North Dakota Law Review

Volume 67 | Number 2 Article 10

1991

Supreme Court Review

North Dakota Law Review Associate Editors

SUPREME COURT REVIEW

The Supreme Court Review briefly summarizes the 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 following topics are included in the Review:

* The Supreme Court Review was written as a special project for Professor Marcia O'Kelly of the University of North Dakota School of Law by Ellen Gillespe and Joseph Aas, third-year students at the School of Law.

ACTIONS AND DEFENSES

HANSEN V. FIRST AMERICAN BANK AND TRUST OF MINOT

In *Hansen v. First American Bank and Trust of Minot*,[1] the North Dakota Supreme Court held that a defendant may amend its answer to include an affirmative defense not raised in the initial pleadings, if no prejudice to the plaintiff results.[2]

On June 9, 1987, Lynn Jackson Hansen filed an action against First American Bank and Trust for breach of fiduciary duty in its capacity as personal representative of her grandfather's estate.[3] First American's answer did not include any affirmative defenses to the claim.[4] On July 14, 1988, the day of trial, First American orally moved to amend its answer to assert several affirmative defenses, including the defense that Hansen's action was barred by the limitation period set forth in section 30.1-21-05 of the North Dakota Century Code.[5] The trial court granted First American's motion to amend and dismissed the action.[6] Hansen appealed.[7]

Hansen cited Rule 8(c) of the North Dakota Rules of Civil Procedure as authority for the proposition that an affirmative defense is waived unless it is plead in the defendant's initial answer.[8] Although the North Dakota Supreme Court agreed that failure to plead an affirmative defense generally results in waiver, the court stated that Rule 8(c) must also be read in conjunction with Rule 15(a) of the North Dakota Rules of Civil Procedure when a motion to amend is involved.[9] Reading the two rules together, the court concluded that an affirmative defense may be asserted in a later amendment to the answer and allowed by the trial court, if the

1. 452 N.W.2d 770 (N.D. 1990).
2. Hansen v. First American Bank & Trust of Minot, 452 N.W.2d 770 (N.D. 1990).
3. *Id.*
4. *Id.* at 770-771.
5. *Id.* at 771. *See* N.D. CENT. CODE § 30.1-21-05 (1988) (requiring that actions against a personal representative for breach of fiduciary duty be brought within six months after the filing of the closing statement).
6. *Hansen*, 452 N.W.2d at 771.
7. *Id.*
8. *Id. See* N.D.R. CIV. P. 8(c) (affirmative defenses).
9. *Hansen*, 452 N.W.2d at 771-772.

plaintiff is not prejudiced as a result.[10] The court, found that the trial court gave ample opportunity to the plaintiff to prepare a defense to the amendment. Therefore, the plaintiff was not prejudiced by the trial court's decision.[11]

The judgment of the trial court was affirmed.[12]

ADMINISTRATIVE LAW AND PROCEDURE

MULLINS V. NORTH DAKOTA DEPARTMENT OF HUMAN SERVICES

In *Mullins v. North Dakota Department of Human Services*,[13] the North Dakota Supreme Court considered the consolidated appeals of three individuals who had been denied services from the developmental disabilities division.[14] The Department found the individuals not entitled to services, pursuant to provisions of the Department's service manual, which had not been adopted in accordance with the North Dakota Administrative Agencies Practices Act (A.A.P.A.).[15] The individuals contended that because the manual had not been properly adopted, the Department erred in determining eligibility for services under the manual provisions.[16] The Department, on the other hand, argued the service manual fell under an exception to the rulemaking requirement because it dealt with internal management of the Department.[17] The district courts reversed the Department's denial of services to the three individuals.[18]

On appeal from the trial court's reversal, the North Dakota Supreme Court determined that the service manual provisions used to deny services to the individuals had not been adopted pursuant to the provisions of the North Dakota Administrative Agencies Practices Act.[19] Further, the court determined the service manual provision did not fall under the internal management exception to the A.A.P.A., as the Department argued, because the provisions directly affected the substantive and procedural rights

10. *Id.* at 772.
11. *Id.* at 772-773.
12. *Id.* at 774.
13. 454 N.W.2d 732 (N.D. 1990).
14. Mullins v. North Dakota Dep't of Human Services, 454 N.W.2d 732 (N.D. 1990). Also included in the appeal were the cases of Dolochek v. North Dakota Dept. of Human Services and Leabo v. North Dakota Dep't of Human Services. *Id.*
15. *Id.*
16. *Id.* at 733.
17. *Id.* at 734. *See* N.D. CENT. CODE § 28-32-01(6)(a) (Supp. 1989) (definition of a rule does not include a matter concerning only internal management).
18. *Mullins*, 454 N.W.2d at 732.
19. *Id.* at 734.

of the individuals.[20] Making the determination that the service manual provisions did not meet the requirements of the A.A.P.A. or fall under the internal management exception, the court concluded the manual provisions were invalid.[21]

The three judgments were remanded for redetermination of the individuals' eligibility.[22]

APPEAL AND ERROR

DAKOTA BANK AND TRUST CO. V. BRAKKE

In *Dakota Bank and Trust Co. v. Brakke*,[23] the issue was whether a defendant, on appeal after a default judgment, could raise, for the first time, the issue of proper notice of a pretrial conference.[24] Fenske Feed and Grain Co. (FFG) was scheduled to appear at a pretrial conference in July of 1988.[25] An affidavit indicated that FFG had been sent an Order for Pretrial Conference by registered and certified mail.[26] FFG claimed that it did not receive notice of the pretrial conference.[27] A default judgment was granted and FFG appealed.[28] FFG did not file a motion for relief from the default judgment, but appealed the judgment to the supreme court.[29]

The supreme court noted that it would not consider an issue on appeal when that issue had not been raised at the trial level.[30] FFG should have filed a motion seeking relief under Rule 60(b) of the North Dakota Rules of Civil Procedure.[31] In this way FFG could have presented facts and evidence that supported its contention of no notice of pretrial conference.[32] Since this evidence was not available on appeal, the supreme court had no choice but to affirm the default judgment.[33]

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20. *Id.* at 734-735.
21. *Id.* at 735.
22. *Id.*
23. 452 N.W.2d 351 (N.D. 1990).
24. Dakota Bank & Trust Co. v. Brakke, 452 N.W.2d 351, 352 (N.D. 1990).
25. *Id.*
26. *Id.* FFG had also been sent a supplemental order indicating that *pro se* litigants must appear at this conference. *Id.* A signed returned receipt was received that indicated that FFG had received this material. *Id.*
27. *Id.*
28. *Id.* at 352, 353.
29. *Brakke*, 452 N.W.2d at 353.
30. *Id.* (citations omitted).
31. *Id.* *See* N.D.R. CIV. P. 60(b) (the rule provides that upon motion a party may obtain relief from a judgment in certain situations, i.e., mistake, inadvertence, excusable neglect).
32. *Brakke*, 452 N.W.2d at 352.
33. *Id.*

AUTOMOBILES

STATE V. WETZEL

In *State v. Wetzel*,[34] the North Dakota Supreme Court held that routine vehicle safety inspections conducted in a systematic manner were reasonable under the fourth amendment.[35]

Tom Wetzel's automobile was stopped by the North Dakota State Highway Patrol for a routine safety inspection at a checkpoint on a state highway.[36] During the check, it was discovered that Wetzel was driving without a valid license.[37] Wetzel was cited for driving while under suspension.[38] Wetzel challenged the stop as unconstitutional under the fourth amendment, claiming that the patrolman exercised unconstrained discretion in stopping vehicles.[39] The trial court granted Wetzel's motion to suppress the evidence obtained by the patrolman on the basis that the state did not establish that the patrolman acted without such discretion.[40]

Guided by a leading United States Supreme Court case, *Delaware v. Prouse*,[41] the North Dakota Supreme Court determined that checkpoint inspections conducted in a reasonable and systematic manner do not violate an individual's fourth amendment rights against unreasonable search and seizure.[42] The patrolman who inspected Wetzel's vehicle did not randomly stop vehicles for inspection, but rather stopped a vehicle, inspected it, and proceeded to stop the next available vehicle for inspection, all in a highly visible manner.[43] The court found that this procedure was sufficiently systematic to pass muster under the fourth amendment.[44] Balancing the interests of the state in vehicle safety against the intrusiveness of the inspection into Wetzel's privacy rights, the check point was determined by the court to be reasonable.[45]

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34. 456 N.W.2d 115 (N.D. 1990).
35. State v. Wetzel, 456 N.W.2d 115 (N.D. 1990).
36. *Wetzel*, 456 N.W.2d at 116.
37. *Id.*
38. *Id.*
39. *Id.* at 117.
40. *Wetzel*, 456 N.W.2d at 117.
41. 440 U.S. 648 (1979).
42. Wetzel, 456 N.W.2d at 117-120. *See* Delaware v. Prouse, 440 U.S. 648 (1979) (thoroughly analyzes permissibility of procedures used in stopping vehicles for license or safety checks under the fourth amendment).
43. *Wetzel*, 456 N.W.2d at 120.
44. *Id.*
45. *Id.*

The suppression order of the county court was reversed.[46]

BANKRUPTCY

BINEK V. ZIEBARTH

In *Binek v. Ziebarth*[47] the issue was whether the automatic stay provision of the bankruptcy code should apply to an appeal from an order denying a debtor's motion to vacate a default judgment.[48] William Binek commenced an action against Silver Ziebarth to recover legal fees.[49] On September 2, 1987, an order for default judgment was granted in favor of Binek.[50] Ziebarth filed a motion for relief from the default judgment.[51] Ziebarth's motion for relief from default judgement was denied.[52] On July 7, 1989, he appealed the order denying his motion for relief of default judgment.[53] On December 22, 1989, Ziebarth filed a chapter 12 bankruptcy petition, and, because of this, asked for a stay of the supreme court appeal.[54]

The automatic stay provision of the bankruptcy code prohibits the continuation of a judicial action that was commenced before the bankruptcy petition was filed.[55] This stay does not apply to actions brought by the debtor, but only actions against the debtor.[56] Binek contended that Ziebarth's motion was initiated for the benefit of the debtor.[57] The supreme court stated that they must look at who originally brought the action, and that determination is to be made at the inception of the case.[58] In this case the initial action was brought by Binek against Ziebarth for collection of legal fees.[59] The motions brought by Ziebarth were immaterial to the determination of who initiated the action.[60] The supreme

46. *Id.* at 121.
47. 452 N.W.2d 327 (N.D. 1990).
48. Binek v. Ziebarth, 452 N.W.2d 327, 328 (N.D. 1990).
49. *Id.* at 327.
50. *Id.*
51. *Id.* Apparently Ziebarth filed a N.D.R.O.C. 3.2 motion for relief pursuant to N.D.R. Civ. P. 60(b). *Id. See* N.D.R.O.C. 3.2 (criteria for filing a motion); N.D.R. Civ. P. 60(b) (providing that upon motion a party may obtain relief from a judgment in certain situations, such as mistake, inadvertence, excusable neglect).
52. *Binek*, 452 N.W.2d at 327-28.
53. *Id.*
54. *Id.*
55. *Binek*, 452 N.W.2d at 328.
56. *Id.* (citing Kessel v. Peterson, 350 N.W.2d 603, 604 (N.D. 1984) (adopting the same view expressed in a third circuit decision)).
57. *Id.*
58. *Id.* It does not matter whether the case had progressed to an appeal. *Id.*
59. *Id.*
60. *Binek*, 452 N.W.2d at 328.

court held that this was "clearly an action against the debtor"[61] and must be stayed under 11 U.S.C. section 362.

BANKS AND BANKING

PRODUCTION CREDIT ASSOCIATION OF FARGO V. ISTA

In *Production Credit Association of Fargo v. Ista*,[62] Allen and DeAnn Ista appealed from a judgment awarding $508,507.11 to the Production Credit Association of Fargo (PCA) and dismissing their counterclaim.[63] The Istas had been receiving financing for their farming operations from PCA for over 30 years.[64] In 1984, due to unusual flooding, the Istas began to experience losses, which continued through 1986.[65] In 1986, PCA denied the Istas' application for an operating loan.[66] PCA filed an action to foreclose their security interests and sought a money judgment in 1987.[67] The Istas filed an answer and counterclaim, alleging bad faith and challenging PCA's security interest in certain crops.[68] The trial court entered a partial summary judgment dismissing the Istas' counterclaim and entered judgment for PCA.[69] The Istas appealed, claiming that PCA breached its fiduciary duty, acted in bad faith, negligently handled their loans, and held invalid security interests in certain crops.[70]

Two of the four issues raised on appeal were easily disposed of by the North Dakota Supreme Court.[71] The Istas contended that PCA owed them a fiduciary duty as shareholders of PCA, yet cited no authority to support their claim.[72] The court, finding no support for the argument, held that without special circumstances, an officer or director of a corporation only owes a duty to shareholders collectively, not to each individual shareholder.[73] Next, the court rejected the Istas' argument that PCA was negligent because it did not ensure that the Istas had hail insurance on their 1986 crop.[74] Finding that PCA did not advance operating funds to the

61. *Id.*
62. 451 N.W.2d 118 (N.D. 1990).
63. Production Credit Ass'n of Fargo v. Ista, 451 N.W.2d 118, 119-120 (N.D. 1990).
64. *Id.* at 120.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Ista*, 451 N.W.2d at 120.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Ista*, 451 N.W.2d at 120-121.
73. *Id.*
74. *Id.* at 125.

Istas during that year, the court held that PCA had no duty to furnish or finance such insurance.[75]

The Istas also raised the issue of whether they were entitled to recover in tort for PCA's failure to consider them for administrative forbearance under federal law, before denying their request for a 1986 operating loan.[76] The Istas contended that violation of the federal regulations gave rise to a separate cause of action under state tort law.[77] Reviewing case law from various federal circuits, the court concluded that a bad faith tort action under state law could not be based upon a violation of the federal farm credit act, when the act and its accompanying regulations imposed no duty upon PCA.[78]

Finally, the court reviewed the Istas' assertion that the trial court erred in holding that PCA had a valid security interest in three years of crops by virtue of a 1985 security agreement.[79] Finding it appropriate to take the course of dealing into consideration to interpret the contract, the court concluded that the language of the agreement was ambiguous and raised a material issue of fact.[80] Therefore, the court held that summary judgment on the issue of the security interest was inappropriate.[81]

The judgment foreclosing the security interests was reversed and remanded, and in all other aspects, the judgment was affirmed.[82]

BROKERS

SCHMIDT V. FIRST NATIONAL BANK AND TRUST COMPANY

In *Schmidt v. First National Bank and Trust Co.*,[83] the North Dakota Supreme Court held that a real estate agent was not entitled to recover a commission under the theory of quantum meruit if he fails to fulfill the contract requirements.[84]

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75. *Id.*
76. *Ista*, 451 N.W.2d at 122-125.
77. *Id.*
78. *Id. See* Smith v. Russellville Production Credit Ass'n, 777 F.2d 1544 (11th Cir. 1985) and Mendel v. Production Credit Ass'n of the Midlands, 862 F.2d 180 (8th Cir. 1988).
79. *Ista*, 451 N.W.2d at 125. In 1985, Ista executed a security agreement to PCA covering "all crops grown and to be grown." *Id.* at 125-26. PCA contended that the agreement gave them a security interest in crops grown by the Istas in 1986, 1987, and 1988. *Id.* The Istas asserted that their course of dealing with the bank for thirty years had been that each security agreement executed to PCA only covered crops grown in that particular growing season. *Id.*
80. *Ista*, 451 N.W.2d at 126-127.
81. *Id.* at 127.
82. *Id.*
83. 453 N.W.2d 602 (N.D. 1990).
84. Schmidt v. First Nat'l Bank and Trust Co., 453 N.W.2d 602 (N.D. 1990).

