North Dakota Law Review

Volume 72 | Number 3 Article 14

1996

North Dakota Supreme Court Review

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 and cases that significantly affect earlier interpretations of North Dakota Law. The Review was written by James R. Salisbury and Richard M. Schreiber as a special project for the NORTH DAKOTA LAW REVIEW.

The following topics are included in the Review:

MAHER V. NORTH DAKOTA DEPARTMENT OF TRANSPORTATION

In *Maher v. North Dakota Department of Transportation*,[1] the Department of Transportation appealed the district court's reversal of the Department's suspension of Timothy Maher's driving privileges.[2]

On October 15, 1994, a North Dakota State Highway Patrol officer observed Maher driving erratically.[3] The officer stopped the car, administered several field sobriety tests to Maher, and then, based on these tests, arrested him for driving under the influence of alcohol.[4] Maher was then transported to a Mandan hospital for a blood test.[5] At the hospital, a registered nurse, using the "vacutainer" tube from a blood collection kit provided to the hospital by the Department, attempted to draw blood from Maher's right arm.[6] Because no blood was collected from this initial attempt, the vacutainer and blood collection kit were discarded.[7] A second kit was opened and a blood sample was obtained from Maher.[8] The second kit was sent to the Director of the Department of Transportation, in accordance with North Dakota Century Code section 39-20-03.1(3), where testing revealed a blood alcohol concentration of 0.21 percent.[9] Maher then made a timely request for an administrative hearing.[10]

At the administrative hearing, Maher first objected to the introduction of the arresting officer's statement that "the time of the stop, according to state radio, was 1:23 a.m.," arguing that it was hearsay.[11] This objection was overruled and the statement was admitted.[12] Maher also argued that the Department was divested of jurisdiction to suspend his license due to the Department's failure to forward the initial empty blood collection kit.[13] Ultimately the hearing officer found that Maher's blood was drawn within two hours of driving, his blood-alcohol content was above 0.10 percent, and that sending the first empty blood collection kit would have been a "useless and idle gesture." Thus the hearing officer concluded that Maher had violated section 39-08-01 of the North

1. 539 N.W.2d 300 (N.D. 1995).
2. Maher v. North Dakota Dep't of Transp., 539 N.W.2d 300, 301 (N.D. 1995).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Maher*, 539 N.W.2d at 301.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Maher*, 539 N.W.2d at 301.
13. *Id.*

Dakota Century Code and suspended Maher's driver's license for 365 days.[14]

Maher appealed this decision to the district court, where the district court reversed, holding that although the "evidence was sufficient to confirm the test was administered within two hours of driving based on the additional evidence received by the hearing officer, . . . the Department's failure to forward the first blood collection kit divested it of jurisdiction to suspend Maher's driver's license."[15] On appeal, the Department argued that the district court erred in finding that the officer's failure to forward the first empty kit divested the director of jurisdiction to suspend Maher's driver's license.[16] Maher cross appealed, asserting the statement of the officer was inadmissible hearsay.[17]

Section 39-20-03.1(3) of the North Dakota Century Code requires the officer to "forward to the director . . . a copy of the certified copy of the analytical report for a blood, saliva, or urine test for all tests administered at the direction of the officer."[18] The court examined this statute in *Bosch v. Moore*,[19] where it concluded that "[t]he legislature has made it the hearing officer's domain, not the officer's, to judge the foundational facts for the admissibility of test results and the weight to be given to each of those results."[20] According to the court in *Maher*, analytical reports for a blood test are the "results" referred to in *Bosch*.[21]

In this case, the hearing officer found that no blood had entered the first vacutainer tube.[22] Therefore, according to the court, it was impossible to obtain an analytical report of a blood test from a vacutainer tube with no blood in it.[23] Thus, the supreme court concluded that section 39-20-03.1 did not require the officer to send the opened, empty blood collection kit to the Director of the Department of Transportation.[24]

In his cross appeal, Maher argued that, absent the officer's statement, the properly admitted evidence was insufficient to establish the time of his driving.[25] Section 39-20-04.1 of the North Dakota Century

14. *Id.*
15. *Id.*
16. *Id.* at 302.
17. *Maher*, 539 N.W.2d at 301.
18. N.D. CENT. CODE § 39-20-03.1(3) (Supp. 1995).
19. 517 N.W.2d 412 (N.D. 1994).
20. Bosch v. Moore, 517 N.W.2d 412, 413 (N.D. 1994).
21. *Maher*, 539 N.W.2d at 302.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*

Code requires the suspension of the driving privileges of an individual whose blood-alcohol concentration was at least 0.10 percent based on a test performed within two hours of driving or being in actual physical control of a vehicle.[26] Maher contends that the officer's statement that "the time of the stop, according to state radio, was 1:23 a.m.," should have been excluded as hearsay.[27]

Admissibility of evidence in an administrative hearing shall be determined in accordance with the North Dakota Rules of Evidence.[28] Evidentiary rulings are reviewed under an abuse of discretion standard.[29] The court established that the statement of the officer was hearsay under Rule 801(c) of the North Dakota Rules of Evidence.[30] However, according to the court, an exception to the hearsay rule exists where a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."[31] Finding that the statement was made contemporaneously with the stop, the court concluded that the statement was properly admitted into evidence as a present sense impression exception to the hearsay rule.[32]

Based upon additional evidence received at the hearing concerning the time of driving, the court concluded that a reasonable person could have found that Maher was tested within two hours of the time of driving. Thus, the supreme court reversed the district court's decision, which required the officer to submit the initial empty blood collection kit, and reinstated the hearing officer's decision to suspend Maher's license for 365 days.[33]

ADMINISTRATIVE LAW—SUSPENSION OF DRIVER'S LICENSE

PETERSON V. DIRECTOR, NORTH DAKOTA DEPARTMENT OF TRANSPORTATION

In *Peterson v. Director, North Dakota Department of Transportation*,[34] the Department of Transportation appealed a judgment of the district court, which reversed the Department's suspension of James Howard Peterson's driver's license.[35] The North Dakota Supreme Court

26. *Maher*, 539 N.W.2d at 302 (citing N.D. CENT. CODE § 39-20-03.1(3) (Supp. 1995).
27. *Id.* at 303.
28. *Id.* (citing N.D. CENT. CODE § 28-32-06(1) (1991)).
29. *Id.*
30. *Id; se also* N.D. R. EVID. 801(c).
31. *Maher*, 539 N.W.2d at 303 (quoting N.D. R. EVID. 803(1)).
32. *Id.*
33. *Id.*
34. 536 N.W.2d 367 (N.D. 1995).
35. Peterson v. Director, North Dakota Dep't of Transp., 536 N.W.2d 367, 368 (N.D. 1995).

reversed the district court and reinstated the decision of the hearing officer, thereby suspending Peterson's license.[36]

Bismarck Police Officer, John McDonald, observed a vehicle traveling north on State Street with its tires "right on" the lane dividers.[37] After the vehicle crossed over the line, Officer McDonald activated his lights and pulled the vehicle over in a nearby parking lot.[38] When Officer McDonald approached the vehicle, he noticed an odor of alcohol coming from inside the vehicle.[39] Suspecting that the driver of the vehicle, Peterson, was under the influence of alcohol, Officer McDonald asked Peterson to perform field sobriety tests.[40] Peterson failed the field sobriety tests and was arrested for driving under the influence of alcohol.[41]

Another Bismarck Police officer, Officer James Chase, subsequently administered an intoxilyzer test to Peterson, which yielded a blood alcohol content of 0.13%.[42] However, when Officer Chase filled out the testing data, he misidentified the solution which was used on the test.[43] Because a discrepancy existed between the solution number on Peterson's test and other intoxilyzer tests administered, the hearing officer subpoenaed Officer Chase to appear at the hearing.[44] At the hearing, Officer Chase testified that the misidentification resulted from an error in transcription and that proper solution, Solution 386, was indeed used.[45] Consequently, the hearing officer concluded that Peterson had been lawfully arrested and tested, and issued a ninety-one day license suspension.[46] The district court reversed, finding that the hearing officer had performed investigatory functions in violation of section 28-32-12.2 of the North Dakota Century Code, when she subpoenaed and questioned Officer Chase.[47]

At the outset, the North Dakota Supreme Court noted that the "mere combination of adjudicative and prosecutorial functions in a Department hearing officer does not, by itself, violate a driver's due process rights."[48] In examining section 28-32-12.2 of the North

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36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Peterson*, 536 N.W.2d at 368.
41. *Id.*
42. *Id.*
43. *Id.* Officer Chase noted the solution as Solution 382 instead of Solution 386. *Id.* Both solutions were approved by the state toxicologist, but Solution 382 was no longer in use. *Id.*
44. *Id.*
45. *Peterson*, 536 N.W.2d at 368.
46. *Id.* at 369.
47. *Id.*
48. *Id.* (citing Dittus v. North Dakota Dep't of Transp., 502 N.W.2d 100, 103 (N.D. 1993)).

Dakota Century Code, the supreme court determined that although the district court found that the hearing officer violated the section that stated that "no person who has served as investigator, prosecutor, or advocate in the investigatory or prehearing stage of a contested case proceeding may serve as hearing officer,"[49] there was no evidence in the record to indicate that the hearing officer served in any of the capacities set forth in this section.[50] Rather, the record showed only that the hearing officer noticed a discrepancy among the numbers listed on intoxilyzer forms.[51]

Moreover, the court noted that, under section 28-32-09 of the North Dakota Century Code,

> [a]ny hearing officer may require, upon the request of any party to the proceedings conducted by the agency, or upon the agency's or the hearing officer's own motion on behalf of the agency, the attendance and testimony of witnesses and the production of documents and other objects described in a subpoena at a hearing or other part of the proceedings.[52]

Thus, the court concluded, that under section 28-32-09(2), the hearing officer has the authority to subpoena the testing officer in order to clarify a discrepancy in the testing procedure, or any other necessary explanation.[53]

Lastly, the court stated that there was no evidence that the hearing officer had prejudged the issues or acted with partiality in subpoenaing the officer to testify.[54] Limiting its review to the subpoena issue, the court held that the subpoena was authorized by statute and reinstated the hearing officer's decision suspending Peterson's driving privileges.[55]

APPEAL AND ERROR—ABUSE OF DISCRETION IN ISSUING INJUNCTION

MAGRINAT V. TRINITY HOSPITAL

In *Magrinat v. Trinity Hospital*,[56] Trinity Hospital (Trinity) appealed a district court judgment enjoining them from suspending Dr. Gaston Magrinat while Trinity conducted an investigation of Dr. Magrinat's alleged misconduct.[57] The North Dakota Supreme Court

49. *Id.* at 369 (quoting N.D. CENT. CODE § 28-32-12.2(1) (1991)).
50. *Peterson*, 536 N.W.2d at 369.
51. *Id.*
52. *Id.* (quoting N.D. CENT. CODE § 28-32-09(2) (Supp. 1995)).
53. *Id.* at 369.
54. *Id.* at 370.
55. *Peterson*, 536 N.W.2d at 370.
56. 540 N.W.2d 625 (N.D. 1995).
57. Magrinat v. Trinity Hosp., 540 N.W.2d 625, 626 (N.D. 1995).

reversed and vacated the injunction, ruling that the trial court abused its discretion in granting injunctive relief because Magrinat's suspension was authorized under Trinity's bylaws.[58]

On June 17, 1995, a patient arrived at Trinity complaining of chest pains, and it was soon determined that he was having a heart attack.[59] The patient's doctor consulted with cardiologist Dr. Magrinat, and both concluded that a coronary bypass surgery was the best option. However, before operating, the doctors decided to conduct a balloon angioplasty procedure to ease the patient's symptoms.[60] Although a backup team was not available, the doctors decided to proceed with the angioplasty because it was an emergency.[61] For reasons not mentioned in the record, the patient's family signed consent documents which required a backup team to be present, rather than consent documents for an emergency procedure.[62] When Dr. Magrinat attempted to gather the equipment needed to conduct the balloon angioplasty, a lab technician at the hospital refused to open the cabinet containing the supplies, because the consent documents did not authorize the procedure without surgical backup.[63] At that point, Dr. Magrinat became upset, and as alleged by some hospital staff, grabbed a telephone receiver and struck a technician in the face with it.[64] It was further alleged that Dr. Magrinat told the patient that the hospital employees were going to let him die.[65] The patient then fired Dr. Magrinat and asked for another cardiologist.[66]

As a result of the incident, Trinity suspended Dr. Magrinat for fourteen days while the Executive Committee performed an investigation.[67] The Executive Committee then issued an interim suspension, and informed Dr. Magrinat that the suspension would be in force until a full investigation was completed and possible recommendations were made.[68] Dr. Magrinat sought injunctive relief in district court pursuant to section 32-05-04(1) of the North Dakota Century Code,[69] which was granted,

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58. *Id.* at 630.
59. *Id.* at 626.
60. *Id.* at 627.
61. *Id.* Trinity policy requires a backup team for a balloon angioplasty unless it is an emergency. *Id.*
62. *Magrinat*, 540 N.W.2d at 627.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Magrinat*, 540 N.W.2d at 627.
68. *Id.* Dr. Magrinat was informed of the suspension by way of letter which stated that suspending his practice privileges during the investigation "is in the best interests of patient care at Trinity Hospital by preventing potential harm to patients." *Id.*
69. N.D. CENT. CODE § 32-05-04(1) (1976). This section provides that "[e]xcept when otherwise provided by this chapter, a final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant . . . [w]hen pecuniary compensation would not afford adequate

and Trinity appealed to the North Dakota Supreme Court, claiming that the granting of injunctive relief was an abuse of discretion.[70]

Dr. Magrinat claimed that if his suspension lasted longer than thirty days, federal law required Trinity to inform the national practitioner data bank, which could cause damage to his professional reputation not compensable by a monetary damage award.[71] Trinity countered this by arguing that monetary damages would be an adequate remedy if Dr. Magrinat's name was wrongfully placed in the national practitioner data bank; further, if the subsequent investigation cleared him of any wrongdoing, that finding would be reported in the data bank eliminating the harm to him.[72]

The North Dakota Supreme Court noted that the granting or denying of injunctive relief will only be reversed if there is an abuse of discretion, and in this case, concluded that the trial court abused its discretion when it granted injunctive relief in favor of Dr. Magrinat.[73] In making this determination, the court looked to the written bylaws of the Trinity Hospital medical staff, which allow the Executive Committee to impose an interim suspension of a physician's privileges during an investigation of his conduct if it is in the best interests of patient care.[74] The Executive Committee issued the suspension in the best interests of patient care, based on information that Dr. Magrinat acted out of anger on June 17, 1995.[75] Furthermore, the Committee had information to conclude that Dr. Magrinat's actions caused a staff employee physical injury, and caused emotional upset and physically endangered the heart attack patient.[76]

The court further noted that the trial court had issued injunctive relief based on the four factors used to determine when a court should issue a preliminary injunction pending a final decision on the merits. These factors, however, were not applicable because Dr. Magrinat sought final relief.[77] When a party such as Dr. Magrinat seeks final injunctive relief, the issue under section 32-05-04 of the North Dakota Century

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relief." *Id.*

70. *Magrinat*, 540 N.W.2d at 627-28. Before getting to the merits of Trinity's argument, the North Dakota Supreme Court raised the issue of appealability on its own prerogative, and concluded that this temporary injunction was appealable. *Id.* at 627.

71. *Id.* at 628. Information released to the national practitioner data bank is available to the general public. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* The bylaws also allow a fourteen day suspension similar to the one Dr. Magrinat received. *Id.*

75. *Magrinat*, 540 N.W.2d at 628.

76. *Id.*

77. *Id.* at 628-29. Those factors are: "(1) substantial probability of succeeding on the merits; (2) irreparable injury; (3) harm to other interested parties; and (4) effect on the public interest." *Id.* at 629.

