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1977 North Dakota Supreme Court Review

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1977 NORTH DAKOTA SUPREME COURT REVIEW*

This is a review of important North Dakota Supreme Court decisions handed down by the court during 1977. The purpose of this review is to serve as a convenient overview of important decisions and, in some cases, a summary of the effect that these decisions will have on North Dakota law.

Not all 1977 decisions are discussed, but only those which are felt will have the greatest impact on North Dakota law.

The review is divided alphabetically by subject area, including the following subjects:

CONTRACTS

In its unanimous opinion of August 18, 1977, the North Dakota Supreme Court, in *Amann v. Frederick*,[1] held that specific perform-

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1. 257 N.W.2d 436 (N.D. 1977).

ance of an option to convey 400 acres of land was warranted despite the contention that one party could not read and his wife did not read various papers they signed.[2] The parties entered into a series of agreements whereby the plaintiffs covenanted to lease 400 acres of farm land from the defendant for five years, together with an option to purchase the 400 acres within that period.[3] The plaintiff exercised his contractual option in writing but the defendants refused to convey the land on the grounds that there was no "meeting of the minds" nor consideration for the option contract.[4]

Speaking for the court, Mr. Justice Vogel stated that, even though the defendants argued that they were not aware of the contents of the lease-option agreement, there was more than adequate evidence before the Dunn County District court judge to justify the conclusion that the contract was based upon mutual assent.[5] If mutual assent is in some way evidenced, the contract will be binding regardless of mental reservations or misunderstandings by one or both parties, in the absence of fraud or other recognized grounds for setting aside the contract.[6]

As to the claim that there was no consideration for the option, the court found that a separate instrument is not required to express consideration for an option agreement.[7] The fact that the parties included an orally discussed option fee in the total yearly rental amount was sufficient consideration for a valid option.[8]

The defendant finally asserted that they were at least entitled to the agreed upon rental value for the fifth year of the contract, despite the fact that the plaintiffs exercised their option during the fourth year of the contract.[9] The court correctly found that when the optionee exercised his option he then became the owner of the real estate and was thereafter entitled to collect the rent on the property.[10] Therefore, any obligation the plaintiff had to pay rent was to himself.[11]

In *Bottineau Public School District No. 1 v. Currie*,[12] the North Dakota Supreme Court reversed a Ward County District Court ruling which held a former Bottineau School teacher liable for breach of contract in the amount of $500 liquidated damages.[13]

Pursuant to the law of North Dakota the Bottineau School Board is required to notify teachers within the district whether it intends to

2. Amann v. Frederick, 257 N.W.2d 436, 438 (N.D. 1977).
3. *Id.*
4. *Id.* at 438-39.
5. *Id.* at 439.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 441.
10. N.D. CENT. CODE § 47-04-26 (1978).
11. 257 N.W.2d at 441.
12. 259 N.W.2d 650 (N.D. 1977).
13. Bottineau Pub. School Dist. No. 1 v. Currie, 259 N.W.2d 650, 650 (N.D. 1977).

renew their contracts for the next year.[14] In 1976, however, negotiations were still in progress between the teachers and the School Board and the latter sent teachers a timely notice that they intended to renew the contracts on the same basis as the prior years except as were modified by the continuing negotiations.[15] Accompanying the notice was a blank response form requesting that the teachers either accept or reject the offer. Instead of responding on the form supplied to them, the teachers answered on their own prepared forms indicating whether they had an intention to return to the Bottineau Public Schools.[16] The defendant returned her response to the School Board with the "it is my intent to [return]" blank checked.[17] Several months later, the defendant resigned her position[18] and the School Board instituted this action to collect liquidated costs of replacement.[19]

In reversing, the supreme court held that no binding contract existed between the parties.[20] The notification to the School Board by the defendant that she intended to return the following year was merely an expression of a future intention, and not a contractual acceptance.[21] "A mere statement of an intention to act in a certain way is not a promise upon which a contract can be predicated."[22]

The court took great care not to fault the School Board for the problem in this case,[23] and placed the blame rather on the statutory provisions by which the Board was guided.[24] The court emphasized a "dire need for legislation delineating and making appropriate adjustments between the two statutes."[25]

CRIMINAL LAW AND PROCEDURE

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14. N.D. CENT. CODE § 15-47-27 (1971).
15. 259 N.W.2d at 651.
16. *Id.* at 652.
17. *Id.*
18. *Id.*
19. The 1975-76 contract between the School Board and the defendant provided in part: "9". Because it is impractical or extremely difficult to fix the actual cost to be incurred at the time of the release request, the parties, hereto, agree that the amount presumed to be the cost of replacement shall be fixed as follows:

Time of Release Request	Cost of Replacement
Within the first 3 days after contract due date	$100
Between 3 days after the contract due date prior to end of present school term	250
Between end of present school term to the termination date of this contract	500

Nothing stated herein shall be construed as meaning that the Board must release the teacher upon payment of the above determined costs. The fee may be waived by the Board if the teacher's resignation is due to ill health, military service, or a hardship case."
Id. at 650-51.
20. *Id.* at 654.
21. *Id.*
22. *Id.*, *quoting* Hayashi v. Ihringer, 79 N.D. 625, 631, 58 N.W.2d 788, 791 (1953).
23. *Id.*
24. N.D. CENT. CODE § 15-47-27 (1971); *Id.* ch. 15-38.1 (1971).
25. 259 N.W.2d at 655.

The supreme court decided some controversial cases involving constitutional law issues in criminal cases. Two of these involved prisoners' rights.

In *Havener v. Glaser*,[26] the court issued a supervisory writ vacating the district court's writ of habeas corpus. Two prisoners, Richard Collins and Michael Schroeder, were placed in administrative isolation at the North Dakota State Penitentiary after allegedly being found in possession of marijuana within the confines of the penitentiary.[27] The matter came before the district court on a petition for a writ of habeas corpus. Gerald G. Glaser, judge of the fourth judicial district, issued the writ. Joseph Havener, warden of the state penitentiary, sought a supervisory writ staying the order of the district court.[28]

The two prisoners alleged in their habeas petition that the purpose for their administrative isolation was punitive[29] and that they had not been afforded procedural due process. The district court concluded that administrative isolation involves "loss of privileges normally afforded inmates, together with greater restrictions on freedom of movement and communication."[30]

The supreme court found that the purpose for segregating Collins and Schroeder was security and not punishment. The court noted the fact that the two prisoners were suspected of "trafficking in narcotics and that this was a serious problem at the penitentiary."[31]

The court distinguished *Kelly v. Brewer*,[32] a case in which administrative segregation at the Iowa State Penitentiary was found to be a denial of due process. In *Kelly* the conditions of confinement were abominable,[33] as contrasted with the less harsh conditions under the North Dakota administrative isolation procedure.

The court indicated that judicial intrusion into prison administration should be avoided, stating that "the administration of a penitentiary is a singular responsibility, many aspects of which are completely outside the experience of a layman, an attorney, or a judge. For this reason, even well-intentioned judicial intervention into the workings of a prison could create problems."[34]

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26. 251 N.W.2d 753 (N.D. 1977).
27. Havener v. Glaser, 251 N.W.2d 753, 754 (N.D. 1977).
28. In North Dakota there is no appeal from a decision in a habeas corpus proceeding but the Supreme Court can exercise its superintending control where the issuance of the writ is predicated upon an error of law. *Id.* at 757; State ex rel. City of Bismarck v District Ct., 64 N.D. 399, 253 N.W. 744 (1934).
29. The administrative isolation unit was established to create "more secure housing and control of inmates . . . who are frequently disruptive of good order or security." It is "*not* to be used as a place of confinement as a *punishment* for violation of institutional rules." *North Dakota State Penitentiary Administrative Regulations* § 505 (as amended February 27, 1976) (emphasis in original).
30. 251 N.W.2d at 757.
31. *Id.* at 760.
32. 525 F.2d 394 (8th Cir. 1975).
33. Kelly v. Brewer, 378 F. Supp. 447 (S.D. Ia. 1974).
34. 251 N.W.2d at 759.

The court concluded that the privileges[35] which Collins and Schroeder had been denied do not involve the protection of the due process clause of the fourteenth amendment to the United States Constitution but held that the reasons for holding the prisoners in administrative isolation should be more specifically explained in writing unless to do so would constitute a serious risk to the security of the institution.[36]

In *State ex rel. Olson v. Maxwell*,[37] the court was confronted with the issue of whether the Director of Institutions has the authority to transfer prisoners, particularly female prisoners, out of the state. The court held that a prisoner cannot be imprisoned outside of the state "unless and until a due-process hearing has been held or waived and an order entered permitting the transfer."[38]

Initially, the action was brought by the Attorney General to obtain a supervisory writ requiring the district court to delete the words "and at no other place" from a judgment sentencing a female prisoner to eighteen months incarceration in the state penitentiary. One of the questions presented was whether the trial judge had authority to specify the place of confinement of convicted prisoners sentenced to imprisonment or whether that authority belonged to the director of institutions. The court held that in North Dakota, "it is the [trial] court . . . which specifies in the first instance the place of confinement. . . ."[39] The court indicated that several statutes give the director of institutions authority to change the place of confinement once the serving of the sentence has begun.[40]

The court then turned to the constitutional issues of procedural due process and equal protection under the law. The court cited *Havener v. Glaser*[41] for the proposition that "the extent to which procedural due process must be afforded depends upon the circumstances of each case and the nature of the loss involved."[42] An administrative transfer requires a due process hearing where it would amount to a "grievous loss" to the prisoner.[43] Some of the enumerated losses to the prisoner resulting from out-of-state incarceration were lack of contact with friends and family, inability to consult with attorneys, and absence from parole hearings which might effect the determination by the parole board.[44] Although these factors alone do not create constitutional barriers to administrative transfer when coupled with classification by sex, a due process hearing is required.

35. The privileges lost by administrative isolation include institutional employment, opportunities for education, visitation, and exercise. *Id.* at 757.
36. *Id.* at 761.
37. 259 N.W.2d 621 (N.D. 1977).
38. State ex rel. Olson v. Maxwell, 259 N.W.2d 621, 624 (N.D. 1977).
39. *Id.* at 625.
40. *Id.* at 626.
41. 251 N.W.2d 753 (N.D. 1977).
42. 259 N.W.2d at 627.
43. *Id.*, *citing* Gomes v. Travisono, 510 F.2d 537, 539-41 (1st Cir. 1974).
44. 259 N.W.2d at 631.

The court found that under the North Dakota Constitution[45] sex is an inherently suspect classification[46] requiring strict judicial scrutiny. Under a strict scrutiny standard of review, mere administrative convenience[47] will not justify out-of-state imprisonment of female offenders without minimal due process.[48]

The statute in question[49] could not be found unconstitutional because only three judges concurred in the majority opinion.[50] The dissent,[51] although it indicated agreement with the philosophical concepts enunciated in the majority opinion, felt that the constitutional issues were not properly before the court.[52] The dissent points out that Cora Kroeplin, the defendant in the criminal action, had been used as a mere pawn to reach a constitutional question which was not raised by her even though she was the party affected.[53] The fear that courts will be "preoccupied with self-styled constitutional questions" brought by judicial officers acting "sua sponte" is a valid one.[54]

The conclusion which can be drawn from the two prison cases is that some minimal amount of due process is required even in the case of non-disciplinary administrative transfers within the prison system.