In 1986, First National contacted several real estate agents, including Bob Schmidt, to help seek a buyer for a shopping center owned by the Bank.[85] Under an oral agreement, Schmidt was to receive a commission if he found a buyer and consummated a sale.[86] Schmidt found a group of investors interested in the property who submitted to First National $10,000 earnest money along with a written option to purchase.[87] The next day, another group of investors submitted a higher offer, which was accepted by First National.[88] The Bank returned the earnest money to the first group of investors.[89] Schmidt subsequently filed an action against First National, asserting that the bank owed him a commission for bringing them a willing buyer or, alternatively, that by bringing a buyer to the Bank, the Bank was able to get a higher offer from the second group of investors, and Schmidt should receive a commission under the theory of quantum meruit.[90] The trial court entered summary judgment dismissing Schmidt's case, concluding that he was not entitled to relief under either theory.[91] Schmidt appealed.[92]

The North Dakota Supreme Court reversed the trial court's summary judgment under the first theory of recovery.[93] Reviewing relevant case law, the court determined that actual completion of the sale of the property is not always necessary for a broker to recover a commission if a willing buyer is produced and that buyer agrees to the seller's terms.[94] This led the court to hold that genuine issues of material fact existed as to whether a commission was actually earned by Schmidt.[95] Therefore, the trial court erred in granting summary judgment.[96]

On the second theory of recovery, the North Dakota Supreme Court agreed with the trial court that Schmidt was not entitled to recover under a theory of quantum meruit as a matter of law.[97] The court concluded that the only recovery available to Schmidt was that of a commission under the contract.[98] The court

85. *Schmidt*, 453 N.W.2d at 603.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Schmidt*, 453 N.W.2d at 604.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Schmidt*, 453 N.W.2d at 604-605.
94. *Id.* at 604.
95. *Id.* at 605.
96. *Id.*
97. *Schmidt*, 453 N.W.2d at 605.
98. *Id.*

explained that to allow a real estate agent to recover in quantum meruit when he fails to earn a commission under a contract, would open a Pandora's box of nonmeritorius claims.[99]

The judgment of the trial court was affirmed in part, reversed in part, and remanded on the breach of contract issue.[100]

CHILD CUSTODY

HEINEN V. HEINEN

In *Heinen v. Heinen*,[101] the North Dakota Supreme Court held the need to establish a significant change of circumstances in a custody modification was waived by a stipulation specifying an alternative procedure.[102]

Ilene and Leo Heinen were divorced in 1986, pursuant to a stipulation.[103] The stipulation provided, among other things, that their two children would live with Leo during the school term and with Ilene during the summer.[104] This arrangement, according to the stipulation, was to continue until 1989, when the parties would review the arrangement and agree as to where the children should be placed for the majority of the time.[105] The stipulation specifically provided that if the parties could not agree, either could petition the court for a determination based on the children's best interests.[106] In April of 1989, Leo petitioned the trial court for a custody determination.[107] The trial court entered judgment favoring Leo for custody of the children during the school year.[108] Ilene appealed.[109]

Ilene contended that no significant change of circumstances existed to justify the trial court's custody determination.[110] Leo, on the other hand, contended that a finding of a significant change of circumstances was not required, because the stipulation called for only a determination based on the children's best interests.[111] Reiterating the necessity of finding a significant change of circumstances prior to a custody modification, the North Dakota Supreme

99. *Id.*
100. *Id.*
101. 452 N.W.2d 331 (N.D. 1990).
102. Heinen v. Heinen, 452 N.W.2d 331 (N.D. 1990).
103. *Heinen*, 452 N.W.2d at 332.
104. *Id.*
105. *Id.* at 333.
106. *Id.*
107. *Heinen*, 452 N.W.2d at 333.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Heinen*, 452 N.W.2d at 333.

Court nevertheless recognized the uniqueness of the language provided in Ilene and Leo's stipulation.[112] Because the stipulation specifically stated the procedure to be used in determining the custody arrangement, the Court concluded that it operated as a waiver of the need to establish a significant change of circumstances.[113] Reviewing the findings of the trial court, the North Dakota Supreme Court agreed that the best interest factors favored placing the children with Leo during the school term.[114]

The judgment of the trial court was affirmed.[115]

CIVIL PROCEDURE

HARMON V. MERCY HOSPITAL

The issue in *Harmon v. Mercy Hospital*[116] was whether the district court erred in granting a request for production of documents under Rule 27 of the North Dakota Rules of Civil Procedure prior to commencement of a court action.[117] This case centers around an employment dispute between Mercy Hospital in Williston and a nurse, Betty Harmon.[118] Harmon was put on probation at the hospital because of a dispute with her supervisors.[119] Harmon wanted to review her personnel file with her attorney, but hospital policy would not allow the review.[120] Harmon then made a request for production of her personnel file pursuant to Rule 27

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112. *Id.* at 334-335. *See* Sjol v. Sjol, 76 N.D. 336, 35 N.W.2d 797 (1949) (the court has recognized the change of circumstances concept since 1949).

113. *Heinen*, 452 N.W.2d at 335.

114. *Id.* at 335-337.

115. *Id.* at 337.

116. 460 N.W.2d 404 (N.D. 1990).

117. Harmon v. Mercy Hosp., 460 N.W.2d 404, 405-06 (N.D. 1990). Rule 27 provides in pertinent part:

> (a) Before Action.
>
> (1) *Petition.* A person who desires to perpetuate testimony regarding any matter may file a verified petition in the district court of the county of the residence of any expected adverse party. The petition must be entitled in the name of the petitioner and show: (i) that the petitioner expects to be a party to an action but is presently unable to bring it or cause it to be brought, (ii) the subject matter of the expected action and the petitioner's interest therein, (iii) the facts the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, (iv) the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and (v) the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

N.D. R. CIV. P. 27(a)(1).

118. *Harmon*, 460 N.W.2d at 405.

119. *Id.*

120. *Id.* The hospital would only let her look at the file alone. *Id.*

of the North Dakota Rules of Civil Procedure.[121] The district court granted Harmon's request.[122]

The supreme court concluded that Rule 27 does not allow one to obtain production of documents for the sole purpose of acquiring facts for a complaint.[123] The court stated that Rule 27 is for obtaining important evidence that is in danger of being lost or concealed prior to commencement of an action.[124] The court found that Harmon did not show that the personnel file was in danger of being lost or altered, or that she could not file an adequate complaint without it.[125] Therefore, the supreme court reversed the district court order granting Harmon's Rule 27 request for production.[126]

COLLEGES AND UNIVERSITIES

HOM V. STATE

In *Hom v. State*,[127] the issue was whether Dickinson State University (DSU) acted within substantial compliance of provisions of an employment contract with Mildred Hom, a member of the DSU faculty.[128] In June, 1985, Hom received a twelve-month notice of termination of her employment contract with DSU.[129] The policy manual of the State Board of Higher Education, which was part of Hom's contract with DSU, established an expedited review process in cases where a faculty member's contract is not renewed.[130] Hom immediately requested written reasons for her

121. *Id.*
122. *Id.*
123. *Id.* at 406.
124. *Harmon*, 460 N.W.2d at 406 (citing Ash v. Cort, 512 F.2d 909, 911 (3rd Cir. 1975)). North Dakota had no case law interpreting Rule 27, so the court looked to cases interpreting Rule 27 of the federal rules. *Id.*
125. *Id.* at 407-08.
126. *Id.* at 408. In dissent, Justice Meschke presented the view that the test for Rule 27 should be whether pre-complaint discovery is required for the sake of justice. *Id.* at 411 (Meschke, J., dissenting). He pointed out that cases relied upon by the majority were inconsistent with the history and spirit of the Federal Rules of pre-trial discovery. *Id.* Further, Justice Meschke argued that this holding was inconsistent with the recent strengthening of Rule 11 sanctions requiring a reasonable investigation of the facts and law prior to filing pleadings. *Id.* at 410-11. See N.D. R. CIV. P. 11 (signature of attorney on a pleading certifies that the attorney filed it in good faith). In the interest of expediting justice, Meschke believed that Rule 27 should be construed broadly as a discovery device. *Harmon*, 460 N.W.2d at 410 (citing Sandmann v. Petron, 404 N.W. 2d 800 (Minn. 1987) (Yetka, J., dissenting)).
127. 459 N.W.2d 823 (N.D. 1990).
128. Hom v. State, 459 N.W.2d 823, 824 (N.D. 1990).
129. *Id.*
130. *Id.* Hom had seven days to request reasons for her termination. *Id.* DSU had seven days to reply. *Id.* Home then had 15 days to request a reconsideration to which DSU had 15 days to respond. *Id.* Hom had 60 days from receipt of her termination notice to request a hearing by the special review committee. *Id.*

termination, to which DSU did not respond for seven months.[131] The district court found that DSU had acted within substantial compliance of its employment contract with Hom and dismissed her breach of contract action.[132]

The supreme court ruled that the long delay by DSU in reconciling Hom's termination prejudiced her.[133] The court noted that according to the substantial compliance doctrine, a college does not have to follow the termination regulations to the letter.[134] The court found that the reason for the regulations was to quickly conclude termination disputes and give the employee enough time to find other employment.[135] According to the court, DSU's seven-month delay constituted more than just a "trifling departure" from the terms of the contract, and it impaired her ability to make a timely decision on future employment.[136] Therefore, the supreme court reversed the district court's dismissal and remanded for determination of Hom's damages.[137]

CONTINUANCE

STATE V. KUNKEL

In *State v. Kunkel*,[138] the issue was whether a defendant should be allowed a continuance when an important witness completely changes his testimony at the time of the trial.[139] Werner Kunkel was arrested for driving while his license was suspended.[140] At the time of the arrest, his car was parked and he was standing at the side of the car with another person.[141] The arresting officers had not seen the men get out of the car, but they thought they had seen Werner driving earlier.[142] Initially the other person, Jeff Myhro, claimed that he was the driver of the car.[143] On the date of trial, Kerner's attorney learned for the first time that Myhro had completely reversed his earlier testimony

131. *Id.*
132. *Id.*
133. *Id.* at 825.
134. *Hom*, 459 N.W.2d at 824. In Stensrud v. Mayville State College, 368 N.W.2d 519 (N.D. 1985), in which a college president gave oral rather than written reasons for termination of a faculty member, the court first adopted the substantial compliance doctrine. *Hom*, 459 N.W.2d at 824.
135. *Id.* at 825.
136. *Id.* at 825-26.
137. *Id.* at 827.
138. 452 N.W.2d 337 (N.D. 1990).
139. State v. Kunkel, 452 N.W.2d 337 (N.D. 1990).
140. *Id.* at 338.
141. *Id.*
142. *Id.*
143. *Id.*

and was going to deny driving.[144] Because of surprise and not being prepared for this development, Kerner's attorney requested a continuance from the trial judge.[145] The trial judge refused the continuance, and Werner appealed.[146]

When a defendant's "key" witness totally reverses his testimony during trial, he should be allowed a certain period to inquire into this change and to prepare to impeach the witness.[147] The supreme court distinguished this situation from the situation where a witness insignificantly changes his testimony.[148] The change in this case was not insignificant, as Myhro's testimony went from "exculpating" Kunkel to "incriminating" him.[149] This was made even more tenuous by the fact that the state decided to call Myhro as a witness.[150] The supreme court also found that there was no evidence to indicate that Kunkel had asked for other continuances or was ill prepared.[151] The supreme court held that the trial court had abused its discretion by not allowing Kunkel a continuance.[152] The case was reversed and remanded.[153]

CONTRACTS

HEUPEL, INC. V. SCHUCH

In *Heupel, Inc. v. Schuch*,[154] the issue was whether an earnest-money agreement was ambiguous so as to allow extrinsic evidence to determine the intent of the parties.[155] In January of 1985, Rueben Heupel executed an agreement to purchase property from Schuch for $25,000.[156] Schuch, who was a realtor, prepared the agreement and required $3,000 in earnest money.[157] One of the conditions of the sale was that the property would be zoned agricultural (allowing 1 to 2 horses and pets), but no feedlot or nui-

144. *Kunkel*, 452 N.W.2d at 338.
145. *Id.*
146. *Id.* at 338-39. Subsequently the state called Myhro as a witness, and Werner was convicted. *Id.*
147. *See* Arrant v. Wainwright, 468 F.2d 677 (5th Cir. 1972) ("where key witness changed her testimony from incriminating defendant to exculpating him, state was entitled to a reasonable delay in trial so that it could investigate the change in testimony and prepare a case for impeachment").
148. *Kunkel*, 452 N.W.2d at 339.
149. *Id.*
150. *Id.* at 340.
151. *Id.* Also, there was no evidence that the continuance would burden the court. *Id.*
152. *Kunkel*, 452 N.W.2d at 340.
153. *Id.*
154. 453 N.W.2d 776 (N.D. 1990).
155. Heupel, Inc. v. Schuch, 453 N.W.2d 776, 777 (N.D. 1990).
156. *Id.*
157. *Id.*

sance would be allowed.[158] Heupel intended to use the property for 4-H animals, and Schuch reassured him that it would be okay.[159] However, after a request by Heupel to the Mandan City Council, it was determined that because of a Mandan City ordinance, only a maximum of three horses would be allowed.[160] This was unacceptable to Heupel, and he requested return of his earnest money.[161] After Schuch's refusal, Heupel initiated an action for recission of the agreement.[162] The trial court found that the contract was ambiguous and allowed extrinsic evidence to determine the intent of the parties.[163] The trial court found for Heupel and Schuch appealed.[164]

A contract is ambiguous when rational arguments support different meanings.[165] The ambiguities in this contract referred to the term "pet" and whether "no feedlot or nuisance" referred to the Mandan ordinance.[166] The supreme court first looked at the relevant contract statutes to be applied in this case.[167] They then determined what the popular definition of pet would be.[168] They concluded that pet had a broader meaning than simply dogs and cats, as Schuch had argued.[169] The court also determined that the Mandan ordinance created an inconsistency in the agreement.[170] Because of these inconsistencies, the court allowed extrinsic evidence.[171] The court then determined that it was not clearly erroneous for the trial court to have resolved this conflict in favor of Heupel and against the maker of the agreement.[172] The supreme court affirmed the trial court's decision.[173]

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158. *Heupel*, 453 N.W.2d at 777.

159. *Id.*

160. *Id.* The ordinance provides that it is a nuisance to keep chickens, swine, rabbits, or cows in the city limits. MANDAN, N.D., CITY ORDINANCE § 13-01-05.

161. *Heupel*, 453 N.W.2d at 777.

162. *Id.*

163. *Id.* When a contract is ambiguous, North Dakota law requires that the contract be interpreted more strongly against the person who caused the ambiguity. *Id. See* N.D. CENT. CODE § 9-07-19 (1987) (there is a presumption that the cause of an uncertainty in a contract was caused by the party that made it).

164. *Heupel*, 453 N.W.2d at 777.

165. *Id.* (citing National Bank of Harvey v. International Harvestor Co., 421 N.W.2d 799, 801 (N.D. 1988)).

166. *Id.*

167. *Id. See* N.D. CENT. CODE § 9-07-06 (1987) (contract construed as a whole giving effect to all provisions); N.D. CENT. CODE §§ 9-07-02, 04 (1987) (intent ascertained from only the writing if possible); N.D. CENT. CODE § 9-07-09 (1987) (ordinary meaning usually given terms in a contract).

168. *Heupel*, 453 N.W.2d at 778. The court used the *Webster Dictionary* meaning for the word pet. *Id.*

169. *Id.*

170. *Id.* City law prohibits horses, while the contract allowed 1 or 2 horses. *Id.*

171. *Id.*

172. *Id. See supra* note 163 and accompanying text.

173. *Heupel*, 453 N.W.2d at 778.

