North Dakota Law Review

Volume 72 | Number 3 Article 12

1996

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Recommended Citation
Fremstad, Joel M. (1996) "Appeal and Error - North Dakota Rule of Civil Procedure 54(b): Looking for the Storied Infrequent Harsh Case," *North Dakota Law Review*: Vol. 72: No. 3, Article 12.
Available at: https://commons.und.edu/ndlr/vol72/iss3/12

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APPEAL AND ERROR—NORTH DAKOTA RULE OF CIVIL PROCEDURE 54(b): LOOKING FOR THE STORIED "INFREQUENT HARSH CASE"

Gessner v. City of Minot, 529 N.W.2d 868 (N.D. 1995)

I. FACTS

On July 26, 1992, Norma Gessner's four-year-old son, Cory Hammond, drowned after falling from a concrete flood control device on the Souris River in Minot, North Dakota.[1] Gessner served a summons and complaint on the Chair of the Ward County Water Management District, and the City Manager of the City of Minot[2] (City), alleging negligent failure to warn.[3] The City answered, alleging that process and the service of process was insufficient and, as such, that Gessner's claim against the City should be dismissed.[4] The City's answer was based on North Dakota Rule of Civil Procedure 4(d)(2)(E),which requires that service of process on cities and other government or quasi-governmental entities be made by serving the summons on a member of the governing board.[5] The City argued that while Mr. Schempp was an employee of the City, he was not a member of the City's governing board and therefore dismissal was proper.[6]

The trial court found, based on Rule 4(d)(2)(E), that process was insufficient and dismissed the City from Gessner's claim.[7] The trial court also directed the entry of final judgment based on Rule 54(b) of the North Dakota Rules of Civil Procedure.[8] Rule 54(b) provides that

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1. Gessner v. City of Minot, 529 N.W.2d 868, 869 (N.D. 1995). During the 1960s and 1970s, annual spring flooding from the Souris River in Minot caused extensive damage. Brief of Appellee Ward County Management Dist. at 2, *Gessner* (No. 94-0365). In an attempt to alleviate the problems caused by flooding, the Army Corp of Engineers constructed flood control structures along the river. *Id.* The Ward County Management District locally sponsored the project and was responsible for the operation and maintenance of the completed project. *Id.* at 2-3. On December 11, 1981, the Corp completed the project and turned over responsibility for the project to the District, who in turn gave the responsibility for operation and maintenance to the City of Minot. *Id.* at 3. The City accepted the responsibility by City Resolution on February 15, 1982. *Id.*

2. *Gessner*, 529 N.W.2d at 869.

3. Brief of Appellee City of Minot at 2, *Gessner* (No. 94-0365); Brief of Appellee Ward County Management Dist. at 1, *Gessner* (No. 94-0365).

4. *Gessner*, 529 N.W.2d at 869.

5. N .D. R. Civ. P. 4(d)(2)(E).

6. *Gessner*, 529 N.W.2d at 869-70.

7. *Id.* at 870.

8. *Id.*; N.D. R. Civ. P. 54(b). *See infra* note 18 (discussing North Dakota Rule of Civil Procedure 54(b)). The trial court's Memorandum Decision of October 10, 1994, and Order for Judgment of Dismissal as to Defendant City of Minot, A Municipal Corporation [hereinafter Judgment of Dismissal] of October 18, 1994, did not make mention of Rule 54(b). Memorandum Decision, *Gessner* (No. 94-C-0912); Order of Judgment of Dismissal as to Defendant City of Minot, *Gessner* (No. 94-C-0912). Gessner's Notice of Appeal was dated November 7, 1994. Notice of Appeal. *Gessner* (No.

final judgment may be entered upon the express direction of the trial court where the trial court finds no just reason for delay.[9] The trial court found no just reason for delay and ordered the entry of final judgment dismissing the City from the case.[10] Upon the entry of judgment, Gessner appealed.[11] Gessner's appeal was based on the trial court's determination of the insufficiency of process,[12] however, this Comment is limited in scope to the trial court's Rule 54(b) certification.

The North Dakota Supreme Court dismissed the appeal, *holding* that the district court was not faced with an "infrequent harsh case" and as such abused its discretion in granting the Rule 54(b) certification.[13]

II. LEGAL HISTORY

A. ORIGIN AND EVOLUTION OF RULE 54(B)

An appeal generally may arise only from a final decision or judgment where all of the issues in the case have been determined.[14] However, Rule 54(b) of the Federal Rules of Civil Procedure[15] and its state counterparts[16] provide an exception to this general rule.[17]

94-C-0912). On December 2, 1994, the parties signed a stipulation to modify the Judgment of Dismissal to include 54(b) certification. Stipulation at 1, *Gessner* (No. 94-C-0912). The Order for Modified Judgment of Dismissal as to Defendant City of Minot, dated December 9, 1994, did include a finding of no just reason for delay and a direction for final judgment. Opinion & Order Granting Plaintiff's Motion to Modify Judgment and for Rule 54(b) Certification at 2, *Gessner* (No. 94-C-0912).

9. *Gessner*, 529 N.W.2d at 870 (citing N.D. R. CIV. P. 54(b)).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id* at 870.

14. 4 AM. JUR. 2D *Appellate Review* § 85 (1995).