Another major area in which constitutional issues were decided in criminal cases is search and seizure. In *State v. Lange*,[55] the defendant was stopped by a Jamestown police officer who had been alerted of a possible DWI.[56] The officer did not stop the car until he had followed it for five blocks and observed it weaving in its lane of traffic. As he was waiting for the driver to produce identification, the officer observed a small pipe in the ashtray and empty brown paper bags of the type used by liquor stores. He advised the driver of his Miranda rights and asked if he had been drinking. The driver, Lange, replied that he had consumed about half of a bottle of wine.

Lange and the passenger, Grager, were taken to the police sta-

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45. N.D. CONST. § 20.

46. 259 N.W.2d at 627; Bingert v. Bingert, 247 N.W.2d 464 (N.D. 1976); Tang v. Ping, 209 N.W.2d 624 (N.D. 1973).

47. The attorney general argued that the state penitentiary was not equipped to provide female prisoners with the same educational benefits and opportunities for rehabilitation. Due to lack of funding, female prisoners would have to be held in protective custody type isolation. 259 N.W.2d at 631.

48. *Id.* at 627.

49. N.D. CENT. CODE § 54-21-25 (1974) states that "[i]f the director of institutions determines that suitable state facilities or services are not available for inmates under his control he may contract for same with the proper authorities of the United States, another state, another agency in this state or a political subdivision of this state."

50. N.D. CONST. § 88. This is the reason that the majority was forced to decide the case on due process grounds. 259 N.W.2d at 629.

51. The dissenting opinion was written by Justice Sand and concurred in by Justice Paulson.

52. 259 N.W.2d at 633.

53. *Id.* at 634.

54. *Id.* at 635.

55. 255 N.W.2d 59 (N.D. 1977).

56. N.D. CENT. CODE § 39-08-01 (Supp. 1977) which states in pertinent part as follows: "No person shall drive or be in physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if . . . (b) he is under the influence of intoxicating liquor; . . . ."

tion. Their car was left locked but unattended. Lange admitted that there was a half a bottle of wine under the seat and consented to a search of the vehicle. However, when informed of the proposed thorough nature of the search the defendants hesitated. They were told that the vehicle could be impounded and searched anyway, so they again consented to the search. The search resulted in the discovery of lysergic acid diethylamide[57] and the charge was changed to possession of a controlled substance with intent to deliver.[58]

The first issue the court considered was whether the defendant was stopped and arrested and his vehicle searched without probable cause. The court said that the police officer, acting upon a radio message and his own observations of erratic driving behavior, had reasonable cause to stop the vehicle.[59] The court also found probable cause to make the arrest based upon the officers observation of the pipe and brown paper bags, his detection of the odor of alcohol, and the admission by the defendant.[60]

The court then discussed the issue of the voluntariness of the search. "Voluntariness is a question to be determined from all circumstances, whether the subject is, or is not, in custody. The circumstances should be viewed as more suspect when the subject is in custody."[61] The court found that the threat to search the vehicle in the absence of consent was not "inherently coercive" and concluded that consent was freely and voluntarily obtained.

The court then turned to the chain of custody problem and concluded that "it was proper for the lower court to conclude that the chain of custody was not broken during the 35 to 45 minute period when the defendant's vehicle containing the controlled substance was left locked, but unattended."[62] Mere speculation that the vehicle could have been broken into, in the absence of any such evidence, is not enough to justify suppression of the evidence.[63]

In *State v. Meadows*,[64] Cel Novak, Stutsman County Deputy Sheriff, observed the defendant, Meadows, drinking a bottle of beer while driving his car. Novak followed Meadows to a truck stop where Meadows left the car and went inside. Novak pulled alongside of Meadows' vehicle and observed a six pack of beer with one bottle missing. He also observed an open bottle of beer on the floor. He attempted to lo-

57. Commonly known as "LSD" or "acid." LSD is a controlled substance under N.D. CENT. CODE § 19-03.1-05(4)(L) (Supp. 1977).
58. A violation under N.D. CENT. CODE § 19-03.1-23(1) (Supp. 1977) which states in pertinent part as follows, ". . . [I]t is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance. . . ."
59. State v. Lange, 255 N.W.2d 59, 63 (N.D. 1977).
60. *Id.*
61. *Id.* at 64.
62. *Id.* at 65.
63. *Id.*
64. 260 N.W.2d 328 (N.D. 1977).

cate Meadows but was unsuccessful. He then made a warrantless search of the vehicle seizing the open bottle of beer and the five unopened bottles remaining in the six-pack. He continued to search for more alcoholic beverages and discovered a pistol in the console. Meadows was charged with carrying a pistol in a motor vehicle without a permit[65] and cited for violation of the North Dakota open bottle law.[66] Meadows moved to suppress the use of the pistol as evidence.

In determining that the search was permissible, the court used a two prong approach: "(1) the officer must have probable cause to believe that seizable items are located in the place to be searched; and (2) the circumstances must bring the search within one of the exceptions to the rule that a search must be based upon a valid search warrant."[67]

The parties agreed that Novak had a right to seize the beer which was in plain view. The question was whether Novak could continue to search for additional open receptacles of alcohol. The court found that Novak's belief that Meadows' vehicle contained more open receptacles of alcohol was not unreasonable.[68] "The reasonableness of Novak's belief . . . should be judged in light of the practical and factual considerations law enforcement personnel are called to act upon in their myriad of duties."[69]

The court then turned to the second question; whether a warrantless search was justified. A warrantless search of an automobile is justified only where there are exigent circumstances, in addition to probable cause, which require immediate action.[70] The court felt that the circumstances[71] were such that there was a "distinct likelihood that the vehicle or the seizable items therein would have been moved" had the officer taken the time to obtain a search warrant.[72]

Meadows argued that because Novak had already seized sufficient

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65. N.D. CENT. CODE § 62-01-05 (1960).
66. *Id.* § 39-08-18 (Supp. 1977).
67. State v. Meadows, 260 N.W.2d 328, 330 (N.D. 1977).
68. *Id.*
69. *Id.* The court enumerated the following circumstances which contributed to Novak's belief:

> (1) Novak had observed Meadows drinking beer while driving the vehicle; (2) there was an open bottle of beer and a partially opened six-pack of beer in the vehicle; (3) there was an odor of alcohol in the vehicle; and (4) Novak's prior experience was that most of the time a party consuming alcoholic beverages on a highway also has more alcohol concealed in the vehicle.

Id. It should be noted that the first three items are only justifications for the seizure of the items in plain view. It could be argued that the finding of probable cause for the extended search was really based on item (4), Novak's assumption that he would find more alcoholic beverages in the vehicle.
70. *Id.* at 332, *citing* State v. Gagnon, 207 N.W.2d 260, 264 (N.D. 1973).
71. The court listed five circumstances: (1) Novak observed Meadows drinking while driving; (2) Novak knew Meadows was in the immediate area; (3) Meadows' mother and other persons in the building knew Novak was looking for Meadows; (4) the vehicle was on property freely accessible to the public; and (5) the vehicle was unlocked making the interior easily accessible. 260 N.W.2d at 332
72. *Id.* at 333.

evidence to convict Meadows under the open bottle statute, there was no justification for the extended search which resulted in discovery of the pistol. The court rejected this argument saying that such a rule, limiting the search and seizure of evidentiary items to what is merely sufficient to convict, would "unnecessarily restrict law enforcement officers in their attempts to apprehend law violators and to preserve evidence of violations."[73]

In *State v. Thompson*,[74] the defendant was convicted in Morton County District Court on two counts of burglary. About 5 p. m. on April 26, 1976, defendant Thompson arrived at the Burleigh County Jail to visit a friend, Michael Morrell, who had previously confessed to several burglaries. Morrell apparently had implicated Thompson. Deputy Sheriff Peck detained Thompson to check out a possible warrant for his arrest in Morton County. Peck arrested Thompson on the Morton County warrant and read the *Miranda*[75] warnings to Thompson who indicated he understood his rights. Thompson started to talk about the burglaries but then decided "he wanted to think about it first."[76] After a search of Thompson's car[77] he was turned over to the Morton County Sheriff's Department. He was then taken to Bismarck police headquarters where an officer Frohlich read him his *Miranda* warnings and questioned him about burglaries in Bismarck. Thompson refused to talk unless he could "make a deal."[78] He was then questioned by Morton County Deputy Sheriff Hoffman. Hoffman again gave Thompson *Miranda* warnings. At about 7:15 p. m. Thompson confessed to several burglaries and showed Hoffman where the fruits of the burglaries were hidden. Thompson objected to the use of any evidence obtained from him subsequent to the time he told Deputy Sheriff Peck he wanted to think about it before making a written statement. The trial court found that Thompson's statements were freely and voluntarily given.[79]

The supreme court reversed in a unanimous opinion. Justice Pedersen, writing for the court, reasoned as follows: "The State has a heavy burden to show a waiver of the constitutional right to remain silent, and that statements made after an indication of a wish to remain silent are, in fact, voluntary."[80] The court discussed several federal cases and concluded that there was a sufficient refusal by Thompson to talk and that the confession was involuntary. The court also found that Thompson's desire not to talk was ignored, and his

73. *Id.*
74. 256 N.W.2d 706 (N.D. 1977).
75. Miranda v. Arizona, 384 U.S. 436 (1966).
76. State v. Thompson, 256 N.W.2d 706 (N.D. 1977).
77. Thompson consented to the search. *Id.* at 709.
78. *Id.*
79. *Id.*
80. *Id.* at 710.

"subsequent statement to Hoffman was never shown to be clearly the result of an intelligent evaluation of new information causing him to change his mind."[81] The opinion went on to say that "[l]ack of communication between police officers cannot be substituted for the necessary strong proof of an intelligent, uncoerced, voluntary waiver of the right to remain silent."[82]

In *Zander v. S.J.K.*,[83] the court held that mere presence at the scene of a crime is not sufficient for a conviction.[84] On January 30, 1977, S.J.K. and three other juveniles were driving along Interstate 94 when they stopped at the Oakes rest area. All four young men entered the rest room but S.J.K. left to telephone his girlfriend. While S.J.K. was on the telephone two of his companions seriously vandalized the rest area and later the phone booth while the third youth waited in the car. All of the other boys testified that S.J.K. had not participated in any of the physical destruction of the property.[85]

The court stated the principle that mere presence at the scene of a crime is not enough to make one an accomplice,[86] but it is one factor to be considered in conjunction with other facts.[87] The court found that S.J.K. had no statutory duty[88] to prevent the damage which occurred nor did he share the criminal intent to commit vandalism or cause his companions to engage in such conduct.[89]

EVIDENCE

The court was presented with several evidence cases in which it attempted to clarify some problem areas existing in the new North Dakota Rules of Evidence.[90]

In *State v. Jensen*[91] the court clarified the meaning of hearsay.[92] There the defendant was tried before a jury and convicted on two counts of murder in the second degree.[93] In reversing the verdict,[94] the court noted a number of evidentiary errors.[95] The defendant had been accused of murdering two hitchhikers. In his defense he offered

81. *Id.* at 712.
82. *Id.*
83. 256 N.W.2d 713 (N.D. 1977).
84. Zander v. S.J.K., 256 N.W.2d 713 (N.D. 1977).
85. *Id.* at 714.
86. *Id.* at 715, *citing* State v. Berger, 235 N.W.2d 254 (N.D. 1975); State v. Helmenstein, 163 N.W.2d 85 (N.D. 1968).
87. 256 N.W.2d at 715, *citing* State v. Anderberg, 228 N.W.2d 631 (S.D. 1975).
88. 256 N.W.2d at 715.
89. N.D. CENT. CODE § 12.1-03-01 (1976).
90. The North Dakota Rules of Evidence became effective February 15, 1977.
91. 251 N.W.2d 182 (N.D. 1977).
92. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.D.R. EVID. 801(c).
93. State v. Jensen, 251 N.W.2d 182, 184 (N.D. 1977).
94. *Id.*
95. At the time the case was tried before the trial court the new Rules of Evidence were not in effect. On retrial, however, the new rules would be applicable so the court pointed out the errors in light of the new rules. *Id.* at 189.

testimony as to the contents of conversations he had with the two decedents. This testimony was excluded as hearsay at trial.[96] The trial court's ruling was held by the court to be erroneous. It held the testimony was not hearsay[97] but rather was offered to establish the state of mind[98] of the defendant which was relevant to his asserted defenses.[99]

The *Jensen* decision rightly points out that it is the purpose for which the out-of-court statements are offered that is the most important factor in determining whether the statements are hearsay. This should serve to alert the unwary attorney to make a proper offer of proof if an otherwise admissible statement is objected to as hearsay.