COUNTIES

MILES HOMES V. CITY OF WESTHOPE

In *Miles Homes v. City of Westhope*,[174] the first issue was whether a county auditor has a duty to search receipts supplied by the county treasurer for a possible new address for mailing of notice of expiration of redemption to a delinquent taxpayer.[175] The second issue was whether the city and county were immune because this action was a discretionary function.[176]

In February of 1980, Barry and Tamara Deschamp gave Insilico a mortgage to secure a $46,000 debt on a lot in Westhope.[177] This mortgage was recorded, and Insilico listed his address as "4500 Lyndale Ave. North, Minneapolis, MN . . . ."[178] The taxes for 1980-82 were not paid on the property.[179] The period of redemption (5 years) ran for each year, and at the end of each redemption period, the Bottineau County Auditor sent a notice that the period of redemption had run.[180] In each of the three years, the notice was sent to Insilico's old address.[181] In 1985, when the first notice was sent, Insilico paid the delinquent taxes and his new address appeared on the check used to pay the taxes.[182] Each year the county treasurer mailed a receipt to Insilico at his new address, but failed to list the new address on the receipt or supply a receipt to the auditor.[183] Insilico did not receive the notice in 1987, when the redemption period had run for the 1982 taxes, because the post office's "move order" had expired.[184] The county obtained title to the property through a tax deed.[185] In February 1989, Insilico brought an action against the county, alleging negligence on the part of the county auditor in not discovering his new address.[186] Summary judgment was granted by the trial court to the county.[187]

Section 57-28-04 of the North Dakota Century Code requires that notice of expiration of period of redemption be sent by the

174. 458 N.W.2d 321 (N.D.1990).
175. Miles Homes v. City of Westhope, 458 N.W.2d 321 (N.D. 1990).
176. *Id.* at 325-327.
177. *Id.* at 322.
178. *Id.*
179. *Miles Homes*, 458 N.W.2d at 322.
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Miles Homes*, 458 N.W.2d at 322.
185. *Id.*
186. *Id.*
187. *Id.* at 323.

auditor to the address furnished by the register of deeds.[188] The trial court determined that the auditor had satisfied that duty and was not negligent.[189] However, Insilico claimed that under North Dakota Century Code section 57-20-08, the county treasurer was required to supply the auditor with a receipt that listed his new address, and the auditor had a duty to search those receipts for a new address.[190] The supreme court held that, in light of *Mullane v. Central Hanover Bank and Trust Co.*, the auditor had a duty to search the tax payment receipts furnished by the county treasurer.[191]

The supreme court then had to determine if the acts of these public officials constituted a discretionary function, thus immune under North Dakota Century Code section 32-12.1-03.[192] The court determined that the requirements of North Dakota Century Code section 57-20-08 were mandatory and not discretionary.[193] In this case the county treasurer had not supplied these receipts to the auditor.[194] The court reversed the summary judgment and remanded for trial.[195]

COURTS

IN RE ESTATE OF RIDL

In *In re Estate of Ridl*,[196] the North Dakota Supreme Court held that a county court, under its implied powers as a probate court, had jurisdiction to decide matters of malfeasance, malpractice, and breach of fiduciary duty on the part of a personal representative.[197]

Robert Baird, an attorney, was appointed personal representative of William Ridl's estate after Ridl's death in 1983.[198] In February of 1988, Kenneth Ridl, an "interested person" of the Ridl

188. *Id.* *See* N.D. CENT. CODE § 57-28-04 (1983).
189. *Miles Homes*, 458 N.W.2d at 323. The trial court stated that nothing in section 57-28-04 requires the auditor to go beyond the mandates of the statute. *Id.*
190. *Id.* at 324.
191. *Miles Homes*, 458 N.W.2d at 324; Mullane v. Hanover Bank and Trust Co., 339 U.S. 306 (1950). When an action will affect an interest in property, "a state must provide 'notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection.'" *Mullane*, 339 U.S. at 314 (citation omitted).
192. *Miles Homes*, 458 N.W.2d at 325. *See* N.D. CENT CODE § 32-12.1-03(3)(c) (a discretionary act by a public employee is an exception to liability of a political subdivision).
193. *Miles Homes*, 458 N.W.2d at 326.
194. *Id.*
195. *Id.*
196. 455 N.W.2d 188 (N.D. 1990).
197. *In re* Estate of Ridl, 455 N.W.2d 188 (N.D. 1990).
198. *Id.* at 189.

estate, sought an order directing Baird to file a final accounting.[199] Baird filed his final accounting and petition for settlement and confirmation in March of 1988.[200] Kenneth Ridl objected to the final accounting, alleging that Baird improperly filed and prepared tax returns for the estate, paid himself unreasonable fees, and caused overdrafts against estate accounts.[201] The county court found that Baird breached his fiduciary duty by mismanaging the estate and consequently removed him as personal representative and attorney, reduced his attorney fees, and ordered him to pay present and future losses to the estate.[202] Baird appealed, contending that the county court lacked subject matter jurisdiction to decide the issue of breach of fiduciary duty.[203]

Looking to Title 30.1 of the North Dakota Century Code, the North Dakota Supreme Court examined the grant of exclusive probate jurisdiction to county courts, and its relationship to the powers, duties and liabilities of the personal representative.[204] The court held that, in addition to the county court's authority to review the personal representative's actions and compensation, the statutory scheme also gives the county court jurisdiction to hold the personal representative liable for losses to the estate caused by a breach of fiduciary duty.[205] Allowing the county court to decide such issues facilitates the probate code's stated purpose promoting speedy and efficient distribution of the estate.[206]

The North Dakota Supreme Court also reviewed the trial court's order requiring Baird to pay $9,605.85 in present losses and $36,594.00 in future losses to the estate.[207] The court concluded that although the county court correctly charged Baird for present losses attributable to lost interest, overdrafts, and faulty tax returns, the charge for $36,594.00 in future losses was in error.[208] A claim against the personal representative for losses to the estate cannot accrue until actual losses have been incurred.[209]

The judgment was affirmed in part, reversed in part and

199. *Id.* at 189-190. *See* N.D. CENT. CODE § 30.1-01-06(21) (defining "interested persons" as heirs, devisees, children, spouses, creditors, beneficiaries, and other persons having a property right in or claim against the decedent's estate).
200. *Estate of Ridl*, 455 N.W.2d at 190.
201. *Id.*
202. *Estate of Ridl*, 455 N.W.2d at 190.
203. *Id.* at 190.
204. *Id.* at 190-192.
205. *Id.* at 192-193.
206. *Estate of Ridl*, 455 N.W.2d at 192-193.
207. *Id.* at 193-195.
208. *Id.* at 194-195. The court also upheld the county court's reduction of Baird's attorney fees from $35,404.46 to $4,000. *Id.* at 193-194.
209. *Estate of Ridl*, 455 N.W.2d at 195.

remanded.[210]

ODDEN V. O'KEEFE

In *Odden v. O'Keefe*,[211] the North Dakota Supreme Court held that a blanket moratorium on civil jury trials for budgetary purposes violated a plaintiff's constitutional right to a jury trial.[212]

Bernard Odden's personal injury and wrongful death action was scheduled for a jury trial in the Northeast Judicial District on January 29, 1990.[213] In December of 1989, Odden was informed that, due to budget cuts, a moratorium on all civil jury trials had been ordered.[214] Odden then petitioned the North Dakota Supreme Court for a supervisory writ requiring the judge to schedule his civil action for a jury trial.[215]

The issue facing the North Dakota Supreme Court was whether the moratorium on all civil jury trials for a period of eighteen months was constitutional under the state constitution.[216] Noting the similarity between state and federal constitutional provisions guaranteeing the right to a jury trial in civil cases, the court looked to a recent Ninth Circuit case on point for guidance.[217] Following the rationale that the availability of constitutional rights should not be subject to budgetary shortfalls or political judgments, the court concluded that the blanket moratorium was a violation of Odden's state constitutional right to a civil jury trial.[218]

Believing the district court would grant the appropriate remedy to Odden in light of its decision, the North Dakota Supreme Court denied Odden's petition for a supervisory writ.[219]

CRIMINAL LAW

STATE V. FASCHING

In *State v. Fasching*,[220] the issue was whether testimonial and nontestimonial evidence should be suppressed when a Miranda

210. *Id.* at 195.
211. 450 N.W.2d 707 (N.D. 1990).
212. Odden v. O'Keefe, 450 N.W.2d 707 (N.D. 1990).
213. *Id.* at 707.
214. *Id.*
215. *Id.* The court's authority to issue a supervisory writ comes from article 6 section 2 of the North Dakota Constitution. *Id.* at 708.
216. *Odden*, 450 N.W.2d at 708.
217. *Id.* at 708-709. *See* Amster v. United States District Court, 792 F.2d 1423 (9th Cir. 1986) (a blanket moratorium violates the seventh amendment to the United States Constitution).
218. *Id.* at 710.
219. *Id.*
220. 453 N.W.2d 761 (N.D. 1990).

warning is not given in a custodial interrogation.[221] On January 1, 1989, Julie Fasching's car was stopped by a Morton County deputy sheriff.[222] The officer suspected Fasching of driving under the influence of alcohol.[223] At the time of the stop, Fasching was accompanied by her attorney, Debra Holter.[224] After Fasching was seated in the patrol car, Holter asked that she be allowed to advise her client.[225] The officer refused the request and preceded to interrogate and test Fasching for alcohol consumption.[226] Subsequently Fasching was arrested and then given her Miranda warnings.[227] Fasching claimed that because of this custodial interrogation, she should have been given her Miranda warnings at the time the interrogation began.[228] She claimed that because of this failure, all evidence gained after she was placed in the patrol car should be suppressed.[229] The trial court agreed and the state appealed.[230]

The North Dakota Supreme Court reiterated the basis for the Miranda warning by citing a passage from Miranda.[231] A custodial interrogation without the Miranda warning requires that all responses be suppressed as evidence.[232] However, this fifth amendment protection does not apply to nontestimonial testing such as blood tests, fingerprints, etc.[233] Even though the state did not claim that this was a noncustodial interrogation, the supreme court showed the difference between custodial interrogation and questioning as a part of a "general on-the-scene" investigation.[234] A routine traffic stop and "general on-the-scene" investigation does not require the Miranda warnings.[235] The trial court found that a person has the right to an attorney at a "sustained and intimidating" questioning, and the supreme court did not disturb the

221. State v. Fasching, 452 N.W.2d 761, 761 (N.D. 1990).
222. *Id.*
223. *Id.* at 761-62.
224. *Id.* at 762.
225. *Fasching*, 453 N.W.2d at 762.
226. *Id.*
227. *Id.*
228. *Id.* Fasching also claimed that the officer did not have probable cause for the stop. *Id.* Because of this illegal arrest all the evidence should have been suppressed. *Id.* Fasching also claimed that she was denied her right to counsel. *Id.*
229. *Id.*
230. *Fasching*, 453 N.W.2d at 762.
231. *Id.* at 762-63.
232. *Fasching*, 453 N.W.2d at 763.
233. *Id.* (citing Schmerber v. California, 384 U.S. 757, 764-65 (1966)) (fifth amendment does not protect an accused from "compulsion as to the source of 'real or physical evidence. . . .").
234. *Fasching*, 453 N.W.2d at 763, 764.
235. *Id.* at 763 (relying on Berkemer v. McCarty, 468 U.S. 420 (1984)).

decision that the trial court made as to this issue.[236] However, the supreme court did find that not all aspects of this stop were testimonial.[237] The answers that Fasching gave to questioning were correctly suppressed, but the evidence derived from field testing should not have been suppressed.[238]

Fasching also argued that this arrest was made without probable cause.[239] However, the trial court failed to indicate whether the officer had reasonable suspicion or probable cause to stop her.[240] Since the trial court was silent on this issue, the supreme court could not make a determination. However, this avenue was still available to her on remand.[241] The court reversed and remanded for further determinations.[242]

STATE V. HOGIE

In *State v. Hogie*,[243] the issue was whether possession of a stolen car by a defendant charged with theft provided the sufficient corroboration to the testimony of his accomplices for a conviction.[244] In April of 1987, Robert Hogie and two friends stole a car and drove it to Kansas, where they were apprehended.[245] Hogie stole the keys used to take the car, and he signed a consent-to-search form when they were stopped in Kansas.[246] Hogie was charged with theft of an automobile.[247] The state used Hogie's two accomplices as witnesses in his trial, and called the sheriff from Kansas to corroborate their testimony.[248] The jury found Hogie guilty of theft of a vehicle.[249]

The supreme court held that the corroborating testimony in this case was sufficient to support Hogie's conviction of theft.[250] The court noted that North Dakota does not allow a conviction of a crime by the uncorroborated testimony of the defendant's accom-

236. *Fasching*, 453 N.W.2d at 764.
237. *Id.*
238. *Id.*
239. *Id.* at 764, 765.
240. *Fasching*, 453 N.W.2d at 765.
241. *Id.*
242. *Id.*
243. 454 N.W.2d 501 (N.D. 1990).
244. State v. Hogie, 454 N.W.2d 501, 502 (N.D. 1990).
245. *Id.*
246. *Id.*
247. *Id.*
248. *Hogie*, 454 N.W.2d at 502-03.
249. *Id.* at 503. The state then moved for a revocation of Hogie's probation on a previous burglary conviction. *Id.* At least partly based on his theft of a vehicle conviction, Hogie's probation was revoked, and the trial court gave Hogie a concurrent sentence. *Id.* Hogie appealed the theft of a vehicle conviction and the probation revocation. *Id.*
250. *Id.* at 505.

plices.[251] The court concluded that the state need not corroborate every fact testified to by an accomplice.[252] The corroborating testimony must only connect the defendant with the crime's commission.[253] The corroboration does not, in itself, need to be enough evidence for a conviction.[254] The court stated than an inference of guilt was established when Hogie was found in possession of a recently stolen car.[255] The court reasoned that this possession corroborated the testimony of Hogie's accomplices.[256] Thus, the court upheld the jury's conviction of Hogie for theft of a vehicle.[257]

STATE V. PICKAR

In *State v. Pickar*,[258] the issue was whether a confession given to law officers was involuntary, thus requiring suppression of the statement.[259] Pickar was involved in an automobile accident in which two women were killed.[260] After the accident, Pickar denied that he was the driver of the vehicle.[261] The placement of his injuries suggested to investigators that he may have been the driver.[262] Subsequently Pickar consented to questioning.[263] The questioning lasted about an hour and forty-five minutes, and during the last fifteen he admitted to driving the car.[264] Pickar was arrested and charged with two counts of manslaughter.[265] He moved the district court for suppression of the confession because it was involuntary.[266] The district court granted the motion and the state appealed.[267]

In determining whether a confession is voluntary, a court

251. *Id.* at 503. *See* N.D. CENT CODE § 29-21-14 (1974) (accomplice testimony must be corroborated).
252. *Hogie*, 454 N.W.2d at 503.
253. *Id.*
254. *Id.*
255. *Id.* at 504.
256. *Hogie*, 454 N.W.2d at 505.
257. *Id.* The court also upheld Hogie's probation revocation. *Id.* In dissent, Justice VandeWalle argued that the majority put too much weight on Hogie's possession of the automobile. *Id.* at 506 (VandeWalle J., dissenting). VandeWalle reasoned that the evidence presented against Hogie was too remote and involved too much speculation as to his guilt. *Id.* at 507. VandeWalle warned that the corroboration requirement protects defendants from convictions based on "coincidence and speculation". *Id.*
258. 453 N.W.2d 783 (N.D. 1990).
259. State v. Pickar, 453 N.W.2d 783, 784 (N.D. 1990).
260. *Id.* at 784.
261. *Id.*
262. *Id.* at 784-85.
263. *Pickar*, 453 N.W.2d at 785.
264. *Id.*
265. *Id.* at 784, 785.
266. *Id.* at 785.
267. *Id.*

must determine if it is a decision that the defendant made freely without coercion.[268] This is done by considering the "totality of the circumstances surrounding the confession."[269] A court must consider the characteristics and the condition of the accused, and also the surroundings in which the confession was given.[270] The supreme court first looked at the character of the accused in the context of this case.[271] The trial court determined that Pickar was in such an emotional state that his statement was involuntarily given.[272] The supreme court also looked at the police conduct in this case.[273] In this case, considering the length and the surroundings of his interrogation, the trial court found that Pickar was susceptible to police coercion because of his emotional state.[274] Also, the trial court determined that the police used psychological pressure to induce this confession.[275] The supreme court reviewed all the evidence of the case and determined that it was sufficient to support the trial court's finding of involuntariness.[276] Since voluntariness was a question of fact to which the trial court must be given great deference, they affirmed the trial court's judgment.[277]

DIVORCE

HEGGEN V. HEGGEN

In *Heggen v. Heggen*,[278] Patricia Heggen appealed from a trial court's division of property and award of child support in her divorce action.[279] After 22 years of marriage, Patricia and John Heggen were divorced, with custody of the two youngest children awarded to Patricia.[280] In the divorce judgment, John was

