices, a box of sandwich bags, an envelope with 'pay/owe information,' and scales."[576]

Dennis claimed that the offense as charged did not exist under North Dakota law and moved that the charge be reduced.[577] However, "the district court denied the motion."[578] Dennis accepted an oral conditional guilty plea at the change of plea hearing, which reserved his right to appeal.[579] Dennis was sentenced to a ten-year prison term following the State's sentencing recommendation, although all but six months of the term was suspended for five years.[580] Dennis was placed on house arrest for the six-month term and electronically monitored.[581]

On appeal, Dennis argued that the offense for which he was charged, "possession of marijuana with intent to deliver within one thousand feet of a school" does not exist under North Dakota law.[582] Dennis claimed that controlling language in the aggravating factor provision under Section 19-03.1-23.1(1)(a) of the North Dakota Century Code for offenses committed near schools is "manufacture" and "distribution."[583] Dennis argues that this language requires "an actual, constructive, or attempted transfer," not simply possession with the intent to deliver and that any statutory ambiguity be resolved in his favor.[584]

The State, on the other hand, argued that the controlling language in the statute is "involved."[585] The State applied the dictionary definition to this term, which defines it in the present tense as including "as a necessary

572. *Id.* at 243.
573. *Id.* at 242.
574. *Id.*
575. *Id.* ¶ 4, 733 N.W.2d at 243.
576. *Id.*
577. *Id.* ¶ 5.
578. *Id.*
579. *Id.*
580. *Id.*
581. *Id.*
582. *Id.* ¶ 7.
583. *Id.* ¶ 11, 733 N.W.2d at 244.
584. *Id.*
585. *Id.*

circumstance, condition, or consequence."[586] In accordance with this definition, the State argued that the offense of possession with the intent to deliver involved the distribution of a controlled substance.[587] Furthermore, the State contended that Dennis' reasoning would produce an absurd result, namely that the same penalty would be applied to his charge of possession of personal consumption and his charge of possession with the intent to deliver it to another person.[588]

The controversy in this case, as indicated by the North Dakota Supreme Court, centered around the terms "involved," "manufacture," and "distribution."[589] The terms "manufacture" and "distribution" were defined by statute, but the term "involved" was not.[590] The court noted that "involved" is defined in the dictionary as "'implicated, affected, or committed.'"[591] This definition differed from the State's definition of the present tense of "involved" and the State urged the court to adopt the broad interpretation of the term "involved" used by the federal courts.[592]

In *United States v. McKenney*,[593] the United States Supreme Court interpreted the term "involved" broadly.[594] The Court determined that the term "involved" extended the focus of the controlled substance law beyond the precise offense at issue and encompassed other offenses which were "related to or connected with such conduct."[595] However, the Court limited this broad interpretation by requiring that for an offense to be included under the "involving" language, the relationship between the offense "must not be too remote or tangential."[596]

Dennis argued that *McKenney* dealt with a very narrow issue regarding only whether the inchoate offense of conspiracy involved possession with the intent to distribute.[597] The North Dakota Supreme Court agreed by concluding that inchoate offenses such as conspiracy often encompass broader conduct than choate offenses.[598]

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586. *Id.*
587. *Id.*
588. *Id.*
589. *Id.* ¶ 13, 733 N.W.2d at 245.
590. *Id.* at 245-46.
591. *Id.* ¶ 15, 733 N.W.2d at 246 (quoting WEBSTER'S NEW WORLD DICTIONARY 742 (2d ed. 1980)).
592. *Id.* ¶¶ 15-16.
593. 450 F.3d 39 (1st Cir. 2006).
594. *Dennis*, ¶ 17, 733 N.W.2d at 246.
595. *Id.* at 247 (quoting *McKenney*, 450 F.3d at 42, 43-44) (emphasis in original).
596. *Id.* (quoting *McKenney*, 450 F.3d at 45) (emphasis in original).
597. *Id.* ¶ 18.
598. *Id.*

The North Dakota Supreme Court ultimately determined that the issue before the court was "whether possession with intent to deliver *involved* the manufacture or distribution of a controlled substance."[599] First, the court determined that Section 19-03.1-23.1(1)(a) supported Dennis' position that the school zone aggravating factor did not apply to him because this factor only applied if the offense actually "*was* the manufacture or distribution of a controlled substance."[600] Second, the court found that Sections 19-03.1-23 and 19-03.1-23.1 lacked parallel language and concluded that the inclusion of the terms "manufacture" and "distribution" impliedly excluded the intent to deliver.[601] Third, the court decided that the defendant had not yet distributed a controlled substance so the mere possession of the substance did not "involve" its distribution; it only indicated an intent to do so.[602] The court further noted that if the legislature had intended the offense of possession with the intent to deliver to be subjected to Section 19-03.1-23.1's aggravating factors, it would have done so.[603] Ultimately, the North Dakota Supreme Court held that the State's request to broadly apply the term "involved" to Dennis' charged offense was unreasonable.[604] Therefore, the court reversed the district court's judgment and remanded the case for "resentencing as a class B felony."[605]

EVIDENCE—EXPERT WITNESS TESTIMONY—CHILD VICTIM OF SEXUAL ASSAULT

STATE V. TIBOR

In *State v. Tibor*,[606] Art Tibor appealed a district court judgment finding him "guilty of two counts of gross sexual imposition."[607] Tibor argued that the district court's decision to allow expert witness testimony, allow an expert witness to "vouch for the victim's credibility," and allow testimony that was cumulative and hearsay was an abuse of discretion.[608] Additionally, Tibor argued that his conviction was not supported by