The court went on in *Jensen* to rule on two other evidentiary errors[100] by holding first, that a psychiatrist or other expert may base his testimony upon reports of psychologists not in evidence,[101] and second, that a psychiatrist or other expert may testify as to his opinion on the ultimate fact to be determined by the jury.[102] These rulings seem to be required by the new Rules of Evidence but they do represent a change from past practices.

The requirements for admissibility of a doctor's deposition,[103] the proper foundation for the excited utterance hearsay exception,[104] and

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96. *Id.* at 188.

97. *Id.* The court stated the testimony was not offered to prove the truth of the content of the conversations. Thus, it was not hearsay. *Id.*

98. The court's use of the term "state of mind" here should not be confused with the hearsay exception in N.D.R. EVID. 803(3) which excepts from hearsay a statement of the declarant's then existing state of mind.

99. The defendant had asserted defenses of mental disease or defect excluding responsibility, intoxication and self-defense. 251 N.W.2d at 188.

100. *Id.* at 189.

101. *Id.* at 189. The applicable rule of evidence states the following:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

N.D.R. EVID. 703.

102. 251 N.W.2d at 189. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.D.R. EVID. 704.

103. The use of a witness' deposition is governed by the following rule:

> The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:
>
> (A) that the witness is dead; or
>
> (B) that the witness is at a greater distance than one hundred miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or
>
> (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or
>
> (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or
>
> (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

N.D.R. CIV. P. 32(a)(3).

104. N.D.R. EVID. 803(2). An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.*

the admissibility of out-of-court statements offered to show the basis for an expert's opinion[105] are explained in *Staiger v. Gaarder*.[106]

The court held that under the facts existing in *Staiger*, the doctor's deposition should not have been admitted.[107] The court noted that there had been no attempt to subpoena the doctor[108] nor were there any "exceptional circumstances"[109] in existence which would persuade the court to allow the deposition. The plaintiff's potential savings of some trial expenses and his attorney's personal commitment to the doctor not to require his presence at trial were not compelling reasons to allow the deposition when balanced against the defendant's right to the spontaneous give-and-take that exists in a cross-examination.[110] This result seems proper for there is no reason to treat a deposition of a doctor any differently from that of any other witness.

In defining the foundational requirements for the excited utterance exception to the hearsay rule the court stated as follows: "The facts must demonstrate (1) that there is a startling event or condition; and (2) that the statement was the product of the declarant's stress or excitement resulting from the startling event or condition."[111] The court said there were numerous factors to consider and that time lapse is important although not necessarily determinative.[112] The court's analysis indicates that there is no strict rule and each case must be decided according to its own facts. A delay of as long as 45 minutes does not necessarily preclude a finding of an excited utterance if there are other facts which point to its existence.[113] In this case the delay was one and one half hours between the incident and the statement.[114] Also there was little testimony in the record regarding the declarant's emotional and physical condition.[115] These facts were an insufficient foundation on which to base an excited utterance claim.[116]

The court concluded by discussing the issue of whether it was error to allow an expert witness to testify as to certain out-of-court statements made to him by a patrolman while both were investigating the accident. The expert had been called to reconstruct the accident and the statements were offered as information on which he would base

105. *See supra* note 101. "The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." N.D.R. EVID. 705.
106. 258 N.W.2d 641 (N.D. 1977).
107. Staiger v. Gaarder, 258 N.W.2d 641, 646 (N.D. 1977).
108. *Id. See* N.D.R. CIV. P. 32(a)(3)(d), *supra* note 103.
109. 258 N.W.2d at 646. *See* N.D.R. CIV. P. 32(a)(3)(E) *supra* note 103.
110. 258 N.W.2d at 646.
111. *Id.* at 647.
112. *Id.*
113. *Id., citing* Trautman v. New Rockford-Fessenden Co-op Transport Ass'n., 181 N.W.2d 754 (N.D. 1970).
114. 258 N.W.2d at 647.
115. *Id.* at 648.
116. *Id.*

his opinion.[117] This testimony was allowed over a hearsay objection and the supreme court affirmed.[118] The court held that these statements were admissible under Rules 703 and 705 of the North Dakota Rules of Evidence.[119]

This is yet another indication of the court's willingness to allow in as much evidence as possible if the proper offer of proof is made. Here the statements were not offered for the truth of their content in which case they would be objectionable as hearsay.[120] Rather they were offered to supply a base for expert testimony and were admitted. The importance of this distinction becomes clear when the result in *Staiger* is contrasted to that in *Fuhrman v. Fuhrman.*[121]

In *Fuhrman* a mother appealed from an order of divorce which provided that the children should reside in the family home with the parents residing there alternately month by month having custody of the children during the period each would reside there.[122] She claimed error in that the report of a social worker containing out-of-court statements from the president of the parties' church, a psychologist, and a psychiatrist was admitted over her hearsay objection.[123]

The court reversed the divorce order holding that the social workers report was offered as substantive evidence and thus was inadmissible as hearsay.[124] In making their ruling the court distinguished between the situation before them and one in which the evidence is offered solely as the basis for the opinion testimony of an expert witness.[125] It is clear from the court's opinion that the evidence in the latter case would be admissible over a hearsay objection as it was found to be in *Staiger.*

GOVERNMENT

Some interesting questions involving conflicts between governmental subdivisions were decided by the court in 1977.

City of Fargo, Cass Cty. v. Harwood Tp.[126] involved a declaratory judgment action to determine whether land the city had acquired in the township for use as a sanitary land fill was subject to township zoning regulations.[127] The court held that it was.[128] In so holding the court rejected the City of Fargo's claim that its power of eminent do-

117. *Id.*
118. *Id.*
119. *Id. See supra* note 105.
120. *See supra* note 92.
121. 254 N.W.2d 97 (N.D. 1977).
122. Fuhrman v. Fuhrman, 254 N.W.2d 97, 98 (N.D. 1977).
123. *Id.* at 99.
124. *Id.*
125. *Id.*
126. 256 N.W.2d 694 (N.D. 1977).
127. City of Fargo, Cass Cty. v. Harwood Tp., 256 N.W.2d 694, 695 (N.D. 1977).
128. *Id.*

main gave it a superior right in choice of a site for its land fill.[129] The court found that both the City of Fargo's power of eminent domain[130] and Harwood Township's zoning power[131] were derived from legislative grants through statutes which did not expressly authorize immunity from regulation of the other.[132] Therefore, any claim of inherent superiority had no basis.[133]

To determine which governmental unit would prevail the court adopted the "balancing-of-public-interests" test.[134] The court cited with approval the trial court's definition of the test which was stated as follows: "In adopting a balancing-of-public-interests" test, the court grants neither of these statutes superior right, but instead gives prevailing force to that statute where the more significant public interest lies."[135]

The court's balancing test will allow fulfillment of the essential purpose of zoning, namely land-use planning. As such it is a step in the right direction.

A conflict between two cities trying to annex the same tract of land was resolved in *City of West Fargo v. City of Fargo*.[136] The city of West Fargo adopted a resolution of annexation covering the 160 acres in question before the City of Fargo had passed its ordinance completing the annexation of the same 160 acres of land.[137] The court held that West Fargo's proceedings had priority under the general rule that proceedings first in time are first in right.[138]

The court rejected both of Fargo's contentions of its priority. First, the court held that West Fargo's proceedings were not terminated or nullified by the filing of protests of more than twenty-five percent of the landowners or the owners of more than twenty-five percent of the land.[139] Second, the court held that West Fargo's petition to the Annexation Review Commission after the protests were filed did not commence a new proceeding which was later in time than Fargo's.[140] All of these steps are a part of an overall continuous annexa-

129. *Id.* at 697.
130. Specific authority exists granting the power of eminent domain to municipalities in the acquisition of land for waste disposal. N.D. CENT. CODE § 40-34-01 (1976).
131. N.D. CENT. CODE § 58-03-01 (1976).
132. 256 N.W.2d at 697.
133. *Id.*
134. *Id.* at 698. The test was taken from Town of Oronoco v. City of Rochester, 293 Minn. 468, 197 N.W.2d 426 (1972).
135. 256 N.W.2d at 698.
136. 251 N.W.2d 918 (N.D. 1977).
137. City of West Fargo v. City of Fargo, 251 N.W.2d 918, 920 (N.D. 1977). West Fargo's resolution of annexation was adopted on March 29, 1976. Fargo's annexation was purportedly completed on May 18, 1976. *Id.*
138. *Id.*
139. *Id.* at 921. "If the owners of one-fourth or more of the territory proposed to be annexed protest, the city may seek annexation by petition to the annexation review commission as hereinafter provided." N.D. CENT. CODE § 40-51.2-07 (Supp. 1977).
140. 251 N.W.2d at 921. After protest by the owners of more than one-fourth of the land, West Fargo applied for annexation to the Annexation Review Commission. *See* N.D. CENT. CODE § 40-51.2-08 (Supp. 1977).

tion process.[141] Thus the rule that proceedings first in time are first in right was applied to uphold the annexation by West Fargo.