268. *Pickar*, 453 N.W.2d at 785.
269. *Id.*
270. *Id.*
271. *Id.* at 785-86. The factors considered include sex and race of suspect, education, physical and mental condition, prior experience with the police. *Id.* at 785. *See* 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 6.2, 448-49 (1984).
272. *Pickar*, 453 N.W.2d at 785. To support this finding the trial court relied on an affidavit that stated Pickar was so emotional that he might commit suicide. *Id.* The state contended that this was Pickar's emotional state of mind after the interrogation and not at the time of confession. *Id.*
273. *Id.* at 786-87.
274. *Id.* at 786.
275. *Id.* Coercive police conduct is determined by the length and conditions of the custody, the police attitude towards defendant, and the pressures exerted. *Id.* (citing Colorado v. Spring, 479 U.S. 564 (1987). There was evidence that Pickar was urged to confess in order to relieve his conscience and the anguish to the families of the women killed in the accident. *Id.* at 787.
276. *Pickar*, 453 N.W.2d at 787.
277. *Id.*
278. 452 N.W.2d 96 (N.D. 1990).
279. Heggen v. Heggen, 452 N.W.2d 96, 98 (N.D. 1990).
280. *Heggen*, 452 N.W.2d at 98.

ordered to pay $240 per month for each child.[281] The marital estate was divided, leaving John with 55 percent of the net estate and Patricia with 45 percent.[282] Patricia appealed both the property division and child support award.[283] John cross-appealed, challenging the custody determination.[284]

Patricia contended that the trial court erred in its valuation of certain business property.[285] The trial court ascribed a $40,000 value to the Heggen Equipment real estate and buildings, based on the testimony of John's banker that the real estate and buildings were only worth their liquidation value.[286] The North Dakota Supreme Court found that unless there is evidence of distressed interest factors in their determination conditions, fair market value is the proper method of valuing property in a divorce.[287] Because no evidence was offered to show distressed conditions, the court held that the trial court's determination was clearly erroneous.[288]

Additionally, Patricia challenged the trial court's valuation of the Heggen Equipment Corporation.[289] She contended that the trial court valued the corporation on a net basis, and then proceeded to offset corporate debt, resulting in the double deduction of debt.[290] The court held that the deduction of corporate debts from the net value of the corporation was clear error because liabilities had already been deducted.[291]

John, in his cross-appeal, challenged the trial court's award of custody of the two youngest children to Patricia, contending that the court erroneously awarded custody solely because Patricia was the primary caretaker.[292] Reviewing the trial court's findings, the North Dakota Supreme Court concluded that the trial court correctly weighed the best interest factors in their determination.[293] Although the primary caretaker is not presumptively granted

281. *Id.*
282. *Id.*
283. *Id.* at 97.
284. *Heggen*, 452 N.W.2d at 98.
285. *Id.* at 99.
286. *Id.*
287. *Id.*
288. *Heggen*, 452 N.W.2d at 99.
289. *Id.* at 100.
290. *Id.*
291. *Id.*
292. *Heggen*, 452 N.W.2d at 101. Patricia also challenged, as too low, the amount of child support John was ordered to pay. *Id.* The court found that although the award was far from generous, it was not clearly erroneous. *Id.*
293. *Id.* at 101-102. *See* N.D. CENT. CODE § 14-09-06.2 (Supp. 1989) (the court is to consider certain factors when deciding what is in the best interest of the child in child custody disputes).

favored status, the court may take that factor into consideration, along with the statutory best interest factors when determining child custody.[294]

The custody and child support awards were affirmed, and the property division was reversed and remanded.[295]

THORLAKSEN V. THORLAKSEN

In *Thorlaksen v. Thorlaksen*,[296] Gregory Thorlaksen appealed a district court decree that awarded Robin Thorlaksen custody of three of the parties' children, ordered him to pay $600 per month child support, and found him in contempt of court for child support arrearages.[297] The parties were divorced in August of 1987, but because Robin Thorlaksen was not represented by counsel in the settlement, she sought relief from the decree a month later.[298] After prolonged proceedings, the district court determined the issues of child custody, support and visitation two years later, ruling that Robin would have primary possession of the children during the school year and Greg during the summer.[299] Additionally, the court ordered Greg to pay $600 per month in child support.[300] Greg subsequently fell behind in his payments and moved the court to reconsider the child support amounts.[301] The trial court, in turn, modified Greg's child support obligation so he would not be obligated to pay during the months when the children lived with him, but proceeded to find him in contempt of court for child support arrearages.[302] Greg appealed, challenging the court's determination of custody, child support and contempt.[303]

The North Dakota Supreme Court addressed Greg's argument that the district court used improper gender bias in placing the children with their mother.[304] Reviewing the findings of the district court, the court concluded that comments made by the district court regarding the younger children's need to be with their

294. *Heggen*, 452 N.W.2d at 101-102.
295. *Id.* at 102.
296. 453 N.W.2d 770 (N.D. 1990).
297. Thorlaksen v. Thorlaksen, 453 N.W.2d 770 (N.D. 1990).
298. *Thorlaksen*, 453 N.W.2d at 771.
299. *Id.* at 772.
300. *Id.*
301. *Id.*
302. *Thorlaksen*, 453 N.W.2d at 772.
303. *Id.*
304. *Id.* at 774. In challenging the custody determination, Greg also raised issues of Robin's marriage during the custody proceedings and the use by the court of an addendum to a home studies report that was not entered into evidence. *Id.* at 772-773. The court rejected Greg's efforts to disparage Robin and found use of the addendum to be harmless error. *Id.* at 772-774.

mother were not improper.[305] While an assumption by a trial court that a mother should always be selected over a father to have custody of small children would be improper, the North Dakota Supreme Court found that the district court had fairly weighed the fitness of both parents before making their custody determination.[306]

As to child support, the North Dakota Supreme Court held that an award of child support below the guidelines cannot be determined to be too high without some showing that the obligor cannot pay or that the obligee does not need it all.[307] The court found no such showing and concluded that the award of $600 was not clearly erroneous.[308]

Finally, the court considered Greg's contention that the district court's contempt ruling was made without fair procedure, notice or hearing.[309] While the trial court may punish contempt occurring in view of the court without notice and hearing, when the contempt finding is for nonperformance of a judicial decree outside of the courtroom, notice and hearing are required before punishment can be imposed.[310] The court concluded that the district court's contempt finding was for the nonpayment of child support, not for behavior that occurred within the view of the court, and held that the district court did not properly adhere to rules of procedure in the contempt finding.[311] Nevertheless, the child support payments past due could not be retroactively reduced.[312]

The finding of contempt was reversed, and the custody and support determinations were affirmed.[313]

RAMSDELL V. RAMSDELL

In *Ramsdell v. Ramsdell*,[314] Shirley Ramsdell appealed a trial court order terminating her alimony upon remarriage.[315] Shirley and Gene Ramsdell were divorced in 1985 after 14 years of marriage.[316] Pursuant to a stipulation entered into by the parties,

305. *Thorlaksen*, 453 N.W.2d at 774.
306. *Id.*
307. *Id.* at 774-775.
308. *Id.*
309. *Thorlaksen*, 453 N.W.2d at 775.
310. *Id.*
311. *Id.*
312. *Id.*
313. *Thorlaksen*, 453 N.W.2d at 776.
314. 454 N.W.2d 522 (N.D. 1990).
315. Ramsdell v. Ramsdell, 454 N.W.2d 522, 523 (N.D. 1990).
316. *Ramsdell*, 454 N.W.2d at 523.

Gene Ramsdell paid $300 per month to Shirley.[317] The stipulation did not signify whether the payments were intended as property or support.[318] In 1988, Shirley sued Gene for delinquent alimony and for failing to deliver certain property pursuant to the decree.[319] Gene contended that his alimony payments to Shirley should be terminated because of her remarriage.[320] Shirley argued that the alimony was intended to be a permanent property settlement, not spousal support.[321] The trial court, viewing the alimony payments as spousal support, terminated Gene's $300 obligation to Shirley because of her remarriage.[322] Shirley appealed.[323]

Reviewing the findings of the trial court, the North Dakota Supreme Court concluded that sufficient evidence supported the determination that Shirley's alimony be considered support rather than property.[324] Although the word "alimony" is ambiguous, the fact that the alimony clause in the stipulation was separate from the property division clause, and that Shirley received a large portion of marital assets compared to Gene's assumption of marital debts, substantiated the determination that her alimony was intended as support and not property.[325]

Shirley Ramsdell alternatively argued that her remarriage did not require termination of her support.[326] She contended that her permanent disability from polio and economic conditions of her new marriage justified continuation.[327] The North Dakota Supreme Court reiterated its position that remarriage will ordinarily call for a termination of support unless extraordinary circumstances exist to justify continuance.[328] The court held that although a disability may, in some cases, constitute an extraordinary circumstance, it will not automatically justify continuance of support.[329] Insufficient evidence existed to show that Shirley's disability and economic conditions of her new marriage constituted extraordinary circumstances.[330] The court concluded that remar-

317. *Id.*
318. *Id.* at 524.
319. *Id.* at 523.
320. *Ramsdell*, 454 N.W.2d at 523.
321. *Id.*
322. *Id.*
323. *Id.* at 523.
324. *Ramsdell*, 454 N.W.2d at 524.
325. *Id.*
326. *Id.*
327. *Id.*
328. *Ramsdell*, 454 N.W.2d at 524-525.
329. *Id.* at 525.
330. *Id.*

riage was reason enough to terminate her support.[331]

The judgment of the trial court was affirmed.[332]

DRIVING WHILE INTOXICATED

KEEPSEAGLE V. BACKES

In *Keepseagle v. Backes*,[333] the issue was whether the words "performance of a chemical test within two hours after driving . . . of a vehicle . . . ." from section 39-20-03.1 of the North Dakota Century Code require actual performance of a blood test or merely collection of the blood sample within the two hour period.[334] In May of 1989, Wayne Keepseagle was stopped for speeding south of Bismarck.[335] After performing the field sobriety tests, he was arrested for driving while under the influence of alcohol.[336] Fifty-five minutes after Keepseagle was stopped, a blood sample was taken from him.[337] The sample was tested four days later, and it contained a blood-alcohol concentration of 0.11 percent.[338] Keepseagle requested an administrative hearing to review the suspension of his drivers license.[339] The administrative hearing officer determined that Mr. Keepseagle was properly arrested and tested for blood-alcohol content, and the district court in Burleigh County affirmed.[340]

The supreme court held that section 39-20-03.1 of the North Dakota Century Code is satisfied if a blood sample is taken within two hours of driving a vehicle.[341] The sample does not have to be tested within the two-hour period.[342] The court noted that the only error complained of by Keepseagle was that his blood test was

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331. *Id.*
332. *Ramsdell*, 454 N.W.2d at 525.
333. 454 N.W.2d 312 (N.D. 1990).
334. Keepseagle v. Backes, 454 N.W.2d 312, 314-15 (N.D. 1990). *See* N.D. CENT. CODE § 39-20-03.1 (Supp. 1989) (drivers license suspended if a chemical test taken within two hours of a stop shows a blood-alcohol level greater than 0.01 percent).
335. *Keepseagle*, 454 N.W.2d at 313.
336. *Id.*
337. *Id.*
338. *Id.*
339. *Keepseagle*, 454 N.W.2d at 313.
340. *Id.* at 314.
341. *Id.* at 316.
342. *Id.* Section 39-20-03.1 of the North Dakota Century Code provides in pertinent part that:

> If a person submits to a test . . . and the test shows that person to have a blood alcohol concentration of at least ten one-hundredths 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, the following procedures apply: . . .

N.D. CENT CODE § 39-20-03.1 (Supp. 1989).

not performed within two hours of his stop.[343] The court recognized that similar statutes had been challenged, but that no one had previously questioned this issue.[344] Other cases have assumed only that a blood sample must be taken within the two hour period.[345] The court found this interpretation to be consistent with common sense.[346] Thus, the court affirmed the suspension of Keepseagle's license to drive.[347]

EVIDENCE

OBERLANDER V. OBERLANDER

In *Oberlander v. Oberlander*,[348] the issue was whether the district court erred in not allowing a witness to testify as an expert in psychology.[349] After a lengthy divorce proceeding centering on the issue of custody, Jack Oberlander was awarded physical custody, and Rebecca Oberlander was allowed reasonable visitation of the couple's three children.[350] At trial, a guardian ad litem for the children recommended joint physical custody.[351] The guardian ad litem based her opinion on the report of a psychologist who administered the Minnesota Multiphasic Personality Inventory (MMPI) on Rebecca and Jack.[352] A psychologist testifying as an expert witness for Jack opined that Rebecca should not receive primary custody of the children, and that they should be put in Jack's control.[353] Jack's expert also based her testimony on the MMPI test results.[354] Rebecca called her own expert witness to interpret the MMPI test results.[355] The district court ruled, however, that because Rebecca's expert was not a member of the American Psychological Association and did not have a North Dakota psychological license, he did not qualify as an expert witness.[356]

The supreme court held that Rebecca's witness qualified as an

343. *Keepseagle*, 454 N.W.2d at 316.
344. *Id.*
345. *Id.*
346. *Id.* at 315.
347. *Keepseagle*, 454 N.W.2d at 316.
348. 460 N.W.2d 400 (N.D. 1990).
349. Oberlander v. Oberlander, 460 N.W.2d 400, 402 (N.D. 1990).
350. *Id.* at 401.
351. *Id.*
352. *Id.*
353. *Oberlander*, 460 N.W.2d at 401-02.
354. *Id.*
355. *Id.* at 402.
356. *Id.*

expert in psychology and should have been allowed to testify.[357] Rule 702 of the North Dakota Rules of Evidence allows expert testimony, if specialized knowledge could aid in the understanding of the case.[358] The court determined that there is no license requirement in Rule 702.[359] The court stated that a witness can qualify as an expert solely through "knowledge, skill, experience, training or education."[360] Thus, the court reversed the part of the divorce decree awarding physical custody to Jack and remanded for a hearing at which time Rebecca's witness will be allowed to testify as a psychological expert.[361]

FAMILY LAW

SMITH V. SMITH

In *Smith v. Smith*,[362] the issue was whether the district court properly retained jurisdiction to (1) dissolve a marriage and (2) adjudicate the incidences of that marriage.[363] After 31 years of marriage, Milton Smith, a resident of Larimore, North Dakota, initiated a divorce action from Joan Smith, a resident of Verona, Pennsylvania, in the District Court for Grand Forks County.[364] Milton lived in various residences throughout and outside the United States due to the requirements of his job.[365] Throughout the time Milton worked away from home, Joan continued to live in a house purchased by the couple in Pennsylvania.[366] She was not a resident of North Dakota.[367] Milton moved to Larimore in 1986 and kept North Dakota residency throughout the pendency of this

357. *Oberlander*, 460 N.W.2d at 403. Rebecca's witness was licensed in Minnesota as a psychologist, had a master's degree in child development and family relations and guidance and counseling, had completed 2,000 hours of marriage and family counseling in order to receive clinical status with the American Association of Family Therapy and the Association of Marriage and Family Therapy, and had spent 25 years as a counselor. *Id.*

358. *Id.* at 402. *See* N.D. R. EVID. 702 (qualified expert may testify as to an opinion to aid the fact finder).

359. *Oberlander*, 460 N.W.2d at 402 (citing Collom v. Pierson, 411 N.W.2d 92, 95-96 (N.D. 1987)).

360. *Id.*

361. *Id.* at 403. Surrogate Justice Pederson agreed that the expert testimony should have been allowed, but he also felt the district court's findings of fact were clearly erroneous. *Id.* at 404 (Pederson, Surrogate J., concurring specially). He argued that the court should have retained jurisdiction to review the findings subsequent to the hearing upon remand. *Id.*

362. 459 N.W.2d 785 (N.D. 1990).

363. Smith v. Smith, 459 N.W.2d 785 (N.D. 1990).

364. *Id.* at 786-87. Milton and Joan were married in Pittsburgh, Pennsylvania in April of 1957. *Id.* at 786. Joan was served in April of 1988 in Pennsylvania. *Id.* at 787. In February 1989, Joan filed for divorce in Pennsylvania. *Id.*

365. *Id.* Milton was a mechanic for a company engaged in building airplanes. *Id.*

366. *Id.*

367. *Id.*

case.[368] Joan, in her answer filed in the divorce action, claimed that the district court did not have personal jurisdiction over her.[369] The district court found it did have jurisdiction over Mrs. Smith.[370] No appearance was made by Joan at the divorce trial.[371] The district court entered a decree of divorce dissolving the Smiths' marriage and distributing their marital property.[372]

The supreme court stated that according to the "divisible divorce" doctrine, there are different jurisdictional requirements for dissolving the marriage than for deciding issues of alimony, spousal support, property distribution, child support and child custody.[373] The supreme court stated that the action to dissolve a marriage is one *in rem*.[374] As long as Milton satisfied the residency requirements, the North Dakota District court properly terminated his marriage, regardless of the location of Joan's residence.[375] The supreme court upheld the dissolution of the divorce.