Code is whether the relief is necessary to prevent the breach of an obligation that exists in the applicant's favor. Here, Dr. Magrinat could not demonstrate the need to prevent a breach because, under the bylaws, Trinity had the right to impose the suspension.[78] The court also looked to public policy, noting that hospitals have a duty to the public to provide suitable physicians and to investigate complaints about them.[79] Although severe, a prehearing suspension of practicing privileges is acceptable when required by patient safety and allowed by the bylaws.[80]

Accordingly, the judgment of the district court was reversed and the injunction vacated.[81]

ATTORNEY AND CLIENT—ADMISSION TO PRACTICE LAW

LAMB V. NORTH DAKOTA BAR BOARD

In *Lamb v. North Dakota Bar Board*[82] Timothy Lamb petitioned the North Dakota Supreme Court pursuant to Rule 8(c) of the North Dakota Admission to Practice Rules for review of the North Dakota Bar Board's negative recommendations on his application for admission to practice law in the State of North Dakota.[83]

Timothy Lamb has taken the North Dakota bar examination on four separate occasions: July 1993, February 1994, July 1994, and February 1995.[84] Each of these examinations required a combined score of at least 260 on the Multistate Bar Examination (MBE) and the North Dakota essay portions.[85] On none of the four examinations did Lamb attain a passing score for admission to practice.[86]

Lamb sought review of the Bar Board's negative recommendation for admission to the Bar arguing, first, that the court should employ a "heightened" or "intermediate" level of scrutiny and should shift the burden to the Bar Board because the court is, in effect, reviewing its own

78. *Id.* at 629.
79. *Id.*
80. *Magrinat*, 540 N.W.2d at 629. The court distinguished this case from McMillan v. Anchorage Community Hosp., 646 P.2d 857 (Alaska 1982). *Id.* In *McMillan*, the Alaska Supreme Court ruled that a hospital board wrongfully suspended a physician's privileges because there was no showing that his being unable to get along with other hospital staff members negatively impacted patient care. 646 P.2d at 865-66. In contrast, in the case at bar the Executive Committee had reason to believe that Dr. Magrinat's conduct put a patient's health in danger. Magrinat, 540 N.W.2d at 629.
81. *Id.* at 630.
82. 539 N.W.2d 865 (N.D. 1995).
83. Lamb v. North Dakota Bar Board, 539 N.W.2d 865, 866 (N.D. 1995), *cert. denied*, 116 S. Ct. 2530 (1996).
84. *Id.*
85. *Id.*
86. *Id.*

policy.[87] Second, Lamb argued that the Bar Board deprived Lamb of due process because he did not receive a fair and impartial hearing, and that the Bar Board denied evidence Lamb requested.[88]

Noting that the United States Constitution does not create a right to practice law,[89] the court looks for a "rational connection between a qualification standard and the applicant's fitness or capacity to practice law" when reviewing a negative recommendation by the Bar Board.[90] A state is free to impose higher qualifications standards for admission to the bar so long as the qualification has a rational connection to the applicant's fitness or capacity to practice law.[91] Finding that the purpose of the bar examination and Bar Board policies was to protect the public, the North Dakota Supreme Court opined that neither employing a heightened level of scrutiny or shifting the burden of proof from the applicant to the Bar Board would serve to advance the purpose of protecting the public and therefore declined to change the level of scrutiny for review of Lamb's petition.[92]

In support of his due process argument, Lamb raised three issues. First, Lamb claimed that the Bar Board deprived him of due process because a hearing officer did not preside over Bar Board hearings.[93] Second, Lamb alleged that he was not told at the May 1994 hearing how the Bar Board derived a passing score, and that the method of determining a passing score was unreliable.[94] Lastly, Lamb claimed that the Bar Board failed to define "practice and procedure" as requested by Lamb at the November 1994 hearing.[95]

However, according to the supreme court, the due process clause does not require a full adversarial proceeding.[96] All that is required by the due process clause is that the Bar Board "employ fair procedures in processing applications for admission to the bar."[97] Finding that Lamb had reasonable opportunities "to present and examine witnesses, to present evidence, to respond to evidence presented against his applications, and to argue his case," the supreme court concluded that the Bar Board's procedures did not deprive Lamb of his due process rights.[98]

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87. *Id.* at 867.
88. *Lamb*, 539 N.W.2d at 867.
89. *Id.* at 866.
90. *Id.* at 867.
91. *Id.* at 866.
92. *Id.* at 867.
93. *Lamb*, 539 N.W.2d at 867.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* (quoting Whitfield v. Illinois Bd. of Law Examiners, 504 F.2d 474, 478 (7th Cir. 1974)).
98. *Lamb*, 539 N.W.2d at 867.

Continuing, Lamb argued that he should be certified to practice law despite the negative recommendations of the Bar Board because the bar examinations he took were unreliable; Lamb presented evidence that given the small number of people taking the February bar examination, the grading of the exams was unreliable.[99] To set aside a bar examination result, however, the applicant must prove that the Bar Board acted unreasonably and arbitrarily.[100] In the opinion of the court, Lamb failed to meet this burden.[101]

Lamb further asserted that "evidence" is not part of "practice and procedure" as that phrase was used in Question 2 of the July 1994 examination.[102] Quoting from the North Dakota Constitution, the supreme court stated that the court has the "authority to promulgate rules of procedure . . . to be followed by all the courts of this state."[103] "This authority includes the promulgation of rules for the receipt and admission of evidence."[104] Accordingly, the court found that procedure includes both pleading and evidentiary matters.[105] Therefore, the Bar Board did not act arbitrarily or unreasonably in including an evidentiary issue in a practice and procedure question.[106] Lastly, the court stated that Lamb had failed to introduce sufficient evidence to find that examination instructions were improperly administered or that the cutoff score used by the Bar Board lacked an adequate foundation.[107] As Lamb did not show by a preponderance of the evidence that the Bar Board acted arbitrarily or unreasonably, the court accepted the Board's negative recommendations and denied Lamb's petitions.[108]

ATTORNEY AND CLIENT—CONFLICT OF INTEREST

HERINGER V. HASKELL

In *Heringer v. Haskell*,[109] Robert Heringer petitioned the North Dakota Supreme Court for a supervisory writ directing the district court to disqualify Randall Bakke and the law firm of Smith, Bakke &

99. *Id.*
100. *Id.* at 868.
101. *Id.*
102. *Id.*
103. *Lamb*, 539 N.W.2d at 868 (citing N.D. CONST. art. VI, § 3, cl. 1).
104. *Id.* (quoting City of Fargo v. Ruether, 490 N.W.2d 481, 483 (N.D. 1992)).
105. *Id.*
106. *Id.*
107. *Id.* at 868-69.
108. *Lamb*, 539 N.W.2d at 869.
109. 536 N.W.2d 362 (N.D. 1995).

Hovland from representing Michael Puklich in litigation against Heringer.[110]

Robert Heringer brought a negligence suit against Puklich, a certified public accountant, for accounting services and professional advice which Puklich provided to Heringer regarding the purchase of a boat dealership.[111] In January of 1992, Heringer consulted with attorney Kenneth Horner of the Smith, Horner & Bakke firm regarding a possible lawsuit against Puklich.[112] Horner accepted the representation and opened a file at the firm containing his notes and other materials from his meeting with Heringer.[113] These notes included confidential information concerning Heringer's claim against Puklich.[114]

Over the course of the next eighteen months, Horner did little work on Heringer's file, and in August of 1993, attorney Craig Boeckel contacted Horner regarding Heringer's claim.[115] On August 27, 1993, Horner transferred the contents of his file to Boeckel, and by way of a cover letter, released any claim that the firm of Smith, Horner & Bakke had to attorney's fees.[116] Subsequently, Horner left this firm in December, 1993, causing the firm to reorganize under the name of Smith, Bakke & Hovland.[117]

When Boeckel contacted Puklich about Heringer's claim, Puklich hired Bakke to represent him.[118] Upon learning of this, Boeckel advised Bakke that Horner's former representation of Heringer created a conflict of interest and requested that Bakke and the Smith firm decline representation of Puklich.[119] Bakke and the firm refused, and Heringer motioned the trial court to disqualify them from representing Puklich.[120]

Despite finding that Horner had in fact represented Heringer in the same litigation and had received confidential and privileged information, the trial court ruled that Bakke and the other attorneys in the firm had not received material information about the file, and denied the

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110. Heringer v. Haskell, 536 N.W.2d 362, 364 (N.D. 1995).
111. *Id.* Heringer did purchase the boat dealership, but ended up filing for bankruptcy. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Heringer*, 536 N.W.2d at 364.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* Horner testified that, during the time between the initial meeting with Heringer and the transfer of the file to Boeckel, the file would have been either behind his secretary's desk or in the general file storage room. *Id.* The other attorneys in the firm had access to the files stored in either area. *Id.* In addition, Horner stated that the partners in the firm occasionally discussed their cases with each other. *Id.*
120. *Heringer*, 536 N.W.2d at 364.

motion.[121] Acknowledging that an order to disqualify counsel is not immediately appealable, Heringer petitioned for a supervisory writ.[122]

Finding the exercise of supervisory jurisdiction appropriate, the North Dakota Supreme Court looked to Rule 1.10(c) of the North Dakota Rules of Professional Conduct concerning imputed disqualification of a law firm upon a former member's representation of an adverse party.[123] It is provided that:

> When a lawyer has terminated an association with a firm, the firm may not thereafter knowingly represent a person when:
>
> (1) The person has interests materially adverse to those of a non-governmental client represented by the formerly associated lawyer;
>
> (2) The matter is the same or is substantially related to that in which the formerly associated lawyer represented the client; and
>
> (3) Any lawyer remaining in the firm has material information protected by Rule 1.6 [confidential information].[124]

According to the supreme court, "[d]isqualification under Rule 1.10 requires a three-step analysis: (1) Are the new client's interests materially adverse to the old client's interests? (2) Is the matter the same or substantially related to the prior representation? (3) Does any lawyer remaining in the firm have material information?"[125] The supreme court found that, under the facts of the case, the first two requirements for disqualification were satisfied.[126] For the court, the critical issue was whether Bakke or other lawyers in the Smith firm had access to confidential material information.[127]

Looking to the comment to Rule 1.10 and cases interpreting the rule, the court concluded that access to confidential information was the deciding factor.[128] Therefore, the firm opposing disqualification must also show that no attorney remaining in the firm had access to the confidential information.[129] Affidavits asserting that the remaining members never saw or discussed the file are insufficient, by themselves,

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121. *Id.*
122. *Id.*
123. *Id.*
124. N.D. R. PROF. CONDUCT 1.10(c).
125. *Heringer*, 536 N.W.2d at 365.
126. *Id.*
127. *Id.*
128. *Id.* at 365-66 (citations omitted).
129. *Id.* at 365.

to prevent disqualification.[130] According to the court, "such access equates with knowledge of the client's confidential information."[131] Thus, to "preserve public confidence in the legal profession, and to insure the confidentiality and integrity of client information, . . . firm[s] must not be allowed to 'switch sides' when attorneys remaining in the firm had access to the former client's file."[132]

In this case, it was conceded that Heringer's confidential file was generally accessible to Bakke for the nineteen months Horner represented Heringer; and further, it was the practice of attorney's in the firm to discuss pending cases.[133] Finding that, "[u]nder [the] circumstances, it [was] reasonable and justified to infer that each attorney had access to, and therefore knowledge of, all confidential information of the firm's clients," the supreme court directed the disqualification of Bakke and the law firm of Smith, Bakke & Hovland.[134]

BREACH OF PEACE—DISORDERLY CONDUCT RESTRAINING ORDER

WILLIAMS V. SPILOVOY

In *Williams v. Spilovoy*,[135] Richard Spilovoy (Richard), ex-husband of Beverly Spilovoy Williams (Beverly), appealed the trial court's decision to issue a restraining order against him,which prevented him from contacting his ex-wife.[136] The North Dakota Supreme Court, in an opinion by Chief Justice VandeWalle, reversed the trial court's issuance of the restraining order.[137]

On April 27, 1994, Beverly filed a petition in district court seeking a restraining order against Richard.[138] After conducting a hearing on the matter, the trial court entered a disorderly conduct restraining order against Richard "prohibiting oral or written communication between the parties, prohibiting them from coming within twenty-five feet of each other, and prohibiting them from being on each other's property except when exchanging the children for visitation."[139] In support of the restraining order, the trial court found that Richard had made calls to Beverly which were "harassing in nature[,]" that Beverly was "fearful

130. *Heringer*, 536 N.W.2d at 365.
131. *Id.* at 366.
132. *Id.* at 367.
133. *Id.* at 366.
134. *Id.* at 367.
135. 536 N.W.2d 383 (N.D. 1995).
136. Williams v. Spilovoy, 536 N.W.2d 383, 384 (N.D. 1995).
137. *Id.* at 385.
138. *Id.* at 384.
139. *Id.*

of close contact with [Richard,]" and that Richard had utilized the children and episodes of visitation to harass Beverly.[140]

However, the North Dakota Supreme Court, on review of the hearing transcript, was unable to find evidence to support the findings of the trial court.[141] Rather, the court found that the evidence revealed only vague and general allegations of harassment.[142] Under section 12.1-31.2-01 of the North Dakota Century Code, a trial court may issue a "no-contact" order if it finds reasonable grounds to believe a party has engaged in disorderly conduct.[143] "Reasonable grounds" to believe disorderly conduct has been committed is synonymous with "probable cause."[144] According to the court, "reasonable grounds exist for purposes of this section when facts and circumstances presented to the judge are sufficient to warrant a person of reasonable caution to believe that acts constituting the offense of disorderly conduct have been committed."[145] Thus, to support a disorderly-conduct restraining order under section 12.1-31.2-01, the petitioning party must introduce evidence of specific acts or threats constituting disorderly conduct.[146]

Addressing each of the trial court findings separately, the court found that the telephone calls, which Beverly emphasized as harassing, revealed no language or actions by Richard rising to the level of disorderly conduct under the statute.[147] Further, the transcript was void of any evidence that Richard made harassing telephone calls or that these calls "otherwise interfered with her 'safety, security, or privacy.'"[148] In addition, the court was unable to find evidence of specific instances when Richard had "utilized the children and episodes of visitation for harassment" of Beverly.[149] Lastly, the court opined that Beverly's subjective fear itself was insufficient to support the restraining order absent evidence of specific instances of actions or threats on Richard's part which constituted disorderly conduct or were the basis for Beverly's fear.[150]

In conclusion, the court cautioned that the opinion should not be read to place unreasonable barriers upon parties seeking restraining

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140. *Id.*
141. *Spilovoy*, 536 N.W.2d at 384.
142. *Id.*
143. *Id.* Disorderly conduct" means "intrusive or unwanted acts, words, or gestures that are intended to adversely affect the safety, security, or privacy of another person." N.D. CENT. CODE § 12.1-31.2-01(1) (Supp. 1995).
144. *Spilovoy*, 536 N.W.2d at 384 (citing Svedberg v. Stamness, 525 N.W.2d 678, 681-82 (N.D. 1994)).
145. *Id.* (quoting *Svedberg*, 525 N.W.2d at 682).
146. *Id.* at 384.
147. *Id.* at 385.
148. *Id.*
149. *Spilovoy*, 536 N.W.2d at 385.
150. *Id.*

orders under the statute.[151] The court noted that in situations where there is split custody of the children, a certain amount of contact must be expected.[152] To justify the restrictions placed upon a party by a no-contact restraining order, the party seeking the order must present more than vague, conclusory statements of disorderly conduct.[153] The court concluded that the statute requires a showing of specific acts or threats constituting disorderly conduct as a prerequisite to attaining a disorderly conduct restraining order.[154]

CONSTITUTIONAL LAW—FREEDOM OF SPEECH AND EXPRESSION

CITY OF FARGO V. BRENNAN

In *City of Fargo v. Brennan*,[155] Brennan appealed his conviction of disorderly conduct for invading the zone of privacy of an assistant administrator of the Fargo Women's Health Organization.[156] The North Dakota Supreme Court affirmed the conviction, concluding that Brennan's conduct of invading the victim's zone of privacy while waving his arms in an angry manner, is not protected speech.[157]

Susan Charon, an assistant administrator at the Fargo Women's Health Organization, was getting into her car when she noticed Brennan (whom she recognized as a frequent protester at the clinic) approaching on his bike.[158] As Charon was getting into her car, Brennan got within five feet of her and started screaming and flailing his arms.[159] However, Brennan did not touch Charon or her car, swing at her, or threaten her.[160]

Charon complained to the City of Fargo, and the city charged Brennan with disorderly conduct, in violation of a Fargo city ordinance.[161] Brennan moved to dismiss the charge, claiming it "was made

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151. *Id.*
152. *Id.*
153. *Id.*
154. *Spilovoy*, 536 N.W.2d at 385.
155. 543 N.W.2d 240 (N.D. 1996).
156. City of Fargo v. Brennan, 543 N.W.2d 240, 241 (N.D. 1996).
157. *Id.* at 245.
158. *Id.* at 241. The Fargo Women's Health Organization is a clinic that performs abortions, and is often targeted by protest groups. *Id.*
159. *Id.*
160. *Id.* Charon testified to this at trial. *Id.* Nonetheless, Charon was still in fear of bodily harm and became "scared to death" based on Brennan's behavior at prior protests in front of the clinic. *Id.* at 241-42. Charon was shaky and upset for the rest of the day. *Id.*
161. *Brennan*, 543 N.W.2d at 242. The disorderly conduct ordinance provides in pertinent part that:

> A person is guilty of disorderly conduct if, with intent to harass, annoy, or alarm another person or in reckless disregard of the fact that another person is harassed, annoyed, or alarmed by his behavior, he:

without probable cause, and [that] the ordinance did not constitutionally prohibit his conduct.[162] The trial court found that the ordinance was not facially unconstitutional, but stated there were not enough facts to determine if it was unconstitutional as applied.[163] A bench trial was conducted, and the trial court concluded that the confrontation was within Charon's zone of privacy and Brennan's waiving of his hands constituted an implied threat and was physically offensive.[164] The trial court convicted Brennan of disorderly conduct, and he appealed. In his appeal, Brennan argued that there was not enough evidence to support his conviction[165] because the ordinance was unconstitutionally applied, due to the fact that his conduct "was not lewd or obscene" and did not involve "fighting words."[166]

On appeal, the city acknowledged that Brennan's expressions warranted First Amendment protection, but his expressions were coupled with physically offensive conduct, and that the physically offensive conduct did not have a legitimate political purpose and therefore was not protected.[167] Brennan, on the other hand, claimed his physical actions "had a legitimate and constitutionally protected purpose of communicating his political message."[168] The North Dakota Supreme Court ruled that Brennan's verbal expressions had a legitimate purpose and were protected, but the manner in which he delivered the message was not protected.[169] The court concluded that to protect public order, a city can prohibit alarming behavior that people find threatening, and Brennan's conduct was physically intimidating and alarmed Charon.[170]

The court further reasoned that a rational degree of physical separation can be imposed on a public forum such as a street.[171] This

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. . . . 8. Creates a hazardous, physically offensive, or seriously alarming condition by any act which serves no legitimate purpose.