INSURANCE

The court considered the usual cases involving ambiguous terms in insurance contracts.[142] One case, although involving ambiguities, was unique and significant because the court was concerned with the method which it would use as a tool to deal with ambiguous terms. *Mills v. Agrichemical Aviation, Inc.*[143] could represent a broader recognition in North Dakota of how the Doctrine of Reasonable Expectations is to be applied. The doctrine, simply stated, requires the court to "ascertain that meaning of the contract which the insured would reasonably expect."[144] Three different approaches have been used to apply the doctrine, two of which depend upon the finding of an ambiguity in the terms of the contract.[145]

In dealing with the two approaches conditioned upon a finding of an ambiguity, the distinction between the two concerns which part of the policy is viewed by the court in applying the doctrine.[146] Courts using the first approach determine what an insured would reasonably expect a particular word or phrase to mean.[147] The second approach applies the doctrine by determining an insured's reasonable expectations in light of general coverage under a particular type of insurance policy.[148]

The court split in selecting which approach should be used, leaving a question as to which will be applied in North Dakota.[149]

The appellee in *Zuraff v. Empire Fire & Marine Insurance Co.*[150] purchased a building for the alleged price of $50,000 and obtained insurance on the building against fire loss in the amount of $60,000.[151] The evidence showed the appellee knew the building was not worth $50,000.[152] The insurer issued the policy without inspecting the prop-

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141. 251 N.W.2d at 921.
142. *See, e.g.*, Henson v. State Farm Fire & Cas Co., 252 N.W.2d 200 (N.D. 1977).
143. 250 N.W.2d 663 (N.D. 1977).
144. Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 419 P.2d 168, 171, 54 Cal. Rptr. 104, 107 (1966).
145. The court stated that since an ambiguity was found in the contract in this case, the merits of the approach to the doctrine not requiring an ambiguity as a condition to its application would not be considered. 250 N.W.2d at 672.
146. *See* Young, Lewis & Lee, *Insurance Contract Interpretations: Issues and Trends*, 625 INS. L.J. 71, 74 (1975).
147. *See* Golding-Keene Co. v. Quality Phenix Fire Ins. Co., 96 N.H. 64, 69 A.2d 856 (1949).
148. *See* Steven v. Fidelity & Cas Co. of N.Y., 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1963).
149. For a complete discussion of this case, the different approaches under the doctrine, and the implications of each *see* 53 N.D.L. REV. 613 (1977).
150. 252 N.W.2d 302 (N.D. 1977).
151. Zuraff v. Empire Fire & Marine Ins. Co., 252 N.W.2d 302, 303 (N.D. 1977).
152. Brief for Appellant, app. at 17, Zuraff v. Empire Fire & Marine Ins. Co., 252 N.W.2d 302 (N.D. 1977).

erty to determine its value.[153] One month after the policy was issued, a fire totally destroyed the building and its contents.[154] In an action brought by the appellee to recover on the policy, the insurer alleged that the appellee obtained the policy through fraud concerning the value of the building insured, rendering the policy void.[155] The district court granted appellee's motion for summary judgment allowing recovery for the full amount of the policy, $60,000.[156]

At issue was North Dakota's Valued Policy Act[157] which provides as follows:

> Whenever any policy of insurance shall be written to insure any real property in this state against loss by fire and the insured property shall be destroyed by fire without fraud on the part of the insured or his assigns, the stated amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured.[158]

The appellee contends the value in the policy was conclusive, but the insurer claims it can assert the defense of fraud by showing that the property was overvalued at the time the policy was issued.[159] The court held[160] that the valued policy statute does not prevent raising fraud in the procurement of the insurance policy as a defense to payment under the policy. The dissent, however, would have held that the valued policy statute binds an insurer to the value stated in the policy and the only fraud which will prevent payment is "fraud subsequent to the issuance of the policy or relating to the destruction of the property."[161]

The majority and dissent clashed in their interpretations of two North Dakota cases, *Jakober v. Commercial Union Assurance Co.*[162] and *Horswill v. North Dakota Mutual Fire Insurance Co.*[163] The majority relied upon these two cases to formulate its conclusion while the dissent, although conceding that language in both cases supported the majority's decision, correctly pointed out that this language is dictum. However, dictum provides an indication to courts of how related issues might be appropriately decided at a later time and if found to be supported by any reasonable theory can provide the basis of new decisions. In this respect the dissent is incorrect. In a like man-

153. 252 N.W.2d at 309.
154. *Id.* at 303.
155. *Id.*
156. *Id.* at 304.
157. N.D. CENT. CODE § 26-18-08 (1978).
158. *Id.*
159. 252 N.W.2d at 305.
160. *Id.* at 309.
161. *Id.* at 311 (Vogel, J., dissenting).
162. 49 N.D. 270, 191 N.W. 480 (1922).
163. 45 N.D. 600, 178 N.W. 798 (1920).

ner however, the majority was weak in its reasoning to support the decision.

Neither the court, nor the briefs of the parties considered an Eighth Circuit case decided shortly after *Jakober* and *Horswill* which would have provided the legal muscle to strengthen the dictim of the North Dakota case law. *United States Fire Insurance Co. of New York v. Sullivan*[164] presented a case very similar to *Zuraff*. The pertinent sections of the valued policy statute in *Sullivan*[165] are identical to the valued policy statute in *Zuraff*. The plaintiff was alleged to have insured a building for a substantial amount more than he knew the building to be valued. The Court expressly found that the statute did provide the insurer a defense of fraud in the procurement of the policy in respect to value.[166] As the majority in *Zuraff* pointed out, one of the purposes of a valued policy statute is to prevent overinsurance by discouraging insurance companies from collecting premiums on overvalued property and then contesting liability when loss occurs.[167] Although it was the insurance companies which originally engaged in the practice of promoting overinsurance of property, it is likewise conceivable that property owners could defraud an insurer by overvaluing their property. The purpose of the statute can be accomplished only if the insurer, too, has some defense to the fraudulent acts of an insured, whether in procuring the policy or subsequently.

To this point in its decision, the majority in *Zuraff* is correct. Where the majority erred was in failing to find a duty in the insurer to inspect the property before issuing the policy in order to determine the value of the property insured. Although the majority disagrees with the dissent's reasoning that *Nathan v. St. Paul Mutual Insurance Co.*[168] provides for a duty to inspect[169] in North Dakota, one of the majority's own cases suggests there is such a duty to inspect.[170] The [insurer] could have ascertained the value [of the property] before issuing its policy. If it did not do so, it should have."[171] The *Sullivan* case also supports this proposition.[172]

The majority suggests a failure to inspect long after the policy is issued might be an estoppel to the insurer asserting a fraud defense.[173]

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164. 25 F.2d 40 (8th Cir. 1928), *cert. denied*, 278 U.S. 608 (1928).
165. NEB. STAT. COMPILED § 7809 (1922) (current version at NEB. REV. STAT. § 44-380 (1943)).
166. United States Fire Ins. Co. of New York v. Sullivan, 25 F.2d 40, 42 (8th Cir. 1928), *cert. denied*, 278 U.S. 608 (1928).
167. 252 N.W.2d at 305.
168. 243 Minn. 430, 68 N.W.2d 385, 388 (1955).
169. The majority denied *Nathan's* authority for the proposition that a duty to inspect exists in North Dakota because duty in *Nathan* was set out in a Minnesota statute. MINN. STAT. ANN. § 65A.08 (West 1968).
170. *See* Horswill v. North Dakota Mutual Fire Ins. Co., 45 N.D. 600, 607, 178 N.W. 798, 800 (1920).
171. *Id.*
172. 25 F.2d at 42.
173. 252 N.W.2d at 309.

The *Horswill* and *Sullivan* reasoning, however, requires an inspection *before* issuing the policy as a condition precedent to asserting the defense of fraud. The latter is the better approach because it obviates the need to determine in each case what a reasonable period of time is before the estoppel attaches.

Sullivan presents, a better rule than either of those offered by the *Zuraff* majority or dissent. To restate that rule—an insurer has the duty to inspect the property before issuing the policy to establish its value. If the insurer performs its duty, "it is bound by its estimate of value based thereon unless conditions (reducing value), not ascertainable by a reasonably careful inspection and known to the insured, are withheld by the insured."[174]

PARENT-CHILD

The court was confronted with several cases dealing with the termination of parental rights pursuant to the Uniform Juvenile Court Act,[175] one of which was *In Interest of R.L.D.*[176] When the supreme court reviews decisions under the Act, the scope of review is much broader than in other cases and is much like a trial de novo.[177] The factors to be established in such a termination proceeding, as has been stated in numerous previous decisions, are (1) that the child is a "deprived child";[178] that the conditions and causes of the deprivation are likely to continue or will not be demedied, and (2) that because of the deprivation, the child is suffering or will probably suffer serious physical or emotional harm. The state has the burden to prove by clear and convincing evidence the existence of each of the factors.[179]

Upon reviewing the record and files, the court first concluded that R.L.D. was a "deprived child," that the deprivation was likely to continue, and that R.L.D. would probably suffer serious harm.[180] In addition to the rather routine substantive issues, several procedural issues were raised by the mother of R.L.D. In ruling on these issues, the court held that although there must be a finding that any deprivation

174. 25 F.2d at 42.
175. N.D. CENT. CODE ch. 27-20 (1974), *as amended*, (Supp. 1977).
176. 253 N.W.2d 870 (N.D. 1977).
177. N.D. CENT. CODE § 27-20-56(1) (1974). The statute authorizes the court to reexamine "the files, records, and minutes or transcript of the evidence of the juvenile court, giving appreciable weight to the findings of the juvenile court." *Id.* This standard of review can be contrasted with that used in child custody cases in which the trial court's findings will not be reversed unless clearly erroneous. *See, e.g.*, Ferguson v. Ferguson, 202 N.W.2d 760 (N.D. 1972).
178. "Deprived child" is defined to be a child who "[i]s without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals, and the deprivation is not due primarily to the lack of financial means of his parents, guardian, or other custodian." N.D. CENT. CODE § 27-20-02(5)(a) (1974). The "best interest of the child" standard used in child custody cases is not applicable in terminating parental rights. In Interest of M.L., 239 N.W.2d 289, 295 (N.D. 1976).
179. In Interest of R.L.D., 253 N.W.2d 870, 874 (N.D. 1977).
180. *Id.* at 875-76.

is likely to continue before parental rights will be terminated, a petition is not defective for failing to allege that fact.[181] Furthermore, the court saw no abuse of discretion in the trial judge's refusal to allow R.L.D. to testify, since the goal of the Uniform Juvenile Court Act is to protect the welfare of the child and the potential stress resulting to a nine year old in testifying outweighed any benefit to be gained from such testimony.[182] On another issue, the court held that there is no duty to supplement interrogatories which were part of a discovery process of a separate and distinct action which had been dismissed, even though the supplementation would have aided the defense in the present case.

In *Odegard v. Odegard*,[183] the court again stated the standard to be used in determining child custody issues was the best interest of the child, not fitness of or fairness to the parents. The plaintiff and the defendant, parents of a four year old child, were separated in 1976 when the wife left, leaving the child in the custody of his father, who was living with his parents. The father instituted divorce proceedings, and in his memorandum opinion, the trial judge found that the best interest of the child would be served by granting custody of the child to the father and the grandparents, rather than to the mother.[184] The mother asserted on appeal that the court's findings were clearly erroneous in that she was deprived of custody because she was a poor housekeeper. She further alleged that it was improper to give custody to "strangers," i.e., the grandparents, and also to ignore the "tender years" doctrine.