15. FED. R. CIV. P. 54(b). *See infra* note 35 (showing the current Federal Rule 54(b)).

16. ALA. R. CIV. P. 54(b); ALASKA R. CIV. P. 54(b); ARIZ. R. CIV. P. 54(b); ARK. R. CIV. P. 54(b); COLO. R. CIV. P. 54(b); D.C. R. CIV. P. 54(b); GA. CODE ANN. § 9-11-54(b) (1994); HAW. R. CIV. P. 54(b); IDAHO R. CIV. P. 54(b); ILL. R. CIV. P. 304(a); IND. R. TR. P. 54(b); KAN. CIV. PROC. CODE ANN. § 60-254(b) (Vernon 1994); KY. R. CIV. P. 54.02; ME. R. CIV. P. 54(b); MD. R. CIV. P. 2-602; MASS. R. CIV. P. 54(b); MICH. CIV. R. 2.604; MINN. R. CIV. P. 54.02; MISS. R. CIV. P. 54(b); MO. R. CIV. P. 74.01(b); MONT. R. CIV. P. 54(b); NEV. R. CIV. P. 54(b); N.J. R. CIV. P. 4:42-2; N.M. R. CIV. P. 1-054(c); N.C. R. CIV. P. 54(b); N.D. R. Civ. P. 54(b); OHIO R. CIV. P. 54(b); OR. R. CIV. P. 67B; R.I. R. CIV. P. 54(b); S.C. R. CIV. P. 54(b); S.D. R. CIV. P. § 15-6-54(b); TENN. R. CIV. P. 54.02; UTAH R. CIV. P. 54(b); VT. R. CIV. P. 54(b); WASH. R. CIV. P. 54(b); W.V. R. CIV. P. 54(b); WYO. R. CIV. P. 54(b). *See infra* note 18 (setting out current North Dakota Rule 54(b)).

17. *See* Allis-Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d 360, 362-63 (3d Cir. 1975) (discussing requirement of properly granted Rule 54(b) certification); *see also* Diane M. Allen, Annotation, *Modern Status of State Court Rules Governing Entry of Judgment on Multiple Claims*, 80 A.L.R. 4th 707 (1990) (discussing use of state rules similar to the federal rule).

North Dakota Rule of Civil Procedure 54(b)[18] was derived from Rule 54(b) of the Federal Rules of Civil Procedure.[19] Where a state rule is derived from the federal system, the legislative history of the federal rule and federal caselaw interpreting the federal rule may be used to construe the intent of the state rule.[20]

Federal Rule 54(b) was originally drafted in 1937 and was amended in 1946 and 1961.[21] The original Federal Rule 54(b)[22] was basically considered a codification of the common law single judicial unit rule.[23] Under the original Rule 54(b), a single judicial unit consisted of a claim and compulsory counterclaims upon which the district court could enter judgment.[24] However, exactly how the original Rule 54(b) should be applied was not so clear.[25]

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18. North Dakota Rule of Civil Procedure 54(b) provides:

> If more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or if multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon the express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of that determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties does not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

The current Federal Rule of Civil Procedure 54(b) is substantively the same. *See infra* note 35 (providing the current Federal Rule of Civil Procedure 54(b)).

19. Union State Bank v. Woell, 357 N.W.2d 234, 236 (N.D. 1984); *see also* N.D. R. CIV. P. 54(b) explanatory note (stating origin of North Dakota Rule 54(b)).

20. *Woell*, 357 N.W.2d at 236.

21. FED. R. CIV. P. 54(b); *see* 6 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 54.01[1] (2d ed. 1985) (discussing evolution of Federal Rule of Civil Procedure 54(b)).

22. The 1937 version of Federal Rule of Civil Procedure 54(b), entitled Judgement at Various Stages, provided:

> When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

6 MOORE ET AL., *supra* note 21, ¶ 54.01[3].

23. 6 MOORE ET AL., *supra* note 21, ¶ 54.01. The 1937 Rule 54(b) was not intended to extinguish the existing federal rule. FED. R. CIV. P. 54(b) notes of advisory committee on 1946 amendment. Under the common law, only entire cases were considered single judicial units. Sears, Roebuck and Co. v. Mackey, 351 U.S. 427, 431 (1956).

24. 6 MOORE ET AL., *supra* note 21, ¶ 54.26[2].

25. FED. R. CIV. P. 54(b) notes of advisory committee on 1946 amendments. Problems in determining any set standard by which to identify separable claims for appeal led to problems with the time within which an appeal could be made. *Mackey*, 351 U.S. at 434. As such, courts began to grant immediate appeals to all potentially appealable cases and the appellate courts were hit with a swell of new cases. *Id.*

In light of the difficulties surrounding the application of Rule 54(b), in 1946 the Advisory Committee for the Federal Rules of Civil Procedure (Committee) amended Rule 54(b).[26] Under the amendment, the single judicial unit rule was changed from a claim and its compulsory counterclaims to "one or more but less than all of the claims."[27] This change eliminated the need to make distinctions between compulsory and permissive counterclaims.[28]

In 1955, a proposed amendment to Rule 54(b) addressed suggestions that Rule 54(b) be amended to apply to multiple parties.[29] This suggestion was made because the Rule, as then stated, did not allow appeal from an order dismissing less than all the parties.[30] However, the United States Supreme Court did not adopt the proposed amendment.[31]

The concerns raised in the 1955 amendment, however, were mirrored in another amendment proposed in 1961.[32] The Committee, although noting that courts had not strictly construed Rule 54(b), was nevertheless concerned that there was a solid base of case law holding the rule inapplicable to multiple parties.[33] As such, the Committee determined that Rule 54(b) should be made applicable to such situations because the delay caused by waiting for the final decision could affect parties in multiple-party cases as harshly as in multiple-claim cases.[34]

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26. *Mackey*, 351 U.S. at 434. Federal Rule of Civil Procedure 54(b) as amended in 1946 provided:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

6 MOORE ET AL., *supra* note 21, ¶ 54.01[5].

27. 6 MOORE ET AL., *supra* note 21, ¶ 54.04[3.-5].