FARGO MUN. CODE § 10-0301 (1992).

162. *Brennan*, 543 N.W.2d at 242. Brennan originally moved to dismiss on the basis that the ordinance was facially unconstitutional for vagueness and overbreadth, that the complaint stated no violation of law, and that it was not a crime to hurt another's feelings. *Id.* The trial court denied the dismissal, and after Brennan changed attorneys, he brought the above amended motion to dismiss. *Id.*

163. *Id.*

164. *Id.* at 242-43.

165. *Id.* at 243. The North Dakota Supreme Court reviews sufficiency of the evidence claims for criminal convictions in the light most favorable to the verdict. *Id.*

166. *Id.* Brennan was sentenced to thirty days in jail, and all but five days were suspended for one year of unsupervised probation, provided that he stay at least ten feet away from Charon. *Id.*

167. *Brennan*, 543 N.W. 2d at 243-44.

168. *Id.* at 244. Brennan further claimed that he moved his arms in order to emphasize a point and that the movement of his arms was intertwined with his speech. *Id.* at 243.

169. *Id.* at 244.

170. *Id.*

171. *Id.* at 244.

conclusion is reflected in *Madsen v. Women's Health Center Inc.*,[172] where the United States Supreme Court upheld injunctions that limited protest activities on public roads.[173] Under *Madsen*, injunctions are to be scruti-nized more closely than city ordinances which reflect a legislative choice to promote a particular social interest.[174] The First Amendment protects a person's right to offer "sidewalk counseling" to those that pass by, but it does not allow a protester to physically intimidate someone on a public street.[175]

In this case, Brennan's conduct of screaming at Charon while waving his arms and invading her "personal zone" by getting within five feet of her were physically offensive and threatening, and therefore supported a conviction under Fargo's disorderly conduct ordinance.[176] Accordingly, the judgment of the district court was affirmed.[177]

CRIMINAL LAW—ADMINISTRATION OF *MIRANDA* WARNINGS—INTOXILYZER TEST

STATE V. CHIHANSKI

In *State v. Chihanski*,[178] Joanne Chihanski appealed her guilty conviction in district court on the charge of driving under the influence of alcohol.[179]

On September 17, 1994, at approximately 12:23 a.m., Officer Grant Schiller arrested Chihanski for driving under the influence of alcohol.[180] Schiller did not administer the *Miranda*[181] warnings to Chihanski at the time of arrest.[182] Chihanski was handcuffed behind her back and placed in Schiller's patrol car.[183] When Schiller placed Chihanski in the patrol car, he checked her mouth and determined that she did not have

172. 114 S. Ct. 2516 (1994).

173. *Brennan*, 543 N.W.2d at 244 (citing Madsen v. Women's Health Ctr. Inc., 114 S. Ct. 2516, 2526 (1994). The "State . . . has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting the property rights of all its citizens." *Madsen*, 114 S. Ct. at 2526. The Court in Madsen upheld the constitutionality of an injunction prohibiting abortion protesters from a 36-foot buffer zone located on a public street outside an abortion clinic, but invalidated many restraints that prohibited protesting within 300 feet of the clinic and its staff because the restraints were not sufficiently tailored to warrant the restriction of the protesters' First Amendment freedom. *Id.*

174. *Brennan*, 543 N.W.2d at 244 (quoting *Madsen*, 114 S. Ct. at 2524).

175. *Id.* (citing *Madsen*, 114 S. Ct. at 2533).

176. *Id.* at 245.

177. *Id.*

178. 540 N.W.2d 621 (N.D. 1995).

179. State v. Chihanski, 540 N.W.2d 621, 622 (N.D. 1995).

180. *Id.* at 623.

181. *See* Miranda v. Arizona, 384 U.S. 436, 444-445 (1966) (setting out procedural safeguards to secure privilege against self incrimination).

182. *Chihanski*, 540 N.W.2d at 623.

183. *Id.*

anything in her mouth.[184] Chihanski was then transported to the Grand Forks Police Department.[185] After arriving at the police department, Schiller checked his weapon while Chihanski remained in his patrol car.[186] Within moments, Schiller returned to his patrol car and took Chihanski into the booking room.[187] There, Schiller read to Chihanski the implied consent advisory, then he asked her to take an Intoxilyzer test to which she agreed.[188]

Sergeant Robert Johnson administered the Intoxilyzer test after determining that twenty minutes had passed by asking Schiller the time of arrest and comparing it to the time on the Intoxilyzer machine.[189] Johnson himself did not observe Chihanski for twenty minutes prior to administering the test.[190] He did ask Chihanski if she had put anything in her mouth, to which she answered "no."[191]

On appeal, Chihanski raised two issues.[192] First, Chihanski contends that the trial court erred when it denied her motion to suppress the statement "no," made in response to a police officer's question "have you put anything in your mouth since the time of arrest" prior to taking an Intoxilyzer test, because it was testimonial, thus requiring *Miranda* warnings.[193] Secondly, Chihanski argued that the Intoxilyzer test was improperly administered because the testing operator did not observe Chihanski for twenty minutes prior to administering the test.[194] The North Dakota Supreme Court affirmed the conviction, concluding that the admission of the statement was harmless error even if it was testimonial requiring *Miranda* warnings, and that the Intoxilyzer test was fairly administered.[195]

The supreme court began by recognizing that the *Miranda* warnings are required only when a defendant is in custody and is being interrogated.[196] Furthermore, even if these elements are present, the evidence elicited must be testimonial.[197] Quoting the standard set forth by the United States Supreme Court in *Chapman v. California*,[198] the North

184. *Id.*
185. *Id.*
186. *Id.*
187. *Chihanski*, 540 N.W.2d at 623.
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Chihanski*, 540 N.W.2d at 622.
193. *Id.*
194. *Id.*
195. *Id.* at 622.
196. *Id.* at 623.
197. *Chihanski*, 540 N.W.2d at 623.
198. 386 U.S. 18 (1967).

Dakota Supreme Court found that "federal constitutional errors do not automatically require reversal if it is shown that they were harmless."[199] However, before a constitutional error can be found harmless, the "court must be able to declare a belief that it was harmless beyond a reasonable doubt."[200] This belief is satisfied if the court is convinced the error did not contribute to the verdict.[201]

Reviewing the entire record, the supreme court found that substantial evidence existed, without Chihanski's statement, to support the determination of both Schiller and Johnson that Chihanski had not eaten, drunk, or smoked anything for twenty minutes before taking the Intoxilyzer test.[202] Convinced that admission of the statement did not contribute to the guilty verdict, the court concluded that, even if the statement was testimonial, admitting it in the absence of *Miranda* warnings was harmless beyond a reasonable doubt.[203]

In addressing the second issue raised by Chihanski, the supreme court recognized that "[f]air administration of an Intoxilyzer test requires scrupulously following the approved method for conducting the test."[204] However, according to the court, scrupulous does not mean hypertechnical.[205] Finding that Chihanski placed undue emphasis on the language from *Bickler v. North Dakota State Highway Commissioner*,[206] which required the officer to "maintain observation" of the subject, the court determined the operative language from that case was that "the operator *must ascertain* that the subject has had nothing to eat, drink, or smoke within twenty minutes prior to the collection of the breath sample."[207] According to the court, "'observing' is not the exclusive manner of 'ascertaining.'"[208] Distinguishing *Bickler*, the Supreme Court found that Johnson did ascertain the lapse of twenty minutes before administering the test by asking Schiller the time of arrest and independently noting the current time.[209] Further, Johnson verified that

199. *Chihanski*, 540 N.W.2d at 623 (quoting State v. Flamm, 351 N.W.2d 108, 110 (N.D. 1984)).
200. *Id.*
201. *Id.*
202. *Id.* at 624. The court found that Chihanski remained in Schiller's presence at all times since her arrest except for the time Schiller was checking his weapon, that Chihanski remained handcuffed at all times, including the testing process, that Schiller checked her mouth at the time of arrest, that Johnson independently noted twenty minutes had passed, and that the pre-testing determination made by Schiller and Johnson would have been unaffected even if Chihanski had been informed of her *Miranda* rights. *Id.*
203. *Id.*
204. *Chihanski*, 540 N.W.2d at 624.
205. *Id.*
206. 423 N.W.2d 146 (N.D. 1988).
207. *Chihanski*, 540 N.W.2d at 624. (citing Approved Method to Conduct Breath Test with Intoxilyzer, Office of State Toxicologist, Apr. 29, 1994) (emphasis by the court).
208. *Id.*
209. *Id.* at 625.

Chihanski could not have eaten, drunk, or smoked anything during the crucial time period prior to taking the test because she was handcuffed throughout the entire process.[210] Thus, the North Dakota Supreme Court concluded that the Intoxilyzer test was fairly administered to Chihanski.[211]

CRIMINAL LAW—ADMISSIBILITY OF CONFESSION

STATE V. BJORNSON

In *State v. Bjornson*,[212] the State appealed from a county court order suppressing a statement made by Bjornson during law enforcement questioning.[213] The North Dakota Supreme Court reversed the suppression of the statement, finding that there was "insufficient competent evidence fairly capable of supporting the trial court's finding of involuntariness."[214]

On March 24, 1994, Chief Deputy Sheriff Jim Thoreson asked Bjornson, a twenty-year veteran of the Cass County Sheriff's Department to come to the sheriff's office.[215] When Bjornson arrived, he was escorted into an adjacent office where Thoreson and Lieutenant Mike Argall confronted him with an allegation that he had indecently exposed himself to a female employee at a local business.[216] At no time was Bjornson informed that he was a suspect, nor was he advised of his *Miranda* rights.[217] Furthermore, Bjornson was not in custody and was free to leave at any point during the interview.[218]

The entire interview lasted approximately two hours.[219] During the interview, Thoreson told Bjornson "that if he were not honest with [Thoreson] and den[ied] involvement that it was [Thoreson's] intention to utilize the North Dakota Bureau of Criminal Investigation to provide an agent to do a follow-up investigation and refer the matter to the State's Attorney's office for criminal prosecution."[220] Shortly thereafter, Bjornson admitted that he had indecently exposed himself.[221]

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210. *Id.*
211. *Id.*
212. 531 N.W.2d 315 (N.D. 1995).
213. State v. Bjornson, 531 N.W.2d 315, 316 (N.D. 1995).
214. *Id.* at 316.
215. *Id.* at 317.
216. *Id.*
217. *Id. See* Miranda v. Arizona, 384 U.S. 436, 444-445 (1966) (setting out procedural safeguards to secure privilege against self incrimination).
218. *Bjornson*, 531 N.W.2d at 319.
219. *Id.* at 317.
220. *Id.*
221. *Id.*

Following the interview, Thoreson and Argall filed written reports describing the interview.[222] These reports were ultimately received into evidence at the suppression hearing.[223]

The trial court found that Thoreson's statement to Bjornson was an "implicit threat to prosecute Bjornson if he did not confess, and a promise not to prosecute if he did confess," in violation of section 29-21-12.1 of the North Dakota Century Code.[224] According to section 29-21-12.1, "'[a]ny statement, admission, or confession procured from any person charged with a crime in a state court, which was obtained by duress, fraud, threat, or promises' [i]s inadmissible as evidence against the person in a criminal action."[225] In addition, the trial court found that Bjornson's statement was involuntarily given.[226]

On appeal, the North Dakota Supreme Court found that Bjornson failed to show that his confession was obtained or induced by Thoreson's statement.[227] The court stated that in order to show that the statement was induced or obtained as a result of a threat, promise, duress, or fraud, Bjornson must establish a "'connection or nexus' between the alleged threat or promise and the statement he seeks to suppress."[228] The court concluded that Bjornson failed to show that anyone promised not to prosecute him, or that even if he believed such a promise were made, he confessed because of it.[229]

Moreover, the North Dakota Supreme Court found that since Bjornson's statement was not involuntary, there was no due process violation.[230] "When a confession is challenged on due process grounds, the ultimate question is whether the defendant's confession was voluntary."[231] "A confession is voluntary if it is the product of the defendant's free choice, rather than the product of coercion."[232] The voluntariness of a confession is determined by examining the totality of the circumstances under which the confession was given.[233]

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222. *Id.*

223. *Bjornson*, 531 N.W.2d at 317.

224. *Id.*

225. *Id.* (quoting N.D. CENT. CODE § 29-21-12.1 (1991)). Under section 29-21-12.1, Bjornson carried the burden of showing that "his statement was induced or obtained as a result of a threat, promise, duress, or fraud." *Id.* Section 29-21-12.1 was repealed in 1995. *Id.* at 317 n.6. *See also* N.D. CENT. CODE § 29-21-12.1 (Supp. 1995).

226. *Bjornson*, 531 N.W.2d at 318.

227. *Id.* at 317-18.

228. *Id.* at 317.

229. *Id.* at 318.

230. *Id.* at 319.

231. *Bjornson*, 531 N.W.2d at 319 (citing Moran v. Burbine, 475 U.S. 412 (1986)).

232. *Id.* at 318 (quoting State v. Pickar, 453 N.W.2d 783, 785 (N.D. 1990)).

233. *Id.* The court focused on two primary factors under this analysis. *Id.* First, the court looked at "the characteristics and condition of the accused at the time of the confession." *Id.* In addition, "the details of the setting in which the confession was obtained" were examined. *Id.*

Examining the record of the confession, the supreme court noted that there was no finding that Bjornson was suffering from a physical or mental condition which would make him susceptible to coercive tactics.[234] Nor was there evidence that he was deprived of food or sleep, or subjected to other coercive interrogation tactics.[235] The court found no evidence showing that Bjornson's will was overborne by Thoreson's questioning.[236] Further, an implied threat of prosecution or promise of leniency, according to the court, is insufficiently coercive to render a confession involuntary.[237]

CRIMINAL LAW—DOUBLE JEOPARDY

CITY OF FARGO V. HECTOR

In *City of Fargo v. Hector*,[238] Hector appealed his conviction for driving under the influence, based on the trial court's refusal to instruct the jury on double jeopardy.[239] The North Dakota Supreme Court affirmed the conviction, concluding that relying on the offense of exhibition driving to establish a conviction for driving under the influence does not violate double jeopardy.[240]

On March 21, 1994, Fargo police officers pulled Hector over after he squealed his tires as he pulled into the street.[241] While charging him with exhibition driving, the officers noticed that Hector had slurred speech, bloodshot eyes, and smelled of alcohol.[242] He was given a series of field sobriety tests, and was subsequently arrested.[243] Hector was found guilty of exhibition driving in municipal court and charged with driving under the influence in county court.[244]

At his trial for driving under the influence, Hector claimed that the offense of exhibition driving was being used to show that he was driving under the influence.[245] Therefore, Hector proposed a double jeopardy verdict form at the close of trial.[246] However, the form was refused

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234. *Id.* Bjornson had twenty years of experience in law enforcement and a criminal justice degree from North Dakota State University.

235. *Id.* at 319.

236. *Bjornson*, 531 N.W.2d at 319.

237. *Id.*

238. 534 N.W.2d 821 (N.D. 1995).

239. City of Fargo v. Hector, 534 N.W.2d 821, 822 (N.D. 1995).

240. *Id.* at 824-25.

241. *Id.* at 822.