The court restated that the finding that the best interest of the child requires custody in one parent or another is a finding of fact which will not be reversed unless clearly erroneous.[185] The court went on to note that the statute embodying the "tender years" doctrine had been repealed,[186] but that the repeal did not alter the fact that mothers are most often better able to care for their infants than are the fathers.[187] That fact, however, is only one of the considerations to be weighed in ascertaining what is to be the best interest of the child.[188]

Although other jurisdictions have held that grandparents are con-

181. *Id* at 877.
182. *Id.*
183. 259 N.W.2d 484 (N.D. 1977).
184. Odegard v. Odegard, 259 N.W.2d 484, 485 (N.D. 1977). The mother was given custody for one month each summer and one day each week. *Id.* n.1.
185. *See* Ferguson v. Ferguson, 202 N.W.2d 760 (N.D. 1972); N.D.R. Civ. P. 52(a).
186. N.D. CENT. CODE § 30-10-06 (1960) (repealed 1973).
187. Once the court gives judicial notice to this fact, it may be questioned to what extent the "ghost" of the "tender years" doctrine will return as a judicial rule rather than a statutory one. Language in the opinion might indicate that the court is already encouraging the use by the trial courts of the "tender years" doctrine. *See* note 188 *infra.*
188. The court stated the finding was not clearly erroneous, but suggested that if it had tried the case in the first instance, it might have made a different determination. 259 N.W.2d at 486.

sidered strangers in awarding custody,[189] North Dakota has not done so, and has awarded custody to grandparents, either alone or jointly with a parent.[190] Furthermore, the court held that the fact that the mother's parents were relatively wealthy is not controlling but only one factor in ascertaining the best interest of the child.

PROFESSIONAL RESPONSIBILITY—ATTORNEYS

Application of Christianson[191] initiates a new way of conditioning reinstatement of a suspended or disbarred attorney. Prior to *Christianson*, reinstatement was conditioned solely upon an application setting forth facts showing that the applicant was entitled to have the disciplinary order "vacated, terminated or modified."[192] The facts must show the applicant to be of good moral character and the proof must be sufficient to overcome the court's former adverse judgment of the applicant's character.[193] *Christianson* declares the authority of the North Dakota Supreme Court to require a reexamination as an additional condition of reinstatement of a suspended or disbarred attorney.[194] While the authority of the court is not challenged,[195] the desirability and propriety of such a condition, especially in circumstances involving suspension, is seriously questioned.

Christianson was originally suspended in 1956[196] after being convicted of a felony.[197] He was reinstated in 1957.[198] In 1970, Christianson was again suspended for reasons of misconduct.[199] His petition for reinstatement was denied in 1972 because of additional findings that Christianson had practiced law while suspended and had engaged in other improper conduct.[200] Reinstatement was again requested in 1973 but again denied for practicing law while under suspension.[201] Upon application for reinstatement in 1974, the Grievance Commission recommended and the court agreed that reinstatement would not be allowed until Christianson retook and passed the bar examination.[202]

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189. *See, e.g.*, Blow v. Lottman, 75 S.D. 127, 59 N.W.2d 825 (1953). *See generally*, 27B C.J.S. *Divorce* § 308 (1959).
190. *See, e.g.*, McKay v. Mitzel, 137 N.W.2d 792 (N.D. 1965).
191. 253 N.W.2d 410 (N.D. 1977).
192. N.D.R. DISCIPLINARY P. 13.
193. Application of Christianson, 202 N.W.2d 756, 759 (N.D. 1972), *quoting* In re Simpson, 11 N.D. 526, 93 N.W. 918 (1903).
194. Application of Christianson, 253 N.W.2d 410, 413 (N.D. 1977).
195. The supreme court may make all necessary rules for the reinstatement of attorneys. N.D. CENT. CODE § 27-02-07 (1974).
196. Application of Christianson, 215 N.W.2d 920, 921 (N.D. 1974).
197. *See* Christianson v. United States, 226 F.2d 646 (8th Cir. 1955), *cert. denied*, 350 U.S. 994 (1956).
198. 215 N.W.2d at 921.
199. In re Christianson, 175 N.W.2d 8 (N.D. 1970). The misconduct included selling estate property without court authority, failing to account for the proceeds from the sale of that property, failing to return costs to a client for work he did not accomplish and paying a note with a "no account" check *Id.* at 10
200. 202 N.W.2d at 758.
201. 215 N.W.2d at 922.
202. 253 N.W.2d at 411.

He did not take the bar examination but rather reapplied for reinstatement in 1976 arguing he should not be required to be reexamined.[203]

Any acts committed contrary to accepted standards of honesty, justice or morality may constitute cause for discipline of an attorney.[204] The Code sets forth those acts which are cause for discipline.[205] These acts concern misconduct as an attorney; they do not involve the attorney's mental capabilities.[206] It is questionable to believe that examining the applicant's mental capacity will provide evidence from which his moral capacity can be judged.

While the court recognized that North Dakota had never before required reexamination as a condition for the reinstatement of an attorney,[207] the court attempted to soften the impact of its decision by noting that six other states have implemented reexamination procedures.[208] The reach of the *Christianson* decision, however, goes far beyond the reexamination procedures of those states.

In California, a general reexamination is not to be used in cases of suspension,[209] should be used only rarely in disbarment cases,[210] and then only when there has been a general charge of lack of legal attainment as opposed to a charge related to conduct involving a particular client.[211] In cases of suspension, and presumably disbarment as well, the court can condition reinstatement upon taking a "Professional Responsibility Examination."[212] The Washington cases relied upon by the court involved disbarred attorneys.[213] The Wisconsin case cited concerned the reinstatement of an attorney who had abandoned his law practice twenty years earlier.[214] Abandoning one's practice is different from being suspended. The former does not inherently include an expectation of return to practice as does the latter. Without this expectation in one's thoughts, it is easier to presume that the one who abandoned his practice has not been attentive to changes in the law. The Florida rules apply to disbarred attorneys only.[215] As the court admitted,[216] the Arkansas case, *In re Dodrill*,[217] did not deal directly with the issue of reexamination. Finally, in Ohio, it is conceded that suspended attorneys are subject to reexamination as a condition

203. *Id.*
204. 175 N.W.2d at 8-9.
205. N.D. CENT. CODE § 27-14-02 (Supp. 1977).
206. *Id.*
207. 253 N.W.2d at 412.
208. The states are California, Washington, Florida, Wisconsin, Arkansas and Ohio. *Id.*
209. Friday v. State Bar, 23 Cal. 2d 501, 144 P.2d 564, 568 (1943).
210. *Id.* at ——, 144 P.2d at 569.
211. *Id.* at ——, 144 P.2d at 568. Merely because an attorney has been disciplined for some rule infraction is no reason to assume that he is not a qualified lawyer. *Id.*
212. Segretti v. State Bar, 15 Cal. 3d 878, 544 P.2d 929, 126 Cal. Rptr. 793 (1976).
213. *See* Petition of Simmons, 81 Wash. 2d 43, 499 P.2d 874 (1972); Petition of Eddleman, 79 Wash. 2d 725, 489 P.2d 174 (1971).
214. State v. Brodson, 11 Wis. 2d 124, 103 N.W.2d 912, 913 (1960).
215. FLA. BAR R. art. XI, rule 11.10(4).
216. 253 N.W.2d at 412.
217. 538 S.W.2d 549 (Ark. 1976).

of reinstatement.[218] Ohio appears to be an extraordinary situation nonetheless, because reinstatement into the bar is impossible for any attorney disbarred or one who has voluntarily surrendered his license to practice.[219]

Christianson does not provide a standard to be used in determining when reexamination will be imposed as a condition for reinstatement. It might be inferred that the "shopping list" approach of *In re Cate*[220] would be used or as the dissent suggests, the court might establish a system for reexamining "all lawyers who have been out of the practice for seven or more years."[221]

It is unfortunate that a suspended attorney will be branded by the same stigma as a disbarred attorney in that he may be subjected to a general reexamination as a condition to his reinstatement as an attorney. The California approach discussed above seems to be the more reasonable procedure. That approach retains the distinction between suspension and disbarment. Provision for a "Professional Responsibility Examination" does supply the disciplinary body with tangible evidence which can be used to judge the moral capacity of the applicant. In the ultimate case, where the attorney has been charged with a lack of legal attainment, the court reserves discretion to require a general reexamination.

TAXATION

In *Butts Feed Lots v. Board of Cty. Commissioners,*[222] the court was presented with the issue of the tax exempt status of farm structures.[223] The appellant was a corporation which sought tax exempt status for a farm residence, quonsets, grain storage facilities, and feeder pens, all related to its cattle feeding operation. The trial court had affirmed a denial of the Board of County Commissioners to allow the exemption. On appeal, the supreme court was not persuaded by the appellee's argument that because a corporation cannot engage in farming in North Dakota, Butts, being a corporation, should be estopped from claiming an exemption for farm buildings.[224] Ownership of

218. RULES FOR THE GOV'T OF THE BAR OF OHIO V (25).
219. RULES FOR THE GOV'T OF THE BAR OF OHIO V (7).
220. 77 Cal. App. 495, 247 P. 231 (1926).
221. 253 N.W.2d at 414 (Pederson, J., dissenting).
222. 261 N.W.2d 667 (N.D. 1977).
223. N.D. CENT. CODE § 57-02-08(15) (Supp. 1977) states that the following will be exempt from taxation:

> All farm structures, and improvements located on agricultural lands. This subsection shall be construed to exempt farm buildings and improvements only, and shall not be construed to exempt from taxation industrial plants, or structures of any kind not used or intended for use as a part of a farm plant, or as a farm residence. Any structure or structures used in connection with a retail or wholesale business other than farming, even though situated on agricultural land, shall not be exempt under this subsection.

224. N.D. CENT. CODE § 10-06-01 (1976) prohibits all corporations, except as otherwise provided, from engaging in the business of farming or agriculture.

the particular structures is not determinative of the exemption and enforcement of the corporate farming law is the duty of the county attorney in a separate action.

Thus, finding that Butts' corporate status not to be determinative, the court turned to the merits of Butts' contention, and held that in order for an enterprise to come within the farm structure exemption, it must, at a minimum, have the following:

> (1) a single tract or contiguous tracts of agricultural land containing a minimum of ten acres, (2) devoted, at least in part, to cultivation, (3) which results in the raising and production of plant and animal life in an unprocessed state, (4) the fruits of which production normally contribute a substantial proportion of the net income of the beneficial owner of agricultural land, (5) with the buildings and structures situated on the land being those reasonable and conducive to the farming enterprise.[225]

Finding that Butts purchased almost all of its feed from outside sources, the court saw the Butts operation of fattening cattle as industrial, not deserving of the farm structure exemption.[226] The opinion represents a good effort by the court, in a well organized and well written opinion, to consolidate a number of definitions and statutes in order to arrive at a test which may be applied to future factual settings.

In *William Clairmont, Inc. v. State*,[227] the court addressed a number of issues involving the state special fuel tax. The appellant was a corporation engaged in construction work for the federal government on federal projects. It brought suit against the State of North Dakota for a refund of special fuel taxes it had paid on diesel fuel, which it claimed it was exempt from.[228] The statute relied upon by the appellants, stated that special fuel used for industrial purposes shall be exempt from the special fuel tax.[229] The state's defense was based on a statute which prohibits refunds to be paid to any person performing work paid for from public funds.[230] The trial court held that the state need not return taxes collected prior to the service of the summons and complaint in the action, but must pay back all sums collected thereafter.

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225. Butts Feed Lots v. Board of Cty. Comm'r, 261 N.W.2d 667, 671-72 (N.D. 1977).
226. *Id.* at 673.
227. 261 N.W.2d 780 (N.D. 1977).
228. N.D. CENT. CODE ch. 57-52 (Supp. 1977) contains a comprehensive scheme of taxation of special fuels which parallels the statutes governing gasoline contained in N.D. CENT. CODE ch. 57-54 (Supp. 1977).
229. N.D. CENT. CODE § 57-52-04 (Supp. 1977). The statute as amended would change the result of the instant case since it provides that fuel used in the performance of a government contract, even though for an industrial purpose, is not exempt from the fuel tax.
230. N.D. CENT. CODE § 57-50-05.1 (1972).