28. 6 *id.*

29. *See* 6 *id.* ¶ 54.01[6.-2] (reprinting the notes of the advisory committee on the proposed 1955 amendments to Federal Rule of Civil Procedure 54(b) which were not adopted).

30. 6 *id.* The Committee noted that most courts had allowed cases involving multiple parties to be appealable where the trial court has met the conditions of Rule 54(b) and as such they did not believe that an amendment was needed. 6 *id.* However, the Ninth Circuit in Steiner v. 20th Century-Fox Film Corp., 220 F.2d 105 (9th Cir. 1955) decided that a judgment involving multiple parties is not appealable even where Rule 54(b) has been followed. 6 MOORE ET AL., *supra* note 21, ¶ 54.01 [6.-2]. The Committee, concerned that more courts would follow the lead of the Ninth Circuit, proposed amending Rule 54(b) to include multiple parties. 6 *id.*

31. 6 MOORE ET AL., *supra* note 21, ¶ 54.01[6.-1].

32. 6 *id.* ¶ 54.01[6.-3].

33. FED. R. CIV. P. 54(b) notes of advisory committee on 1961 amendment.

34. *Id.*

The Committee's 1961 proposal was adopted and Rule 54(b) has not been amended since that time.[35]

B. APPLICATION OF FEDERAL RULE OF CIVIL PROCEDURE 54(b)

Federal Rule 54(b) was intended to provide an appeal for separate and distinct claims, apart from the final judgment of the entire case.[36] In doing so, the injustice of delay would be prevented.[37] Furthermore, the intent was also to maintain the longstanding federal policy against piecemeal appeals.[38] Rule 54(b) complies with this policy since an appeal may only be taken where at least one party is disposed of or where there is a separate claim.[39] However, the rule is not intended to be used indiscriminately merely because a party or claim has been disposed of.[40]

Where more than one claim for relief is presented or multiple parties are involved, Rule 54(b) requires the court to make an express determination that there is no just reason for delay and to expressly direct the entry of final judgment.[41] These decisions are to be left to the discretion of the trial court.[42] The burden of proof is on the party requesting Rule 54(b) certification to prove that there is no just reason

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35. FED. R. CIV. P. 54(b). The current Federal Rule of Civil Procedure 54(b) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

North Dakota Rule of Civil Procedure 54(b) begins with "if" rather than "when." N.D. R. CIV. P. 54(b); *see also supra* note 18 (providing current North Dakota Rule 54(b)).

36. FED. R. CIV. P. 54(b) notes of advisory committee on 1946 amendments.

37. *Id.*

38. *See id.* (citing Hohorst v. Hamburg-American Packet Co., 148 U.S. 262 (1893) for this premise). *See also* Sears, Roebuck and Co. v. Mackey, 351 U.S. 427, 438 (1956) (noting that in many cases the amended Rule 54(b) preserves the policy against piecemeal appeals more effectively than the original rule).

39. 10 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2654 (1983).

40. *See, e.g.*, Page v. Preisser, 585 F.2d 336, 339 (8th Cir. 1978) (noting that certification should not be granted in such a manner as to become common or as a means of assisting counsel).

41. FED. R. CIV. P. 54(b). This language was added to the 1946 rule and kept in the 1961 rule. *See supra* notes 22, 26 and 35 (providing text of 1937, 1946, and current Rule 54(b)).

42. *See* Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 12 (1980) (noting that the question will often be a close one, but that balancing all of the factors is best left to the trier of fact who is able to evaluate all available information and because of this should be given substantial deference); Collins v. Metro-Goldwyn Pictures Corp., 106 F.2d 83, 85 (2d Cir. 1939) (noting that in order to prevent delay and promptly decide the case a court needs a large degree of discretion).

for delay.[43] In *Sears, Roebuck and Co. v. Mackey*,[44] the United States Supreme Court stated that the district court acts as a "dispatcher"[45] and that it may in its discretion certify claims for appeal "in the interest of sound judicial administration."[46] However, the mere fact that the district court has granted certification under Rule 54(b) does not preclude an appellate court from reviewing the decision.[47]

C. APPELLATE REVIEW OF FEDERAL RULE OF CIVIL PROCEDURE 54(b)

Both trial and appellate courts have struggled with what constitutes a just reason for delay.[48] In *Allis-Chalmers Corp. v. Philadelphia Electric Co.*,[49] the Third Circuit Court of Appeals stated that a Rule 54(b) certification should only be granted in the "infrequent harsh case."[50] In *Allis-Chalmers*, the court also noted five factors which other courts had considered when reviewing 54(b) certifications.[51] These include:

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.[52]

The court further noted that the circumstances in each case determine which factors will guide the trial court in validly exercising its discretion in granting certification under Rule 54(b).[53]

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43. Allis-Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d 360, 365 (3d Cir. 1975).