242. *Id.*

243. *Id.* The opinion does not say what tests Hector performed or how many he passed and failed. *Id.* Further, Hector was offered the opportunity to take a blood-alcohol test, but refused. *Id.*

244. *Hector*, 534 N.W.2d at 822.

245. *Id.*

246. *Id.* Hector's form was based on Rule 31(e)(2) of the North Dakota Rules of Criminal

because the trial court ruled as a matter of law, that double jeopardy does not apply, and a special verdict form is required only if it is a question of fact.[247] Thereafter, the jury convicted Hector for driving under the influence.[248] Hector then moved for a new trial based on the trial court's refusal to instruct the jury on double jeopardy and the denial of a special verdict form.[249] The trial court denied the motion, and Hector appealed to the North Dakota Supreme Court.[250]

Hector claimed on appeal that the trial court abused its discretion in relying on his exhibition driving offense to establish driving under the influence and consequently violated double jeopardy.[251] Specifically, he argued that the trial court erred by failing to instruct the jury on double jeopardy, by refusing to submit a special verdict form, and by ruling as a matter of law, that double jeopardy did not apply.[252]

Hector argued that it was an abuse of discretion to refuse to instruct the jury on double jeopardy.[253] In rejecting Hector's argument, the North Dakota Supreme Court noted that a written jury instruction was not submitted by Hector.[254] Because it is up to counsel, not the trial court, to draft and submit such special instructions, the trial court did not abuse its discretion in refusing to give the instruction.[255]

Hector's second argument was that the trial court abused its discretion by refusing to submit the special verdict from.[256] The North Dakota Supreme Court disagreed, relying on the explanatory note following Rule 31 of the North Dakota Rules of Criminal Procedure.[257] Rule 31 requires the submission of a special verdict form only if double jeopardy is a question of fact, and since the trial court ruled as a matter of law that double jeopardy did not apply, there was no abuse of discretion.[258]

Procedure. It is provided that "[w]henever the defendant interposes the defense that he has been former-ly convicted or acquitted of the same offense or an offense necessarily included therein, or once in jeopardy, and evidence thereof is given at the trial, the jury, if it so finds, shall declare that fact in its verdict." N.D. R. CRIM. P. 31(e)(2). The rule allows evidence to be presented on double jeopardy and, if it is a fact question, the jury may be requested to make a declaration on it. *Hector*, 534 N.W.2d at 823.

247. *Hector*, 534 N.W.2d at 823.

248. *Id.* at 822.

249. *Id.*

250. *Id.*

251. *Id.* at 823.

252. *Hector*, 534 N.W.2d at 822.

253. *Id.* at 823.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Hector*, 534 N.W.2d at 823. The explanatory note following Rule 31 states that "[a] determination of factual issues in the specific instances provided in this subdivision is deemed to be within the province of the jury. Because it is the court that determines the issue of law, the scope of the jury is not exceeded." *Id.* (quoting N.D. R. CRIM. P. 31, Explanatory Note).

258. *Id.*

Hector also argued on appeal that double jeopardy was violated because his offense of exhibition driving was used to establish an element of his conviction for driving under the influence.[259] Noting that the interpretation of the North Dakota Constitution's Double Jeopardy Clause is the same as the United States Constitution's Double Jeopardy Clause, the North Dakota Supreme Court looked to recent case law from the United States Supreme Court to conclude that there was no double jeopardy violation.[260] The court relied heavily on *United States v. Dixon*,[261] in which the United States Supreme Court used the "same elements" test, sometimes referred to as the *"Blockburger"*[262] test, which examines "whether each offense contains an element not contained in the other; if not, they are the 'same offence' (sic) and double jeopardy bars additional punishment and successive prosecution."[263] The North Dakota Supreme Court noted that *Dixon* overruled *Grady v. Corbin*,[264] thus it followed that all North Dakota Supreme Court cases which relied on *Grady* were also overruled.[265] The North Dakota Supreme Court then applied the *Blockburger* test, comparing the offense of exhibition driving to the offense of driving under the influence.[266] The court noted that "[e]ach offense contains an element not contained in the other."[267] The criminal offense of driving under the influence and the non-criminal offense of exhibition driving have different requirements, and therefore using the offense of exhibition driving to establish driving under the influence did not violate double jeopardy.[268]

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259. *Id.*

260. *Id.* at 823-25.

261. 113 S. Ct. 2849 (1993).

262. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932) (setting out that to determine whether there are two offenses arising from the same conduct is to ascertain "whether each provision requires proof of an additional fact which the other does not").

263. *Hector*, 534 N.W.2d at 823 (quoting United States v. Dixon, 113 S. Ct. 2849, 2856 (1993)).

264. 495 U.S. 508 (1990). In *Grady*, the Supreme Court held the state barred by double jeopardy from prosecuting homicide and assault charges based entirely on conduct on which the defendant had been previously convicted of misdemeanors. Grady v. Corbin, 495 U.S. 508, 523 (1990).

265. *Hector*, 534 N.W.2d at 823-24.

266. *Id.* at 824.

267. *Id.* The Fargo Municipal Code prohibits exhibition driving by providing that:

> "Exhibition driving" means driving a vehicle in such a manner that it creates or causes unnecessary engine noise, tire squeal, skid or slide upon acceleration, braking or stopping; or that causes the vehicle to unnecessarily turn abruptly or sway; or driving and executing or attempting one or a series of unnecessarily abrupt turns.

Id. (quoting FARGO MUN. CODE § 8-0317(B)(2) (1992)). The provision that prohibits driving under the influence states that "[n]o person shall drive, or be in actual physical control of, any vehicle upon any street, highway, public or private parking lot, or other public or private property in this city if said person is under the influence of intoxicating liquor or controlled substances." *Id.* (quoting FARGO MUN. CODE § 8-0310 (1994)).

268. *Id.* Hector also raised the "same evidence" argument, claiming that some of the evidence used in the prosecution for exhibition driving was also used in his trial for driving under the influence. *Id.* The court rejected his argument, noting that the Supreme Court in *Grady* rejected the same

In a concurring opinion, Justice Meschke claimed that the majority only "attempted burial" of the *Grady* "same conduct" doctrine.[269] In concluding that double jeopardy was not violated, Justice Meschke simply pointed out that a "criminal penalty after a civil assessment for the same conduct does not create double jeopardy."[270] According to Justice Meschke, the later criminal prosecution for driving under the influence did not violate double jeopardy, because the exhibition driving assessment was in a civil case.[271]

CRIMINAL LAW—INVESTIGATORY STOP

STATE V. HAWLEY

In *State v. Hawley*,[272] Jacqueline Hawley appealed from the district court's denial of her motion to suppress evidence and from her conviction for actual physical control of a motor vehicle while under the influence of alcohol.[273]

On December 29, 1994, North Dakota Highway Patrol Trooper Lonny Hulm came upon Hawley's pickup truck parked on the eastbound off-ramp of Exit 134 on Interstate 94 with its engine running and lights off.[274] Although there was room for cars to go around the truck, Hulm testified that Hawley's vehicle was blocking part of the off-ramp.[275] Hulm pulled up behind the truck, checked the license number by radio, and turned on the patrol car's overhead lights.[276] Hulm approached the vehicle and asked Hawley if "everything was okay."[277] When Hawley responded, Hulm noticed an odor of alcohol.[278] After further investigation, Hawley was arrested for actual physical control of a motor vehicle.[279]

At trial, Hawley moved to suppress the evidence, alleging that Hulm did not have "a reasonable and articulable suspicion for making the stop."[280] The trial court denied the motion, concluding that a Fourth Amendment seizure did not occur until Hulm smelled the odor of

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evidence test, so separate offenses may be proved by using the same evidence. *Id.*

269. *Id.* at 825 (Meschke, J., concurring). Justice Meschke asserted that the majority's approach was inadequate because there will be many instances where the same traffic conduct will result in multiple prosecutions, for example when an intoxicated driver kills someone. *Id.*

270. *Hector*, 534 N.W.2d at 825.

271. *Id.*

272. 540 N.W.2d 390 (N.D. 1995).

273. State v. Hawley, 540 N.W.2d 390, 391 (N.D. 1995).

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Hawley*, 540 N.W.2d at 391.

279. *Id.*

280. *Id.*

alcohol.[281] In addition, the court found that Hulm was on a "community caretaking function" when he approached the vehicle on foot.[282] Hawley entered a conditional plea of guilty, reserving her right to appeal the denial of suppression.[283]

In *State v. Halfmann*,[284] the North Dakota Supreme Court established three distinct levels of law enforcement-citizen encounters.[285] The first level, arrests, require probable cause.[286] Next are "Terry" stops which must be supported by a reasonable and articulable suspicion of criminal activity when the law enforcement officer lacks probable cause.[287] The last level, community caretaking encounters do not implicate the Fourth Amendment.[288]

On appeal, Hawley asserted that Hulm not only lacked a reasonable and articulable suspicion to make the stop, but also, there was no "indicia of distress" justifying a community caretaking encounter.[289] Finding that Hulm had a reasonable and articulable suspicion of a parking violation, the supreme court bypassed Hawley's second argument and affirmed her conviction for actual physical control.[290]

To justify an investigatory stop, an officer must have a reasonable and articulable suspicion that a law has been, or is being, violated.[291] This standard requires more than a "mere hunch," but less than "probable cause."[292] Here, the court noted that Hulm admittedly had not formed any suspicions of criminal activity at the site of the parked vehicle, but rather believed he was performing a caretaking function.[293] Nonetheless, the court emphasized that the reasonable and articulable standard is an objective one and "does not hinge upon the subjective beliefs of the arresting officer."[294]

Under this objective standard, the court may find a reasonable and articulable suspicion of criminal activity, despite the investigating officer's own beliefs, "if there was an 'objective manifestation' to lead a reasonable person in Hulm's position to believe that a traffic violation

281. *Id.*
282. *Id.*
283. *Hawley*, 540 N.W.2d at 391.
284. 518 N.W.2d 729, 730 (N.D. 1994).
285. *Hawley*, 540 N.W.2d at 392. (citing State v. Halfmann, 518 N.W.2d 729, 730 (N.D. 1994)).
286. *Id.* (citing *Halfmann*, 518 N.W.2d at 730).
287. *Id.* (citing *Halfmann*, 518 N.W.2d at 730).
288. *Id.* (citing *Halfmann*, 518 N.W.2d at 730).
289. *Id.*
290. *Hawley*, 540 N.W.2d at 392.
291. *Id.*
292. *Id.* (citing State v. Brown, 509 N.W.2d 69, 71 (N.D. 1993)).
293. *Id.*
294. *Id.*

may be taking place."[295] The court stated that all traffic violations, no matter how minor, meet the required suspicion for an investigative stop.[296] Accordingly, the supreme court found that Hawley's truck, which was partially blocking the off-ramp with its lights off, was a sufficient objective manifestation leading a reasonable person to suspect that it was illegally parked.[297] Thus, the court concluded that a reasonable and articulable suspicion justified Hulm's investigation.[298]

CRIMINAL LAW—INVESTIGATORY STOP

BOROWICZ V. NORTH DAKOTA DEPARTMENT OF TRANSPORTATION

In *Borowicz v. North Dakota Department of Transportation,*[299] Borowicz appealed a district court ruling affirming the suspension of his drivers license for driving under the influence of alcohol (DUI).[300] The North Dakota Supreme Court affirmed the ruling, concluding that the arresting officer had reasonable grounds to investigate a parked truck on a public road in which the driver was asleep behind the wheel.[301]

On June 3, 1994, a Grand Forks Police Officer approached Borowicz's truck, which was parked on a public road, and knocked on the driver's window.[302] When Borowicz did not respond, the officer knocked louder with his flashlight until Borowicz woke up.[303] After Borowicz woke up, the officer asked him to open the door, and noticed that the truck was not running, but that the keys were in the ignition.[304] Thereafter, the officer detected the odor of alcohol emitting from Borowicz and as a consequence, asked him to perform field sobriety tests, of which Borowicz failed four out of five.[305] Borowicz was subsequently arrested for being in actual physical control of a vehicle while under the influence of alcohol, in violation of section 39-08-01 of the North Dakota Century Code.[306] At the police station, a breathalyzer

295. *Hawley*, 540 N.W.2d at 393.
296. *Id.*
297. *Id.*
298. *Id.*
299. 529 N.W.2d 186 (N.D. 1995).
300. Borowicz v. North Dakota Dep't of Transp., 529 N.W.2d 186, 186-87 (N.D. 1995).
301. *Id.* at 187.
302. *Id.*
303. *Id.*
304. *Id.*
305. *Borowicz*, 529 N.W.2d at 187. Borowicz properly counted backwards from one hundred, but failed the walk-and-turn, one-leg stand, alphabet, and finger-dexterity tests. *Id.*
306. *Id.* The statute provides:

> 1. A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply:
>
> a. That person has an alcohol concentration of at least ten one-hundredths

test revealed Borowicz's blood alcohol concentration to be 0.13%.[307] At an administrative hearing before the Department of Transportation, the hearing officer concluded that the investigation and subsequent arrest by the officer was proper and suspended Borowicz's license for one year.[308] Borowicz appealed the ruling to the district court, which affirmed the administrative hearing officer's ruling.[309] Borowicz then appealed to the North Dakota Supreme Court.[310]

On appeal, Borowicz claimed that the investigatory stop made by the arresting officer was improper because it was not done within the domain of a police officer's "community caretaker function . . . and that the officer had no reasonable, articulable suspicion that Borowicz committed or was committing a crime" when he approached the truck.[311]

The North Dakota Supreme Court refused to determine whether the officer's actions amounted to a stop.[312] Instead, the court noted that if a stop did in fact occur, any Fourth Amendment privacy interest that Borowicz claimed was outweighed by the officer's reasonable suspicions of actual physical control and the important public interest in preventing DUI offenses.[313] The court found that since the truck was already parked when the officer noticed it, the only "stop" that may have occurred was when Borowicz was asked to open the door and provide his driver's license.[314] However, by this time, the officer had a reasonable, articulable suspicion of actual physical control, based on the fact that Borowicz was behind the wheel with the keys in the ignition, to justify the "stop."[315] Because the officer had reasonable grounds to investigate the parked truck, and following the investigation, had reasonable grounds to conclude that Borowicz was in actual physical control of the truck, the suspension of Borowicz's license was affirmed.[316]

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of one percent by weight at the time of the performance of a chemical test within two hours after the driving or being in actual physical control of a vehicle.

b. That person is under the influence of an intoxicating liquor.

N.D. CENT. CODE § 39-08-01(1) (Supp. 1995).

307. *Borowicz*, 529 N.W.2d at 187.

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Borowicz*, 529 N.W.2d at 188. The court did note, however, that the facts were similar to those in State v. Franklin, 524 N.W.2d 603 (N.D. 1994), where the court ruled that a stop did not occur. *Id.*

313. *Id.* at 188.

314. *Id.*

315. *Id.*

316. *Id.* at 188-89.

CRIMINAL LAW—JURY

STATE V. MARSHALL

In *State v. Marshall*,[317] Floyd Solomon Marshall appealed from his jury conviction of accomplice to burglary, under sections 12.1-22-02 and 12.1-03-01 of the North Dakota Century Code.[318]

On the morning of November 7, 1993, Officer McDonald of the North Dakota State University Police Department observed a car with its lights off in the parking lot of a local restaurant.[319] Patrolling the street a while later, Officer McDonald again noticed the car in the lot, but this time observed a person, who was later identified as Marshall, in it.[320] He also observed another person, Todd Edmond Cody, outside the car near the drive-up window of the restaurant.[321] Officer McDonald stopped the car as it began to leave the parking lot with its headlights off, and radioed for assistance.[322] While investigating the area, Officer McDonald found the drive-up window of the restaurant ajar.[323] In addition, other officers found pry bars, gloves, and cash in Marshall's car.[324] Based on this evidence, police arrested Marshall and Cody for burglary.[325]

Cody pled guilty to burglary and agreed to testify against Marshall in return for a deferred sentence.[326] Marshall, charged under sections 12.1-22-02 and 12.1-03-01 as an accomplice to burglary, entered a plea of innocent.[327] At trial, Cody testified that on the evening of the arrest, Marshall had been teaching Cody how to burglarize businesses, and that together they had robbed the restaurant.[328] Although Marshall denied complicity in the burglary, he was convicted on the accomplice charge.[329]

Marshall, a black man, raised three different issues on appeal from this verdict.[330] First, he alleged that the jury selection process in North Dakota was unconstitutional, arguing that the "North Dakota's jury

317. 531 N.W.2d 284 (N.D. 1995).
318. State v. Marshall, 531 N.W.2d 284, 285 (N.D. 1995).
319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.*
323. *Marshall*, 531 N.W.2d at 285.
324. *Id.* The amount of cash found was within ten dollars of that stolen from the restaurant. *Id.*
325. *Id.*
326. *Id.*
327. *Id.* at 285-86.
328. *Marshall*, 531 N.W.2d at 286. Cody stated that Marshall was too big to go through the window so Cody broke in, pried open a cash register, and took the money to split with Marshall. *Id.*
329. *Id.*
330. *Id.*

selection process is based upon a system whereby many individuals of minority races are excluded," thereby denying him and other minorities an impartial jury venire.[331] In addition, Marshall argued that he was denied an impartial jury as the result of a "racist" jury instruction.[332] Lastly, Marshall contended that the uncorroborated testimony of an accomplice was insufficient to convict.[333]

Jury selection in North Dakota is governed by chapter 27-09.1 of the North Dakota Century Code, which provides that "[a] citizen may not be excluded from jury service in this state on account of race, color, religion, sex, national origin, physical disability, or economic status."[334] The purposeful exclusion of members of the defendant's race from the jury for his criminal trial would deny an accused member of a racial minority equal protection of the laws.[335] According to the court, the evidence presented by Marshall to support this claim consisted of unsubstantiated assertions without any record support.[336] The court stated that "bare assertions, standing alone, are insufficient to show an under representation of a distinct group."[337] The court stated that in order for a defendant to show a facial violation of the Sixth Amendment, he must show

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is due to systematic exclusion of the group in the jury-selection process.[338]

While Marshall met the first part of this inquiry, the court found that the evidence presented to show under representation or systematic exclusion was wholly insufficient to establish a constitutional violation.[339]

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331. *Id.* Marshall is a very dark complected African-American, and was the only minority member in the courtroom during the trial. *Id.*

332. *Id.*

333. *Marshall*, 531 N.W.2d at 286.