In an opinion outlining the history of the special fuel tax and its exemptions to the present day, including the industrial use exemption, the court properly saw the restriction of refunds inapplicable. Since the appellants were exempt from the tax in the first instance, they were not seeking "refunds" but restitution of taxes illegally collected.[231]

But once recognizing that the state had illegally collected the taxes, the court affirmed the district court's ruling that only taxes paid after service of the summons and complaint, could be recovered.[232] This was based on the general rule that taxes voluntarily paid cannot be recovered by the taxpayer.[233] Although it initially appears questionable, in view of penalties for failure to pay taxes, that any payment of taxes is truly voluntary, the decision appears to conform with not only prior North Dakota law, but also the law in other jurisdictions.[234] Only after the service of the summons and complaint were the taxes paid under protest.[235]

TORTS

The supreme court, in an informative opinion, discussed the relationship between the Wrongful Death Act and the intestate succession law in determining who are heirs at law for purposes of recovery for wrongful death. In *Broderson v. Boehm*,[236] as a result of injuries suffered in an automobile collision, Pauline (mother) and Debra (daughter) Boehm died, leaving as survivors the father and two daughters. A wrongful death action was commenced by Debra's administrator to recover for Debra's death, naming as defendants the driver of the other vehicle and his father, the county, and the decedent's father.[237] Named as beneficiaries in the action were the surviving daughters and the father, the daughters claiming loss of loving care, advice, guidance, etc., and the father claiming loss of assistance in caring for the younger children.[238] The trial court held that evidence showing losses suffered by Debra's sisters was inadmissible on the grounds that the father was the "sole heir at law,"[239] and thus the only beneficiary entitled to recover.

North Dakota's Death by Wrongful Act provisions[240] state who may

231. William Clairmont, Inc. v. State, 261 N.W.2d 780, 784 (N.D. 1977).
232. *Id.* at 786.
233. *See e.g.*, Rushton v. Burke, 6 Dak. 478, 43 N.W. 815 (1889).
234. *See* WORDS AND PHRASES, "Voluntary Payment" (1962).
235. It would be possible to voice such a protest before service of a summons and complaint. In this particular case, however, there was no indication of any objection or protest of any kind prior to that date. 261 N.W.2d at 876.
236. 253 N.W.2d 864 (N.D. 1977).
237. The decedent's father was named as a defendant because he was the owner of the vehicle driven by Pauline Boehm and thus could be held vicariously liable under the family purpose doctrine. Broderson v. Boehm, 253 N.W.2d 864, 868 (N.D. 1977).
238. *Id.* at 866.
239. *Id.*
240. N.D. CENT. CODE ch. 32-21 (1976), *as amended*, (Supp. 1977).

bring a wrongful death action and in what order they must proceed. Brothers and sisters are not named as being able to initiate the action.[241] The action, however is to be for the benefit of the "heirs at law."[242] It had been previously held that the class of "heirs at law" entitled to be beneficiaries was broader than the class entitled to initiate the action,[243] and that the former included surviving brothers and sisters.[244] But in all the cited cases which allowed recovery to brothers and sisters, either the parents were dead or legally disqualified from recovering.[245] Furthermore, it had been most commonly held that absent contrary intent, the word "heirs" means those who take under the statutes of descent.[246] The intestacy statute provided that only if there was no issue, spouse, or parent surviving would the estate go to the brothers and sisters.[247] The court thus concluded, in conformance with the weight of authority, that "heirs at law" in the Wrongful Death Act includes only those persons who by the law of descent would succeed to the property in case of intestacy, but in addition, if members of a preferred class are disqualified to recover for reasons other than death, those next entitled to inherit would be considered as beneficiaries.[248] Because the decedent's father was neither dead nor disqualified from recovering, and thus first in line to benefit from the action, the sisters were barred from recovery.[249]

In another case involving the Wrongful Death Act, *Schneider v. Baisch*,[250] the sole issue before the court was the amount of damages

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241. 253 N.W.2d at 866, *citing* N.D. CENT. CODE § 32-21-03 (1976). The statute states in part as follows: "The action shall be brought by the following persons in the order named: 1. The surviving husband or wife, if any. 2. The surviving children, if any. 3. The surviving mother or father. 4. The personal representative." N.D. CENT. CODE § 32-21-03 (1976).

242. N.D. CENT. CODE § 32-21-04 (1976) reads as follows:

> The amount recovered shall not be liable for the debts of the decedent, but shall inure to the exclusive benefit of his *heirs at law* in such shares as the judge before whom the case is tried shall fix in the order for judgment, and for the purposes of determining such shares, the judge after the trial may make any investigation which he deems necessary.

(Emphasis added).

243. Stangeland v. Minneapolis, St. P. & S.S.M. Ry. Co., 105 Minn. 224, 117 N.W. 386 (1908).

244. *See e.g.*, Satterberg v. Minneapolis, St. P. & S.S.M. Ry. Co., 19 N.D. 38, 121 N.W. 70 (1909). Some courts have restricted "heirs" to never include collateral heirs. *See e.g.*, Blom v. United Air-Lines, Inc., 152 Colo. 486, 382 P.2d 993 (1963).

245. *See* Sanders v. Green, 208 F. Supp. 873 (D.C.S.C. 1962); Swenson v. McDaniel, 119 F. Supp. 152 (D.C. Nev. 1953); Wilson v. City and County of San Francisco, 106 Cal. App. 2d 440, 235 P.2d 81 (1951); Fuchs v. Kansas City S. Ry. Co., 132 La. 782, 61 So. 790 (1913); Pries v. Ashland Home Tel. Co., 143 Wis. 606, 128 N.W. 281 (1910).

If a statute is worded "next of kin," courts often allow recovery by siblings despite the fact that the parents are still living. *See e.g.*, Martz v. Revier, 284 Minn. 166, 170 N.W.2d 83 (1969). "Next of kin," however, is not synonomous with "heirs at law."

246. *See e.g.*, Schaefer v. Merchants Nat'l Bank of Cedar Rapids, Iowa, 160 N.W.2d 318 (Iowa 1968).

247. N.D. CENT. CODE § 56-01-04 (1972), (repealed 1975) (current version at N.D. CENT. CODE ch. 30.1-04 (1976), *as amended*, (Supp. 1977)). The current verison was adopted from the Uniform Probate Code. It does not change the outcome of the present case.

248. 253 N.W.2d at 869.

249. *Id.* at 870.

250. 256 N.W.2d 370 (N.D. 1977).

to be awarded.[251] The decedent was killed in an automobile collision, leaving as survivors his fifty-six year old wife and two adult children. Eleven months after the collision and prior to trial of the wrongful death action, the decedent's wife died of cancer. The action was brought by one of the children, John, on his own behalf and as personal representative of his mother's estate,[252] and by the other child, Colleen. On the issue of damages, the trial court awarded the wife's estate a sum based on her life expectancy at age fifty-six,[253] rather than on her actual survival lifetime of eleven months. On appeal, the supreme court reversed the trial court's decision, following the weight of authority in other jurisdictions. The court, in what would appear to be a well reasoned opinion except for the dissent, held that when a beneficiary dies prior to the trial of the wrongful death action, and the action is pursued by the personal representative of the estate, the element of uncertainty regarding life expectancy is removed and damages can properly be awarded based on actual survival time.[254] Since the theory behind awarding damages in wrongful death actions is to compensate the beneficiary rather than to punish the wrongdoer,[255] the court's decision, besides being in line with the weight of authority, appears logical in that an award of damages without regard to actual losses loses its character as compensation, and acts more as a punishment. The dissent[256] seems to have overlooked this fact when it suggested that the defendant should not enjoy a windfall because of the fortuitous death of a survivor. It seems incorrect to look, as did the dissent, at the defendant's point of view as it would be if wrongful death awards were punitive. Recovery is based solely on compensation to the beneficiary and it is only reasonable that a survivor who lives eleven months should be compensated for those eleven months rather than receive an award based on her life expectancy before she died.[257]

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251. The defendant admitted liability pursuant to contractual stipulation. Schneider v. Balsch, 256 N.W.2d 370 (N.D. 1977).

252. Pursuant to N.D. CENT. CODE § 32-21-05 (1976), *as amended*, (Supp. 1977), death does not abate a cause of action, thus the wife's right to recovery as a beneficiary of the wrongful death action survives to the benefit of her estate.

253. Because damages are based on the loss suffered by the beneficiaries and not on the loss sustained by the decedent's estate, the life expectancy of both the decedent and the beneficiary are relevant factors. The award is based on the life expectancy which is shortest as between the decedent and the beneficiary since the beneficiary could expect no contribution from the decedent beyond the life expectancy of either the decedent or the beneficiary. 256 N.W.2d at 371-72.

254. *Id.* at 372. *See* Wakefield v. Gov't Employees Ins. Co., 253 So. 2d 667 (La. App. 1971), *writ denied*, 260 La. 286, 255 So. 2d 771 (1972); Adams v. Sparacio, 196 S.E.2d 647 (W. Va. 1973). *See generally* Annot., 43 A.L.R.2d 1291 (1955); S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 8.21 (2d ed. 1975).

255. *See* Hyyti v. Smith, 67 N.D. 425, 272 N.W. 747 (1937) (held that punitive damages are not recoverable in a wrongful death action).

256. The dissent was authored by Associate Justice Vogel.

257. Justice Vogel can be commended for his thoughtful discussion concerning the reliance on decisions from other states. Certainly it is the court's function to fix the law of this state and to disregard unreasonable out-of-state decisions. But these decisions should not be disregarded just because they originate from courts outside this state, if in

In a well written opinion, the court, in *Olson v. Chesterton Co.*,[258] expanded the doctrine of strict liability in tort.[259] Olson was seriously injured when, while he was applying a belt dressing on a stalled conveyor belt, the belt suddenly engaged, pushing his hand into the machinery. He brought an action for strict liability in tort against the manufacturer of the belt dressing.

The label on the belt dressing can had warned that the product should be applied to only running belts, but the plaintiff alleged that the warning was inadequate, constituting a defect making the product unreasonably dangerous.[260] At the trial, the jury returned a verdict for Olson in the amount of $400,000 dollars. On appeal, the defendant claimed three defenses—misuse of the product, the "obvious or patent danger" rule, and assumption of risk. The question before the court was whether a motion for judgment notwithstanding the verdict or in the alternative for a new trial, should have been granted.[261]

As to the defense of misuse of the product, the court followed the Restatement position[262] that one who sells a product has a duty to warn not only of dangers in its intended use but also to warn of dangers involved in a use which can be reasonably anticipated.[263] Whether a risk is reasonably foreseeable is a jury question, and the court concluded that a jury could reasonably find that Olson's misuse of the product was forseeable. The most noteworthy issue in the case was that concerning the obviousness of the risk. The "obvious danger" rule relieves the seller of his duty to warn the consumer of dangers so obvious that no warning is deemed necessary.[264] Thus if this rule

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fact they support the most reasonable position. The dissent relied on the Pattern Jury Instructions to support the view that the health of the beneficiary should be viewed at the time of the decedent's death for purposes of awarding damages. In furher support, the dissent offered examples illustrating how the defendant benefits when the beneficiary dies before trial, and yet pays nothing extra if the beneficiary outlives her life expectancy. What appears to have been ignored by the dissent are the policies behind the majority's position. When the beneficiary dies before trial there is no policy supporting recovery by the beneficiary's estate of an amount greater than what is needed to actually compensate the beneficiary, for any additional recovery would act as punishment against the defendant. *See supra* note 255. But when the beneficiary outlives her life expectancy, although she is in fact not fully compensated, there is a countervailing policy favoring finality of judgments. Therefore, the two situations cannot be fairly compared.