44. 351 U.S. 427 (1956).

45. Sears, Roebuck and Co. v. Mackey, 351 U.S. 427, 435 (1956).

46. *Id.* at 437. *See also* Panichella v. Pennsylvania R.R. Co., 252 F.2d 452, 455 (3d Cir. 1958) (noting that a trial court must consider the policy against piecemeal appeals while factoring in any other special circumstances presented by the case).

47. *See, e.g., Mackey*, 351 U.S. at 437 (stating that any abuse of discretion by the district court remains reviewable).

48. *See* 10 WRIGHT ET AL., *supra* note 39, § 2655 (discussing the recent emergence of standards with which to determine whether a just reason for delay exists).

49. 521 F.2d 360 (3d Cir. 1975).

50. Allis-Chalmers Corp. v. Philadelphia Elec. Co., 521 F.2d 360, 363 (3d Cir. 1975) (quoting *Panichella*, 252 F.2d at 455). The court in *Allis-Chalmers* defined unusual or harsh circumstances as those relating in part to solvency or economic duress. *Id.* at 366 n.14.

51. *Id.* at 364.

52. *Id.* (citations omitted).

53. *Id.*

In *Curtiss-Wright Corp. v. General Electric Co.*,[54] the United States Supreme Court criticized the use of the "infrequent harsh case" standard to determine whether there was just reason for delay.[55] The Supreme Court noted that, in isolation, the infrequent harsh case standard is both unworkable and unreliable as a standard of review.[56] The Supreme Court stated that the Third Circuit Court of Appeals' holding misinterpreted the proper standard of review because it relied on the notes of the Advisory Committee on the Rules of Civil Procedure.[57]

The Supreme Court in *Curtiss-Wright* reaffirmed that the correct standard is one which balances the district court's discretion against the "interest of sound judicial administration."[58] Under this standard, the appellate court's job is to ensure that the district court's decision squares with the record, not to "reweigh" the factors behind the district court's decision.[59]

D. APPLICATION AND APPEALABILITY OF NORTH DAKOTA RULE 54(b)

The North Dakota Rules of Civil Procedure were "adapted" from the Federal Rules of Civil Procedure in 1957.[60] While the granting of Rule 54(b) certification was not initially the subject of much debate,[61] it has since been reviewed extensively by the North Dakota Supreme Court.[62]

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54. 446 U.S. 1 (1980).

55. Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 9-10 (1980).

56. *Id.* at 10. The Supreme Court in *Curtiss-Wright* addressed the court of appeals' finding that the possibility of setoff mitigated against the granting of certification unless there could be a showing of harsh or unusual circumstances. *Id.* at 9.

57. *Id.* The Advisory Committee note stated that an entire lawsuit as a whole is the proper judicial unit for appellate review, but that this rule would afford a simple and workable remedy in "infrequent harsh" cases through the exercise of discretionary power. *Id.*

58. *Id.* at 10 (quoting Sears, Roebuck and Co. v. Mackey, 351 U.S. 427, 437 (1956)).

59. *Id.*

60. Estate of Stuckle v. Stuckle, 427 N.W.2d 96, 98 (N.D. 1988) (Meschke, J., concurring). North Dakota's Rule 54(b) has followed the changes made in the Federal Rule and has been virtually the same since the 1961 amendments which made the Rule applicable to multiple parties. *Id.*

61. *Id.* at 98-99.

62. *See* Mitchell v. Sanborn, 536 N.W.2d 678, 682 (N.D. 1995) (finding record inadequate to support Rule 54(b), but allowing appeal to proceed under supervisory jurisdiction); Vanover v. Kansas City Life Ins. Co., 535 N.W.2d 424, 427 (N.D. 1995) (dismissing appeal based on trial court's abuse of discretion in granting Rule 54(b) motion); Ingalls v. Glass Unlimited, Inc., 529 N.W.2d 872, 873 (N.D. 1995) (dismissing appeal based on trial court's abuse of discretion in granting Rule 54(b) motion); Bulman v. Hulstrand Constr. Co., 503 N.W.2d 240, 242 (N.D. 1993) (dismissing appeal based on trial court's abuse of discretion in granting Rule 54(b) motion); Slaubaugh v. Slaubaugh, 499 N.W.2d 99, 105 (N.D. 1993) (finding unusual and compelling circumstances justifying the trial court's grant of Rule 54(b) certification); Gissel v. Kenmare Township, 479 N.W.2d 876, 878 (N.D. 1992) (dismissing appeal based on trial court's abuse of discretion in granting Rule 54(b) certification); Ceartin v. Ochs, 479 N.W.2d 863, 865 (N.D. 1992) (noting lack of Rule 54(b) certification by trial court); Smith v. Vestal, 456 N.W.2d 502, 505 (N.D. 1990) (dismissing appeal based on improper grant of Rule 54(b) certification by trial court); Janavaras v. National Farmers Union Property, 449 N.W.2d 578, 582 (N.D. 1989) (Meschke, J., concurring) (dismissing appeal based on trial court's improper grant of