334. *Id.* (quoting N.D. CENT. CODE § 27-09.1-02 (1991)).

335. *Id.* (citing Strauder v. West Virginia, 100 U.S. 303 (1879)).

336. *Id.* at 287. Marshall offered data from a recent census report to show that there were 280 blacks among the approximately 103,000 people eligible for jury service in Cass County. *Id.* On the basis of this evidence, Marshall claimed that there were "no blacks in the jury pool," and that supplementation of the jury list would have increased the chance for blacks to be in the venire. *Id.*

337. *Id.* (quoting State v. Fredericks, 507 N.W.2d 61, 65 (N.D. 1993)).

338. *Marshall*, 531 N.W.2d at 286 (quoting *Fredericks*, 507 N.W.2d at 65).

339. *Id.* at 287.

Because Marshall failed to show a purposeful exclusion, the court concluded that the jury selection process was constitutional.[340]

Marshall also argued that the instruction given to the jury was racist thereby denying him of his right to an impartial jury.[341] According to Marshall, the word "appearance" in the instruction suggested that the jury take into account his race when considering his testimony.[342] Reviewing the jury instructions as a whole, an instruction is erroneous if it "relates to a central subject in the case, and affects a substantial right of the accused."[343] A judicial instruction which is intended to "inflame the racial, religious, or ethnic prejudices of jurors" constitutes such an error.[344]

Construing the word in context, the court concluded that the instruction on "appearance" was not intended to mark a racial characteristic but was rather meant to focus the attention of the jury on the outward mannerisms of the witness which might reasonably affect credibility.[345] Moreover, the court found that there was no racial suggestion implicit in the instruction.[346] Thus, the court concluded that the instruction was not improper so as to require a reversal of Marshall's conviction.[347]

Lastly, Marshall argued that the evidence was insufficient to convict him as it was based solely on the testimony of an uncorroborated accomplice.[348] A person cannot be convicted upon the testimony of his accomplice unless that testimony is corroborated by other evidence that tends to connect the defendant with the commission of the offense.[349] The corroboration is insufficient if it merely shows the commission of the offense, or surrounding circumstances.[350] While the testimony of the accomplice need not be incriminating in itself, the inquiry is answered when some material fact tending to connect the accused with the crime is corroborated.[351] Based on the evidence presented at trial, the court found that the testimony of Cody was sufficiently corroborated so as to support the conviction of Marshall.[352]

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340. *Id.*
341. *Id.*
342. *Id.* "Appearance" was also mentioned with "manner" in the final written instructions to the jury on "weight and credibility." *Id.*
343. *Marshall*, 531 N.W.2d at 287.
344. *Id.* (quoting State v. McKinney, 518 N.W.2d 696, 702 (N.D. 1994)).
345. *Id.*
346. *Id.* at 288.
347. *Id.*
348. *Marshall*, 531 N.W.2d at 288.
349. *Id.*
350. *Id.* (quoting N.D. CENT. CODE § 29-21-14).
351. *Id.* (citing State v. Torres, 529 N.W.2d 853, 855 (N.D. 1995)).
352. *Id.*

CRIMINAL LAW—SEARCH AND SEIZURE

STATE V. JOHNSON

In *State v. Johnson*,[353] Johnson appealed his district court conviction of possession of a controlled substance.[354] The North Dakota Supreme Court affirmed the conviction, holding that probable cause did not become stale when three days passed between discovery of marijuana seeds and the application for the search warrant, that an officer withholding information from the magistrate regarding the fact that the marijuana seeds were not capable of germination was immaterial, and that there was no violation of Johnson's *Miranda*[355] rights.[356]

On January 27, 1994, a Sheridan County deputy sheriff took a garbage bag off of Johnson's front yard.[357] The next day, an agent for the South Sakakawea Drug Task Force found twenty-five marijuana seeds while searching the bag.[358] On February 2, the task force agent obtained a search warrant for Johnson's house, and Johnson was arrested and read his *Miranda* rights.[359] Thereafter, officers searched Johnson's home.[360] Upon request, Johnson told officers where drugs and drug paraphernalia were hidden.[361] Johnson was eventually charged with possession of a controlled substance.[362]

Johnson made a motion to suppress the evidence found in his home, which was denied.[363] Johnson then entered a conditional guilty plea to possession of less than one-half ounce of marijuana.[364] After the judgment was entered, he appealed to the North Dakota Supreme Court, claiming that probable cause to support the search warrant became stale, probable cause to issue the search warrant would not have existed had a police officer not withheld the fact that the seeds found in his garbage bag were incapable of germination, and that his *Miranda* rights were violated.[365]

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353. 531 N.W.2d 275 (N.D. 1995).
354. State v. Johnson, 531 N.W.2d 275, 277 (N.D. 1995).
355. *See* Miranda v. Arizona, 384 U.S. 436, 444-445 (1966) (setting out procedural safeguards to secure privilege against self incrimination).
356. *Johnson*, 531 N.W.2d at 278-80.
357. *Id.* at 277. The deputy sheriff did not open the bag at this time. *Id.*
358. *Id.*
359. *Id.*
360. *Id.*
361. *Johnson*, 531 N.W.2d at 277.
362. *Id.*
363. *Id.*
364. *Id.*
365. *Id.*

With regard to the stale probable cause argument, Johnson relied on the fact that the garbage bags were taken from the front of his house on January 27, but a search warrant was not applied for until February 2.[366] In rejecting his argument, the court noted that the number of days between the occurrence of the facts relied upon and the issuance of the warrant does not by itself determine probable cause.[367] Instead, when an activity is of a "protracted and continuous nature" like drug use, passage of time may not be relevant.[368] Thus, it was not improper for the magistrate to conclude that more marijuana was probably inside Johnson's house since it was found in his garbage.[369]

Johnson also argued that probable cause to issue the search warrant would not have been present had a police officer told the magistrate that the seeds taken from his garbage bag were incapable of germination and were of the type commonly found in birdseed.[370] However, the court concluded that while the seeds being incapable of germination may be an important fact at trial, it was not important in determining probable cause, because the seeds found in the garbage bag were sufficient evidence to indicate the likelihood of more marijuana being found in Johnson's home.[371] Thus, the court did not agree with Johnson's argument that had the magistrate known the seeds were incapable of germination, probable cause would not have been found to issue the search warrant.[372]

Johnson's *Miranda* argument had two parts: he claimed that (1) he was not given his *Miranda* rights prior to the search of his house, and (2) even if he did properly receive them, it had not been shown that he knowingly and voluntarily waived his right to remain silent.[373] At the suppression hearing, Johnson claimed he did not remember that the

366. *Johnson*, 531 N.W.2d at 278. The court noted that it reviews the sufficiency of the evidence using the totality of the circumstances, and probable cause to conduct a search exists "if the facts and circumstances relied on by the magistrate would warrant a person of reasonable caution to believe the contraband or evidence sought probably will be found in the place to be searched." *Id.* (citations omitted).

367. *Id.* (citations omitted).

368. *Id.*

369. *Id.* The court was influenced by the fact that drug use is often habitual and continuous. *Id.* To further his argument, Johnson also claimed there was no evidence as to the length of time the garbage bag was outside his house before being seized. *Id.* But the court noted that because garbage is picked up on a weekly basis, the magistrate reasonably concluded that the garbage bag was recently placed outside of Johnson's house. *Id.*

370. *Id.*

371. *Johnson*, 531 N.W.2d at 279.

372. *Id.* When someone challenges a search warrant's validity because the information was recklessly or intentionally omitted from the affidavit, it must be demonstrated that the information would have been material to the findings by the magistrate. *Id.* at 278.

373. *Id.*

Miranda warnings were read to him.[374] However, there was testimony that the *Miranda* warnings had been read to Johnson, and the trial court concluded that they had been read accordingly.[375] The North Dakota Supreme Court refused to disturb this conclusion, deferring to the trial court's superior conditions to assess a witness' credibility.[376]

With regard to the issue of whether Johnson knowingly and voluntarily waived his right to remain silent, the court relied on the inevitable-discovery doctrine.[377] The court relied on the test set out by the United States Supreme Court in *Nix v. Williams*,[378] which requires that the state show that the marijuana and drug paraphernalia would have been discovered even without the alleged unlawfully obtained omission by Johnson.[379] Relying on the fact that a valid search warrant was obtained, the court concluded that the officers would have inevitably found the drugs and paraphernalia even if Johnson had not told them where to look.[380] Thus, the decision of the district court was affirmed.[381]

DOUBLE JEOPARDY—SUSPENSION OF DRIVER'S LICENSE

STATE V. ZIMMERMAN

In *State v. Zimmerman*,[382] Defendants Edward Zimmerman and Albert Knutson appealed from their criminal convictions for driving under the influence of alcohol, each arguing that the criminal prosecution constituted double jeopardy because his driver's license had been previously suspended in an administrative proceeding relating to the same conduct.[383] The North Dakota Supreme Court affirmed both convictions, concluding that criminal and administrative proceedings do not constitute double jeopardy.[384]

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374. *Id.*

375. *Id.* at 279.

376. *Johnson*, 531 N.W.2d at 279. A ruling on a suppression matter will only be disturbed if "there is insufficient competent evidence fairly capable of supporting the trial court's determination and the decision is not contrary to the manifest weight of the evidence." *Id.*

377. *Id.* The court noted that North Dakota has a two part "inevitable-discovery" test. *Id.* at 279-80. One of the requirements is that police not act in bad faith. *Id.* at 280. The other part is the test from Nix v. Williams, 467 U.S. 431 (1984).

378. 467 U.S. 431 (1984).

379. *Johnson*, 531 N.W.2d at 280. It was held in *Nix*, that the "evidence obtained as a result of unlawful police conduct may be admissible at trial if the prosecution proves by a preponderance of the evidence that the challenged evidence would have been inevitably or ultimately discovered by lawful means in the course of the investigation." *Id.* (citing *Nix*, 467 U.S. at 444).

380. *Id.*

381. *Id.*

382. 539 N.W.2d 49 (N.D. 1995).

383. State v. Zimmerman, 539 N.W.2d 49, 50 (N.D. 1995).

384. *Id.*

Both Zimmerman and Knutson were separately charged with driving under the influence of alcohol in violation of North Dakota Century Code section 39-08-01; Knutson on December 31, 1994, and Zimmerman on February 5, 1995.[385] Each defendant had his driver's license administratively suspended prior to trial.[386] Both Knutson and Zimmer-man filed motions to dismiss the criminal charges arguing that the administrative suspension of their driving privileges constituted punishment within the meaning of the Double Jeopardy Clauses of the United States and North Dakota Constitutions.[387] After denial of their motions to dismiss, Knutson and Zimmerman each entered a conditional plea of guilty to the charges, and were convicted.[388] On appeal, Zimmerman and Knutson contend that the administrative suspension of their driving privileges for driving under the influence of alcohol constitutes punishment for double jeopardy analysis, thus precluding criminal punishment for the same traffic offense.[389]

According to the North Dakota Supreme Court, administrative proceedings are civil in nature, separate and distinct from the criminal proceedings associated with an arrest for violating North Dakota Century Code section 39-08-01.[390] The court distinguished civil proceedings from criminal, concluding that the legislature has created two primary methods of dealing with drunk drivers.[391] First, the court recognized that the legislature has enacted criminal proceedings to deter and punish drunk driving.[392] North Dakota Century Code section 39-08-01 makes it a misdemeanor for any person to drive or be in actual physical control of a motor vehicle upon a highway with a blood-alcohol content of at least ten one-hundredths of one percent.[393]

In addition, "to protect the traveling public by temporarily removing drunk drivers from the highways," the legislature has enacted civil proceedings.[394] These civil proceedings are best exemplified by the Implied Consent Act, found in North Dakota Century Code Chapter 39-20. [395] Under this Act, any person who operates a motor vehicle on a highway is deemed to have consented to chemical testing to determine

385. *Id.*
386. *Id.*
387. *Id.*
388. *Zimmerman*, 539 N.W.2d at 51.
389. *Id.* at 53.
390. *Id.* at 52.
391. *Id.* at 51.
392. *Id.*
393. *Zimmerman*, 539 N.W.2d at 51.
394. *Id.*
395. *Id.*

the alcohol content of his or her blood.[396] Violation of this Act can result in suspension or revocation of the person's driving privileges.[397]

Beginning with the decision in *State v. Sinner*,[398] the North Dakota Supreme Court has stated that the administrative suspension of a driver's license due to criminal convictions for traffic violations is not double jeopardy as it is not a penalty.[399] According to the court, use of the public highways is a privilege, not an absolute right, which a person enjoys subject to the control of the state through the exercise of its police power.[400] A driver must obey the laws of the state because these laws are intended to make highway travel within the state safe.[401] In addition, since the driving privilege is subject to control and regulation by the state, a driver's license may be suspended or revoked for violation of these laws, even though the loss of driving privileges may create a substantial hardship on the person.[402]

In support of their appeal, Zimmerman and Knutson cite to recent United States Supreme Court decisions which they contend overrule the effect of *Sinner*.[403] However, according to the North Dakota Supreme Court, the revocation of a privilege is not ordinarily considered punishment.[404] The court observed that the United States Supreme Court has stated that the "revocation of a privilege voluntarily granted" is a remedial sanction "characteristically free of the punitive criminal element."[405] Citing to numerous other state appellate court decisions, the North Dakota Supreme Court found the instant case distingishable from the cases cited by Zimmerman and Knutson.[406]

According to the court, separate criminal and administrative proceedings do not constitute double jeopardy.[407] Rather, an administrative license suspension or revocation is premised on "substantial remedial

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396. *Id.*
397. *Id.* at 51-52.
398. 207 N.W.2d 495 (N.D. 1973).
399. *Zimmerman*, 539 N.W.2d at 52.
400. *Id.* (quoting State v. Kouba, 319 N.W.2d 161, 163 (N.D. 1982)).
401. *Id.* (quoting *Kouba*, 319 N.W.2d at 163).
402. *Id.*
403. *Id.* at 53. In particular, the Defendants cite to United States v. Halper, 490 U.S. 435, 440 (1989), and Department of Revenue of Montana v. Kurth Ranch, 114 S. Ct. 1937 (1994), for two propositions. First, Zimmerman and Knutson argue that a civil sanction which does not fairly serve a remedial purpose but rather serves as a deterrent, is considered punishment. *Id.* (citing United States v. Halper, 490 U.S. 435, 448 (1989)). Secondly, according to Zimmerman and Knutson, these cases hold that where a defendant has already been punished in a criminal prosecution, that person may not also be subjected to an additional civil sanction where the second sanction serves as a deterrent or retribution. *Id.* (citing *Halper*, 490 U.S. at 448-49).
404. *Zimmerman*, 539 N.W.2d at 52.
405. *Id.* (quoting Helvering v. Mitchell, 303 U.S. 391, 399 (1938)).
406. *Id.* at 54-55 (citations omitted).
407. *Id.* at 54.

purposes."[408] The "revocation or suspension of a license operates for the benefit of the public and is not intended as a penalty inflicted upon the license holder."[409] It serves the remedial purpose of protecting public safety by "quickly removing potentially dangerous drivers from the roads."[410] Thus, the state's "compelling interest in highway safety justifies the administrative suspension."[411] In the opinion of the court, any punitive or deterrent effect as a result of an administrative license suspension is merely incidental to this important remedial purpose.[412]

DRAM SHOP ACT—LIABILITY OF HOST

ZUEGER V. CARLSON

In *Zueger v. Carlson*,[413] Lillian Zueger and LeRoy Kudrna appealed from a district court decision granting summary judgment and dismissing their tort claims against Boomers bar.[414] The North Dakota Supreme Court reversed the district court's decision and remanded the case for further proceedings, holding that the release of a dram shop claim does not constitute a release of all other claims, and that bar owners have a duty to protect patrons from assaults.[415]

According to their complaint, appellants Zueger and Kudrna were injured at Boomers bar on October 29, 1993, when an off-duty bouncer attacked them without provocation.[416] As a result of the attack, both appellants suffered permanent injuries.[417] Boomers had a dram shop liability policy and a comprehensive general liability policy.[418] The claim under the dram shop policy was settled for $10,000.[419] Appellants then, however, brought an action under the premise liability policy, and Boomers responded with a motion for summary judgment, claiming that the premise liability claims were dram shop claims under another name.[420] The trial court granted summary judgment in favor of

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408. *Id.* (quoting State v. Zerkel, 900 P.2d 744, 758 (Alaska Ct. App. 1995).