258. 256 N.W.2d 530 (N.D. 1977).

259. RESTATEMENT (SECOND) OF TORTS § 402A (1966) was adopted in North Dakota in Johnson v. American Motors Corp., 225 N.W.2d 57 (N.D. 1974).

260. The applicable standard of review was as follows:

> When ruling on a motion for a directed verdict or for judgment notwithstanding the verdict, the court must decide whether the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, reasonable men could reach but one conclusion as to the verdict. . . .

Nokota Feeds, Inc. v. State Bank of Lakota, 210 N.W.2d 182, 187 (N.D. 1973).

261. Comment j to § 402A of the Restatement states that inadequacy of warnings or directions may render a product unreasonably dangerous. The plaintiff did not allege the dressing or the container to be defective. Olson v. A.W. Chesterton Co., 256 N.W.2d 530, 535 (N.D. 1977).

262. RESTATEMENT (SECOND) OF TORTS § 402A, Comment h (1965).

263. *See* 63 AM. JUR. 2d *Products Liability* § 136 (1972). This dual duty had been recognized in Johnson v. American Motors Corp., 225 N.W.2d 57 (N.D. 1974) for actions in strict liability in tort.

264. *See* Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950). New York has since

was to be followed, the defendant would "ipso facto" be relieved of liability if the risk from misuse which injured the plaintiff was obvious, even though such misuse, from the defendant's standpoint, was foreseeable. North Dakota had previously declined to follow the rule in negligence cases,[265] and other authorities had carried over the abrogation into the strict products liability area.[266] Properly recognizing that the whole theory behind strict liability in tort is to place special responsibilities upon manufacturers of defectively dangerous products, the court found the "obvious risk" rule to be incompatible with that theory, and thus held it to be inapplicable as a per se rule in North Dakota.[267] As would be expected, however, the obviousness of the risk, although not an automatic defense to liability for failure to warn, is still relevant toward the doctrine of assumption of risk, a valid defense in strict liability in tort.[268] Assumption of risk is a factual determination, and using the applicable standard of review, the court found substantial evidence on which the jury could conclude that the plaintiff did not appreciate the risk which he confronted.[269]

The reasoning in the court's decision can be commended as being in conformance with the spirit behind strict products liability in tort, and the fine manner in which the opinion was written, dealing with a wide scope of issues, should make it a valuable source to future litigants.[270]

In a case more noteworthy for its procedural implications than for its impact on substantive tort law, the court modified its stance on the presumption of negligence against a bailee who fails to account for nondelivery of bailed goods. In *F-M Potatoes v. Suda*,[271] in an action by the plaintiff-bailor against the defendant-bailee for the bailee's failure to maintain proper temperature control which resulted in the deterioration of certain bailed potatoes, the trial court imposed

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abrogated the rule in negligence cases. *See* Micallef v. Miehle Co., etc., Inc., 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

265. *See* Johanson v. Nash Finch Co., 216 N.W.2d 271 (N.D. 1974).

266. *See e.g.*, Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D. Pa. 1971); Byrns v. Riddel, Inc., 113 Ariz. 264, 550 P2d 1065 (1976); Luque v. Mclean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972). *See generally* 2 FRUMER & FRIEDMAN, PRODUCTS LIABILITY § 16A[5] (1976).

267. 256 N.W.2d at 537.

268. *See* RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965). In Wentz v. Deseth, 221 N.W.2d 101 (N.D. 1974), the elements of assumption of risk were identified as (1) knowledge of abnormal danger, (2) voluntary exposure to it, (3) freedom of choice to avoid it, and (4) injury proximately caused by the abnormal danger. *Id.* Thus, obviousness of the danger would be relevant toward whether the plaintiff had subjective knowledge of the danger.

269. 256 N.W.2d at 538.

270. Several other issues were decided by the court in a careful and detailed manner. Among the more notable ones was the issue of admissibility of testimony from an expert in man-machine relationships, which the court held was in the proper discretion of the trial court. *Id.* at 539. On the issue of the admissibility of state-of-the-art evidence in strict liability cases, after recognizing the split in authority, the court logically held that in strict liability cases, the issue is the condition of the product, not the conduct of the defendant. Thus, state-of-the-art evidence is of low probative value, the exclusion of such is not an abuse of discretion. *Id.* at 540.

271. 259 N.W.2d 487 (N.D. 1977).

upon F-M, as bailee, a presumption of negligence.[272] The effect of such a presumption places the burden on a defendant to prove absence of his negligence by a preponderance of the evidence.[273] This became one of the issues asserted on appeal.

The court recognized that the bailed goods, i.e., potatoes, were perishable goods which ordinarily deteriorate from inherent conditions, absent any negligence. The court went on to hold, in conformance with other authorities,[274] that when loss to perishable goods is involved, there is no presumption of negligence against the bailee.[275] Therefore the burden of proving negligence by a preponderance of the evidence remains with the plaintiff as it would in a non-bailment action. Undoubtedly, this case can have noticeable effects in an agriculturally based state such as North Dakota, where the bailment of perishable goods is a common phenomenon. Perhaps an important question yet unanswered is what agricultural products will be deemed to be in the category "perishable" as that term is used by the court.[276] By statute, however, a common type of bailment, that of seed and grain, will in most cases not be affected by this decision, even if the particular product is deemed "perishable," since negligence will not be an issue.[277]

UNIFORM COMMERCIAL CODE

One of the major decisions of the North Dakota Supreme Court's 1977 term was its July 27 ruling in *Peoples Bank and Trust v. Reiff*.[278] The majority of the court held that since a rider to a subordination agreement executed by the plaintiff bank specifically referred to the secured transactions article of the Uniform Commercial Code[279] and the agreement and rider were interwoven with sales of goods and security transactions specifically covered by the Uniform Commercial

272. F-M Potatoes, Inc. v. Suda, 259 N.W.2d 487, 491 (N.D. 1977). North Dakota had adopted the rule that when the plaintiff shows the existence of a bailment for hire and nondelivery by the bailee of the bailed goods in their original condition, a presumption of negligence arises against the bailee. McKenzie v. Hanson, 143 N.W.2d 697 (N.D. 1966).

273. N.D.R. EVID. 301.

274 *See* Grady v. Blue Line Transfer & Storage Co., 195 Iowa 300, 190 N.W. 375 (1922); Southern Ice & Util. Co. v. Stewart, 15 S.W.2d 132, 136 (Tex. Civ. App. 1929); Lopeman v. Gee, 40 Wash. 2d 586, 245 P.2d 183 (1952). *See also* Annot., 92 A.L.R.2d 1298, 1328 (1963).

275. 259 N.W.2d at 491.

276. The court appears to define "perishable" goods as those goods "which ordinarily deteriorate in the course of time from inherent or natural conditions." *Id.* This could possibly be seen to include a wide variety of agricultural products other than potatoes.

277. N.D. CENT. CODE § 60-02-22 (1960), a rather obscure statute which has not been repealed since the passage of the U.C.C. version of the duty of care owed by a bailee, N.D. CENT. CODE § 41-07-10(1) (1968), appears to say that in the case of a public warehouseman acting as a bailee for grain or seed, in the event of loss of such grain or seed, the bailee is absolutely liable without regard to negligence. In such an action, burden of proof would have no effect, except in the establishment of the bailment relationship and loss of the goods.

278. 256 N.W.2d 336 (N.D. 1977).

279. N.D. CENT. CODE § 41-09-01 through 09-53 (1968).

Code,[280] the general provisions article of the Uniform Commercial Code[281] was applicable.[282] Furthermore the statutory non-Uniform Commercial Code parol evidence rule[283] was applicable with regard to the subordination agreement and rider as a supplementary general principle of law.[284]

The Peoples Bank and Trust had a security interest in the inventory and accounts receivable of defendant Reiff and instituted this action against Reiff and another creditor which also had a security interest in the inventory and accounts receivable, to obtain a determination of priorities.[285] The supreme court reversed the Mountrail County District Court ruling which had entered a judgment determining that the second creditor, by the execution of a rider to a subordination agreement, waived its priority against Reiff for any money due in excess of $15,000.[286] The rider, which was at the crux of this dispute, provided that provisions of the subordination agreement should only apply to that portion of the superior indebtedness up to and including the first $15,000 thereof, and that priority of the remainder of the superior indebtedness should be determined in accordance with the provisions of Article 9 of the Uniform Commercial Code.[287] The court found this provision inconsistent with parol evidence that the bank intended that there be a $15,000 limit on the subordination agreement, but held the parol evidence inadmissible[288] under the non-Uniform Commercial Code parol evidence rule. The case was remanded for a redetermination of creditor priorities.[289]

In a special concurring opinion, Mr. Justice Peterson expressed the view that North Dakota Rule of Civil Procedure 52 (a) mandated reversal. His conclusion rested upon the premise that the conclusions of law by the trial court were not supported, or at least were not so set forth, by the findings of fact.[290]

Mr. Justice Vogel, in a dissenting opinion, insisted that the case should have been governed solely by Uniform Commercial Code principles. He reasoned that because the Uniform Commercial Code may be applied to transactions which are analogous to sales although technically not sales, the non-Uniform Commercial Code parol evidence rule[291] is inapplicable and the opinion of the district court was correct.[292]

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280. *Id.* § 41-09-37 (1968).
281. *Id.* ch. 41-01 (1968).
282. Peoples Bank & Trust v. Reiff, 256 N.W.2d 336, 340 (N.D. 1977).
283. N.D. CENT. CODE § 9-06-07 (1968).
284. 256 N.W.2d at 340.
285. *Id.* at 337-40.
286. *Id.* at 339.
287. *Id.* at 338.
288. *Id.* at 342.
289. 256 N.W.2d at 345-46.
290. 256 N.W.2d at 346.
291. N.D. CENT. CODE § 9-06-07 (1968).
292. 256 N.W.2d at 346.