North Dakota Rule 54(b) is essentially the same as Federal Rule 54(b)[63] and much of its application has followed that of the Federal Rule.[64] The North Dakota Supreme Court has recognized the historic federal policy against piecemeal appeals that both the federal courts and Federal Rule of Civil Procedure 54(b) have tried to maintain.[65] In doing so, the North Dakota Supreme Court has dictated that North Dakota Rule 54(b) not be applied matter-of-factly.[66] Although North Dakota trial courts are granted discretion[67] in making their decisions, the scope of discretion has of late been narrowed by the North Dakota Supreme Court.[68] Furthermore, certifications granted by North Dakota district courts remain subject to review by the North Dakota Supreme Court.[69] Thus, if the North Dakota Supreme Court finds on appeal that the trial court abused its discretion in granting certification, the certification will be set aside, resulting in no final order or judgment for the court to review.[70]

Rule 54(b) certification); Club Broadway, Inc. v. Broadway Park, 443 N.W.2d 919, 922 (N.D. 1989) (Meschke, J., dissenting) (dismissing appeal based on trial court's abuse of discretion in granting Rule 54(b) certification); Peterson v. Zerr, 443 N.W.2d 293, 300 (N.D. 1989) (VandeWalle, J., concurring and Meschke, J., concurring and dissenting) (dismissing appeal); Sargent County Bank v. Wentworth, 434 N.W.2d 562, 565 (N.D. 1989) (Meschke, J., concurring) (dismissing appeal); Regstad v. Steffes, 433 N.W.2d 202, 205 (N.D. 1988) (dismissing appeal); Gast Constr. Co., v. Brighton Partnership, 422 N.W.2d 389, 391 (N.D. 1988) (dismissing appeal); Herzog v. Yuill, 399 N.W.2d 287, 288 n.1 (N.D. 1987) (deciding to not review grant of Rule 54(b) certification because of disposition of case); Gillan v. Saffell, 395 N.W.2d 148, 149 (N.D. 1986) (dismissing appeal for lack of appealable order); Buurman v. Central Valley Sch. Dist., 371 N.W.2d 146, 149 (N.D. 1985) (dismissing appeal); Union State Bank v. Woell, 357 N.W.2d 234, 239 (N.D. 1984) (dismissing appeal based on trial court's abuse of discretion in entering final judgment pursuant to Rule 54(b)); Mitzel v. Schatz, 167 N.W.2d 519, 526-27 (N.D. 1968) (dismissing appeal based on failure to make determination and direction pursuant to Rule 54(b)).

63. N.D. R. CIV. P. 54(b). *See supra* note 18 (detailing the current North Dakota Rule 54(b)).

64. *See supra* notes 39, 41, 43-48 and 50-60 and accompanying text (citing federal cases dealing with the application of Rule 54(b)).

65. *See, e.g.*, Union State Bank v. Woell, 357 N.W.2d 234, 237 (N.D. 1984) (noting the historic federal policy). Justice Meschke has also noted that North Dakota has its own history against piecemeal appeals dating back to North Dakota's first supreme court. Estate of Stuckle v. Stuckle, 427 N.W.2d 96, 100 (N.D. 1988) (Meschke, J., concurring) (citing Persons v. Simons, 46 N.W. 969, 970 (N.D. 1890)).

66. *Woell*, 357 N.W.2d at 237 (noting that a grant of certification should not be routine).

67. *See, e.g.*, Mitzel v. Schatz, 167 N.W.2d 519, 526 (N.D. 1968) (noting that the trial court's decision will not be set aside unless the trial court is found to have abused its discretion).

68. *See* Peterson v. Zerr, 443 N.W.2d 293, 300-01 (N.D. 1989) (VandeWalle, J., concurring specially) (stating that the majority is severely limiting the trial court's discretion). In *Peterson*, Justice Meschke, who was not on the court at the time of the decision in *Woell*, wrote an extensive dissenting opinion after the majority rejected the reasons given by the trial court in support of the Rule 54(b) certification. *Id.* at 302 (Meschke, J., concurring and dissenting). In his dissent, Justice Meschke was extremely critical of the way the court substituted their judgment for that of the trial court, noting that "[a]ll finality is made by trial courts. Conservation of judicial energy and elimination of delays are not subjects of exclusive appellate wisdom." *Id.* at 303.

69. *See, e.g., Woell*, 357 N.W.2d at 236 (noting that court will *sua sponte* review the trial court's certification to determine whether the trial court has abused its discretion).

70. *Id.*

The North Dakota Supreme Court has established a two-part framework for its appellate jurisdiction.[71] First, there must be an order which is appealable per North Dakota Century Code section 28-27-02,[72] and second, Rule 54(b) must be complied with.[73] This differs little from the federal system where 28 U.S.C. § 1291 provides for the right to appeal from federal district courts to federal appellate courts.[74]

While the North Dakota Rule has generally been applied in the same manner as the Federal Rule, North Dakota case law has at times taken a different approach.[75] Illustrative of this is that the North Dakota Supreme Court continues to apply the infrequent harsh case standard,[76] despite the United States Supreme Court's decision in *Curtiss-Wright*.[77] In *Union State Bank v. Woell*,[78] the North Dakota Supreme Court took note of *Curtiss-Wright*,[79] but stated that the infrequent harsh case standard properly reflects the intended purpose of North Dakota Rule 54(b).[80]

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71. Gast Constr. Co., v. Brighton Partnership, 422 N.W.2d 389, 390 (N.D. 1988).