599. *Id.* ¶ 19, 733 N.W.2d at 248 (emphasis in original).
600. *Id.* ¶ 20 (emphasis in original).
601. *Id.*
602. *Id.*
603. *Id.*
604. *Id.*
605. *Id.* ¶ 21.
606. 2007 ND 146, 738 N.W.2d 492.
607. *Tibor*, ¶ 1, 738 N.W.2d at 494.
608. *Id.*

sufficient evidence.[609] The North Dakota Supreme Court disagreed with Tibor's arguments and affirmed the district court's decision.[610]

On December 9, 2005, a school counselor met with Jane Doe, who was eleven years old.[611] Doe had given the counselor a note stating that she needed to talk to someone about something that had been happening since she was in kindergarten.[612] During the meeting, Doe revealed to the counselor that every day after school when her mother was gone, her stepfather, Tibor, touched her breasts and vagina.[613] Following the meeting, the counselor reported the allegations to social services and Doe was interviewed that same day.[614] In the interview, Doe stated that Tibor touched her breasts and vagina with his hands and that these incidents took place "after school in her bedroom, the laundry room, Tibor's bedroom, and the basement living room, when her mother was at work."[615]

On December 13, 2005, Doe underwent a sexual assault exam, during which she stated that Tibor touched her vagina with his fingers several times a month and even more than once a week at times.[616] She also stated that after Tibor touched her, it would sometimes hurt when she would urinate.[617] The doctor performing the exam found an approximately four millimeter long tear on Doe's vagina, which was consistent with the allegations.[618]

Based on these allegations, Tibor was charged with one count of gross sexual imposition.[619] Later, the charge was increased to five counts of gross sexual imposition for the alleged abuse of Doe from August 1, 2005 through December 10, 2005.[620] The charges were brought under Sections 12.1-20-03(2)(a) and 12.1-20-03(1)(d) of the North Dakota Century Code.[621]

Prior to trial, the State announced that it planned to call Paula Condol as an expert witness to testify as to the "typical behaviors of sexually abused children."[622] The State also announced that it intended to call Dr.

609. *Id.*
610. *Id.*
611. *Id.* ¶ 2.
612. *Id.*
613. *Id.*
614. *Id.* ¶ 3.
615. *Id.*
616. *Id.* ¶ 4.
617. *Id.*
618. *Id.*
619. *Id.* ¶ 5.
620. *Id.*
621. *Id.*
622. *Id.* ¶ 6.

Alonna Norberg as an expert witness to testify whether Doe's genital abrasion was consistent with her allegations.[623] Additionally, the State intended to present hearsay testimony, comprised of out-of-court statements made by Doe.[624]

Tibor brought a motion *in limine* to exclude Condol's testimony because it would confuse the jury and be prejudicial.[625] Tibor also objected to the State's use of hearsay testimony.[626] The district court denied the motion *in limine* finding that the testimony could aid the jury in "understanding the evidence or determining the facts in issue."[627] A hearing was held as to the admissibility of the hearsay testimony.[628] The court found the statements admissible because the requirements of Rule 803(24) of the North Dakota Rules of Evidence, regarding statements made by children as to sexual abuse, had been met.[629]

A jury trial was then held from July 31, 2006 to August 2, 2006.[630] At the conclusion of the trial, the jury found Tibor guilty on two of the five counts and acquitted him of the remaining three counts.[631] Tibor was convicted of Count 4, which alleged that "Tibor inserted his tongue into Doe's vulva," and Count 5, which alleged that "Tibor touched Doe's vagina with his finger."[632] Ultimately, "Tibor was sentenced to twelve years in prison."[633]

On appeal, Tibor argued that the district court abused its discretion in allowing Condol's testimony regarding child sexual abuse accommodation syndrome.[634] The North Dakota Supreme Court acknowledged that it had never decided whether a district court's allowance of testimony of child sexual abuse accommodation syndrome amounted to an abuse of discretion.[635] Other courts have addressed the issue, however, and determined that expert witnesses may testify as to "typical behaviors or characteristics of sexually abused children and whether a specific victim exhibits symptoms consistent with sexual abuse."[636] However, courts must be careful to

623. *Id.* at 495.
624. *Id.* ¶ 8.
625. *Id.* ¶ 7.
626. *Id.* ¶ 8.
627. *Id.* ¶ 7.
628. *Id.* ¶ 8.
629. *Id.*
630. *Id.* ¶ 9.
631. *Id.* ¶ 15, 738 N.W.2d at 496.
632. *Id.* ¶¶ 5, 34, 738 N.W.2d at 494, 500.
633. *Id.* ¶ 15, 738 N.W.2d at 496.
634. *Id.* ¶ 16.
635. *Id.* ¶ 19, 738 N.W.2d at 497.
636. *Id.*

prevent an expert from vouching for a "child victim's credibility" when allowing this type of expert testimony.[637]

Based on the reasoning of these other courts, the North Dakota Supreme Court concluded that a district court does not abuse its discretion when it allows testimony regarding child sexual abuse accommodation syndrome as long as the testimony could help a jury understand the evidence.[638] The court reasoned that the district court's decision to allow Condol's testimony in this case was appropriate because Condol was qualified as an expert and the testimony could assist the jury's understanding of the evidence.[639] The court further found that the district court did not reach its decision in an "arbitrary, unreasonable, or unconscionable manner."[640] Therefore, the court held that the district court's decision did not constitute an abuse of discretion.[641]