The supreme court set a different standard for adjudicating the incidences of the marriage by requiring *in personam* jurisdiction over both parties to the divorce.[376] The test for personal jurisdiction requires either the satisfaction of the "long-arm" provision contained in the North Dakota Rules of Civil Procedure over the nonresident, or an appearance in court by the nonresident without challenging the court's personal jurisdiction.[377] The court reasoned that personal jurisdiction could not be obtained over Joan by the district court, because she had insufficient contacts with North Dakota, and because she only appeared in court to contest its jurisdiction.[378] Therefore, the court affirmed the dissolution of the marriage and reversed the distribution of the incidences to the

368. *Id.*

369. *Smith*, 459 N.W.2d at 787.

370. *Id.* A hearing was held to determine the jurisdictional issue. *Id.* Joan appeared specially for this hearing to contest jurisdiction. *Id.*

371. *Id.*

372. *Id.*

373. *Id.* at 787, 788-89 (citing Hall v. Hall, 585 S.W.2d 384, 385 (Ky. 1979)).

374. *Smith*, 459 N.W.2d at 787-88. *See* Shaffer v. Heitner, 433 U.S. 186, 207 (1977) (*In rem* jurisdiction is "a customary elliptical way of referring to jurisdiction over the interests of a person in a thing").

375. *Smith*, 459 N.W.2d at 788 (citing Byzewski v. Byzewski, 429 N.W.2d 394, 397 (N.D. 1988)).

376. *Id.* at 788. The court stated that, "a court must have personal jurisdiction over a non-resident spouse in order to validly adjudicate matters of alimony or spousal support; the distribution or division of property; rights to child custody; and the award of child support." *Id.* at 788-89 (citations omitted).

377. *Id.* at 789. *See* N.D.R. Civ. P. 4(b)(2) (personal jurisdiction based on contacts with the state).

378. *Smith*, 459 N.W.2d at 789.

marriage.[379]

FRAUD

WEST V. CARLSON

In *West v. Carlson*,[380] the North Dakota Supreme Court held that restoration of status quo is a requirement for recission of a contract, and a seller has a duty to disclose material facts known to him which are not reasonably discoverable.[381]

Paul and Mary West, under a written agreement with Gary and Jean Carlson, exchanged 400 acres of their land in Cass County, North Dakota, for a lot owned by the Carlsons in Gallatin County, Montana.[382] Along with the lot in Montana, the Wests also received from the Carlsons $60,000 and an assignment of right, title, and interest in an agreement with Daniel Henderson, wherein Henderson made payments for the purchase of a house and adjoining lot.[383] A few months after the agreement was signed by the parties, Henderson moved out of the house and stopped making payments to the Wests because he learned that the septic system to the lot was not located on the same tract of land, the house was located on a property line, and the well had dried up.[384] Henderson sued both the Wests as assignees and the Carlsons.[385] Under an agreement between Henderson, Carlson, and West, the house and adjacent land were sold to another party.[386] The Wests then sued the Carlsons, seeking recission of the original exchange agreement because of fraud and failure of consideration, and alternatively sought damages for breach of contract and deceit.[387] The district court refused to rescind the contract because of the sale of the home and lot to another party prior to trial, but awarded monetary damages to the Wests.[388] The Carlsons appealed, and the Wests cross-appealed.[389]

In their cross-appeal, the Wests argued that the trial court erred in refusing to rescind the contract, because of the sale of the

379. *Id.*
380. 454 N.W.2d 307 (N.D. 1990).
381. West v. Carlson, 454 N.W.2d 307 (N.D. 1990).
382. *West*, 454 N.W.2d at 308.
383. *Id.*
384. *Id.* at 308-309.
385. *Id.* at 309.
386. *West*, 454 N.W.2d at 309.
387. *Id.*
388. *Id.*
389. *Id.*

house and lot to another party prior to trial.[390] They contended that by giving the Carlsons $60,000, the property, and the money from the sale of the house and lot, the Carlsons were restored.[391] The North Dakota Supreme Court determined that restoration of status quo was impossible, because the subject of the assignment had been sold to another party.[392] The court agreed that in order to rescind an agreement, the party seeking recission must restore the preceding status quo.[393]

The Carlsons contended on appeal that the trial court erred in awarding damages for fraud, because intent to deceive was not established at trial.[394] Reviewing the fraud statute, the court found that suppression of known material facts and making of false statements constituted actual fraud.[395] The court concluded that the facts and circumstances established actual fraud under the statute.[396]

The judgment of the trial court was affirmed.[397]

GUARDIAN AND WARD

KOPPERUD V. REILLY

In *Kopperud v. Reilly*,[398] a personal representative of an estate brought an action against a former conservator and the conservator's son to rescind a contract for the sale of decedent's farmland.[399] Lorraine Reilly was appointed conservator of Earl Raymond Johnston's financial affairs in 1979.[400] Eddie Kopperud, an attorney and personal representative under Johnston's will, helped obtain the conservatorship order and advised Lorraine on various transactions.[401] In 1984, Lorraine spoke with Kopperud regarding a proposed sale of 270 acres of Johnston's farmland to

390. *West*, 454 N.W.2d at 309.
391. *Id.*
392. *Id.*
393. *Id.*
394. *West*, 454 N.W.2d at 309.
395. *Id.* at 310. *See* N.D. CENT. CODE § 9-03-08 (1988) (acts committed that result in actual fraud). The finding of the trial court showed that the Carlsons failed to disclose material facts about the condition of the house and particulars of the agreement with Henderson, and that the Carlsons also made false statements regarding payments from Henderson. *West*, 454 N.W.2d at 310-311. The court rejected Carlsons' contention that their statement to West that Henderson would have no trouble making payments was an expression of opinion and, therefore, not fraudulent. *Id.* at 311.
396. *Id.*
397. *Id.* at 312.
398. 453 N.W.2d 598 (N.D. 1990).
399. Kopperud v. Reilly, 453 N.W.2d 598 (N.D. 1990).
400. *Kopperud*, 453 N.W.2d at 599.
401. *Id.*

her son, Daniel.[402] Kopperud reviewed the proposed contract for sale and advised Lorraine that the interest rate was too low and that an appraisal should be conducted prior to execution of the contract.[403] When Johnston passed away in 1986, his farmland was valued at $371,250, with a rental value that would have yielded the conservatorship $24,000 annually.[404] Instead, under the contract for deed with Daniel, the conservatorship would only receive $16,961 annually.[405] Learning this information, Kopperud, as personal representative of Johnston's estate, filed an action for recission of the contract for deed, alleging that Lorraine acted with a conflict of interest by selling the land to her son at an unfair price.[406] The county court rescinded the contract and Lorraine appealed.[407]

Lorraine first contended that the county court lacked jurisdiction to hear Kopperud's action for recission.[408] The North Dakota Supreme Court determined that the county court had jurisdiction to exercise incidental powers for effective adjudication of probate matters.[409] Because Kopperud's claim raised issues incidental to the county court's jurisdiction over Johnston's estate, the court concluded it had the authority to resolve the conflict of interest issue.[410]

Secondly, Lorraine argued that the trial court erred in denying them a jury trial.[411] The North Dakota Supreme Court found, based upon the language of the statute, that the right to a jury trial in a probate matter arises only in cases of a formal will dispute.[412] Because Johnston's will was not in dispute, the court concluded Lorraine had no right to a jury trial.[413] Additionally, the court reiterated the long standing principle that the right to a jury trial does not exist in a suit of equity, such as that for recission of contract.[414] Therefore, the trial court did not err in denying a jury

402. *Id.*
403. *Id.* Although Lorraine raised the interest rate, an appraisal was never conducted, and the land was consequently sold to her son for $180,000 to be paid over a period of 30 years. *Id.*
404. *Kopperud*, 453 N.W.2d at 599.
405. *Id.*
406. *Id.*
407. *Kopperud*, 453 N.W.2d at 599-600.
408. *Id.* at 600.
409. *Id.*
410. *Id.* at 601.
411. *Kopperud*, 453 N.W.2d at 601.
412. *Id.*
413. *Id.*
414. *Id.*

trial.[415]

Finally, Lorraine asserted that the trial court erred in finding a conflict of interest, because she did not benefit monetarily from the sale to her son.[416] Reviewing the findings of the county court, the North Dakota Supreme Court found monetary benefit to be unnecessary to support the conflict of interest claim in light of the extremely low sale price of the land, the familial relationship between Lorraine and Daniel, and various other factors.[417]

The judgment of the county court was affirmed.[418]

IMPLIED CONTRACT

IN RE ZENT

In *In re Zent*,[419] the issue was whether the trial court should have allowed a claim against the decedent's estate under an implied contract theory.[420] Ann Johnson and John A. Zent met in 1979 and continued a close relationship until John's death in 1988.[421] During the three years prior to his death, John's condition progressively worsened due to back surgery, a series of strokes, and Alzheimer's disease.[422] While John was incapacitated, Ann took care of nearly all of his personal and domestic needs.[423] After John's death, Ann filed a claim for $31,025.00 against his estate as compensation for her services.[424] Ann's claim was disallowed and the matter went to trial.[425] The court found no express or implied contract or unjust enrichment upon which Ann could have based her claim.[426]

The supreme court held that the law will presume that Ann expected compensation for services rendered by her to John, and that she should recover for these services under an implied contract.[427] The court noted that a benefit that is normally paid for is a proper basis for an implied contract.[428] As John's condition wors-

415. *Kopperud*, 453 N.W.2d at 601.
416. *Id.*
417. *Id.*
418. *Id.*
419. 459 N.W.2d 795 (N.D. 1990).
420. *In re* Zent, 459 N.W.2d 795, 798 (N.D. 1990).
421. *Id.* at 797.
422. *Id.*
423. *Id.* at 797-98.
424. *In re Zent*, 459 N.W.2d at 797.
425. *Id.* at 798. The personal representative for the estate was Howard A. Zent, John's son. *Id.*
426. *Id.*
427. *Id.* at 801.
428. *Id.* at 798 (citing Cole v. Cole, 517 N.E.2d 1248 (Ind. Ct. App. 1988) and RESTATEMENT OF RESTITUTION § 1 comment c (1937)).

ened, Ann spent about 8-10 hours a day at his house helping him to dress, bathe, and take medication.[429] The supreme court found that Ann provided "skilled care" services to John, thereby resulting in the receipt of a "valuable benefit."[430] Even though Ann testified she expected no compensation, the services rendered by her went well beyond the relationship shared by Ann and John.[431] The court likened the services provided by Ann to those for which one would normally expect to be compensated.[432] For the purposes of an implied contract, the court assumed Ann fully expected compensation for her services.[433] Thus, the supreme court reversed the trial court and remanded for a determination of the proper compensation to be awarded to Ann.[434]

INSTRUCTIONS TO JURIES

STATE V. MARKS

In *State v. Marks*,[435] Debra K. Marks appealed her conviction of driving while under the influence of intoxicating liquor.[436] On January 15, 1989, the North Dakota Highway Patrol stopped Debra's vehicle for speeding, and, in the course of the stop, arrested her for the alcohol-related offense.[437] Marks was taken to the hospital for a blood test, the result of which showed a blood-alcohol concentration of .18 percent.[438] Marks was found guilty by a jury and convicted.[439] Marks appealed the conviction.[440]

On appeal to the North Dakota Supreme Court, Marks contended that at trial the prosecutor made an improper comment in his closing argument, which deprived her of a fair trial.[441] During the trial, after Marks attacked the validity of the blood test results, the prosecution commented that defense counsel could have tested leftover blood samples to recheck the validity of the tests.[442]

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429. *In re Zent*, 459 N.W.2d at 799.
430. *Id.* at 800.
431. *Id.* The court held that "a statement of a claimant's unexpressed secret intention does not defeat a claim of unjust enrichment." *Id.*
432. *Id.*
433. *In re Zent*, 459 N.W.2d at 800-01. In the case of an implied contract a court should look beyond the facts of the case and decide what would be most equitable under the circumstances. *Id.* at 800.
434. *Id.* at 801.
435. 452 N.W.2d 298 (N.D. 1990).
436. State v. Marks, 452 N.W.2d 298 (N.D. 1990).
437. *Marks*, 452 N.W.2d at 298-299.
438. *Id.* at 299.
439. *Id.*
440. *Id.*
441. *Marks*, 452 N.W.2d at 299.
442. *Id.*

Marks' defense counsel objected to the comment, stating that it illegally shifted the burden of proof to the defendant.[443] Marks asserted on appeal that the illegal shifting of the burden of proof was unfairly prejudicial to her case.[444]

The North Dakota Supreme Court, reviewing relevant case law, determined that the statement was predictable and invited, and therefore not prejudicial to Marks.[445] The trial court is given discretion to control and determine the scope of opening and closing arguments.[446] In light of the sufficiency of the evidence against the defendant, the failure of defense counsel to ask for a curative instruction at the time the comment was made, and the very brief attention that was given to the comment by the jury, the court concluded that the trial court did not abuse its discretion in overruling Marks' motion for a mistrial.[447]

Marks also contended that the trial court erred in not allowing her to submit proposed jury instructions following closing arguments.[448] Although litigants have a right to request instructions upon the issues of the case, the trial court has the discretion to deny the request if improperly submitted.[449] Reviewing the record of the trial court, the North Dakota Supreme Court found that defense counsel had improperly requested the trial court to settle jury instructions by failing to submit written instructions to the court and had improperly requested the court to propose instructions to Marks' filings.[450] Finding that the trial court's failure to allow Marks to settle instructions did not affect her substantial rights, the court concluded that the trial court's decision was not clearly erroneous.[451]

The jury verdict and judgment of the county court were affirmed.[452]

INSURANCE

NATIONAL FARMERS UNION PROPERTY AND CASUALTY COMPANY V. KOVASH

In *National Farmers Union Property and Casualty Company*

443. *Id.* at 299-300.
444. *Id.*
445. *Marks*, 452 N.W.2d at 300-303.
446. *Id.*
447. *Id.* at 303.
448. *Id.*
449. *Marks*, 452 N.W.2d at 303. *See* N.D.R. CRIM. P. 30(b) (requested instructions).
450. *Marks*, 452 N.W.2d at 303-306.
451. *Id.*
452. *Id.* at 306.

v. Kovash,[453] the North Dakota Supreme Court held that an insurer need not investigate facts independent of the pleadings in determining its duty to defend, when the complaint against the insured alleges conduct specifically excluded by the insurance policy.[454]

Albert Kovash held three insurance policies with the National Farmers Union Property and Casualty Company (National) and a fourth policy with Farmers Union Mutual Insurance Company (Mutual).[455] When Kovash's neighbor brought an action against him, alleging that Kovash maliciously closed a section line to the public and used the neighbor's private road, Kovash sought help from the insurance companies.[456] National and Mutual commenced a declaratory judgment action against Kovash, seeking a determination that neither company had a duty to defend, because intentional conduct was excluded from coverage under the policies.[457] The trial court held that National and Mutual had no duty to defend, because Kovash's actions alleged in the complaint were intentional and purposeful.[458] Kovash appealed.[459]

Kovash contended on appeal to the North Dakota Supreme Court that an insurer must investigate facts independent of the pleadings before determining the insurer's duty to defend, rather than relying solely on the allegations of the complaint.[460] Following recent decisions on point, the court rejected Kovash's arguments and concluded that the duty to defend arises from the allegations contained in the complaint.[461] If the acts alleged in the complaint are specifically excluded under the insured's policy, the insurer need not inquire into independent facts to determine its duty to defend.[462] The court held that National and Mutual had no duty to defend Kovash, because the complaint against him alleged intentional conduct that was specifically excluded in the insurance policies.[463]

The judgment of the trial court was affirmed.[464]

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453. 452 N.W.2d 307 (N.D. 1990).
454. National Farmers Union Property and Casualty Co. v. Kovash, 452 N.W.2d 307 (N.D. 1990).
455. *National Farmers*, 452 N.W.2d at 308.
456. *Id.*
457. *Id.* at 309.
458. *Id.*
459. *National Farmers*, 452 N.W.2d at 309.
460. *Id.*
461. *Id.* (citing Kyllo v. Northland Chem. Co., 209 N.W.2d 629, 634 (N.D. 1973) and Applegren v. Milbank Mutual Ins. Co., 268 N.W.2d 114 (N.D. 1978)).
462. *National Farmers*, 452 N.W.2d at 309-312.
463. *Id.* at 312.
464. *Id.*