72. N.D. CENT. CODE § 28-27-02 (1991). Section 28-27-02 provides:

> The following orders when made by the court may be carried to the supreme court: 1. An order affecting a substantial right made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken; 2. A final order affecting a substantial right made in special proceedings or upon a summary application in an action after judgment; 3. An order which grants, refuses, continues, or modifies a provisional remedy, or grants, refuses, modifies, or dissolves an injunction or refuses to modify or dissolve an injunction, whether such injunction was issued in an action or special proceeding or pursuant to the provisions of section 35-22-04, or which sets aside or dismisses a writ of attachment for irregularity; 4. An order which grants or refuses a new trial or which sustains a demurrer; 5. An order which involves the merits of an action or some part thereof; 6. An order for judgment on application therefor on account of the frivolousness of a demurrer, answer, or reply; or 7. An order made by the district court or judge thereof without notice is not appealable, but an order made by the district court after a hearing is had upon notice which vacates or refuses to set aside an order previously made without notice may be appealed to the supreme court when by the provisions of this chapter an appeal might have been taken from such order so made without notice, had the same been made upon notice.

73. *Gast*, 422 N.W.2d at 390. *See also supra* part II.B (explaining application of Rule 54(b)).

74. *See* Estate of Stuckle v. Stuckle, 427 N.W.2d 96, 99 (N.D. 1988) (noting that North Dakota's appeals statute is comparable to the federal statute).

75. *See, e.g.*, Union State Bank v. Woell, 357 N.W.2d 234, 237 n.4 (N.D. 1984) (finding that "infrequent harsh" case language accurately reflected the intent of North Dakota Rule 54(b)). Justice Meschke has however, on several occasions voiced his concern over the tests applied by the majority. *See* Peterson v. Zerr, 443 N.W.2d 293, 301-04 (N.D. 1989) (Meschke, J., concurring and dissenting); Sargent County Bank v. Wentworth, 434 N.W.2d 562, 565-67 (N.D. 1989) (Meschke, J., concurring); Regstad v. Steffes, 433 N.W.2d 202, 205-07 (N.D. 1988) (Meschke, J., concurring); *Estate of Stuckle* 427 N.W.2d at 97-103 (Meschke, J., concurring).

76. *See, e.g.*, Gissel v. Kenmare Township, 479 N.W.2d 876, 877 (N.D. 1992) (stating that on review the purpose is to determine whether the circumstances present an "infrequent harsh case" such that an immediate appeal may be taken).

77. Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1 (1980).

78. 357 N.W.2d 234 (N.D. 1984).

79. 446 U.S. 1 (1980).

80. *Woell*, 357 N.W.2d at 237 n.4. *But see* Peterson v. Zerr, 443 N.W.2d 293, 303 (N.D. 1989) (Meschke, J., concurring and dissenting) (criticizing this determination by the majority in *Woell*, stating

The North Dakota Supreme Court has stated that, under the infrequent harsh case standard, the circumstances will need to be extraordinary[81] and expressed in writing[82] before Rule 54(b) certification is granted. The court has further stated that a trial court's finding of an infrequent harsh case will require more than a simple listing of the circumstances in each case.[83]

The North Dakota Supreme Court has noted several factors which other courts have used in making Rule 54(b) certifications.[84] Circumstances in which the North Dakota Supreme Court has found an abuse of discretion in granting Rule 54(b) certification include: potential mootness,[85] potential rendering of an advisory opinion,[86] reducing the length of a trial,[87] avoiding a second trial,[88] saving time and expense of second trial,[89] presence of claims, cross-claims, and third-party claims,[90] and jurisdictional issues.[91] Circumstances in which the North Dakota Supreme Court has stated might justify certification include: presence of complex or unique controlling issues,[92] and the possibility of a third trial where an incident causing action has occurred over seven years prior.[93]

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that they gave this standard too much credence considering that it fails to enunciate a clear standard).

81. *See* Slaubaugh v. Slaubaugh, 499 N.W.2d 99, 105 (N.D. 1993) (requiring "hardship or unusual prejudice"); Janavaras v. National Farmers Union Property, 449 N.W.2d 578, 580 (N.D. 1989) (requiring "a showing of out-of-the-ordinary circumstances or cognizable, unusual hardships"). The supreme court has more recently noted that the rule, while requiring hardship or prejudice, does not go so far as to require the harm suffered to be irreparable. Rose Creek Dev. Corp. v. Plaza Dev. Group, Inc., 514 N.W.2d 368, 370 (N.D. 1994). Justice Meschke has also challenged the majority's use of "unusual or compelling circumstances" as a standard. *See, e.g.*, Sargent County Bank v. Wentworth, 434 N.W.2d 562, 566 (N.D. 1989) (Meschke, J., concurring) (arguing against use of unusual or compelling circumstances test). In *Wentworth*, Justice Meschke noted that while the supreme court used this very stringent standard in *Woell*, the standard in Rule 54(b) is that there be no just reason for delay. *Id. See also supra* notes 18 and 35 (providing North Dakota and Federal Rule 54(b) respectively).

82. *Woell*, 357 N.W.2d at 237. The supreme court in *Woell* was not presented with a written basis for the district court's certification, but stated that where the reasons may be determined from the record the case need not be remanded to the district court. *Id.* at 238.

83. Club Broadway, Inc. v. Broadway Park, 443 N.W.2d 919, 921 (N.D. 1989).

84. *Woell*, 357 N.W.2d at 238. *See supra* notes 50-57 and accompanying text (citing federal cases discussed in *Woell*).