Tibor next argued, however, that in Condol's testimony, she "vouched for Doe's credibility and testified she believed Doe had been abused."[642] In the State's disclosure of the witness, the State stated that it intended to use Condol's testimony to analyze whether Doe's behaviors were typical of children that had been sexually abused.[643] Furthermore, the State indicated that it did not plan to ask Condol if she believed Doe had been sexually abused.[644] Tibor argued that the State exceeded the scope of its disclosure when it allowed Condol to testify that she believed Doe had been abused because it invaded the province of the jury.[645] The North Dakota Supreme Court found, however, that although Condol's testimony supported a determination that Doe had been abused, the possibility that Doe had not been truthful in her testimony continued to remain.[646] Therefore, the court determined that Condol's testimony was appropriate and did not invade the jury's province.[647]

Tibor further argued that it was inconsistent to allow the State to present expert testimony to analyze whether Doe's behavior was consistent with the typical behavior of sexually abused children.[648] Pursuant to *State*

637. *Id.*
638. *Id.* at 497-98.
639. *Id.* ¶ 20, 738 N.W.2d at 498.
640. *Id.*
641. *Id.*
642. *Id.* ¶ 21.
643. *Id.* ¶ 22.
644. *Id.*
645. *Id.*
646. *Id.*
647. *Id.*
648. *Id.* ¶ 23.

v. Austin,[649] Tibor, as a criminal defendant, was not allowed to present expert testimony regarding his alleged sexual interest in young girls.[650] In *Austin*, the North Dakota Supreme Court affirmed a district court's decision to exclude a criminal defendant's use of expert testimony as to whether he was sexually interested in children.[651] The court determined that the district court's explanation as to the exclusion of the evidence was not arbitrary, unreasonable, or unconscionable; therefore, it was not an abuse of discretion.[652] In this case, the court also held that the district court did not abuse its discretion.[653]

Tibor next argued that the district court's decision to allow expert witnesses to testify about Doe's change in demeanor during her interview with a social worker was an abuse of discretion because the testimony constituted hearsay and the State failed to disclose it in the pretrial notice.[654] Additionally, Tibor claimed that this testimony was cumulative and prevented him from effectively cross-examining Doe because it was too prejudicial.[655]

The North Dakota Supreme Court indicated that Doe's nonverbal conduct had been offered as evidence of her demeanor and attitude.[656] The court looked to Rule 801 of the North Dakota Rules of Evidence, which provided that nonverbal conduct could be offered as evidence without constituting hearsay if it was not intended as an assertion.[657] Therefore, the court found that the testimony regarding Doe's demeanor was not hearsay and the district court's decision to admit the evidence was not an abuse of discretion.[658] As to Tibor's argument that the testimony was "cumulative and unfairly prejudicial," the court determined that while the testimony was repetitious, this mere repetition did not make the statements unduly prejudicial.[659] Therefore, the court found that the district court's decision to admit the evidence of Doe's demeanor did not amount to an abuse of discretion.[660]

649. 2007 ND 30, 727 N.W.2d 790.
650. *Tibor*, ¶ 23, 738 N.W.2d at 498.
651. *Id.* ¶ 24.
652. *Id.* at 498-99.
653. *Id.* ¶¶ 24-25, 738 N.W.2d at 499.
654. *Id.* ¶¶ 26, 28.
655. *Id.*
656. *Id.* ¶ 29.
657. *Id.*
658. *Id.*
659. *Id.* ¶¶ 30-31, 738 N.W.2d at 500.
660. *Id.* ¶ 31.

Tibor's final argument on appeal asserted that the evidence in the record was not sufficient to sustain his conviction of two counts of gross sexual imposition.[661] Tibor argued that he was innocent based on Doe's inconsistent statements regarding the abuse.[662] Additionally, Tibor contended that he was not responsible for Doe's genital abrasion because Doe's physical examination took place five days after the last alleged episode of abuse and the doctor testified that the "abrasion was probably more than 24-48 hours old and would heal quickly."[663] Tiber further claimed that he "proved he did not have time to abuse Doe."[664]

The North Dakota Supreme Court noted that enough evidence had been presented so that Tibor was not convicted on all five counts of gross sexual imposition for which he had been charged.[665] However, the court noted that sufficient evidence had been presented to charge him with two of those counts.[666] Tibor was charged with "inserting his tongue into Doe's vulva and for using his finger to touch Doe's vagina."[667] Evidence was presented through Doe's testimony that Tibor had touched her in these ways and that the abuse occurred when her mother was not home.[668] Evidence was also presented that Doe and her siblings were home alone with Tibor at times and Doe's brothers testified that during these times, Doe was sometimes alone in a room with Tibor and the door was locked or closed.[669] The doctor that performed the sexual assault exam on Doe also testified that Doe's genital abrasion was consistent with the sexual abuse allegations.[670] Furthermore, expert testimony was presented that Doe's behavior was consistent with the behavior typically exhibited by children that had been sexually abused.[671]

Based on the evidence in the record, the North Dakota Supreme Court concluded that sufficient evidence was present to sustain Tibor's convictions for gross sexual imposition.[672] The court therefore affirmed the district court's judgment.[673]

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661. *Id.* ¶ 32.
662. *Id.*
663. *Id.*
664. *Id.*
665. *Id.* ¶ 34.
666. *Id.*
667. *Id.*
668. *Id.*
669. *Id.*
670. *Id.*
671. *Id.*
672. *Id.* at 501.
673. *Id.* ¶ 35.