RAWLINGS V. FRUHWIRTH

In *Rawlings v. Fruhwirth*,[465] the North Dakota Supreme Court held that an insurance agent has a duty to exercise skill and care which a reasonably prudent person engaged in the insurance business would use under similar circumstances.[466]

Donald Rawlings' son was killed in a car accident involving Charles Sweeney.[467] At the time of the accident, Sweeney had a limit of $25,000 on his automobile liability policy and carried an umbrella policy covering liability of $250,000 to $1,250,000, leaving a gap in coverage between the two policies.[468] As a result of a settlement between Sweeney and Rawlings in a wrongful death action, Sweeney assigned his cause of action against two insurance agents for the liability coverage gap to Rawlings.[469] Rawlings, as assignee, brought a negligence action against Duane Larson, a North Dakota insurance agent for failure to procure insurance requested by Sweeney, failure to protect Sweeney from gaps in coverage, and for making a negligent misrepresentation regarding availability of the coverage.[470] The defendant moved for summary judgment in district court.[471] The district court granted summary judgment, concluding that because no special relationship existed between Sweeney and Larson, the agent had no duty to procure insurance to fill the gap.[472] Rawlings appealed.[473]

Because the North Dakota Supreme Court had not previously set out a standard of care for insurance agents, the court found case law from other jurisdictions to be instructive.[474] Reviewing the case law, the court adopted the Minnesota standard of care requiring insurance agents to exercise skill and care of a reasonably prudent person engaged in the insurance business under similar circumstances.[475] This duty, the court found, is ordinarily limited to the general duty of an agent to act in good faith and follow instructions.[476] Applying this standard to the facts of the

465. 455 N.W.2d 574 (N.D. 1990).
466. Rawlings v. Fruhwirth, 455 N.W.2d 574 (N.D. 1990).
467. *Rawlings*, 455 N.W.2d at 575.
468. *Id.*
469. *Id.*
470. *Id.*
471. *Rawlings*, 455 N.W.2d at 575.
472. *Id.*
473. *Id.*
474. *Id.* at 576.
475. *Rawlings*, 455 N.W.2d at 577. *See* Gabrielson v. Warnemunde, 455 N.W.2d 540 (Minn. 1989) (insurance agents are under a legal duty to exercise the skill and care that a reasonable prudent person in similar circumstances would exercise while in the insurance business).
476. *Rawlings*, 455 N.W.2d at 577.

case, the court concluded that Larson fulfilled his duty by alerting Sweeney to the gap in coverage and advising him to fill it.[477] Finding no special relationship to justify a higher level of duty and no reliance on behalf of Sweeney, the court found Larson had no duty to procure insurance to fill the gap.[478]

The judgment of the trial court was affirmed.[479]

JUDGMENT

THOMPSON V. GOETZ

In *Thompson v. Goetz*,[480] Roger and Phyllis Thompson brought an action against William Goetz, their former attorney, for malpractice, fraudulent misrepresentation, and breach of a settlement agreement.[481] Because Goetz failed to answer the Thompsons' complaint, a default judgment was entered against him and a hearing was set to determine damages.[482] Goetz moved to vacate the default judgment for excusable neglect, supporting his motion with affidavits indicating that he suffered from mental disabilities.[483] The trial court denied Goetz's motion.[484] Prior to the hearing on damages, Goetz appealed.[485]

The first issue before the North Dakota Supreme Court was whether the trial court's order denying Goetz's motion to vacate was appealable, when the issue of damages had not yet been adjudicated.[486] Although an order denying a motion to vacate a default judgment is ordinarily appealable under section 28-27-02 of the North Dakota Century Code if claims remain unadjudicated, the order must be accompanied by a Rule 54(b) order certifying the default judgment as a final judgment.[487] In this case, the trial court's order was not accompanied by a 54(b) order, but the supreme court nevertheless agreed to consider the issues on their merits, because the partial default judgment would otherwise eliminate Goetz's defenses to liability.[488]

Goetz also attacked the trial court's grant of a default judg-

477. *Id.* at 578-580.
478. *Id.*
479. *Id.* at 580.
480. 455 N.W.2d 580 (N.D. 1990).
481. Thompson v. Goetz, 455 N.W.2d 580, 581 (N.D. 1990).
482. *Thompson*, 455 N.W.2d at 582.
483. *Id.*
484. *Id.*
485. *Id.* at 583.
486. *Thompson*, 455 N.W.2d at 583.
487. *Id. See* N.D. CENT. CODE § 28-27-02 (relating to appealable orders and N.D.R. CIV. P. 54(b)).
488. *Thompson*, 455 N.W.2d at 583.

ment without requiring the Thompsons to produce supporting evidence.[489] The North Dakota Supreme Court held that proof must be submitted by the plaintiff before a default judgment can be granted, except in cases where a certain sum is sought.[490] Because the trial court granted a default judgment without a submission of proof by the plaintiffs, the court concluded that the trial court abused its discretion in refusing to vacate the judgment.[491]

Reviewing the supporting affidavits submitted with Goetz's motion to vacate, which identified his psychological disabilities and suicidal thinking, the North Dakota Supreme Court concluded that Goetz's mental disabilities were the cause of his failure to answer the Thompsons' complaint.[492] The court found mental incapacity to be an appropriate ground for vacating a default judgment and held that the trial court erred in refusing to grant Goetz's motion.[493]

Finally, the court responded to Goetz's claim that the plaintiffs' attorney should have been disqualified under Rule 3.7 of the North Dakota Rules of Professional Conduct, because he was a possible witness in the case.[494] Reviewing Rule 3.7, the court determined that the mere possibility that opposing counsel may be called as a witness does not warrant disqualification under the rule.[495]

The supervisory writ was granted and the trial court was directed to vacate the default judgment.[496]

MANDAMUS

NORTH DAKOTA COUNCIL OF SCHOOL ADMINISTRATORS V. SINNER

In *North Dakota Council of School Administrators v. Sinner*,[497] the North Dakota Supreme Court held the Director of Budget had no clear duty to restore foundation aid payments, and that the statute allowing the Director to reduce appropriations

489. *Id.* at 583-585.
490. *Thompson*, 455 N.W.2d at 584.
491. *Id.* at 585.
492. *Id.* at 587.
493. *Id.*
494. *Thompson*, 455 N.W.2d at 587. *See* N.D. RULES OF PROFESSIONAL RESPONSIBILITY RULE 3.7 (an attorney may not act as an advocate in a case in which it is likely that he will be a necessary witness).
495. *Thompson*, 455 N.W.2d at 587-588.
496. *Id.* at 588.
497. 458 N.W.2d 280 (N.D. 1990).

was not an unconstitutional delegation of legislative authority.[498]

In 1987, the North Dakota legislature made general fund appropriations based on projections that the state would have $1.055 billion in general fund revenues for the 1987-89 biennium.[499] Responding to 1988 forecasts that projected less revenues than expected, the Director of the Office of Management and Budget, Dick Rayl, uniformly reduced all general fund agency budgets by two percent, pursuant to power given to him by section 54-44.1-12 of the North Dakota Century Code.[500] As a result of the reductions, foundation aid grants to local school districts were reduced.[501] When revised projections showed that revenues would likely exceed the original $1.055 billion projections, the school districts asked for funds to be restored to the levels first appropriated by the legislature in 1987.[502] Although actual general fund revenues for the biennium did exceed the projected amounts, the funds were not restored.[503] The North Dakota School Administrators brought an action against Governor George Sinner, Dick Rayl, and the Superintendent of Public Instruction, Wayne Sanstead, seeking a writ of mandamus to compel restoration of the allotted funds.[504] The district court entered an order dismissing the action.[505] The School Districts and Council appealed.[506]

The first issue raised on appeal to the North Dakota Supreme Court was whether Rayl had an absolute duty to restore funds when revenue projections improved, pursuant to section 54-44.1-12 of the North Dakota Century Code.[507] The School Districts asserted that a writ of mandamus should issue, because Rayl had clear statutory duty to restore funds pursuant to section 54-44.1-12.[508] Reviewing the language of the statute, the court found that it specifically allowed Rayl to make allotments reducing available funds when revenues were estimated to be insufficient, but did not impose a duty on Rayl to restore the funds when the revenue pro-

498. North Dakota Council of School Adm'r v. Sinner, 458 N.W.2d 280 (N.D. 1990).
499. *Sinner*, 458 N.W.2d at 281.
500. *Id.*
501. *Id.*
502. *Id.* at 282.
503. *Sinner*, 458 N.W.2d at 282.
504. *Id.*
505. *Id.*
506. *Id.*
507. *Sinner*, 458 N.W.2d at 283. *See* N.D. CENT. CODE § 54-44.1-12 (1989) (relating to the director of budget's control over the rate of expenditures).
508. *Sinner*, 458 N.W.2d at 284.

jections improved.[509] Because the School Districts failed to show that Rayl had a clear duty to restore the funds, the court concluded that the trial court did not err in refusing to issue a writ of mandamus.[510]

Next, the court considered the School Districts' contention that section 54-44.1-12 of the North Dakota Century Code, which allowed Rayl to reduce appropriations, was an unconstitutional delegation of the legislature's authority to make appropriations.[511] Applying the doctrine of nondelegation, the court concluded section 54-44.1-12 gave Rayl authority to control the rate of expenditures, but only within specifically defined parameters, and therefore did not constitute an unconstitutional delegation of legislative authority.[512]

The order of the district court was affirmed.[513]

MENTAL HEALTH

EX REL. L.B.

Ex rel. L.B.[514] involved the appeal of an individual who was involuntarily committed as a "mentally ill person requiring treatment."[515] The appellant challenged the county court's finding that he was within the statutory definition of a "mentally ill person requiring treatment," and also argued that the North Dakota State Hospital failed to present a statutorily required listing of alternative treatment at his treatment hearing.[516]

Reviewing the county court's findings, the North Dakota Supreme Court concluded that clear and convincing evidence existed that the appellant was a "mentally ill person requiring treatment" within the meaning of the statute.[517] The appellant had a history of violence and aggressive behavior when he consumed alcohol, lacked contact with reality, lacked insight and judgment, and posed a serious risk of harm to himself and others.[518]

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509. *Id.*
510. *Id.* The court noted the 1989 legislature could have taken action to restore the allotted funds, but did not do so. *Id.*
511. *Sinner*, 458 N.W.2d at 285.
512. *Id.* at 285-286.
513. *Id.* at 296.
514. 452 N.W.2d 75 (N.D. 1990).
515. *Ex rel.* L.B., 452 N.W.2d 75, 76 (N.D. 1990). *See* N.D. CENT. CODE § 25-03.1-02 (defining who is a "mentally ill person" and a "person requiring treatment").
516. *Ex rel. L.B.*, 452 N.W.2d at 76.
517. *Id.* at 77-78.
518. *Id.*

The North Dakota Supreme Court also addressed the appellant's contention that the North Dakota State Hospital failed to supply a listing of alternative treatment options, as required by section 25-03.1-21(1) of the North Dakota Century Code.[519] The court found that the State Hospital did submit the correct report but listed no alternative treatment options because of the appellant's resistance to treatment.[520] The court held that the failure to list alternative treatment options in this case did not render the report void under the statute.[521]

The judgment of the county court was affirmed.[522]

MORTGAGES

FARM CREDIT BANK OF ST. PAUL V. MARTINSON

In *Farm Credit Bank of St. Paul v. Martinson,*[523] the issue was whether twelve grain bins built by the renter on leased farmland continued to be owned by the renter after foreclosure proceedings upon the farmland.[524] John Martinson leased farmland from his mother in Dickey County, North Dakota.[525] Prior to 1981, John erected twelve grain bins on the rented farmland.[526] In 1981, his mother received a loan from Farm Credit Bank secured by the farmland rented to John.[527] Farm Credit Bank foreclosed upon the property and was high bidder at the sheriff's sale.[528] The bank eventually received deeds to the land on which the grain bins were located.[529] In an action to evict the Martinsons from the farmland, the county court determined that the grain bins were fixtures on the farmland and therefore property of Farm Credit Bank.[530]

The supreme court held that, absent notice of ownership filed pursuant to section 47-06-04 of the North Dakota Century Code, the grain bins were property of Farm Credit Bank.[531] Section 47-

519. *Id.* at 78. *See* N.D. CENT. CODE § 25-03.1-21(1) (the state hospital or other treatment facility must provide the court with report assessing alternatives to hospitalization).
520. *Ex rel. L.B.*, 452 N.W.2d at 78.
521. *Id.*
522. *Id.* at 78-79.
523. 453 N.W.2d 816 (N.D. 1990).
524. Farm Credit Bank of St. Paul v. Martinson, 453 N.W.2d 816, 817-18 (N.D. 1990).
525. *Id.* at 817.
526. *Id.*
527. *Id.*
528. *Martinson*, 453 N.W.2d at 817.
529. *Id.*
530. *Id.*
531. *Id.* at 818. *See* N.D. CENT CODE § 47-06-04 (1978) (when a tenant may remove fixtures from land).

06-04 of the North Dakota Century Code allows an agricultural tenant eight months after he vacates leased property to remove fixtures erected by him prior to filing of any deed on the property.[532] Such removal is proper only if the tenant filed a notice of intention to remove the fixture with the register of deeds soon after its construction.[533] The court noted that Farm Credit Bank filed their mortgage after the grain bins were built, and John had not filed a notice of his ownership.[534] Therefore, the supreme court affirmed the county court's finding that Farm Credit Bank owned the grain bins upon foreclosure of the rental property.[535]

FIRST STATE BANK OF NEW ROCKFORD V. ANDERSON

In *First State Bank of New Rockford v. Anderson*,[536] Warren Anderson appealed the trial court's entry of a deficiency judgment following foreclosure and sale of 200 acres of his land.[537] In 1984, Anderson executed a mortgage to the First State Bank, which was prepared on a standard Short Term Mortgage Redemption Act Form, even though the acreage of the property exceeded limits for that type of mortgage.[538] Although the form stated that the Short Term Act would govern, the trial court found that use of the form did not preclude the granting of a deficiency judgment.[539]

The North Dakota Supreme Court noted the legislature's public policy against deficiency judgments.[540] Construing North Dakota foreclosure statutes strictly in the mortgagor's favor, the court held that the bank waived its right to a deficiency judgment when it agreed to be bound by the Short Term Mortgage Redemption Act.[541] Whether the form was used by mistake or inadvertence, the court concluded that when a lender agrees at the outset of the transaction to be bound by the Act, it may not later elect a more beneficial procedure at foreclosure.[542]

The judgment of the district court was reversed.[543]

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532. *Martinson*, 453 N.W.2d at 818.
533. *Id.*
534. *Id.*
535. *Id.* at 818-19.
536. 452 N.W.2d 90 (N.D. 1990).
537. First State Bank of New Rockford v. Anderson, 452 N.W.2d 90, 91 (N.D. 1990).
538. *Id.* at 91. *See* N.D. CENT. CODE § 32-19.1 (the Short Term Mortgage Redemption Act applies to parcels of land not exceeding 40 acres and allows the parties to agree to a shortened redemption period, with the lender foregoing its right to seek a deficiency judgment).
539. *Anderson*, 452 N.W.2d at 91.
540. *Id.* at 92.
541. *Id.*
542. *Anderson*, 452 N.W.2d at 92, 93.
543. *Id.* at 93.