85. Bulman v. Hulstrand Constr. Co., 503 N.W.2d 240, 242 (N.D. 1993).

86. Bjornson v. Guaranty Nat'l Ins. Co., 510 N.W.2d 622, 624 (N.D. 1994).

87. Imperial Oil of N.D., Inc. v. Hanson, 510 N.W.2d 598, 601 (N.D. 1994).

88. Swenson v. Raumin, 520 N.W.2d 858, 860 (N.D. 1994); Club Broadway, Inc. v. Broadway Park, 443 N.W.2d 919, 921 (N.D. 1989).

89. Gissel v. Kenmare Township, 479 N.W.2d 876, 877 (N.D. 1992). *But see* Slaubaugh v. Slaubaugh, 499 N.W.2d 99, 105 (N.D. 1993) (finding by the district court that grant of certification would prevent waste of time and resources upheld by supreme court).

90. Smith v. Vestal, 456 N.W.2d 502, 505 (N.D. 1990); *see also* Buurman v. Central Valley Sch. Dist., 371 N.W.2d 146, 148 (N.D. 1985) (noting that where a claim is severed from the main action that no Rule 54(b) order is needed).

91. *Imperial Oil*, 510 N.W.2d at 601.

92. Janavaras v. National Farmers Union Property, 449 N.W.2d 578, 580-81 n.4 (N.D. 1989); *see also* Bulman v. Hulstrand Constr. Co., 503 N.W.2d 240, 241 (N.D. 1993) (finding sovereign immunity to be a unique, but not controlling issue).

93. *Slaubaugh*, 499 N.W.2d at 105.

In *Gessner v. City of Minot*,[94] the North Dakota Supreme Court reaffirmed its adherence to the "infrequent harsh case" standard while providing little clarification of what constitutes an infrequent harsh case for North Dakota district courts.[95]

III. CASE ANALYSIS

In *Gessner v. City of Minot*,[96] the North Dakota Supreme Court *sua sponte* reviewed the trial court's grant of Rule 54(b) certification to determine whether the trial court had abused its discretion.[97] On review, the court reaffirmed the "infrequent harsh case" standard in dismissing the appeal.[98] However, the court did not give a meaningful explanation of this standard despite the numerous appeals that reach the court on Rule 54(b) certification.[99]

The North Dakota Supreme Court had previously implemented the "infrequent harsh case" standard to determine whether a grant of Rule 54(b) certification is proper.[100] In *Gessner*, the court acknowledged that the policy behind Rule 54(b) is to prevent piecemeal appeals,[101] while further noting that they have no right to render advisory opinions.[102]

The court noted that the trial court met the requirements of Rule 54(b) by expressly finding no just reason for delay and expressly directing the entry of final judgment.[103] However, the court concluded

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94. 529 N.W.2d 868 (N.D. 1995).

95. Gessner v. City of Minot, 529 N.W.2d 868 (N.D. 1995).

96. 529 N.W.2d 868 (N.D. 1995).

97. *Gessner*, 529 N.W.2d at 870 (citing Janavaras v. National Farmers Union Property, 449 N.W.2d 578, 580 (N.D. 1989)).

98. *Id.*

99. *Id. See supra* note 62 (citing some of the many cases that reach the supreme court in part due to Rule 54(b) issues).

100. *Gessner*, 529 N.W.2d at 870 (citing Gissel v. Kenmare Township, 479 N.W.2d 876, 877 (N.D. 1992)).

101. *Id.* at 870 (citing Bulman v. Hulstrand Constr. Co., 503 N.W.2d 240, 241 (N.D. 1993)).

102. *Id.*

103. *Id. See supra* note 8 (explaining circumstances which lead to trial court's grant of certification). The trial court gave "compelling reasons" in granting certification, including:

> 1) The adjudicated claims are factually and legally distinct from the remaining claims. Because the adjudicated claims present clear questions of law, the supreme court will not be faced with examining a factually different record on appeal of the adjudicated claims. Also, there will be little, if any, repetition in the factual record on appeal of the adjudicated and the unadjudicated claims; the supreme court will not have to consider the same material on two different appeals. 2) It is appropriate that a Rule 54(b) certification be issued in the interest of judicial economy, effectiveness and efficiency of judicial determination, costs of litigation, possible injustice, and the prejudice, distress and hardship the Plaintiff will suffer if required to endure two trials of the wrongful death of her young son. 3) A certification of judgment will not unjustly delay the litigation or prejudice the Defendants. 4) Certification will save the parties court time and resources. 5) Defendants have stipulated to Plaintiff's motion. 6) The court finds there is no just reason for delay of the entry of final judgment.

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that the trial court was "not confronted with a harsh case overcoming our policy against piecemeal appeals, prejudice or hardship, or any unusual or compelling circumstances dictating immediate entry of a judgment."[104] The supreme court noted that without special circumstances, the possibility of avoiding a second trial was not a sufficient reason for granting Rule 54(b) certification.[105] The court apparently found no harsh circumstances, nor did it indicate what circumstances would present the appropriate case for a grant of Rule 54(b) certification.[106]

The court did, however, note that there is a just reason for delay where future developments at trial may eliminate the need for appellate review.[107] By example, the court explained that at trial, the Water Management District could be found one hundred percent liable for the damages suffered by Gessner and, as such, there would be no need to review the City's dismissal.[108] The court stated that if this circumstance materialized, any decision the court rendered would be advisory.[109]

IV. IMPACT

The North Dakota Supreme Court's opinion in *Gessner* indicates that the scope of Rule 54(b) will remain narrow.[110] While there is disagreement about whether the supreme court has correctly narrowed the application of Rule 54(b), the scope, nevertheless, has been so narrowed.