FAMILY LAW—CHILD SUPPORT—COMPUTATION OF SUPPORT OBLIGATIONS

CLINE V. CLINE

In *Cline v. Cline*,[674] the Minot Regional Child Support Enforcement Unit (Unit) appealed the district court's "July 28, 2006 Second Amended Judgment," which set David Cline's child support.[675] The North Dakota Supreme Court held that the district court's failure to compute David Cline's child support obligation according to the child support guidelines was an error.[676] The court therefore reversed and remanded the case for a redetermination of the child support obligation under the guidelines.[677]

In 1997, David and Sharon Cline divorced and Sharon received custody of their two minor children.[678] David was ordered to pay child support in an amount calculated by the court through the use of the child support guidelines.[679] The court then adjusted David's support obligation based on his "extended visitation with the children and his travel costs," thereby giving him a "two-month credit against his annual support obligation."[680]

In 2002, Sharon requested and was granted permission to move to Iowa with the children.[681] At that time, David's monthly obligation was increased to $602 based on an increased income and he continued to receive the annual credit.[682] An amended judgment incorporated these provisions into the parties' stipulation.[683]

In 2006, Sharon requested that the Unit review David's child support obligation.[684] The Unit motioned that David's obligation be increased based on changes in his income.[685] The Unit and David stipulated that his monthly net income was $3,234, which would amount to a monthly support obligation of $920 without accounting for any deviations.[686] The Unit

674. 2007 ND 85, 732 N.W.2d 385.
675. *Cline*, ¶ 1, 732 N.W.2d at 386.
676. *Id.*
677. *Id.*
678. *Id.* ¶ 2.
679. *Id.*
680. *Id.*
681. *Id.* ¶ 3.
682. *Id.* at 386-87.
683. *Id.* at 387.
684. *Id.* ¶ 4.
685. *Id.*
686. *Id.*

claimed that deviations from the guidelines must be calculated under relevant provisions of the guidelines.[687] David, however, argued that he should be allowed to receive the credit provided in the prior stipulation.[688]

The district court determined that David "should continue to receive a two-month credit against his support obligation."[689] In arriving at this decision, the district court noted that the credit had been determined based on the increased expenses David would have incurred when Sharon moved to Iowa.[690] Therefore, the district court continued the two-month credit of David's child support obligation and recalculated the obligation.[691]

The Unit appealed the district court's decision.[692] The Unit argued that the district court's failure to comply with the child support guidelines pursuant to chapter 75-02-04.1 of the North Dakota Administrative Code in calculating David's obligation was an error.[693] In child support determinations, "[a] court errs as a matter of law when it fails to comply with the requirements of the child support guidelines in determining an obligor's child support obligation."[694]

In this case, the court acknowledged the district court's power to modify earlier child support orders.[695] However, the court noted that courts cannot order a reduced support obligation that fails to comply with the child support guidelines.[696] Therefore, the court found that the district court had erred as a matter of law when it failed to compute David's support obligation according to the child support guidelines.[697]

Under the child support guidelines, specific provisions exist regarding "deviations for extended visitation and travel expenses related to [the] exercise of visitation."[698] Specifically, Section 75-02-04.1-08.1 of the North Dakota Administrative Code provides that a district court is required to

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687. *Id.*
688. *Id.*
689. *Id.* ¶ 5.
690. *Id.*
691. *Id.*
692. *Id.* ¶ 6.
693. *Id.*
694. *Id.* (citing Heinz v. Heinz, 2001 ND 147, ¶ 16, 632 N.W.2d 443, 450). As to the standard of review in child support determinations, the *de novo* standard applies to questions of law and the clearly erroneous standard applies to findings of fact. *Id.* (citing Berge v. Berge, 2006 ND 46, ¶ 7, 710 N.W.2d 417, 419). Additionally, in some limited areas, findings of fact may be "matters of discretion subject to an abuse-of-discretion standard of review." *Id.* (*Berge*, ¶ 7, 710 N.W.2d at 419).
695. *Id.* ¶ 8, 732 N.W.2d at 388 (citing Zarrett v. Zarrett, 1998 ND 49, ¶ 10, 574 N.W.2d 855, 858).
696. *Id.* (citing *Zarrett*, ¶¶ 6-8, 574 N.W.2d at 857).
697. *Id.*
698. *Id.* ¶ 9.

adjust a child support obligation upon an award of extended visitation to an obligor.[699] Furthermore, subsection (2) of this provision contains a complex formula to use to calculate deviations from child support based on the length of visitation in the court order.[700]

When extended visitation is present, "the district court must adjust the amount of child support to reflect that visitation in accordance with the guideline formula."[701] In this case, David's visitation undisputedly satisfied the guideline's definition of extended visitation.[702] Therefore, David's child support obligation must be adjusted in accordance with Section 75-02-04.1-08.1 of the North Dakota Administrative Code.[703]

The child support guidelines also specifically provide for deviations from support obligations when obligors have "a reduced ability to pay due to travel expenses incurred for child visitation" in Section 75-02-04.1-09(2)(i).[704] The guidelines provide that in these situations, the travel expenses are to be "subtracted from the obligor's net income before calculating the support obligation."[705] In this case, the district court awarded David a two-month credit towards his annual support obligation instead of using the child support guidelines to determine the appropriate adjustment amount.[706] Ultimately, the court must follow the provisions in the child support guidelines as to David's "scheduled extended visitation and related travel expenses."[707]

On appeal, David argued that the district court's judgment should be upheld.[708] He claimed that the child support award was "at least 85 percent of the calculated amount under the guidelines" and cited Section 14-09-08.4(3) of the North Dakota Century Code in support of this argument.[709] The court however indicated that this statute did not expressly or implicitly allow "child support awards that deviate less than 15 percent from the calculated support obligation under the guidelines."[710] Instead, it merely establishes a line below which child support agencies are required to "seek

699. *Id*. (citing N.D. ADMIN. CODE § 75-02-04.1-08.1 (2008)).