409. *Zimmerman*, 539 N.W.2d at 55 (quoting Thompson v. Thompson, 78 N.W.2d 395, 399 (N.D. 1956)).

410. *Id.* (quoting State v. Strong, 605 A.2d 510, 513 (Vt. 1992)).

411. *Id.* (quoting Kobilansky v. Liffrig, 358 N.W.2d 781, 791 (N.D. 1984)).

412. *Id.*

413. 542 N.W.2d 92 (N.D. 1996).

414. Zueger v. Carlson, 542 N.W.2d 92, 93 (N.D. 1996).

415. *Id.*

416. *Id.*

417. *Id.* According to the appellants, Boomers employees failed to come to their aid and the assault was not stopped until other patrons restrained the off-duty bouncer. *Id.*

418. *Id.*

419. *Zueger*, 542 N.W.2d at 93-94. The release specifically left open claims for "negligent security, failure to provide adequate security, failure to stop an assault or other premises liability claims." *Id.* at 94.

420. *Id.* at 94.

Boomers, concluding that all forms of bar owner liability were superseded by the Dram Shop Act and that the appellants had not established a bar owner's common law duty to provide security.[421] The appellants appealed to the North Dakota Supreme Court.[422]

On appeal, Boomers argued that summary judgment was appropriate for four reasons: that appellants failed to provide evidence that raised a genuine issue of material fact, that all common law liability for bar owners is superseded by the Dram Shop Act, that Boomers had no duty to provide security for the appellants or stop the assault, and that allowing the appellants to pursue the claim would be improperly splitting a cause of action.[423] Boomers' claim that the appellants did not raise a genuine issue of material fact was based on the argument that appellants were required to present evidence that Boomers had failed to provide adequate security, and that the appellants failed to do so.[424] However, the court rejected that argument, noting that Boomers had not challenged the factual basis for the appellants' claim, but had raised purely legal issues.[425] Therefore, the court concluded that since Boomers had not established the absence of a genuine issue of material fact, the appellants were not required to submit evidence to support the factual allegations of their claim.[426]

Boomers next argued that the release of appellants' dram shop claims released Boomers from all liability because the Dram Shop Act supersedes all of a bar owner's common law liability.[427] The argument was based on section 1-01-06 which provides that there is no common law in cases where the North Dakota Century Code declares law.[428] The court rejected this argument, noting that the state legislature intended the Dram Shop Act to create a completely new form of liability for wrongfully selling alcohol, and that the act had no relation to any common law

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421. *Id.*; *see also infra* note 427 (setting out North Dakota's Dram Shop Act).

422. *Zueger*, 542 N.W.2d at 94.

423. *Id.* at 94-97.

424. *Id.* at 94.

425. *Id.* Instead of challenging the factual basis for the appellants' claim, Boomers argued that the release of dram shop liability acted as a release of all claims, and allowing appellants to proceed was an improper splitting of causes of action. *Id.*

426. *Id.* at 94-95.

427. *Zueger*, 542 N.W.2d at 95. The North Dakota Dram Shop Act provides in pertinent part:

> Every spouse, child, parent, guardian, employer, or other person who is injured by any obviously intoxicated person has a claim for relief for fault under section 32-03.2-02 against any person who knowingly disposes, sells, barters, or gives away alcoholic beverages to a person under twenty-one years of age, an incompetent, or an obviously intoxicated person, and if death ensues, the survivors of the decedent are entitled to damages defined in section 32-21-02.

N.D. CENT. CODE § 5-01-06.1 (1987).

428. *Zueger*, 542 N.W.2d at 95.

liability or tort theory.[429] Therefore, by adopting the Dram Shop Act, the legislature had not intended to supersede other, unrelated premises-based of liability claims against bar owners.[430] Liquor establishments have a common law duty to maintain a safe environment for their customers just like the duty any business owes to people it invites onto its premises, and the Dram Shop Act does not affect that duty.[431] Boomers tried to further their argument by relying on the language of *Stewart v. Ryan*,[432] a 1994 North Dakota Supreme Court case.[433] Specifically, Boomers claimed *Stewart* ruled that under comparative fault, all fault included dram shop, and therefore dram shop includes all fault.[434] However, the court pointed out that Boomers misread *Stewart*, because the opinion holds only that dram shop liability is to be considered when comparing fault, and does not require dram shop liability to supersede all other common law actions.[435]

In the alternative, Boomers argued that even if common law liability was not superseded by dram shop liability, it had no duty to provide security or to intervene in the assault after it began.[436] The court rejected this argument as well, noting that the issue of a bar owner's duty to protect customers from assaults was one of first impression for North Dakota.[437] The court then turned to section 344 of the Restatement of Torts, which provides that a possessor of land who holds the land open for business to the public is liable for physical harm caused by acts of third persons and by the failure of the land possessor to discover that the acts are being done or give adequate warning.[438] Furthermore, comment f of section 344 states that when a land possessor may have reason to

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429. *Id.* (quoting Aanenson v. Bastien, 438 N.W.2d 151, 153 (N.D. 1989)).

430. *Id.*

431. *Id.* (quoting Manuel v. Weitzman, 191 N.W.2d 474, 476 (Mich. 1971)).

432. 520 N.W.2d 39 (N.D. 1994).

433. *Zueger*, 542 N.W.2d at 95.

434. *Id.* at 95-96. The specific language Boomers relied on stated that "negligence, willful conduct, and dram shop liability are all integrated." *Id.* at 96 (quoting *Stewart*, 520 N.W.2d at 46).

435. *Id.* at 96. The court further noted that *Stewart* integrates negligence, willful conduct, and dram shop only for allocating fault under comparative fault, and that negligence continues to be a theory separate from dram shop liability. *Id.* (quoting *Stewart*, 520 N.W.2d at 46).

436. *Id.*

437. *Id.*

438. *Zueger*, 542 N.W.2d at 96 (citing RESTATEMENT (SECOND) OF TORTS § 344 (1965)). Section 344 provides that:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
>
> (a) discover that such acts are being done or are likely to be done, or
>
> (b) give a warning adequate to enable visitors to avoid the harm, or otherwise to protect them against it.

RESTATEMENT (SECOND) OF TORTS § 344 (1965).

know that there is likelihood of conduct by third persons that may endanger the safety of visitors, the land possessor should anticipate careless conduct on the part of third persons and therefore may be under a duty to take action against it.[439] Relying on section 344, the court concluded that a bar owner owes a duty to protect customers from assault when the owner has reason to anticipate conduct by third persons which may endanger patrons.[440] The appellants contended that Boomers knew fights had occurred in the past and that the off-duty bouncer who had assaulted them was violent because he had been involved in past altercations.[441] Therefore, the court ruled that the trial court erred in ruling that Boomers had no duty to protect the appellants from attack or to come to their aid once the attack had begun.[442]

Finally, Boomers claimed that allowing the appellants to pursue common law claims after releasing Boomers from dram shop liability would constitute an inappropriate splitting of a cause of action.[443] The court rejected this argument as well, noting that past decisions have held that the rule against splitting causes of action does not pertain when a defendant consents to such a splitting.[444] Boomers made an express agreement with the appellants which stated that release of dram shop liability claim did not release them from any other claims under Boomers' premise liability policy.[445] Because Boomers expressly consented to a splitting of the dram shop and common law claims, such a split was allowable.[446]

Accordingly, the judgment of the district court was reversed, and the case was remanded for further proceedings.[447]

FAMILY LAW—DIVORCE—DISTRIBUTION OF MARITAL ASSETS

BELL V. BELL

In *Bell v. Bell*,[448] Kyle Bell appealed from a divorce judgment in which the district court awarded his ex-wife Kimberly Engelstad all

439. *Zueger*, 542 N.W.2d at 96-97 (quoting RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965).
440. *Id.* at 97. The court also looked to courts in other states which rely on section 344 to rule that bar owners have a duty to patrons to protect them from assault when the owner has reason to anticipate that third persons will endanger their safety. *Id.*
441. *Id.*
442. *Id.*
443. *Id.*
444. *Zueger*, 542 N.W.2d at 97 (citing Klem v. Greenwood, 450 N.W.2d 738, 742-43 (N.D. 1990)).
445. *Id.*
446. *Id.*
447. *Id.* at 98.
448. 540 N.W.2d 602 (N.D. 1995).

remaining assets in the marital estate.[449] The North Dakota Supreme Court affirmed the district court judgment, holding that the award of all remaining marital assets to a party to a divorce is justified when the other party dissipates most of the marital estate through an "illegal flight from justice."[450]

In October of 1993, Bell and Engelstad were married and had one child, a son, born in January of 1994.[451] During the marriage, Bell received an $80,000 wrongful death award, after his father and grandmother died in a car accident.[452] In April 1994, the parties separated after Bell was arrested for gross sexual imposition upon children, and for use of minors in sexual performances.[453] After his arrest, Bell posted $20,000 bail and fled to Colorado, forfeiting the bond.[454] Bell was arrested in August 1994, and none of the $80,000 award was left.[455] Additionally, Bell was over $34,000 in arrears on his child support obligation, having paid no part of the obligation with the award.[456]

Engelstad sued for divorce on September 16, 1994. At the trial on April 24, 1995, Engelstad appeared in person and was represented by counsel; Bell appeared through counsel and by telephone deposition.[457] The district court awarded all marital assets to Engelstad, basing this award on Bell's criminal conduct and the suffering he had put Engelstad through.[458] Bell appealed, claiming it is improper for North Dakota courts to consider fault in making property awards.[459]

Before addressing the merits of Bell's appeal of the property award, the North Dakota Supreme Court considered the significance of the fact that a complete transcript of the trial was not provided to the court.[460] Engelstad argued that the decision of the district court should be affirmed because Bell did not provide a complete transcript.[461] Bell countered that he should not be prejudiced by the lack of a transcript because he was indigent, and that the transcript requirement should be waived or the state should provide one.[462] The court ruled that North Dakota Rule of

449. Bell v. Bell, 540 N.W.2d 602, 602 (N.D. 1995).
450. *Id.* at 603.
451. *Id.* Bell's parental rights were terminated sometime after May, 1994. *Id.*
452. *Id.*
453. *Id.* The criminal case involving Bell was also heard by the North Dakota Supreme Court. State v. Bell, 540 N.W.2d 599 (N.D. 1995).
454. *Bell*, 540 N.W.2d at 603.
455. *Id.*
456. *Id.*
457. *Id.* Bell could not appear in person because he was incarcerated. *Id.* at 604.
458. *Id.*
459. *Bell*, 540 N.W.2d at 604.
460. *Id.* at 603.
461. *Id.*
462. *Id.* Bell claimed that his indigence was a result of his incarceration and the fact that the trial

Appellate Procedure 10(b) requires the appellant to order a transcript, and the rule does not allow a transcript to be provided at the state's expense for indigent defendants in civil cases or for waiver of transcript fees.[463] Furthermore, when the record on appeal does not allow for meaningful review, the North Dakota Supreme Court will decline review.[464] Review was not declined in this appeal, however, because the court was provided with a partial transcript and also had a copy of Bell's telephone deposition.[465]

On appeal, Bell argued that North Dakota courts may not regard fault when making property awards, while Engelstad claimed that when misconduct is extreme, a property award giving every asset to one party can be equitable.[466] The North Dakota Supreme Court affirmed the award of all remaining marital assets to Engelstad, noting that the unusual facts in this case justified such a result.[467] The court noted that in making an award of property in divorce proceedings, the district court should follow the *Ruff-Fischer* guidelines.[468] One factor in these guidelines is the parties' conduct during the marriage.[469] The court also noted that any substantial disparity in the trial court's property division must be explained.[470]

The North Dakota Supreme Court then discussed the property distribution at issue, noting that while an award of all the assets to one spouse is as large of a substantial disparity as possible, the unusual circumstances in the case merited such a result.[471] The unusual circumstances included Bell's dissipating the $80,000 wrongful death award, which was the biggest asset in the marriage.[472] According to the court, Bell gave himself about ninety percent of the marital assets, and spent the money without any concern for his wife or child support obligations.[473]

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court awarded all the marital assets to Engelstad. *Id.*

463. *Id.* The purpose of Rule 10(b) is to allow the North Dakota Supreme Court to fully understand the facts and the rationale for the trial court's decision. *Id.* An appellant who does not provide a transcript assumes the consequences because it is the appellant who has the burden of showing that the trial court erred. *Id.* at 604.

464. *Bell*, 540 N.W.2d at 603-04.

465. *Id.* at 604.

466. *Id.*

467. *Id.* at 605.

468. *Id.* at 604 (citing Ruff v. Ruff, 52 N.W.2d 107 (N.D. 1952), and Fischer v. Fischer, 139 N.W.2d 845 (N.D. 1966)). In making a property distribution, the trial court must include all the property of the marital estate, including inherited property. *Id.*

469. *Bell*, 540 N.W.2d at 604 (quoting *Ruff*, 52 N.W.2d at 111). Some members of the North Dakota Supreme Court would limit their contemplation of misconduct to economic misconduct; however, both economic and non-economic misconduct were present in this case. *Id.* at 605.

470. *Id.*

471. *Id.* The total assets of the marital estate amounted to approximately $7,580.75. *Id.* Also, the total debt was $36,006.65, with $34,406.65 of that attributable to the child support obligation owed by Bell. *Id.*

472. *Id.* at 605.

473. *Id.*

Because Bell wasted so much of the marital assets, the trial court did not err in awarding Engelstad all remaining assets.[474] Accordingly, the judgment of the district court was affirmed.[475]

INFANTS—DETERMINATION OF RIGHT OF CUSTODY

OWAN V. OWAN

In *Owan v. Owan*,[476] Rayann Owan appealed a district court divorce decree which awarded custody of her daughter, Danika, to her ex-husband, Stephen Owan.[477] The North Dakota Supreme Court reversed the custody award and remanded the case to district court for a reconsideration of custody, after the district court made findings of domestic violence.[478]

Rayann and Stephen were married in 1990, and their daughter was born in 1991.[479] After a turbulent marriage that lasted four years, Rayann sued for divorce in February 1994, and was awarded temporary custody of Danika.[480] At the divorce proceedings, Rayann testified as to several episodes of Stephen's violent behavior.[481] Specifically, Rayann testified that Stephen kicked through a locked bathroom door, threw a cordless phone, and put her up against the wall, and hit it, in an attempt to scare her.[482] Rayann also testified that Stephen threatened to kill her if she left him, and that he threatened suicide on several occasions.[483] The trial court awarded Stephen custody of Danika, with child support to be paid by Rayann.[484] Rayann appealed to the North Dakota Supreme Court.[485]

The North Dakota Supreme Court reversed the trial court's custody award, concluding that the trial court erred by not giving enough attention to the statutory presumption against awarding custody to a parent who has committed domestic violence.[486] The statutory presumption

474. *Bell*, 540 N.W.2d at 605.

475. *Id.*

476. 541 N.W.2d 719 (N.D. 1996).