LANG V. BANK OF NORTH DAKOTA

In *Lang v. Bank of North Dakota*,[544] Ernest Lang appealed the dismissal of his claim for deprivation of statutory postforeclosure opportunities.[545] Lang gave a first mortgage on his farmland to the Bank of North Dakota (Bank) pursuant to a board of university and school land investment program.[546] The Bank, acting for the board, foreclosed on the mortgage when Lang became delinquent.[547] During Lang's statutory redemption period, the Bank sold a sheriff's certificate on Lang's land to a second mortgagee, the Bank of Steele.[548] Lang filed a claim, contending that the sale to the Bank of Steele denied his statutory opportunity to repurchase the land at a private sale under chapter 15-07 of the North Dakota Century Code.[549] The trial court held the statute inapplicable and dismissed Lang's claim.[550] Lang appealed.[551]

Lang contended on appeal to the North Dakota Supreme Court that statutes in effect at the time of the mortgage contract afforded him the opportunity to repurchase his land prior to public sale of the property.[552] The court proceeded to review the unique statutory provisions governing the board of university and school lands loans to farmers and its underlying legislative policy.[553] Because the purpose of the program is to benefit and protect farmers, the court held that the bank must follow the statutory plan when foreclosing a mortgage, rather than deal with the transaction in a standard commercial setting.[554] Therefore, the court found Lang's postforeclosure privileges may have been deprived by the Bank, if the sale of the sheriff's certificate failed to take Lang's statutory rights into consideration.[555]

The trial court's summary judgment was reversed and the

544. 453 N.W.2d 118 (N.D. 1990). In *Lange I*, Lang v. Bank of North Dakota, 377 N.W.2d 575 (N.D. 1985), Lang sued the Bank for wrongful foreclosure and the trial court dismissed for failure to state a claim. On appeal, the North Dakota Supreme Court reversed and remanded, finding that a claim did exist.. On remand the trial court again dismissed Lang's claim.

545. Lang v. Bank of North Dakota, 453 N.W.2d 118 (N.D. 1990).

546. *Lang*, 453 N.W.2d at 120. *See* N.D. CENT. CODE § 15-03-04 (1988) (mandates the Board to invest part of its permanent funds in first mortgages on farmland in North Dakota).

547. *Lang*, 453 N.W.2d at 118-120.

548. *Id.* at 118.

549. *Id.* at 119.

550. *Id.* at 119-120.

551. *Lang*, 453 N.W.2d at 120.

552. *Id.*

553. *Id.* at 120-122.

554. *Id.* at 122.

555. *Lang*, 453 N.W.2d at 122.

case remanded for trial.[556]

NORWEST BANK NORTH DAKOTA V. FREDERICK

In *Norwest Bank North Dakota v. Frederick*,[557] the issues were: (1) whether an installment mortgage was ambiguous because the date of final payment was incorrect; (2) whether the trial court incorrectly decided that as a matter of law, a creditor's notice before foreclosure complied with North Dakota Century Code section 32-19-21; and (3) whether defendant, under section 32-19-12 of the North Dakota Century Code, should be allowed to pay a delinquent installment at trial.[558] Norwest Bank of North Dakota brought a foreclosure action against Frederick for default on an $80,000 loan.[559] Norwest elected to accelerate the loan and informed Frederick of its intentions in its notice before foreclosure.[560] The same notice informed Frederick that he could "cure the defaults, decelerate the debt and reinstate the loan," if he paid the past due installments within thirty days after notice.[561] Frederick did not pay within thirty days, but did offer to pay at the time of trial.[562] Norwest would not accept the payment and stated that the debt was accelerated.[563] The trial court allowed Norwest the foreclosure and Frederick appealed.[564]

At trial, Frederick claimed that the note and mortgage were ambiguous, because they listed the date of final payment incorrectly.[565] However, Frederick admitted at trial that the date was a mistake and had been amended.[566] The supreme court held that since the documents had been corrected, his argument was "without merit."[567]

North Dakota Century Code section 32-19-21 provides, in pertinent part, that a notice for foreclosure will contain "[t]he amount due for principal, interest, and taxes paid by the owner of the mortgage, stated separately."[568] Frederick claimed that Norwest had not complied with the statute because they had listed

556. *Id.* at 123.
557. 452 N.W.2d 316 (N.D. 1990).
558. Norwest Bank North Dakota v. Frederick, 452 N.W.2d 316, 317 (N.D. 1990).
559. *Id.*
560. *Id.*
561. *Id.*
562. *Frederick*, 452 N.W.2d at 317.
563. *Id.*
564. *Id.*
565. *Id.*
566. *Frederick*, 452 N.W.2d at 317.
567. *Id.*
568. *Id. See* N.D. CENT. CODE § 32-19-21 (1976).

the interest incorrectly and had not listed the taxes paid by the mortgagee.[569] The supreme court decided that Frederick did not present evidence at the trial level to meet his burden of proving that the interest stated was incorrect.[570] They also found that since Norwest did not pay any taxes, they did not have to list the taxes separately.[571]

Frederick also averred that, as a matter of law, the court must accept his tender of payment at trial for the overdue installments.[572] He urged the court to overrule *Metropolitan Building and Loan Association v. Weinberger*,[573] which allowed a creditor the right to accelerate a debt.[574] He claimed that *State Bank of Kenmare v. Lindberg*[575] was inconsistent with this proposition, and a mortgage could not be accelerated in violation of North Dakota Century Code section 32-19-12.[576] The supreme court distinguished the cases by showing the factual differences between Lindberg and this case.[577] The supreme court held that North Dakota Century Code section 32-19-12 does not apply where a mortgagee accelerates the debt after the thirty-day period has run.[578] Thus, the court affirmed the trial court's decision.[579]

MUNICIPAL CORPORATIONS

PELKEY V. CITY OF FARGO

In *Pelkey v. City of Fargo*,[580] the North Dakota Supreme

569. *Frederick*, 452 N.W.2d at 318.
570. *Id.*
571. *Id.*
572. *Id.* North Dakota Century Code section 32-19-12 provides:

> Whenever an action shall be commenced for the foreclosure of a mortgage upon which there shall be due any interest, or any portion or installment of the principal, and there shall be other portions or installments to become due subsequently, the complaint shall be dismissed upon the defendant's bringing into court at any time before decree of sale the principal and interest due, with costs and disbursements.

N.D. CENT. CODE § 32-19-12 (1976). Frederick offered to pay the past due amounts at the time of trial. *Frederick*, 452 N.W.2d at 317.
573. 67 N.D. 627, 275 N.W.2d 638 (1937).
574. Metropolitan Bldg. and Loan Ass'n. v. Weinberger, 67 N.D. 627, 275 N.W.2d 638 (1937).
575. 436 N.W.2d 12 (N.D. 1989).
576. *Frederick*, 452 N.W.2d at 318.
577. *Id.* In *Lindberg*, the supreme court reversed a foreclosure judgment because the notice before foreclosure stated that the entire debt had to be paid within thirty days. *Id.* North Dakota Century Code section 32-19-28 only requires that if, within thirty days after notice of foreclosure, you pay past due installments that caused the default, then the mortgage is reinstated. N.D. CENT. CODE § 32-19-28 (1976). The notice of foreclosure in the case at bar complied with section 32-19-28, and thus was distinguishable from *Lindberg*.
578. *Frederick*, 452 N.W.2d at 319.
579. *Id.*
580. 453 N.W.2d 801 (N.D. 1990).

Court held that the power of the people to initiate and refer legislation did not include power to refer local laws and ordinances.[581]

In 1988, the voters of the City of Fargo approved a charter amendment authorizing a one-half percent sales and use tax to finance the construction of a domed facility.[582] John L. Pelkey, Jr., Steven Plinke, and Edward Christianson submitted a proposal to repeal the authorization of the sales and use tax to the Board of City Commissioners, who refused to submit the proposal to the voters.[583] Pelkey then requested the district court issue a writ of mandamus to compel the City to submit the repeal proposal to a vote.[584] The district court denied the request, citing section 40-05.1-09 of the North Dakota Century Code, which prohibits the submission of proposals to amend or repeal home rule charters more than every two years.[585] Pelkey appealed, asserting that section 40-05.1-09 of the North Dakota Century Code is an unconstitutional restriction on the people's power to initiate legislation.[586] The City of Fargo moved to dismiss the appeal for mootness.[587]

The North Dakota Supreme Court first addressed the motion of the City of Fargo.[588] The City asserted that article 10, section 16 of the North Dakota Constitution prohibits the repeal of ordinances providing for the payment of debt until the debt is paid. Therefore, the petitioners' proposal to repeal could not be submitted to the voters.[589] Although the court agreed with the City, they nevertheless found that the issue raised was a matter of great public interest and concern and refused to dismiss the case for mootness.[590]

The petitioners asserted that section 40-05.1-09 of the North Dakota Century Code was unconstitutional as a restriction of the people's right to initiate legislation.[591] Applying general principles of statutory construction, the court considered all sections of article III of the Constitution and determined that a petition to

581. Pelkey v. City of Fargo, 453 N.W.2d 801 (N.D. 1990).
582. *Pelkey*, 453 N.W.2d at 802. The amendment was adopted in early 1989. *Id.*
583. *Id.*
584. *Id.*
585. *Pelkey*, 453 N.W.2d at 802-803. North Dakota Century Code section 40-05.1-09 provides that: "Any proposal to amend or repeal home rule charters shall not be submitted to the electorate more often than every two years." N.D. CENT. CODE § 40-05.1-09 (1988).
586. *Pelkey*, 453 N.W.2d at 803.
587. *Id.*
588. *Id.*
589. *Id.* *See* N.D. CONST. art. 10, § 16 (all laws or ordinances are irrepealable until the debt is paid).
590. *Pelkey*, 453 N.W.2d at 803. Generally, an appeal will be dismissed if issues become moot. *Id.*
591. *Id.* at 804. *See* N.D. CONST. art. 3, § 1.

initiate must involve a state law that will be voted on in a statewide election.[592] Therefore, the court held that section 40-05.1-09 was not unconstitutional, because the power of initiative and referendum does not apply to local laws and ordinances.[593]

The judgment of the district court was affirmed.[594]

NEGLIGENCE

ERICKSON V. SCHWAN

In *Erickson v. Schwan*,[595] the children of Dale Erickson brought a wrongful death action in district court against Dennis Schwan, Barry Schwan, and Timothy Regan.[596] Dale Erickson was killed when he was run over by the rear wheels of a tractor-trailer while it was being loaded with grain.[597] Regan was the driver of the vehicle and an employee of the Schwans.[598] The jury apportioned negligence at 90% to Erickson and 10% to Regan.[599] Consequently, the district court dismissed the action. The court denied a motion for a new trial and the Ericksons appealed.[600]

The first issue the North Dakota Supreme Court addressed was whether the district court erred in refusing to give the Ericksons' requested instruction on momentary forgetfulness.[601] Reviewing the facts, the court found no evidence, either direct or circumstantial, that Erickson momentarily forgot the danger.[602] Because an instruction with no basis in the evidence would leave the jury to theorize as to whether Erickson momentarily forgot the danger, the court concluded that the district court did not err in refusing to give the momentary forgetfulness instruction.[603]

The Ericksons next asserted that the trial court erred in refusing to give their requested instruction on duty of care.[604] The

592. *Pelkey*, 453 N.W.2d at 804.
593. *Id.* at 805.
594. *Id.* Justice VandeWalle dissented to the majority's determination that the appeal was moot, because he believed the courts were not powerless since the bonds had not yet been issued. *Id.*
595. 453 N.W.2d 765 (N.D. 1990).
596. Erickson v. Schwan, 453 N.W.2d 765, 766 (N.D. 1990).
597. *Erickson*, 453 N.W.2d at 766.
598. *Id.* at 767.
599. *Id. See* N.D. CENT. CODE § 9-10-07 (1987) (when negligence on the part of the plaintiff is greater than the negligence of the defendant, recovery is barred).
600. *Erickson*, 453 N.W.2d at 767.
601. *Id.* The momentary forgetfulness doctrine provides that if a plaintiff exposes himself to a danger of which he has knowledge but momentarily forgets, the forgetfulness is not contributory negligence, unless it was lack of ordinary care to not have kept the danger in mind. *Id.*
602. *Id.* at 769.
603. *Id.*
604. *Id.*

supreme court concluded that a trial court is only required to instruct the jury as to the applicable law of the case and need not give instructions in the specific language requested by a party.[605]

Finally, the court considered the issue of juror misconduct.[606] The Ericksons, relying on a jury foreman's affidavit that stated that bias and confusion existed among the jurors, tried to establish that juror misconduct during deliberations had occurred.[607] The court refused to admit the juror's affidavit, stating that affidavits are only admissible to show that prejudicial information or outside influence was brought to bear upon a juror or that the verdict was arrived at by chance.[608]

The judgment of the district court was affirmed.[609]

PLEA BARGAINING

STATE V. SCHUMACHER

In *State v. Schumacher*,[610] the North Dakota Supreme Court held that the failure of a trial court to advise a criminal defendant of mandatory minimum sentence prior to entry of guilty plea required that defense be allowed to withdraw his plea.[611]

Marcus Schumacher was charged with murder and attempted murder.[612] He later pleaded guilty to reduced charges of manslaughter and reckless endangerment pursuant to a plea agreement.[613] The court accepted Schumacher's plea, but failed to advise him of the mandatory minimum sentence prior to entry of the plea.[614] Schumacher subsequently filed a motion to withdraw his guilty plea, asserting that the trial court did not advise him of the mandatory sentence, as required by Rule 11 of the North Dakota Rules of Criminal Procedure.[615] After two evidentiary hearings, the trial court determined that Rule 11 had been substantially complied with.[616] Schumacher appealed.[617]

The state conceded on appeal to the North Dakota Supreme

605. *Erickson*, 453 N.W.2d at 769.
606. *Id.* at 770.
607. *Id.*
608. *Id.*
609. *Erickson*, 453 N.W.2d at 770.
610. 452 N.W.2d 345 (N.D. 1990).
611. State v. Schumacher, 452 N.W.2d 345 (N.D. 1990).
612. *Schumacher*, 452 N.W.2d at 346.
613. *Id.*
614. *Id.*
615. *Id.* *See* N.D.R. CRIM. P. 11(b)(2) (requiring the court to personally address the defendant of the mandatory minimum sentence prior to accepting a guilty plea).
616. *Schumacher*, 452 N.W.2d at 346.
617. *Id.*

Court that the trial court did not advise Schumacher of the mandatory minimum sentence prior to accepting his guilty plea.[618] However, the state argued that Rule 11 was substantially complied with by Schumacher's awareness of the sentence, defense counsel's explanation of the sentence, and defense counsel's request to impose the minimum sentence at the sentencing hearing.[619] The court found that the purpose of Rule 11 is to ensure that the record affirmatively reflects a knowing and voluntary decision by the defendant, and concluded that the failure to meet the requirements of Rule 11 cannot be cured by the fact that Schumacher may have been aware of the mandatory minimum sentence.[620] In order to fulfill these requirements, a trial court must advise the defendant of, and determine that he understands the effect of, the mandatory minimum sentence prior to the entry of the plea.[621] The court concluded that if a defendant is not so advised, he is entitled to withdraw his plea of guilty.[622]

The order denying Schumacher's motion to withdraw his guilty plea was reversed and the case remanded to the district court.[623]

SEARCHES AND SEIZURES

STATE V. HUETHER

In *State v. Huether*,[624] the state appealed from an order suppressing evidence obtained in a warrantless search.[625] David Huether was stopped by a state highway patrol officer for speeding, and in the process of the stop, Huether admitted that he had been drinking.[626] The officer suspected an open container and obtained Huether's permission to search the vehicle.[627] Upon a search of the vehicle, the officer noticed a small paper bag pushed partly under the front seat.[628] The officer pulled the bag out and opened it, finding 33 packets of a controlled substance.[629] Huether denied ownership of the bag and knowledge of its con-

618. *Id.*
619. *Id.*
620. *Schumacher*, 452 N.W.2d at 346-348.
621. *Id.* at 347.
622. *Id.* at 348.
623. *Id.*
624. 453 N.W.2d 778 (N.D. 1990).
625. State v. Huether, 453 N.W.2d 778 (N.D. 1990).
626. *Huether*, 453 N.W.2d at 780.
627. *Id.*
628. *Id.*
629. *Id.*

tents.[630] He was arrested and charged with possession with intent to deliver a controlled substance.[631] At trial, Huether moved to suppress the evidence of the controlled substance.[632] The district court ordered the evidence suppressed, finding that the search exceeded Huether's consent, was not supported by a probable cause, and violated Huether's expectation of privacy.[633] The state appealed.[634]

The state initially argued that when Huether stated that the bag was not his and that he had no knowledge of it, he relinquished his expectation of privacy.[635] The North Dakota Supreme Court found that disavowal of ownership was not enough to relinquish Huether's right of privacy, especially when the bag was located in an area where there was a legitimate privacy expectation.[636] An effort to disclaim ownership cannot alone constitute abandonment.[637]

Next, the state asserted that the search of the bag was within Huether's consent.[638] The court rejected this argument, stating that the purpose of the search was limited to finding an open container, and the scope of the officer's search was defined by the object of the search.[639] The officer overlooked a more obvious bag that contained a six-pack of beer and instead opened a concealed bag which had neither the size nor shape of a beverage container.[640] The court agreed with the trial court's finding that the bag could not have been reasonably expected to contain an alcoholic beverage container; therefore, the search exceeded the scope of Huether's consent.[641]

The North Dakota Supreme Court rejected the state's probable cause argument on the same grounds.[642]

The order of the trial court was affirmed.[643]

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630. *Huether*, 453 N.W.2d at 780.
631. *Id.*
632. *Huether*, 453 N.W.2d at 780.
633. *Id.*
634. *Id.*
635. *Id.*
636. *Huether*, 453 N.W.2d at 781-782.
637. *Id.*
638. *Id.* at 781.
639. *Id.* *See* United States v. Ross, 456 U.S. 798 (1982) (constitutional scope of a warrantless search of an automobile is defined by the object of that search).
640. *Huether*, 453 N.W.2d at 782.
641. *Id.*
642. *Id.* at 783.
643. *Id.*

STATE V. RODE

In *State v. Rode*,[644] Mark Rode challenged, as a violation of his fourth amendment rights, the testing by law enforcement agents of a package addressed to him which contained cocaine .[645] A private delivery company opened an undeliverable package addressed to the defendant and discovered a substance inside that appeared to be cocaine.[646] The delivery company contacted law enforcement agents, who promptly took the package to the Jamestown law enforcement center for testing.[647] The substance was positively identified as cocaine.[648] The law enforcement agents then arranged for the package to be resealed and delivered to Rode, who was then arrested for drug possession.[649] Rode challenged the officers' testing of the package contents under the fourth amendment to the United States Constitution and article 1, section 8 of the North Dakota Constitution.[650] The trial court granted Rode's motion to suppress the evidence and the state appealed.[651]

Because the actions of the delivery service were non-governmental and did not fall under the purview of the fourth amendment, the degree of the invasion of Rode's privacy was tested from the point that it exceeded a private search.[652] The North Dakota Supreme Court found that once the delivery service opened the package, the subsequent testing by law enforcement agents to identify the substance only remotely compromised Rode's expectation of privacy.[653] Balancing the interests of the government against Rode's privacy interests, the court held that the purpose of the test was merely to identify whether or not the substance was cocaine and did not constitute a search under the fourth amendment or the North Dakota Constitution.[654]

The trial court's suppression order was reversed.[655]

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644. 456 N.W.2d 769 (N.D. 1990).