In *Air Heaters, Inc. v. Johnson Electric, Inc.*,[293] the question of the applicability of Article 2 of the Uniform Commercial Code to mixed "goods" and "service" contracts came before the North Dakota Supreme Court for the first time. The case was an appeal by Johnson Electric, Inc. from a judgment of the Williams County District Court in which that court awarded damages to Air Heater's, Inc. on the basis that Johnson Electric breached an implied warranty in the installation of an electrical system in a building owned by Air Heaters.[294] Air Heaters suit was premised on negligence, breach of express warranty, breach of implied warranty for ordinary purposes, and strict liability in tort for its design, construction, installation and maintenance of the electrical distribution system.[295]

In resolving the question of whether the contract for the design and installation of the electrical system by Johnson Electric was covered by the implied warranties of the Uniform Commercial Code,[296] the court expressly adopted the *Bonebrake* test[297] espoused by the Eighth Circuit Court of Appeals.[298] With the adoption of the *Bonebrake* test, it becomes necessary in mixed goods and service contracts, to determine whether their predominant factor is the rendition of service, with goods incidentally involved, or is a transaction of sale, with labor incidentally involved.[299] The Court concluded that the record in this instance did not include enough factual data concerning this particular contract to make that determination.[300]

Continuing, Mr. Chief Justice Erickstad, speaking for a unanimous Court, pointed out the fact that the implied warranties under the Uniform Commercial Code[301] are not the only implied warranties covering construction contracts.[302] In its 1973 term, the North Dakota Supreme Court, in *Dobler v. Malloy*,[303] adopted the rule that the doctrine of implied warranty of fitness can apply to construction contracts when certain conditions are met.[304] Because the four conditions

293. 258 N.W.2d 649 (N.D. 1977).
294. Air Heaters, Inc. v. Johnson Electric, Inc., 258 N.W.2d 649, 650 (N.D. 1977).
295. *Id.* at 651.
296. N.D. CENT. CODE § 41-02-31, 32 (1968).
297. Bonebrake v. Cox, 499 F.2d 951 (8th Cir. 1974).
298. *Id.* at 960.
299. 258 N.W.2d at 652.
300. *Id.*
301. N.D. CENT. CODE §§ 41-02-31, 32 (1968).
302. 258 N.W.2d 649 (N.D. 1977).
303. 214 N.W.2d 510 (N.D. 1973).
304. Dobler v. Malloy, 214 N.W.2d 510 (N.D. 1973). In *Dobler*, the court said:
> Although the precise matter has not been before this court previously, we adopt the holding . . . that the doctrine of implied warranty of fitness for the purpose applies to construction contracts under circumstances where (1) the contractor holds himself out, expressly or by implication, as competent to undertake the contract; and the owner (2) has no particular expertise in the kind of work contemplated; (3) furnishes no plans, designs, specifications, details, or blueprints; and (4) tacitly or specifically indicates his reliance on the experience and skill of the contractor, after making known to him the specific purposes for which the building is intended.

of *Dobler*[305] were held to have been met, the trial court's finding that the fire was caused by a defect in the electrical system was upheld.[306]

Mott Grain Company v. First National Bank & Trust Company of Bismarck[307] involved an appeal by the First National Bank and Trust Company of Bismarck from a Hettinger County District Court judgment holding it liable for the face amount of 17 checks, totaling $40,-520.93, which were the property of Mott Grain Company. The grain company was a depositor in the bank and the payee on the checks which had been wrongfully endorsed by its manager and deposited in his personal account.[308] The bank argued on appeal that a corporate authorization[309] gave it authority to handle checks endorsed by the grain company manager, that the manager was therefore clothed with apparent or ostensible authority to present checks to the bank, and that the negligence of the Mott Grain Company precluded it from recovery.[310] The case was governed[311] by the Uniform Commercial Code.[312]

The North Dakota Supreme Court held that the language in the corporate authorization did not cover the funds in question because the bank did not treat them as funds of the corporation, but rather as funds of the individual.[313]

The bank's argument that the grain company's negligence constituted a defense[314] was also rejected because the bank did not meet the requirements[315] to qualify as a holder in due course.[316] The grain company manager was depositing third-party checks payable to the grain company in his personal account and thus "for his own benefit." The bank therefore, did not acquire the instruments without notice and was subject to the claims and defenses of the grain company.[317]

Id., *citing* Robertson Lumber Co. v. Stephen Farmers Cooperative Elevator, 274 Minn. 17, 143 N.W.2d 622 (1966).

305. 214 N.W.2d 510 (N.D. 1973).

306. 258 N.W.2d at 656-57.

307. 259 N.W.2d 667 (N.D. 1977).

308. Mott Grain Co. v. First Nat'l Bank & Trust Co. of Bismarck, 259 N.W.2d 667, 668 (N.D. 1977).

309. A "Corporate Authorization Resolution" signed by both parties herein stated, in pertinent part, as follows:

> That checks, drafts and other withdrawal orders and any and all other directions and instructions of any character with respect to funds of this corporation now or hereafter with said Bank may be signed by any one of the [three officers] and said Bank is hereby fully authorized to pay and charge to such account or accounts any checks, drafts and other withdrawal orders so signed, and to honor any directions or instructions so signed, whether or not payable to the individual order of or deposited to the individual account of or inuring to the individual benefit of any of the foregoing officers or persons.

Id. at 668-69.

310. *Id.* at 669.

311. *Id.*

312. N.D. CENT. CODE ch. 41-01 (1968); *Id.* ch. 41-03 (1968).

313. 259 N.W.2d at 670.

314. N.D. CENT. CODE § 41-03-43 (1968)

315. *Id.* § 41-03-32 (1968).

316. 259 N.W.2d at 670.

317. *Id.*

WILLS AND TRUSTS

Since the North Dakota Legislature's adoption of the Uniform Probate Code,[318] the court has had a significant body of law to interpret. This year the court resolved questions concerning the problems of non-concurring co-representatives and appellate procedure.

The appellant in *Conway v. Parker*[319] was a co-representative with her sister, the appellee, of their parents' estates.[320] The appellee petitioned to and was granted by the probate court a request that a power of attorney be given to a specific accounting firm to represent the estates before the Internal Revenue Service and to obtain any extensions of time necessary to file the proper tax returns.[321] The appellant claimed she was compelled to execute a power of attorney, an act she did not wish to perform.[322] Underlying this claim is Uniform Probate Code Section 3-717[323] which provides that in the situation of co-representatives, unless the will provides otherwise, "the concurrence of all is required on all acts connected with the administration and distribution of the estate."[324]

The court relied on a personal representative's duty to settle and distribute an estate "as expeditiously and efficiently as is consistent with the best interests of the estate,"[325] to resolve the conflict between the Code's goal of joint action and the stalemate that had developed in the administration of the estates. As the possibility of late filing penalties, which would ultimately be paid from the estate, could be avoided by granting the power of attorney to the accounting firm, the failure of the co-representatives to agree could not prevail and threaten the best interests of the estate.[326]

Once a duty existed, the Court upheld the probate court's authority to order the execution of the power of attorney. Uniform Probate Code Section 3-607[327] provides as follows:

> 1. On petition of any person who appears to have an interest in the estate, the court . . . may . . . make any other order to secure proper performance of his [personal representative's] duty, if it appears to the court that the personal representative otherwise may take some action which would jeopardize

318. 1973 N.D. Sess. Laws ch. 257 (codified at N.D. CENT. CODE tit. 30.1).
319. 250 N.W.2d 266 (N.D. 1977).
320. Conway v. Parker, 250 N.W.2d 266, 270 (N.D. 1977).
321. *Id.*
322. *Id.* at 271. The reason the appellee had sought the court order was in part because the estate had been threatened earlier with a substantial late filing penalty for filing late one of the tax returns. By delegating the tax preparation to the accounting firm, the appellee was attempting to ensure that all tax returns were properly filed. *Id.*
323. N.D. CENT. CODE § 30.1-18-17 (1976).
324. *Id.*
325. N.D. CENT. CODE § 30.1-18-03(1) (1976).
326. 250 N.W.2d at 272.
327. N.D. CENT. CODE § 30.1-17-07 (1976).

> unreasonably the interest of the applicant or of some other interested person.[328]

The court cleverly overlooked the words "may *take some action* which would jeopardize . . . the interest of the applicant . . . ."[329] in its reading of the statute.[330] This case did not involve "action" which would jeopardize the interests of someone; rather, the appellant's "inaction," that is, the failure to concur with the grant of a power of attorney to the accounting firm, was the alleged threat to the appellee's interest. Rather than ignoring the words and rendering its decision questionable, the court could have construed the words in such a way as to bring about the same result. The entire purpose behind the statute seems to be to allow the courts some control over the personal representative's administration of an estate. An applicant's interest in the estate can be jeopardized as easily by a personal representative's failure to act as by her acts. By recognizing this, the court could have developed a policy of control that would encourage personal representatives to act in accordance with their duties to administer estates.

The *Conway* approach should not always be followed, particularly in the case of co-representatives. If not limited, this approach could develop into a "race to the court" by the representative thinking his method of administration to be the better. Courts should be certain that a duty exists and that the circumstances do not permit a joint decision. One of those circumstances should be the good faith of the petitioning co-representative. A court should not exercise its authority to order a co-representative to act properly for the best interests of the estate when the petitioning co-representative has not himself acted with good faith in attempting to negotiate a joint decision with the other.

The appellate procedure question was considered in *In re Estate of Bieber*.[331] The question involved a district court's jurisdiction of an appeal from county court. Specifically, was service of the notice of appeal upon the attorney of the personal representative alone sufficient to give the district court jurisdiction over the appeal?[332] The court held it was not, as North Dakota law requires service upon not only the personal representative, but also on all other parties to the probate proceeding before the county court.[333]

The legislature's adoption of the Uniform Probate Code did not include Section 1-308 providing for appellate procedure. Instead the

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328. *Id.*
329. *Id.* (emphasis added).
330. 250 N.W.2d at 272.
331. 256 N.W.2d 879 (N.D. 1977).
332. In re Estate of Bieber, 256 N.W.2d 879, 880 (N.D. 1977).
333. *Id.*

legislature provided that district courts have appellate jurisdiction as provided in Chapter 30-26 of the North Dakota Century Code.[334] Appellate review is also governed by the Rules of Civil Procedure,[335] one of which is Rule 81 (b) providing that the "rules do not supersede the provisions of statutes relating to appeals to or review by the district courts, but shall govern procedure and practice relating thereto insofar as these rules are not inconsistent with such statutes."[336] This inconsistency was resolved by the Court's declaration that the Rules of Civil Procedure apply insofar as they are not contrary to the Code.[337]

North Dakota law requires each person who was a party to the county court proceeding to be made a party to the appeal[338] and the appellant to have the notice of appeal served on each of the parties.[339] Chapter 30-26 of the Code does not, however, specify the manner of service of the notice of appeal.[340] At this point, the transition is made from the Code to the Rules of Civil Procedure. The requirements are found in Rule 5.[341]

Undoubtedly the most important feature of this decision as it relates to an attorney's practice is that appeals in probate matters from county courts are different from appeals generally.[342] In probate matters all parties must be served by the appellant.[343] In other appeals the appellant need only serve the clerk of the trial court.[344] The clerk then has the responsibility of serving notice on the other parties.[345]

334. N.D. CENT. CODE § 30.1-02-02(2) (1976).
335. N.D.R. CIV. P. 81(b).
336. *Id.*
337. 256 N.W.2d at 881.
338. N.D. CENT. CODE § 30-26-02 (1976).
339. N.D. CENT. CODE § 30-26-03 (1976).
340. In re Ashbrook's Estate, 110 N.W.2d 184, 188 (N.D. 1961). The manner of service was outlined in N.D. CENT. CODE ch. 30-02. Those provisions were repealed when the Uniform Probate Code was adopted. 1973 N.D. Sess. Laws ch. 257.
341. N.D.R. CIV. P. 5.
342. 256 N.W.2d at 882.
343. N.D. CENT. CODE § 30-26-02 (1976)
344. N.D.R. APP. P. 3.
345. *Id.*