700. *Id*. (citing N.D. ADMIN. CODE § 75-02-04.1-08.1(2)).

701. *Id*. (citing Shaw v. Shaw, 2002 ND 114, ¶ 19, 646 N.W.2d 693, 698; Gleich v. Gleich, 2001 ND 185, ¶ 14, 636 N.W.2d 418, 423).

702. *Id*.

703. *Id*.

704. *Id*. ¶ 10.

705. *Id*.; *see also* N.D. ADMIN. CODE § 75-02-04.1-09(7) (stating that adjustments "shall be made to the obligor's net income").

706. *Id*. ¶ 11, 732 N.W.2d at 388-89.

707. *Id*. at 389.

708. *Id*. ¶ 12.

709. *Id*.

710. *Id*.

an amendment of court-ordered support."[711] Furthermore, this section specifically requires that support awards be calculated in accordance with the child support guidelines.[712]

Ultimately, the North Dakota Supreme Court held that the district court's computation of David's child support obligation was an error as a matter of law.[713] Therefore, the court reversed and remanded the case to redetermine David's child support obligation under the child support guidelines.[714]

PROBATE LAW AND ESTATE ADMINISTRATION—NOTICE TO CREDITORS—REASONABLE DILIGENCE STANDARD

ESTATE OF GILBERT ELKEN, JR.

Lorry Larson appealed a district court judgment which denied his claims against the decedent's estate.[715] The North Dakota Supreme Court found that the district court misapplied the law when it determined that Larson was not a reasonably ascertainable creditor pursuant to Section 30.1-19-01 of the North Dakota Century Code, thereby finding Larson's claims untimely.[716] The court ultimately held that Larson was a reasonably ascertainable creditor and remanded the case for further proceedings on Larson's claims.[717]

The decedent was granted a life estate in a house in Mayville, North Dakota in February 1999.[718] The decedent lived in the house until July 2002, upon which time he moved into a nursing home in Mayville where he remained until his death on February 16, 2005.[719] A guardian served on the decedent's behalf during this time.[720]

After a pipe broke in the decedent's house in 2004 and caused water damage, Larson made the repairs.[721] Larson then submitted a bill to the decedent's guardian and indicated that all of the necessary repairs had not

711. *Id.*
712. *Id.* ¶ 13.
713. *Id.* ¶ 14.
714. *Id.*
715. Estate of Gilbert Elken, Jr., 2007 ND 107, ¶ 1, 735 N.W.2d 843, 843.
716. *Id.*
717. *Id.*
718. *Id.* ¶ 2. Lorry Larson, Joan Tryhus, and Sandra Bloomquist were granted remainders in the life estate. *Id.*
719. *Id.*
720. *Id.*
721. *Id.*

been made.[722] Larson acknowledged that the decedent's guardian had always indicated a willingness to pay for any additional damages.[723]

Following the decedent's death, the personal representative of his estate published "a notice to creditors in the Traill County Tribune for three successive weeks in April 2005."[724] This notice provided that any creditor's claim, which was not presented to the personal representative of the decedent's estate within three months of publication, would be barred.[725] A copy of the notice was not mailed to Larson, who was a California resident.[726] Over a year later, Larson sought compensation for repairs made to the decedent's house and "filed claims against the decedent's estate on May 12, May 23, June 26, and June 30, 2006" which were denied by the personal representative.[727]

Larson petitioned the district court to allow his claims.[728] The parties then presented affidavits and agreed to have the court decide the case based on the record.[729] The district court denied the claims "concluding they were not submitted to the personal representative within three months after the publication of the notice to creditors" pursuant to North Dakota Century Code Section 30.1-19-03(1).[730] The district court determined that Larson was not "a known or reasonably ascertainable creditor" under Section 30.1-19-01.[731] In making its decision, the court looked to the legislature's intent under Section 30.1-19-01 and defined "a reasonably ascertainable creditor" as a "creditor who regularly submits billings."[732] The court determined that Larson's claims did not fit into this narrow definition and ultimately denied the claims.[733]

Upon appeal, Larson argued that the district court erred in finding his claims against the decedent's estate untimely.[734] Section 30.1-19-03(1) of

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722. *Id.*
723. *Id.*
724. *Id.*
725. *Id.*
726. *Id.*
727. *Id.* at 844.
728. *Id.* ¶ 3.
729. *Id.*
730. *Id.*
731. *Id.*
732. *Id.*
733. *Id.* The district court further found that "the personal representative was not required to mail Larson a copy of the notice to creditors." *Id.* Additionally, the court "declined to adopt a 'good cause' exception for filing claims and found there was no evidence of fraud or affirmative deception to support Larson's equitable estoppel argument." *Id.*
734. *Id.* ¶ 5, 735 N.W.2d at 845. Since the district court action was treated as a bench trial and tried without a jury, the court's findings of fact are governed under a clearly erroneous standard of review. *Id.* ¶ 4, 735 N.W.2d at 844.