645. State v. Rode, 456 N.W.2d 769 (N.D. 1990).

646. *Rode*, 456 N.W.2d at 769. The package was opened by company employees pursuant to a company policy regarding undeliverable packages. *Id.*

647. *Id.*

648. *Id.*

649. *Id.*

650. *Rode*, 456 N.W.2d at 770.

651. *Id.*

652. *Id.*

653. *Id.*

654. *Rode*, 456 N.W.2d at 771.

655. *Id.*

SENTENCING

STATE V. HANSON

In *State v. Hanson*,[656] the failure of a court to take action to reduce a criminal sentence within 120 days from the original imposition of the sentence was held to foreclose the court's power to reduce the sentence.[657]

Thomas E. Hanson pleaded guilty, under a plea agreement, to two counts of gross sexual imposition and was sentenced to serve concurrent six-year terms in the North Dakota State Penitentiary, with two years suspended.[658] Hanson moved to reduce his sentence pursuant to Rule 35(b) of the North Dakota Rules of Criminal Procedure.[659] The trial court granted Hanson's motion and suspended four years of Hanson's sentence.[660] The state requested that the trial court reconsider its reduction in sentence on the basis that Rule 35(b) requires that a court act to reduce a sentence within 120 days from the date of sentencing.[661] The trial court denied the state's motion to reconsider, reasoning that once a motion is timely made, the 120-day requirement is met.[662] The state appealed.[663]

In determining whether the 120-day time limit imposed by Rule 35(b) of the North Dakota Rules of Criminal Procedure applied to the time in which a motion must be made or in which a court must act, the North Dakota Supreme Court looked to the plain language of Rule 35(b) and its explanatory note.[664] The court found that the 120-day limit clearly applied to the time in which the court must act on a reduction in sentence.[665] The trial court was incorrect in reducing Hanson's sentence more than 120 days after the original sentencing.[666] The failure of a sentencing court to act within the 120-day limit forecloses the court's power to reduce a criminal sentence.[667]

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656. 452 N.W.2d 329 (N.D. 1990).
657. State v. Hanson, 452 N.W.2d 329 (N.D. 1990).
658. *Hanson*, 452 N.W.2d at 329.
659. *Id. See* N.D.R. CRIM. P. 35(b) (reduction of sentence).
660. *Hanson*, 452 N.W.2d at 329.
661. *Id.*
662. *Id.* at 329-330.
663. *Hanson*, 452 N.W.2d at 330.
664. *Id.* The explanatory note to Rule 35(b) of the North Dakota Rules of Criminal Procedure states: "It should be noted that the period is not defined as the time in which the motion may be made, but is rather the time in which the court may act." N.D.R. CRIM. P. 35(b).
665. *Hanson*, 452 N.W.2d at 330.
666. *Id.*
667. *Id.*

The North Dakota Supreme Court reinstated Hanson's original sentence.[668]

SOCIAL SECURITY AND PUBLIC WELFARE

NEWLAND V. JOB SERVICE NORTH DAKOTA

In *Newland v. Job Service North Dakota*,[669] the North Dakota Supreme Court held that an employee's difficulty in obtaining child care due to a change from standard work hours to on-call schedule with unpredictable hours may constitute good cause for quitting attributable to the employer, if the employee makes a good faith effort to preserve employment.[670]

Joy Newland was employed by Dakota Drug, Inc. of Minot for one and one-half years as a utility clerk and order filler.[671] Her work hours were from 7:30 a.m. to 4:30 p.m.[672] In 1989, the company informed Newland that her shift would change to an irregular schedule running from 4:30 a.m. to 8:30 p.m. or later, depending upon the work that needed to be done.[673] Although the schedule change did not involve an increase or decrease in hours, the time when work was to begin and end each day was unpredictable.[674] Unable to secure care for her children on the new schedule, Newland quit her job and filed for unemployment compensation benefits.[675] Job Service denied benefits, determining that Newland quit for personal reasons that did not constitute good cause attributable to the employer.[676] Newland appealed.[677]

Newland contended that Job Service erred in concluding she voluntarily quit her job without good cause attributable to Dakota Drug, Inc..[678] Looking to public policy supporting the unemployment compensation system—that benefits should be provided to persons unemployed through no fault of their own—the North Dakota Supreme Court construed provisions of the act in New-

668. *Id.* at 330-331. Although the court's ruling negates the trial court's power to reduce Hanson's sentence, the court stated that Hanson still had the opportunity to apply to the parole board at anytime for early release and the parole board would review his sentence periodically. *Id.*

669. 460 N.W.2d at 118 (N.D. 1990).

670. Newland v. Job Service North Dakota, 460 N.W.2d 118 (N.D. 1990).

671. *Newland*, 460 N.W.2d at 120.

672. *Id.*

673. *Id.*

674. *Id.*

675. *Newland*, 460 N.W.2d at 120.

676. *Id.*

677. *Id.*

678. *Id.*

land's favor.[679] The court determined that although child care alone is not a condition attributable to an employer, it may combine with other factors to constitute good cause for quitting.[680] In her application for benefits, Newland had given the shift change and child care problems as reasons for quitting, and the court stated that Job Service was required to consider all reasons which may have combined to make Newland quit, even if one factor alone may be disqualifying.[681] Considering the shift change, the court determined it to be good cause attributable to Dakota Drug, Inc., even though it resulted in no increase or decrease in hours.[682] Making this determination, the court concluded that if Newland was found to have made a good faith effort to preserve her employment by exercising a good faith effort to find child care, benefits should be awarded.[683]

The trial court's order was reversed and the case remanded for determination of the child care issue.[684]

TAXATION

SPEEDWAY, INC. V. JOB SERVICE NORTH DAKOTA

In *Speedway, Inc. v. Job Service North Dakota*,[685] the North Dakota Supreme Court held that a restaurant was required to pay job insurance taxes on income earned by restaurant manager, even though the manager's only income was from percentage of profits under an oral lease agreement.[686]

Speedway opened a restaurant and lounge in Minot.[687] Under an oral lease agreement, Shirley Struckness leased the restaurant from Speedway for $3,200 a month, plus 75% of monthly net profits over $800.[688] In 1987, Job Service issued a determination requiring Speedway to pay job insurance taxes on Struckness' income.[689] Speedway appealed the determination, claiming that Struckness was simply leasing the business from Speedway, and

679. *Newland*, 460 N.W.2d at 120.
680. *Id.* at 121. *See* N.D. CENT. CODE § 52-01-05 (1989) (providing a declaration of public policy concerning involuntary unemployment in North Dakota); N.D. CENT. CODE § 52-06-02 (1989) (describing when a person is disqualified from receiving benefits).
681. *Newland*, 460 N.W.2d at 122.
682. *Id.*
683. *Id.* at 124-125.
684. *Id.*
685. 454 N.W.2d 526 (N.D. 1990).
686. Speedway, Inc. v. Job Service North Dakota, 454 N.W.2d 526 (N.D. 1990).
687. *Speedway*, 454 N.W.2d at 527.
688. *Id.* Struckness was responsible for managing the restaurant operations and received the first $800 of monthly net profits and additional 25% of all additional profits.
689. *Id.*

therefore the percentage of profits received by her was not subject to taxation.[690] Although an appeals referee agreed with Speedway, the Executive Director of Job Service concurred with the initial decision.[691] Speedway then appealed to the district court, which upheld the Executive Director's determination.[692] Speedway appealed to the North Dakota Supreme Court.[693]

Speedway asserted that job insurance taxes were not required on Struckness' income because she did not fall under the definition of a person who performs services "for wages or under any contract for hire."[694] Interpreting the statute, the North Dakota Supreme Court determined that the phrase "contract for hire" did not have substantially the same meaning as wages, as Speedway argued.[695] Because Struckness managed the corporation's business and received a share of the business profits in return, the court concluded that Struckness was an individual who performed services under a "contract for hire," and her income was, therefore, subject to job insurance taxation.[696] Direct payment of wages or salary from employer to employee is not required for services to become subject to job insurance taxation.[697]

The judgment of the trial court was affirmed.[698]

VENDOR AND PURCHASER

SECURITY STATE BANK OF HANNAFORD V. HARRINGTON

In *Security State Bank of Hannaford v. Harrington*,[699] Burt and Ruth Harrington sold 480 acres of farmland to their son, Gerald, and his wife, Nancy,under a contract for deed.[700] The farmland consisted of two parcels, one located in Griggs County and the other in Foster County.[701] Gerald farmed the land with Security State Bank (Security), providing operating expense loans.[702] In return for the financing, Security requested a first mortgage on the

690. *Speedway*, 454 N.W.2d at 527.
691. *Id.*
692. *Id.*
693. *Id.*
694. *Speedway*, 454 N.W.2d at 528. *See* N.D. CENT. CODE § 52-01-01(17)(e) (providing that "[s]ervices performed by an individual for wages or under any contract for hire must be deemed to be employment subject to North Dakota unemployment compensation law").
695. *Speedway*, 454 N.W.2d at 528.
696. *Id.* at 528-30.
697. *Id.*
698. *Id.* at 530.
699. 452 N.W.2d 72 (N.D. 1990).
700. Security State Bank v. Harrington, 452 N.W.2d 72 (N.D. 1990).
701. *Harrington*, 452 N.W.2d at 73.
702. *Id.*

Foster County property.[703] In order to comply with Security's request, Burt and Ruth Harrington conveyed legal title to the property to Gerald.[704] Security acquired a first mortgage on the property and also took a lien on Gerald's vendee interest in the contract for deed on the Griggs County property.[705] When Gerald later defaulted on his loans, he conveyed the Foster County property to Security.[706] Security then foreclosed its lien on the Griggs County property and brought action against Burt and Ruth Harrington for specific performance of the contract for deed.[707] The Harringtons counterclaimed, requesting cancellation of the contract.[708] The trial court allowed the cancellation, subject to Security's right to redeem for the price of the unpaid balance of the contract for deed.[709] Security appealed.[710]

Security first asserted on appeal to the North Dakota Supreme Court that the Harringtons were barred by a ten-year limitation period set forth in section 28-01-42 of the North Dakota Century Code from cancelling the contract for deed.[711] Looking to the language of the statute, the court found that section 28-01-42 clearly and unambiguously provided a twenty year statute of limitations and, therefore, the Harrington's action was not time barred.[712]

Security next asserted that the redemption amount set by the trial court should have been reduced to reflect the Harringtons' conveyance of the Foster County property to Gerald, because it essentially destroyed their vendor's lien on that parcel.[713] The North Dakota Supreme Court found that the conveyance was conditioned on Gerald's continued payment of the full contract price, therefore, the Harringtons' vendors lien was retained on the Griggs County property.[714] Concluding that as assignee, Security had no greater right of redemption than Gerald, the court upheld the redemption amount set by the trial court.[715]

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703. *Id.*
704. *Id.*
705. *Harrington*, 452 N.W.2d at 73.
706. *Id.*
707. *Id.*
708. *Id.* at 74.
709. *Harrington*, 452 N.W.2d at 74.
710. *Id.*
711. *Id.*
712. *Id. See* N.D. CENT. CODE § 28-01-42 (1988) (relating to the time limitation for bringing an action to cancel or enforce a contract for the sale or conveyance of real estate).
713. *Security*, 452 N.W.2d at 74-75.
714. *Id.*
715. *Id.* The redemption amount reflected the full unpaid balance of the contract for deed plus interest.

The judgment of the trial court was affirmed.[716]

WORKERS COMPENSATION

PLANTE V. NORTH DAKOTA WORKERS COMPENSATION BUREAU

In *Plante v. North Dakota Workers Compensation Bureau*,[717] the North Dakota Supreme Court held that a workers compensation claimant could not pick and choose benefits in two different states in order to get highest possible compensation.[718]

Curtis Plante was injured in North Dakota while employed by a Minnesota construction company.[719] He applied for and collected temporary disability benefits from the North Dakota Workers Compensation Bureau until he returned to work.[720] When he found himself unable to continue to work, he filed a workers compensation claim in Minnesota for temporary total disability benefits, permanent partial disability benefits, and medical expenses.[721] Minnesota settled with Plante for $20,000, which represented benefits for 10.5% permanent partial impairment and for three months of temporary total disability benefits.[722] Plante then filed in North Dakota for benefits not offered in Minnesota.[723] The North Dakota Workers Compensation Bureau denied benefits on the basis that Minnesota benefits were not supplemental to his North Dakota benefits.[724] Upon rehearing, the Bureau found that Plante waived entitlement to North Dakota benefits when he accepted the Minnesota award, with the exception of medical benefits.[725] The district court affirmed the Bureau's decision.[726] Plante appealed.[727]

Plante argued on appeal that the Minnesota settlement was supplemental to North Dakota benefits within the meaning of section 65-05-05 of the North Dakota Century Code, because the ben-

716. *Id.*
717. 455 N.W.2d 195 (N.D. 1990).
718. Plante v. North Dakota Workers Compensation Bureau, 455 N.W.2d 195 (N.D. 1990).
719. *Plante*, 455 N.W.2d at 196.
720. *Id.*
721. *Id.*
722. *Id.*
723. *Plante*, 455 N.W.2d at 196-197.
724. *Id.* at 197. *See* N.D. CENT. CODE § 65-05-05 (1985) (prohibits compensation unless benefits received from another state are supplemental to North Dakota benefits).
725. *Plante*, 455 N.W.2d at 197.
726. *Id.*
727. *Id.*

efits were in addition to benefits received.[728] The North Dakota Supreme Court rejected Plante's argument, finding Plante's Minnesota award to be distinct and separate, rather than in addition to, the North Dakota award.[729] Furthermore, the court found that Plante would have received greater benefits than contemplated by either state's workers compensation plans if he was allowed the requested benefits.[730] Although an employee may file in the state that provides the most desirable benefits, he may not pick and choose the highest benefits in each state.[731]

The decision of the district court was affirmed.[732]

728. *Id.*
729. *Plante*, 455 N.W.2d at 198.
730. *Id.* at 199-200.
731. *Id.* at 200.
732. *Id.*