Justice Meschke has opined in several cases that where procedure is involved, certainty is more important than correctness.[111] One might accept this proposition if the process became certain in the end. However, the widespread use of Rule 54(b) by trial courts and attorneys, and the repeated dismissal of those cases by the North Dakota Supreme

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Gessner (No. 94-C-0912).

104. *Gessner*, 529 N.W.2d at 870.

105. *Id.* *See supra* notes 85-93 and accompanying text (noting factors which the court has previously looked at).

106. *Gessner*, 529 N.W.2d at 870,

107. *Id.*

108. *Id.* at 870.

109. *Id.*

110. *Id.* This trend has been ongoing and has been recognized by other Justices besides Justice Meschke. *See* Peterson v. Zerr, 443 N.W.2d 293, 300-01 (N.D. 1989) (VandeWalle, J., concurring specially) (stating that the majority is severely limiting trial court's discretion).

111. *E.g.*, Regstad v. Steffes, 433 N.W.2d 202, 205 (N.D. 1988) (Meschke, J., concurring).

Court, indicate otherwise.[112] Even Justice Meschke has stated that "certainty is now gone."[113]

The North Dakota Supreme Court has put together a framework for applying Rule 54(b) and there are some indicators based on past decisions about what fact situations will withstand the court's strict scrutiny. However, what is needed are some bright line rules or a restatement by the North Dakota Supreme Court of what will justify granting certification. If the supreme court were to take this step, North Dakota trial courts would have clearer limits on their discretion and would stop granting Rule 54(b) so freely. Additionally, attorneys would be able to more objectively determine whether a Rule 54(b) certification should be sought.

In the alternative, if the supreme court does not clearly restate the factors guiding Rule 54(b), the court should more clearly integrate the facts into its opinions and discuss why a trial court's reasons are so insufficient as to justify dismissal on the basis of an abuse of discretion. This would, like the use of bright line rules, provide North Dakota trial courts and attorneys with guidance in determining when Rule 54(b) certification is appropriate.

Along with the need for a restatement of Rule 54(b) and its proper application, is the need for a reevaluation of what factors should come into play.[115] While the North Dakota Supreme Court is seeing more requests for 54(b) certification, the length and expense of trials is becoming greater and the time it takes to get to trial is longer, thus magnifying the harsh effects of not being granted Rule 54(b) certification based upon the existing factors.[116]

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112. The use of Rule 54(b) began to escalate in the early 1980s. Union State Bank v. Woell, 357 N.W.2d 234, 236 (N.D. 1984). In *Woell*, the supreme court took special care to note that recent cases in which appeals had been denied on the basis of improper certification did not mean that Rule 54(b) certification would be granted routinely. *Id.*

113. Club Broadway, Inc. v. Broadway Park, 443 N.W.2d 919, 923 (N.D. 1989) (Meschke, J., dissenting).

115. *See supra* notes 85-93 and accompanying text (listing factors that have been involved in making Rule 54(b) decisions). A full discussion of what factors should be involved in Rule 54(b) certifications and what types of cases the Rule should be applied in is beyond the scope of the Comment. For a very detailed discussion of Rule 54(b) in state courts, see Allen, *supra* note 17. Interestingly, the annotation treats North Dakota cases specially in certain aspects of its discussion. *Id.*

116. Justice Maring, the Supreme Court's newest justice, appears to have revived the discussion about Rule 54(b). Wyatt v. Adams, 551 N.W.2d 775, (N.D 1996) (Maring, J., dissenting). In *Wyatt*, the majority opinion, citing potential mootness, found the trial court abused its discretion, dismissed the appeal, and assessed costs against Defendant, Grand Forks Welding. *Id.* at 777. Justice Maring dissented from the opinion stating, "that the time has come for this court to be more flexible in its application of Rule 54(b), N.D.R.Civ. P., more deferential to the district courts and generally more willing to hear appeals which are products of Rule 54(b) certification." *Id.* Justice Maring argued that "[t]he court's continued reliance on *Allis-Chalmers* is misguided" in light of *Curtiss-Wright*. *Id.* at 778. Rather, Justice Maring stated "the cost of litigation . . . should be a factor." *Id.* In support of her argument, Justice Maring noted that as of late courts have followed "a less restrictive approach" and

Something needs to be done, because at this point the rule is helping no one. While the rule exists to prevent delay and injustice, we now have the reverse, for there is an inordinate amount of wasted time and money going into fruitless appeals, both on the part of the courts involved and the parties seeking review. The action that needs to be taken, however, cannot be unilateral. Attorneys and trial courts must do their part as well as the North Dakota Supreme Court.

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given greater deference to district courts. *Id.* at 779.

Justice Maring's final argument concerned the assessment of costs against the defendant. *Id.* Justice Maring noted that it was the district court that granted certification and that it is "wrong to punish the appellee for the mere use of a rule of civil procedure . . . when it was the trial court that the majority found abused its discretion . . . ." *Id.*

* I especially wish to thank my fiancee and best friend, Jennifer, for her endless help, support, and love.