the North Dakota Century Code provides that creditor claims against a decedent's estate, which arise prior to the decedent's death, are barred unless the presentment of the claims occurs within three months of the first publication and mailing of notice under Section 30.1-19-01; or, if notice to creditors is not published or mailed, presentment of the claims occurs within three years of the date of the decedent's death.[735]

Larson argued that the district court erred in its decision that Larson was not entitled to actual notice by erroneously limiting the definition of a reasonably ascertainable creditor as a person who regularly submits billing statements.[736] Larson further argued that the court erred in its interpretation of the term "includes" as a term of limitation.[737] Finally, Larson argued that this interpretation ignored the United States Supreme Court's decision in *Tulsa Professional Collection Services, Inc. v. Pope*,[738] which imposed a due process requirement on personal representatives to make "reasonably diligent efforts to uncover the identities of creditors."[739]

The North Dakota Supreme Court began its decision by addressing the use of the term "includes."[740] The court noted that when used in a statutory definition, the term "includes" has consistently been interpreted as a word of enlargement, not a term of limitation.[741] Specifically, the court acknowledged that the use of the term "includes" in defining a reasonably ascertainable creditor as one who regularly submits billing, is "a definition of enlargement and not of limitation."[742]

The mailed notice requirement for reasonably ascertainable creditors provided for in Section 30.1-19-01 of the North Dakota Century Code was enacted in response to the United States Supreme Court's decision in *Pope*.[743] In *Pope*, the Supreme Court held that a notice provision for claims in probate requiring only notice by publication, did not satisfy the due process requirement that reasonably ascertainable creditors must receive actual notice.[744] The Court determined that a personal representative satisfies this due process requirement by using "reasonably diligent efforts" to establish the identities of reasonably ascertainable creditors.[745] However,

735. *Id.*
736. *Id.* ¶ 6.
737. *Id.*
738. 485 U.S. 478 (1988).
739. *Elken*, ¶ 6, 735 N.W.2d at 845.
740. *Id.* ¶ 8, 735 N.W.2d at 846.
741. *Id.*
742. *Id.*
743. *Id.* ¶ 9.
744. *Id.* (citing *Pope*, 485 U.S. at 489-90).
745. *Id.* (citing *Pope*, 485 U.S. at 490).

for creditors that are not reasonably ascertainable, notice by publication is sufficient.[746] Based on this decision and rules of statutory construction, the North Dakota Supreme Court held that under Section 30.1-19-01, a reasonably ascertainable creditor can be uncovered by a personal representative through reasonably diligent efforts.[747]

The North Dakota Supreme Court found that the district court's interpretation of a reasonably ascertainable creditor under Section 30.1-19-01, was contrary to the decision in *Pope* and the principle that the term "includes" is a term of enlargement and not of limitation when used in a definition.[748] The district court determined that Larson was not entitled to the mailed notice given to creditors because he was not a reasonably ascertainable creditor in that he did not regularly submit billings to the decedent or the decedent's estate.[749] The North Dakota Supreme Court found that this determination was based on an erroneous and limiting interpretation of Section 30.1-19-01 and concluded that the district court misapplied the law in its interpretation of a reasonably ascertainable creditor.[750]

Additionally, the North Dakota Supreme Court addressed the parties' arguments regarding whether the personal representative could have discovered Larson's claims by contacting the decedent's guardian and inquiring into the decedent's financial affairs.[751] These arguments raised the question as to whether the determination of a reasonably ascertainable creditor involves an inquiry into the facts of the case.[752] This inquiry turns upon what constitutes reasonable due diligence on the part of the personal representative.[753]

The North Dakota Supreme Court noted that Section 30.1-18-15(27) imposes a duty on personal representatives to "satisfy and settle any claims against an estate."[754] Additionally, Section 30.1-28-12 provides guardians with the authority to deal with their ward's property.[755] According to the court, these provisions require a personal representative to inquire as to the state of a decedent's financial affairs, such as by contacting a known

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746. *Id.* The Court reasoned that it was reasonable to dispense with the actual notice requirement for those creditors with merely conjectural claims. *Id.*

747. *Id.*

748. *Id.* ¶ 10, 735 N.W.2d at 847.

749. *Id.*

750. *Id.*

751. *Id.* ¶ 11.

752. *Id.* ¶ 12.

753. *See id.* ¶ 13, 735 N.W.2d at 847-48 (explaining that a personal representative has the duty to satisfy claims against an estate and to use reasonably diligent efforts in this process).

754. *Id.* at 847.