477. Owan v. Owan, 541 N.W.2d 719, 720 (N.D. 1996).

478. *Id.*

479. *Id.* The two lived together two years before they were married, and moved several times between Arizona, Minnesota, and Williston, North Dakota. *Id.*

480. *Id.* Before the trial began, Stephen moved back to Arizona and Rayann became pregnant by a man she intended to marry. *Id.*

481. *Id.*

482. *Owan*, 541 N.W.2d at 720. There was also evidence that Rayann would sometimes slap and scratch Stephen. *Id.*

483. *Id.*

484. *Id.*

485. *Id.*

486. *Id.* The statutory presumption arises from section 14-09-06.2(1)(j), which states:

In awarding custody or granting rights of visitation, the court shall consider evidence of

makes domestic violence the foremost factor in determining child custody.[487] To rebut the presumption, the violent parent has the burden of proving by clear and convincing evidence that other circumstances exist which require the child to be placed with the violent parent.[488] The trial court, relying upon the testimony of Stephen's social worker witness, found that Stephen's physical altercations were minor.[489]

The supreme court concluded, for several reasons, that this finding was unsatisfactory.[490] First, it was improper to rely on Stephen's social worker witness to give trial testimony as an expert as to Stephen's conduct.[491] The social worker witness testified that the violence was situational in terms of marital discord and not a pattern in Stephen's life.[492] Stephen claimed that the trial court's finding should be affirmed because the witness did not make any finding of credible evidence of domestic violence.[493] The court rejected this argument, agreeing with Rayann, that if the trial court intended to adopt the findings of the expert, more evidence is required.[494] A trial court cannot delegate its statutory responsibility to make findings on domestic violence.[495] Specifically, a court cannot make an independent investigator's report the decisive element of its decision as to custody of the child.[496] Section 14-09-06.2(1)(j) of the North Dakota Century Code specifically directs the trial court to make findings about domestic violence and to show that the custodial arrangement protects both the child and parent who was subject to domestic violence, and this duty cannot be delegated.[497] Furthermore, the trial court's findings did not allow adequate review of the extensive evidence of violence committed by Stephen.[498]

> domestic violence. If the court finds credible evidence that domestic violence has occurred, this evidence creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded sole or joint custody of a child. This presumption may be overcome only by clear and convincing evidence that the bests interests of the child require that parent's participation as a custodial parent. The court shall cite specific findings of fact to show that the custody or visitation arrangement best protects the child and the parent or other family or household member who is the victim of domestic violence.

Id. at 720-21 (quoting N.D. CENT. CODE § 14-09-06.2(1)(j)(Supp. 1995)).

487. *Owan*, 541 N.W.2d at 721.

488. *Id.*

489. *Id.* The trial court further noted that in most of the altercations, Rayann acted first and Stephen reacted. *Id.*

490. *Id.*

491. *Id.*

492. *Owan*, 541 N.W.2d at 721.

493. *Id.*

494. *Id.* at 721-22.

495. *Id.* at 722.

496. *Id.* (citations omitted). The reason for this is based in the notion that the trial court does not have the authority to delegate the power to decide questions regarding child custody. *Id.*

497. *Owan*, 541 N.W.2d at 722. *See also* N.D. CENT. CODE § 14-09-06.2(1)(j) (Supp. 1995).

498. *Owan*, 541 N.W.2d at 722.

Second, the trial court failed to make adequate findings regarding Stephen's allegations that Rayann slapped and scratched him.[499] When domestic violence is committed by both parents, the trial court must measure the amount of violence committed by each.[500] If the violence committed by one parent is significantly greater than that committed by the other, the statutory presumption against custody only applies to the parent who committed the greater domestic violence.[501] However, if the amount of violence committed by the parents is roughly the same, and both parties are found to be fit parents, a presumption against awarding custody to either parent does not exist.[502] Instead, the trial court is to consider the remaining best interests of the child factors to make a custody decision.[503] Because the trial court did not weigh the violent conduct described in the testimony or measure the disposition of each parent for continued violence, the trial court's findings on domestic violence were insufficient, and the case was reversed and remanded for such findings.[504]

Justice Sandstrom dissented, stating that the best interests of the child outweigh any other factors.[505] According to Justice Sandstrom, a parent-child relationship can only be altered if it is in the best interests of the child, and the majority failed to discuss such interests.[506] While domestic violence is unacceptable, the goal of punishing violent parents does not justify a child custody award that is not in the best interests of the child.[507] Furthermore, in determining the proportionality of intervention by the government in raising children, the only relevant consideration is whether the intervention promotes the best interests of the child.[508] Because the majority failed to properly consider the best interests of the child, Justice Sandstrom dissented.[509]

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499. *Id.*

500. *Id.* (quoting Krank v. Krank, 529 N.W.2d 844, 850 (N.D. 1995)).

501. *Id.* (quoting *Krank*, 529 N.W.2d at 850).

502. *Id.* (quoting *Krank*, 529 N.W.2d at 850). When the violence is proportional, the trial court should also consider which parent is least likely to continue to act violently. *Id.*

503. *Owan*, 541 N.W.2d at 722 (quoting *Krank*, 529 N.W.2d at 850).

504. *Id.* at 722-23.

505. *Id.* at 723 (Sandstrom, J., dissenting) (quoting 42 AM. JUR. 2D *Infants* § 43 (1969)).

506. *Id.*

507. *Id.* The majority's analysis is constitutionally infirm because it does not limit child custody consideration of domestic violence to the extent it concerns the best interests of the child. *Id.*

508. *Owan*, 541 N.W.2d at 723 (quoting Stanley v. Illinois, 405 U.S. 645, 650 (1972)).

509. *Id.* at 724.

INFANTS—DETERMINATION OF RIGHT OF CUSTODY

MCADAMS V. MCADAMS

In *McAdams v. McAdams*,[510] Carmen McAdams appealed a district court divorce judgment splitting custody of her two sons between her and her ex-husband, Keith.[511] Carmen also appealed the district court's denial of her motion for a new trial.[512] The North Dakota Supreme Court reversed the judgment of the district court and remanded the case for a new trial, finding that when one parent willfully alienates a child from another parent, custody may not be awarded to that parent.[513]

Keith and Carmen were divorced, in 1992, after Carmen removed their two children from Bismarck to New York without Keith's knowledge or consent.[514] The district court awarded Kenneth custody of the oldest son, Kenneth, and custody of the younger son, Bryan, to Carmen.[515] This custody award was based on information that Keith had completely alienated Kenneth, from Carmen, and that a significant amount of professional help would be required to re-establish a healthy relationship between Kenneth and his mother.[516] Custody of the younger son was awarded to Carmen since their relationship was not as seriously damaged.[517]

Carmen moved for a new trial, which was denied.[518] She then appealed the decision to the North Dakota Supreme Court, arguing that the district court erred in awarding split custody, and that the district court abused its discretion by denying her motion for a new trial because of insufficient evidence and irregularity of the proceedings.[519]

In considering the judgment of the district court, the supreme court noted that split custody is generally looked upon unfavorably.[520] In the present case, Keith had already alienated Kenneth, from his mother, and

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510. 530 N.W.2d 647 (N.D. 1995).

511. McAdams v. McAdams, 530 N.W.2d 647, 648-49 (N.D. 1995).

512. *Id.* at 649. Carmen's request for a new trial was based on irregularity of the proceedings and insufficient evidence.

513. *Id.* at 650.

514. *Id.* at 649. Keith filed for a divorce in North Dakota, and Carmen filed in New York. *Id.* The New York district court concluded that North Dakota had jurisdiction and dismissed Carmen's action. *Id.* A custody investigator, appointed by the district court of Burleigh County, concluded that Carmen should be awarded custody of both children because Keith suffered from a personality disorder and may have abused Carmen. *Id.*

515. *Id.*

516. *McAdams*, 530 N.W.2d at 649-50.

517. *Id.* at 650.

518. *Id.* at 649. The judge recused himself after denying the motion for a new trial. *Id.*

519. *Id.*

520. *Id.* at 650.

was likely to prevent Kenneth, from developing a healthy relationship with Carmen.[521] The decision of the district court, in awarding custody of Kenneth to Keith, effectively terminated Kenneth and Carmen's relationship without considering the best interests of the child.[522] The supreme court found that because the district court failed to consider the children's best interests, the judgment of split custody was clearly erroneous.[523] The supreme court concluded that there was insufficient evidence to support the district court's decision; thus, the district court abused its discretion by denying Carmen's motion for a new trial.[524]

The supreme court also considered Carmen's motion for a new trial, based on irregularity in the proceedings.[525] The irregularity asserted by Carmen was a conversation held between the custody investigator and the district court judge before the court arrived at its decision.[526] However, the supreme court noted that the judge had already made his decision prior to this conversation, that he did not rely on any information the investigator provided, and that the judge recused himself after denying Carmen's motion for a new trial.[527] Although the communication may have appeared improper, it did not influence the judge's decision and therefore was not prejudicial to Carmen.[528] Accordingly, a new trial was not ordered on the grounds of irregularity in the proceedings.[529] Nonetheless, a new trial was ordered based on the finding that the district court's decision of split custody was clearly erroneous.[530]

INSURANCE—NO-FAULT COVERAGE

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. V. ESTATE OF GABEL

In *State Farm Mutual Automobile Insurance Co. v. Estate of Gabel*,[531] the wife of Kenneth Gabel and his estate (Gabels) appealed from an order of summary judgment dismissing their claims against State Farm Mutual Automobile Insurance Company for benefits under

521. *McAdams*, 530 N.W.2d at 650.
522. *Id.*
523. *Id.* The court noted that a child's best interests are furthered when the relationship with the non custodial parent is nurtured. *Id.* (citing Johnson v. Schlotman, 502 N.W.2d 831, 834 (N.D. 1993)).
524. *Id.*
525. *Id.* at 651.
526. *McAdams*, 530 N.W.2d at 651. It was alleged that the judge told the investigator that the result of his decision would be to give each parent "a child to destroy." *Id.* It was further alleged that the judge said his decision would likely result in both parties leaving the state and the court "will be rid of them and not have to deal with them again." *Id.*
527. *Id.*
528. *Id.*
529. *Id.*
530. *Id.* at 650.
531. 539 N.W.2d 290 (N.D. 1995).

their no-fault insurance policy and from an order denying their motion for attorney's fees.[532]

On February 23, 1993, Kenneth Gabel suffered an aneurysm while driving his pickup truck in a Dickinson parking lot; his pickup subsequently smashed into a building across the street from the parking lot.[533] The parties stipulated that the cause of death was the ruptured aneurysm, which was neither caused by, nor aggravated by, the collision.[534] The Gabels sought coverage from State Farm, their automobile insurer, under the policy's no-fault clause.[535]

The Gabels were denied benefits under the policy by State Farm.[536] Thereafter, State Farm initiated a declaratory judgment action to determine any obligations under the policy.[537] Based on the facts stipulated to by the parties, State Farm moved for summary judgment.[538] Alleging bad-faith, the Gabels counterclaimed and requested an award of attorney's fees.[539] The district court denied the Gabels' counterclaim and request for attorney's fees, and granted State Farm's motion for summary judgment.[540] The Gabels, citing to *Weber v. State Farm Mutual Automobile Insurance Co.*,[541] argued that Kenneth Gabel was "occupying" the vehicle within the meaning of the no-fault statute, and therefore they were entitled to partial summary judgment on the company's obligations under the policy.[542]

However, according to the North Dakota Supreme Court, occupancy is not the only no-fault requirement that must be satisfied under the statute.[543] In addition to the occupancy requirement, the injury must arise out of the *operation of a motor vehicle*.[544] "Operation of a motor vehicle" is defined as "operation, maintenance, or use of a vehicle as a vehicle."[545] Looking to the Comment to the Uniform Motor Vehicle Accident Reparations Act, upon which the North Dakota Auto Accident Reparations Act (Act) is based, the court concluded that "[t]he policy of

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532. State Farm Mut. Auto. Ins. v. Estate of Gabel, 539 N.W.2d 290, 292 (N.D. 1995).
533. *Id.*
534. *Id.*
535. *Id.*
536. *Id.*
537. *Estate of Gabel*, 539 N.W.2d at 292.
538. *Id.*
539. *Id.*
540. *Id.*
541. 284 N.W.2d 299 (N.D. 1979).
542. *Estate of Gabel*, 539 N.W.2d at 292.
543. *Id.*
544. *Id.* Under the North Dakota Auto Accident Reparations Act, "'accidental bodily injury' is 'injury . . . arising out of the operation of a motor vehicle, and which is accidental as to the person claiming basic or optional excess no-fault benefits.'" *Id.* (quoting N.D. CENT. CODE § 26.1-41-01(1) (1995)).
545. *Id.* at 292-93 (citing N.D. CENT. CODE § 26.1-41-01(13)).

the Act is to provide coverage for injury resulting directly from motoring accidents and to leave to other forms of insurance and compensation systems those losses which are tangential to motoring."[546]

According to the court, "[t]he automobile must provide more than the location of the injury."[547] The fact that the injury took place in a motor vehicle "does not transport the accident into the scope of the no-fault act."[548] The court noted that "[t]he Gabels offered no evidence showing that the aneurysm was caused by any aspect of the use of the motor vehicle as a motor vehicle."[549] Finding that the aneurysm was neither caused by, nor aggravated by the accident, the supreme court concluded that Kenneth Gabel's death was not a result of the operation of a motor vehicle.[550]

The supreme court also recognized that the Act requires the injury to be *accidental* as to the person claiming benefits.[551] Quoting from *Kordell v. Allstate Insurance Co.*,[552] the North Dakota Supreme Court opined that death resulting from natural processes unrelated to the automobile accident is not an *accident* under the no-fault act.[553] Pointing out that there was no legislative intent for the no-fault law to include coverage for bodily injuries resulting from internal causes, rather than external causes, the court concluded that Kenneth Gabel's death, as a result of an aneurysm unrelated to motoring, was not an *accident* within the definition of the Act.[554]

Lastly, the Gabels asserted that the language of the policy obligates State Farm to pay attorney's fees and expenses.[555] The Supreme Court stated that "[w]hen the language of an insurance contract is 'clear and explicit, the language should not be strained in order to impose liability on the insurer.'"[556] Finding that the "What We Pay" section under the "No-Fault" heading did not list attorney's fees for actions against the insurer, the court declined to impose this liability on State Farm.[557] The Gabels' contended that State Farm should be required to reimburse the Gabels for attorney's fees and expenses incurred because State Farm

546. *Id.* at 293 (citing Uniform Motor Vehicle Accident Reparations Act § 1(a)(6) cmt., 14 U.L.A. 47 (1995)).
547. *Estate of Gabel*, 539 N.W.2d at 293.
548. *Id.*
549. *Id.*
550. *Id.*
551. *Id.* (citing N.D.C.C. § 26.1-41-01(1)).
552. 554 A.2d 1, 2 (N.J. Super. Ct. App. Div. 1989).
553. *Estate of Gabel*, 539 N.W.2d at 293-94.
554. *Id.* at 293 (citing JFK Memorial Hosp. v. Kendal, 501 A.2d 192, 199 (N.J. Super. Ct. Law Dev. 1985)).
555. *Id.* at 294.
556. *Id.* (quoting Stetson v. Blue Cross of N. Dakota, 261 N.W.2d 894, 897 (N.D. 1978)).
557. *Id.*

initiated this declaratory action.[558] The court responded that pursuant to the "American Rule,"[559] the Gabels' would be required to bear their own attorney's fees.[560]

JURY—ERRONEOUS DISMISSAL FOR CAUSE

LARSON V. WILLIAMS ELECTRIC COOPERATIVE, INC.

In *Larson v. Williams Electric Cooperative, Inc.*,[561] the district court judge excused all the members of Defendant Williams Electric Cooperative (Williams) from the forty person jury selection panel.[562] The North Dakota Supreme Court reversed the judgment and remanded the case for a new trial, concluding that potential jurors may not be excluded for cause merely because they are members of the defendant cooperative unless there is an individualized inquiry beforehand.[563]

Larson, a dairy farmer, was a member of Williams Electric Cooperative and used Williams' electricity to run milking equipment.[564] Soon after the milking equipment was installed using Williams' electricity, milk production dropped, the livestock became nervous around the milking equipment, and cows began to suffer from a bacterial infection called mastitis.[565] Consequently, the entire livestock was replaced.[566] However, the same problems developed in the new livestock.[567] Larson's veterinarian investigated the problem and suggested that the problem was electrical.[568] Larson complained extensively to Williams, noting that he was also getting shocked by the equipment, and, in an attempt to remedy the problem, Williams installed a blocker on Larson's electrical line to stop the stray voltage problems.[569] Thereafter, the problems in the herd and milking ended.[570] Williams claimed that the improvements were not

558. *Estate of Gabel*, 539 N.W.2d at 294.

559. *Id.* (citing Duchscherer v. W.W. Wallwork, Inc., 534 N.W.2d 13, 16 (N.D. 1995)). Under the American Rule, it is generally assumed that a party to a suit will pay its own attorney fees, unless a statute authorizes otherwise. *Duchscherer*, 534 N.W.2d at 16.

560. *Id.*

561. 534 N.W.2d 1 (N.D. 1995).

