

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20100231

MERVIN GAJEWSKI)
as next friend of all North Dakota)
intact minor males)
Plaintiffs/Appellants)

Supreme Ct. No. 20100231
District Ct. No. 09-c-151

VS

THE STATE OF NORTH DAKOTA.)
Wayne Stenehjem, Attorney General)
Defendants/Appellees)

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

SEP 02 2010

APPEAL FROM THE DISTRICT COURT
MCKENZIE COUNTY, NORTH DAKOTA

STATE OF NORTH DAKOTA

NORTHWEST JUDICIAL DISTRICT

HONORABLE GERALD RUSTAD

BRIEF OF PLAINTIFFS/APPELLANTS

Mervin Gajewski
Mervin Gajewski

as "next friend" of all minor North Dakota intact males
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ISSUES BEFORE THE COURT

Did the Court violate North Dakota Constitution's Article 14 Sec. 1
dismissing the case under Rule 12 b resulting in denial of due process
and equal protection?

Did the Court err when denying Plaintiffs motion for summary judgment?

Authorities Cited

North Dakota Constitution Article 14 Sec. 1

... nor shall any state deprive any person of life, liberty or property, without
due process of law, nor deny to any person within its jurisdiction the equal
protection of the laws.

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N.D R. Civ. P.
Rule 12b
Rule 8c

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STATEMENT OF THE CASE

This is an appeal from a District Court order dated May 27, 2010 denying motion to vacate illegal judgment and denying plaintiffs motion for summary judgment in Civil No. 09-c-151. *appendix 1*

A "Next Friend" complaint was filed by Mervin Gajewski on behalf of North Dakota sexually intact minor North Dakota males seeking protection under certain criminal North Dakota Statute of assault and other assertions concerning the excising of a part of these incompetent persons' genitalia. The complaint was declaratory judgment *in*

Nature but was not denominated as such.

The Defendant filed a motion to dismiss the complaint on December 17, 2009 under rule 12-b alleging lack of standing of Plaintiff. Plaintiff's denied the allegation. Plaintiff's filed a brief in opposition and required oral argument and the right to show evidence. In response the Defendant filed a statement stating "The State accepts as true the factual allegations in the complaint, an evidentiary hearing is unnecessary." *Appendix 4*

I Mervin Gajewski was told by the deputy clerk of court the motion was calendared for hearing in April 13, 3:00 pm. Mervin Gajewski appeared on behalf of plaintiff's. The court did not recognize his appearance as a wedding took up the time frame. The Defendants did not appear.

Plaintiff's filed a notice of motion and motion and brief for summary judgment on January 27, 2010. The Defendant filed a motion in opposition. *quoting* the court from the above May 27, 2010 order. *Appendix 1*

"although not expressly stated, the March 1, 2010 order denied Plaintiff's January 27, 2010 motion for summary judgment when it dismissed the action."

Judgment was entered March 9, 2010 dismissing the complaint with prejudice. A motion by Plaintiff's was filed dated April 28, 2010 to vacate illegal judgment.

It is that order denying Plaintiff's motion that is being appealed.

POINTS OF DISCUSSION - ARGUMENT

Did the court violate North Dakota Constitution article 14 Sec. 1 dismissing the case under Rule 12 b, resulting in denial of due process and equal protection?

Yes it did.

1. It appears the court did not have jurisdiction to dismiss the case using the

standing issue under rule 12 b as there are only seven reasons given under that rule and standing is not one of them. See rule 12 b attached herewith. *see addendum, page 7.*

It appears that standing is an affirmative defense — a fact issue as others brought under rule 8 c under Affirmative Defenses. Where it says “and any other matter constituting an avoidance or affirmative defense.” Standing or the lack thereof appears to be a fact issue that needs to be proved with evidence by the Plead Plaintiff/Defendant in this instance. It appears to be an adversary issue settled by evidence, whichever side can be most persuasive. See rule 8 c *addendum Page 8* concerning affirmative defenses. The use of rule 12 b thoroughly thwarted the due process litigation of the standing issue, whereas under 8 c it would have gotten the facts out on both sides for proper consideration by the court.

It also appears equal protection is a very important issue herein of the right of these incompetent minor male persons of having a part of their genitalia excised without their personal consent. If the excising of the tissue of the unconsenting adult person, male or female, a complaint by anyone would activate our criminal statutes, it wouldn't take a “Next Friend” with certain qualifications. There would be full immediate unimpeded action by our justice system.

The issue here isn't some obscure inconsequential action. The excising cuts off at least 20,000 nerve endings. Only in three nations of the world are most male infants subjected to this genital cutting, the United States of America, Israel and South Korea who adopted it from American influences. About 80% of the world's males are intact.

Did the court error when denying Plaintiffs motion for summary judgment?

2. Yes. the court should have granted Plaintiffs motion for summary judgment. *Appendix 5-B*

There was no issue of material fact, as Defendants admitted all the facts set out in Plaintiffs complaint that stated “The cutting is seldom therapeutic in nature, a violation under criminal statute 12.1-17-01.1 and 12.1-20-07 sexual assault and other statutes. The cutting is done for compensation and or gratification. There is no statute in North Dakota

that provides for the excising of normal functional healthy tissue such as circumcision. The excising of the normal boys prepuce is a life-long invasion of his privacy. The modification of normal, healthy genitalia is only legal upon the owner's request or consent and is only a matter of personal equity only." See complaint: *Appendix 2 and 3*. Defendants acceptance of the factual allegations of Plaintiffs' complaint. *Appendix 4*

The Defendant is very persistent that the Plaintiffs don't have standing to prosecute the case and the court seems to have given its agreement. What has been missed in Defendant's argument is the fact this is not a civil matter, but criminal acts perpetrated on the helpless minor male persons. Therefore it appears it is now the Defendants and the courts sworn duty to protect these minor people from the criminal *assaults of* acts of tearing and/or cutting off a part of these minor boys penises. Tradition and cosmetic reasons for the tearing or cutting fail in the face of statutory criminal law to the contrary.

In conclusion, it appears Plaintiffs were denied due process of law when dismissing the case under rule 12 b when they should have moved under rule 8 c as standing was then a fact issue to be resolved by evidence.

Another issue is relevant here: these minor intact boys are being denied equal protection under the criminal law as to age and gender as to their respective prepuces, male or female. It should be especially noted here in Defendants admission that North Dakota statute does not permit circumcision. Also we know one does not have to have a special standing to report a criminal act toward incompetent persons.

Therefore Plaintiffs are asking this honorable court to reverse the District Court order appealed here. ^{*ix*} And that North Dakota minor boys prepuces be equally protected as any other normal body part under North Dakota ^{*Constitutions*} Article 14 Sec. 1 Equal Protection Clause as to criminal law and as to age and ^{*both*} gender genitalia. And grant such other relief as this honorable court deems just and right.

Respectfully submitted this day *August 23, 2010*

Mervin Gajewski Re submitted this day
Sept. 1, 2010 *Mervin Gajewski*

Mervin Gajewski.

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