755. *Id.*

guardian as to the decedent's financial affairs.[756] Therefore, the North Dakota Supreme Court concluded that Larson was a reasonably ascertainable potential creditor who could have been found through reasonably diligent efforts, specifically if the personal representative had contacted the decedent's guardian.[757] As a result, the court found that Larson's claims were not time barred and remanded the case for further proceedings on the claims.[758]

TORT LAW—STATUTE OF LIMITATIONS—SHOWING GOOD CAUSE

SCHEER V. ALTRU HEALTH SYSTEM

Loretta Scheer appealed a district court judgment, which dismissed her claim of professional negligence.[759] The district court dismissed the claim for failing to serve an expert affidavit within the three month statute of limitations.[760] An exception to dismissal for failing to meet this statute of limitations is provided in Section 28-01-46 of the North Dakota Century Code, but this exception is only appropriate when a plaintiff demonstrates good cause.[761] The North Dakota Supreme Court held that "a plaintiff may move for good cause as late as in response to [a] defendant's motion to dismiss."[762] Based on this holding, the court reversed and remanded the district court's decision to decide whether Scheer demonstrated good cause to support an extension.[763]

In February 2004, Scheer sought treatment for abdominal pain at Altru Health System.[764] Dr. Leslie Sullivan performed surgery on Scheer's gallbladder on March 4, 2004 at the Altru facility.[765] Scheer was discharged from Altru on March 5, 2004.[766] That evening, however, Scheer experienced "'crampy abdominal pain' and 'felt something pull.'"[767] On March 8, 2004, Scheer told Dr. Sullivan about these symptoms.[768] On March 10, 2004, Dr. Sullivan performed another surgery on the area and

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756. *Id.*
757. *Id.* at 847-48.
758. *Id.* at 848.
759. Scheer v. Altru Health System, 2007 ND 104, ¶ 1, 734 N.W.2d 778, 780.
760. *Id.*
761. *Id.*
762. *Id.*
763. *Id.*
764. *Id.* ¶ 2.
765. *Id.*
766. *Id.*
767. *Id.*
768. *Id.*

"placed a drain in Scheer's bile duct."[769] Scheer experienced further problems and was transferred to a Fargo hospital, then to the Mayo Clinic on March 12, 2004.[770] While at the Mayo Clinic, doctors told Scheer that "part of her bile duct had been surgically removed."[771]

On March 9, 2006, Scheer filed a complaint in district court, which claimed that Sullivan negligently performed Scheer's gallbladder operation.[772] The court also found, for purposes of the appeal, that Altru Health System was served on March 9, 2006 and Dr. Sullivan was served on March 13, 2006.[773] On July 12, 2006, both Dr. Sullivan and Altru Health System moved to dismiss the claim because Scheer allegedly failed under Section 28-01-46, "to serve them with an admissible expert affidavit."[774] The parties filed the motion with the district court on July 17, 2006 and Scheer requested additional time to respond to the parties' motion to dismiss.[775] That same day, Scheer sent a letter to Dr. Sullivan and Altru.[776] The letter was written by Dr. Jeffry Snow on March 1, 2006 and contained his opinion that the operation performed by Dr. Sullivan fell below the appropriate standard of care.[777] On July 24, 2006, Scheer's request for additional time to respond to the motion to dismiss was granted by the district court.[778]

On August 15, 2006, Scheer responded to the motion and on August 25, 2006, Scheer served Altru and Dr. Sullivan with an affidavit from Dr. Snow.[779] In his affidavit, Dr. Snow opined that Dr. Sullivan performed Scheer's operation below the standard of care.[780] Specifically, Dr. Snow stated that Dr. Sullivan mistakenly cut and clipped the common bile duct instead of the cystic duct.[781]

The district court dismissed Scheer's lawsuit on October 17, 2006 without prejudice because Scheer "failed to timely serve the expert affidavit."[782] The court based this decision on the Eighth Circuit Court of

769. *Id.*
770. *Id.*
771. *Id.*
772. *Id.* ¶ 3.
773. *Id.*
774. *Id.* ¶ 4.
775. *Id.*
776. *Id.*
777. *Id.*
778. *Id.*
779. *Id.* ¶¶ 4-5, 734 N.W.2d at 780-81.
780. *Id.* ¶ 5, 734 N.W.2d at 781.
781. *Id.*
782. *Id.* ¶ 6.

Appeals decision of *Weasel v. St. Alexius Medical Center*,[783] which interpreted the 1997 version of Section 28-01-46 of the North Dakota Century Code.[784] In this decision, the Eighth Circuit held that a motion for good cause by a plaintiff can only be granted if the motion is filed "prior to [a] [d]efendant filing a [m]otion to [d]ismiss for failure to obtain an expert opinion within three months."[785] The district court concluded under this holding that Scheer's request for an extension was too late and dismissed her claim without prejudice.[786]

On appeal, Scheer argued that the district court's dismissal of her claim without prejudice could be appealed because if she were to find that the three month period lapsed, she would not be able to relitigate her claim.[787] The 2005 version of Section 28-01-46 provides in part:

> Any action for injury or death alleging professional negligence by a physician, . . . hospital, . . . *must be dismissed without prejudice* on motion *unless* the plaintiff serves upon the defendant an *affidavit* containing an admissible expert opinion to support a prima facie case of professional negligence *within three months of the commencement of the action*. The court may set a later date for serving the affidavit for good cause shown by the plaintiff.[788]

Scheer argued that the district court erred in interpreting Section 28-01-46 because the statute does not state that a plaintiff must show good cause before the expiration of the three month period or ask for an extension prior to the defendant's motion to dismiss.[789] Additionally, Scheer claimed that the decision should be remanded to consider whether she had good cause for an extension.[790]

The North Dakota Supreme Court began its decision by analyzing Section 28-01-46. The court first stated that Section 28-01-46 creates an affirmative defense and contains two exceptions.[791] First, the time within which the plaintiff must serve the expert affidavit can be extended upon a showing of good cause by the plaintiff.[792] Second, if the injury at issue is