562. Larson v. Williams Elec. Coop., Inc., 534 N.W.2d 1, 2-3 (N.D. 1995). After the trial the jury entered a judgment against Williams. *Id.* at 2.

563. *Id.* at 4.

564. *Id.* at 2.

565. *Id.*

566. *Id.*

567. *Larson*, 534 N.W.2d at 2.

568. *Id.* The electrical problem at issue was stray voltage. *Id.* at 1. This problem occurs when stray voltage goes from an appliance through the ground. *Id.* at 2 n.1. If a cow is standing nearby, the electricity will use it as a pathway. *Id.* So much as one volt of electricity can be "catastrophic to a dairy farm." *Id.*

569. *Id.*

570. *Id.*

the result of the blocker being installed, but instead were due to deficiencies which Williams corrected after the farm was inspected by the North Dakota Electrical Inspector.[571] Larson brought suit for damages to the dairy operation caused by the stray voltage.[572]

Before trial, the judge excluded from the forty person jury selection panel all members of Williams, on the basis that they were interested parties because they receive their power from Williams.[573] At trial, the jury returned a $429,506 verdict against Williams.[574] Williams appealed to the North Dakota Supreme Court, claiming that it was improper to dismiss the twelve members of Williams from the jury selection panel, and that the statute of limitations had run on Larson's claim.[575]

Noting that the standard of review is abuse of discretion for trial court rulings on jury challenges, the North Dakota Supreme Court agreed with Williams that it was improper to dismiss the potential jurors, and reversed and remanded on this ground.[576] Relying on prior case law, the court stated that a juror's membership in a cooperative, where the cooperative is a party in a lawsuit, does not automatically disqualify a juror as an interested party.[577] Rather, to disqualify a prospective juror, actual bias must be established.[578] Specifically, one must challenge a potential juror for cause.[579] The court noted that section 28-14-06(5) of the North Dakota Century Code, when read in conjunction with North Dakota Rule of Civil Procedure 47(c), requires the potential juror's interest in a lawsuit's outcome to be analyzed, and after doing this, a potential juror may be excused for cause.[580] The North Dakota Supreme Court further noted that it is the policy of the state to select jurors

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571. *Id.*

572. *Larson*, 534 N.W.2d at 1.

573. *Id.* at 2-3. The record as to arguments regarding dismissal of the jurors was missing, and the court was disturbed by this. *Id.* at 3, n.2. The court concluded that court personnel may have lost the notes about disqualification of the prospective jurors who were members of Williams and the voir dire examination of them. *Id.* At oral argument, both parties agreed that evidence regarding the interests of the Williams members had not been presented to the trial court. *Id.*

574. *Id.* at 2.

575. *Id.* at 2, 5.

576. *Id.* at 5.

577. *Larson*, 534 N.W.2d at 3.

578. *Id.* (citing Cassady v. Souris River Tel. Coop., 520 N.W.2d 803, 806 (N.D. 1994)). The North Dakota Supreme Court has refused to adopt an automatic disqualification rule for potential jurors. *Id.*

579. *Id.* at 4.

580. *Id.* Challenges for cause may be taken on the grounds of "[i]nterest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation." N.D. CENT. CODE § 28-14-06(5) (1991). Further:

> If the trial judge, after the examination of any juror, is of the opinion that grounds for challenge for cause are present, the judge should excuse that juror from the trial of the case. If the judge does not excuse the juror, any party may challenge the juror for cause as provided by law.

from a fair cross section of the population, and this policy was violated by removing all the parties of Williams because it excluded an identifiable group.[581] Because no individualized inquiry was made in the selection process, the case was reversed and remanded.[582]

Chief Justice VandeWalle concurred, agreeing that prospective jurors should not be excluded because of status.[583] However, VandeWalle argued that there was no equal protection right that had to be vindicated because there was nothing to indicate that the jury used was prejudiced or less competent than a jury that included members of Williams.[584] Although he noted that he would have preferred to affirm the decision of the district court, VandeWalle agreed to side with the majority supporting their effort to make a statement as to the importance with which we regard our jury system.[585] He noted, however, that this decision should have little value as precedent, since few errors regarding the jury require a new trial because it is rare that substantial justice would require it.[586]

JURY—SELECTION PROCESS

STATE V. ROBLES

In *State v. Robles*,[587] Appellant Jaime Robles raised two issues on appeal of his conviction for aggravated assault.[588] First, Robles contended that the panel from which his jury was selected did not represent a fair cross-section of the community and thus violated section 27-09.1-05 of the North Dakota Century Code.[589] Second, Robles contended that the jury selection process violated his right to an impartial jury under the Sixth Amendment to the United States Constitution.[590] The North

581. *Larson*, 534 N.W.2d at 4. The court noted that people called to serve on a jury are to "'be selected at random from a fair cross section of the population of the area served by the court.'" *Id.* (quoting N.D. CENT. CODE § 27-09.1-01 (1991)).

582. *Id.* Williams also appealed the district court's denial of summary judgment on the ground that Larson failed to meet the six-year statute of limitations. *Id.* Williams claimed that Larson's knowledge of the stray voltage problem was a question of law; however, the North Dakota Supreme Court disagreed, ruling that summary judgment was inappropriate because material questions of fact existed as to when Larson knew of facts which would place a reasonable person on notice that a potential claim existed and was caused by Williams' negligence. *Id.*

583. *Id.* (VandeWalle, C.J., concurring).

584. *Id.*

585. *Id.*

586. *Larson*, 534 N.W.2d at 5-6.

587. 535 N.W.2d 729 (N.D. 1995).

588. State v. Robles, 535 N.W.2d 729, 730 (N.D. 1995).

589. *Id.*

590. *Id.*

Dakota Supreme Court, finding that the procedure violated neither chapter 27-09.1 nor the Sixth Amendment, affirmed the conviction.[591]

On April 24, 1994, while attempting to inflict serious bodily injury on Victor Tayen, Robles shot Lee Alanis, causing substantial bodily harm to Alanis.[592] Robles was charged with aggravated assault, under section 12.1-17-02(3) of the North Dakota Century Code.[593] Prior to trial, Robles moved to dismiss the criminal information claiming that Hispanics are "systematically excluded from jury service in Walsh County and, therefore, a trial in Walsh County would deny Robles his statutory and constitutional rights to a fair and impartial jury."[594] The trial court denied this motion and a jury ultimately convicted Robles of aggravated assault.[595]

The North Dakota Supreme Court distinguished the Sixth Amendment claim from the alleged violation of chapter 27-09.1, addressing the statutory claim first.[596] Initially, the court determined whether the jury selection procedure in place in Walsh County complied with the requirements and procedures set forth in chapter 27-09.1 to compile and maintain a master jury list.[597] Under the jury selection plan in effect for Robles' trial, the county clerk was required to compile the master list from "the voters in the most recent general election and a list of licensed drivers."[598] Robles argued that the master list should have been supplemented with additional sources of names, such as utility bills, job service records, or migrant school records.[599] Despite this argument, the court stated that Robles introduced no evidence which would tend to show that the supplemental sources would produce a fairer cross-section than the present system.[600] Therefore, absent a directive from the court or other compelling reason, the county clerk was not required to supplement the list with other sources.[601]

Addressing the constitutional challenge, the court noted that a criminal defendant making a constitutional challenge to a jury selection procedure must show:

> (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this

591. *Id.* at 730-31.
592. *Id.* at 731.
593. *Robles*, 535 N.W.2d at 731.
594. *Id.*
595. *Id.*
596. *Id.*
597. *Id.*
598. *Robles*, 535 N.W.2d at 731 (quoting the North Dakota Jury Selection Plan (1992)).
599. *Id.*
600. *Id.*
601. *Id.*

> group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is due to systematic exclusion of the group in the jury-selection process.[602]

Under the first element, the court stated that a group of people is distinct when "the members of the group have a shared attribute that defines or limits their membership and when they share a community of interests."[603] According to the court, Hispanics are considered a distinctive group for purposes of the Sixth Amendment and thus, Robles successfully proved the first element of his constitutional challenge.[604]

However, Robles did not present evidence revealing that Hispanics have been underrepresented on jury venires.[605] Moreover, the court found that even if Robles had shown that Hispanics were under-represented in Walsh County jury venires, he had failed to prove that Hispanics were systematically excluded in the Walsh County jury selection process.[606] To show systematic exclusion, Robles was required to show that the exclusion was inherent in the particular jury selection process utilized.[607] Conclusory observations and assertions are insufficient to illustrate systematic exclusion.[608] As Robles did not meet his burden of showing either disproportionate representation of Hispanics on jury venires or systematic exclusion of Hispanics in the jury selection process, his Sixth Amendment claim also failed.[609]

JUVENILE LAW—TERMINATION OF PARENTAL RIGHTS

IN RE ADOPTION OF J.S.P.L. V. WESSMAN

In re Adoption of J.S.P.L. v. Wessman,[610] J.E.N. (Jack) appealed from a judgment terminating his parental rights and granting the adoption petition of M.L.L. (Mark) and S.M.L. (Sandy).[611] Finding clear

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602. *Id.* at 732 (quoting Duren v. Missouri, 439 U.S. 357, 364 (1979)).

603. *Robles*, 535 N.W.2d at 732.

604. *Id.*

605. *Id.* at 733. Evidence presented by Robles consisted of: 1990 census data showing that of the total adult population in Walsh County of the 10,023, 213 were Hispanic; testimony by the clerk of court and the Walsh County prosecuting attorney; and Walsh County jury reports. *Id.* at 732. This evidence was intended to show the low number of Hispanics serving on jury venires in Walsh county. *Id.*

606. *Id.*

607. *Id.*

608. *Robles*, 535 N.W.2d at 733.

609. *Id.* at 733-34.

610. 532 N.W.2d 653 (N.D. 1995).

611. *In re Adoption of J.S.P.L. v. Wessman*, 532 N.W.2d 653, 655 (N.D. 1995). All pseudonyms for the parties used here are the same as those used by the North Dakota Supreme Court opinion in the

and convincing evidence to support the termination of Jack's parental rights, the North Dakota Supreme Court affirmed the judgment of the trial court.[612]

Jack is the natural father of J.S.P.L. (Joan), J.J.L. (Jeff), and J.W.L. (Justin).[613] In January of 1992, after bribing his children to let him in, Jack entered the house of his wife, P.J.N. (Patty) and, in the presence of the children, shot her several times with a handgun when she returned from work.[614] Patty died as a result of the gunshots.[615] For this crime, Jack was convicted of murder and sentenced to life imprisonment with no possibility of parole for at least twenty-five years.[616] Shortly after the murder, Sandy, Patty's sister, was awarded physical custody of the children.[617] Sandy and her husband, Mark, sought to adopt the children and terminate Jack's parental rights in December of 1993.[618]

At Jack's request, he was granted court-appointed counsel to oppose the adoption.[619] However, unsatisfied with counsel, Jack requested the court to appoint an alternate attorney.[620] This request was denied by the court.[621] Jack's court-appointed counsel moved to have Jack personally appear at the adoption hearing and for a continuance of the hearing.[622] Mark and Sandy opposed this motion, arguing that Jack posed "an obvious and significant security risk" and his presence would add to the emotional and psychological trauma of the children, who were testifying at the hearing.[623] Moreover, Jack would have the opportunity to participate in the hearing through a deposition administered at the state penitentiary.[624]

The trial court granted the motion for a continuance but denied the motion for personal appearance citing the danger and security risk associated with Jack's presence.[625] Jack responded by dismissing his court-appointed attorney and electing to proceed pro se.[626] Jack also

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case.

612. *Id.* at 656.
613. *Id.* at 655.
614. *Id.* at 656.
615. *Id.*
616. *In re Adoption of J.S.P.L.*, 532 N.W.2d at 656.
617. *Id.*
618. *Id.*
619. *Id.*
620. *Id.*
621. *In re Adoption of J.S.P.L.*, 532 N.W.2d at 656. Thereafter, Jack filed a pro se resistance to the adoption. *Id.*
622. *Id.*
623. *Id.*
624. *Id.*
625. *Id.* The Court also looked at the additional inconvenience to the prison authorities. *Id.*
626. *In re Adoption of J.S.P.L.*, 532 N.W.2d at 656.

canceled his deposition, which was scheduled to be taken at the penitentiary.[627] In order to obtain Jack's cooperation, the trial court allowed Jack to represent himself, but ordered the court-appointed counsel to continue as Jack's legal advisor.[628] In addition, the trial court allowed Jack to appear by telephone at the hearing.[629] After receiving testimony, the trial court terminated Jack's parental rights and granted the adoption.[630]

On appeal, Jack argued "that the trial court violated his right to access the courts by not allowing him to personally cross-examine the witnesses at the adoption hearing."[631] According to the North Dakota Supreme Court, the facts of this case implicated the constitutional rights of self-representation and confrontation.[632]

Addressing the right to self-representation, the court recognized that the criminal defendant has a Sixth Amendment right to self-representation when the defendant knowingly and intelligently elects to proceed pro se.[633] Yet, the defendant's Sixth Amendment right to self-representation:

> is not violated when a trial judge appoints standby counsel over the defendant's objection, so long as standby counsel's participation does not "effectively allow[ ] counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance."[634]

Moreover, the court observed that the right to self-representation does not guarantee the personal presence of the defendant at a civil proceeding unrelated to his imprisonment.[635] Where the prisoner has elected to proceed pro se, waiving his right to court-appointed counsel, he may not later claim his constitutional right to self-representation has been violated when he is denied the opportunity to appear personally in

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627. *Id.*

628. *Id.* at 656-57.

629. *Id.* at 657. At the hearing, the trial court allowed Jack to orally argue the motions which he had previously filed with the court. *Id.*

630. *Id.*

631. *In re Adoption of J.S.P.L.*, 532 N.W.2d at 657.

632. *Id.* at 658.

633. *Id.*

634. *Id.* at 658-59 (quoting McKaskle v. Wiggins, 465 U.S. 168, 178 (1984)).

635. *Id.* The court agreed that:

> If it is apparent that the request of the prisoner to argue personally reflects something more than a mere desire to be freed temporarily from the confines of the prison, that he is capable of conducting an intelligent and responsible argument, and that his presence in the courtroom may be secured without undue inconvenience or danger, the court would be justified in [allowing the prisoner to appear personally.]

Id. (quoting Price v. Johnston, 334 U.S. 266, 284-85 (1948)).

a civil proceeding.[636] Accordingly, "Jack's invocation of his right to self-representation did not create a correlative absolute right to personally appear at the adoption hearing."[637]

Turning to the right to confrontation, the supreme court reiterated that prisoners retain a due process right to reasonable access to the courts,[638] but found that "a prisoner does not have an absolute constitutional right to personally appear in court and defend an action to terminate parental rights if the prisoner has been otherwise permitted to appear through counsel and by deposition."[639] Rather, the court concluded that the personal appearance of a prisoner at these proceedings is discretionary with the trial court.[640]

Although the Sixth Amendment gives a criminal defendant the right to confront and cross-examine witnesses, that right does not extend to civil proceedings for termination of parental rights.[641] According to the court, the right to confront and cross-examine "are not rights universally applicable to all hearings."[642] Although the denial of the opportunity to cross-examine in a parental rights case invokes due process concerns, the court found that "due process does not entitle a parent to personally confront and cross-examine a child witness if the child would be traumatized by the experience."[643]

Balancing the important public interest at stake against Jack's procedural due process right, the court concluded that the trial court did not violate Jack's constitutional rights by denying his request to appear personally.[644] In making this determination, the court pointed to the trial court's concern over the potential danger and security risk, the resulting inconvenience on the prison authorities, and the substantial state interest in the emotional and psychological welfare of the children.[645] In conclusion, the court found that the procedure fashioned by the trial court adequately addressed Jack's due process and Sixth Amendment rights, and thus, did not deny Jack reasonable access to the courts.[646]

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636. *In re Adoption of J.S.P.L.*, 532 N.W.2d at 659-60.

637. *Id.* at 660.

638. *Id.* at 657 (citing Bounds v. Smith, 430 U.S. 817, 821 (1977)).

639. *Id.* (citing *In re* F.H., 283 N.W.2d 202, 209 (N.D. 1979)).

640. *Id.* at 658. The North Dakota Supreme Court lists several factors to be taken into account when the trial court exercises its discretion in this area. *Id.* at 658 n.3 (citing *In re* F.H., 283 N.W.2d 202, 209 (N.D. 1979)).

641. *In re Adoption of J.S.P.L.*, 532 N.W.2d at 660 (citations omitted).

642. *Id.* (quoting Wolff v. McDonnell, 418 U.S. 539, 567 (1974)).

643. *Id.*

644. *Id.* at 662.

645. *Id.* at 662-63.

646. *In re Adoption of J.S.P.L.*, 532 N.W.2d at 662-63.