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783. 230 F.3d 348 (8th Cir. 2000).
784. *Scheer*, ¶ 6, 734 N.W.2d at 781.
785. *Id.* (citing *Weasel*, 230 F.3d at 353).
786. *Id.*
787. *Id.* ¶ 8.
788. *Id.* ¶ 10, 734 N.W.2d at 781-82 (quoting 2005 N.D. Sess. Laws ch. 280, § 1) (emphasis in original).
789. *Id.* ¶ 15.
790. *Id.*
791. *Id.* ¶¶ 19-20, 734 N.W.2d at 783-84.
792. *Id.* ¶ 20, 734 N.W.2d at 784.

an obvious occurrence, an expert affidavit is not required.[793] The second exception was not at issue because Scheer did not contend that her injury amounted to an obvious occurrence.[794]

Pursuant to Section 28-01-46, if good cause is shown, a court may choose to grant or deny a plaintiff's request for an extension to serve his or her expert affidavit before the three month period expires.[795] Once the three month period expires, however, the case becomes "eligible for dismissal without prejudice."[796] However, the statute does not indicate when or how a plaintiff is able to avoid dismissal by showing good cause for an extension to serve the expert affidavit.[797] Instead, a plaintiff is not able to show good cause once the case is dismissed because the case is no longer pending upon dismissal.[798] Furthermore, this section is only intended to apply before trial, not during trial and does not require a defendant to move to dismiss immediately upon the lapse of the three month period.[799]

Section 28-01-46 places the burden of proof on the plaintiff to demonstrate good cause.[800] Scheduling conferences may provide an opportunity for plaintiffs to motion for good cause for an extension.[801] Additionally, since the section serves as an affirmative defense for defendants, defendants may choose not to assert the defense and reach an agreement with the plaintiff to set a different deadline for service of the expert affidavit.[802] However, agreement between the parties is not necessary if sufficient good cause is presented by the plaintiff.[803] If an agreement is reached between the parties, the scheduling order must clearly reflect such agreement and specify the new deadline for service of the expert affidavit.[804]

Furthermore, the exception requires that the plaintiff demonstrate good cause prior to the dismissal of the case.[805] It is possible that a defendant can file a motion to dismiss long after the three month period lapses.[806] Additionally, plaintiffs have the right to respond to the defendant's motion

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793. *Id.*
794. *Id.*
795. *Id.* ¶ 21.
796. *Id.* ¶ 22.
797. *Id.* ¶ 23.
798. *Id.*
799. *Id.* ¶¶ 23-24.
800. *Id.* ¶ 25 (citing N.D. CENT. CODE § 28-01-46 (2001)).
801. *Id.* at 785.
802. *Id.*
803. *Id.*
804. *Id.*
805. *Id.* ¶ 26.
806. *Id.*

to dismiss.[807] Therefore, "the latest a plaintiff could show good cause would be in response to the defendant's motion to dismiss."[808]

In applying the statute to the facts in this case, the North Dakota Supreme Court applied the plain meaning of the statute.[809] In this case, Scheer's complaint was served on Altru Health System on March 9, 2006 and on Dr. Sullivan on March 13, 2006.[810] The district court found that the latest date upon which Scheer's three month period would lapse would be on June 13, 2006.[811] Over a month after the statutory period lapsed on July 17, 2006, Dr. Sullivan and Altru asserted their affirmative defense and filed a motion to dismiss Scheer's claim.[812] The district court granted Scheer an extension to respond to the motion and Scheer served the expert affidavit on August 25, 2006.[813]

Ultimately, the North Dakota Supreme Court determined that the district court misapplied the Eighth Circuit's Court of Appeals interpretation of Section 28-01-46 in *Weasel*.[814] As a result, the district court dismissed Scheer's claim without determining the existence of good cause.[815] The North Dakota Supreme Court stressed that whether Scheer demonstrated good cause for an extension in her response was a question to be decided by the trier of fact.[816] As a result, the district court's decision was reversed and remanded for a determination of good cause.[817]

Justice Kapsner concurred in the result but did not furnish a separate opinion.[818] Justice Crothers' dissented with the majority's opinion.[819] In Justice Crothers' opinion, the majority did not follow the legislative mandates requiring that statutes be interpreted according to their plain meaning or the mandate in the controlling statute in this case, Section 28-01-46.[820]

Justice Crothers provided that Section 28-01-46 is clear in its mandate that a plaintiff's claim be dismissed if the affidavit is not "served within three months of commencement of the action."[821] Justice Crothers asserted

807. *Id.*
808. *Id.*
809. *Id.* ¶ 27.
810. *Id.*
811. *Id.*
812. *Id.*
813. *Id.*
814. *Id.*
815. *Id.*
816. *Id.*
817. *Id.*
818. *Id.* ¶ 28.
819. *Id.* ¶ 29.
820. *Id.* ¶ 30.
821. *Id.* ¶ 31, 734 N.W.2d at 786.

that in this case an affidavit was required and Scheer both failed to meet the three-month deadline and failed to request an extension before the defendants filed a motion to dismiss.[822] Therefore, in Justice Crothers' opinion, Scheer's claim was properly dismissed under Section 28-01-46.[823]

Justice Crothers asserted that the majority focused its opinion on the fact that the defendants did not immediately move to dismiss the claim following the three month lapse.[824] Instead, Justice Crothers argued that in this case, the defendants' failure to immediately motion to dismiss the plaintiff's claim provided Scheer with additional time to serve the expert affidavit.[825]

822. *Id.* ¶ 32.
823. *Id.*
824. *Id.* ¶ 33.
825. *Id.*