

ORIGINAL

Supreme Court Number 20080056
District Court Number 07-C-00866

20080056

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

APR 23 2008

Reuben Larson,

STATE OF NORTH DAKOTA

Plaintiff/Appellant,

vs.

Gail Hagerty, Zachery Pelham,
and Wayne Stenehjem,

Defendants/Appellees.

APPEAL FROM JUDGMENT GRANTING MOTION TO DISMISS
DISTRICT COURT OF BURLEIGH COUNTY

REPLY BRIEF OF APPELLANT

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Defendants' Brief, on pages 5-6, raises a new argument to ask this Court to not reconsider the cases legislating/declaring N.D.C.C. 32-12.2-04 to be a subject matter jurisdictional predicate statute, for the reason that the Legislature has not amended it since 1998, within the past five legislative sessions, because that is what makes it a subject matter jurisdictional predicate statute!

Larson has already pointed out that it violates the Separation of Powers Principle when a court legislates, writes or re-writes or amends a statute, when a court says a statute says something it does not say, when a court has to put words in to a statute to make it say something the court wants it to say and mean.

Also, legislating, making law, exceeds a court's judicial power, this contrary to due process of law and Article VI, §1 of the N.D. Constitution. A court can only apply the law to the facts. A court can not make the law, then apply it to the facts.

Defendants' new argument or reasoning is still violative of these principles.

On page 6 of their Brief, citing cases, they say, quoting: "We presume the legislature is aware of judicial construction of a statute, and from its failure to amend a particular statutory provision, we may presume it acquiesces in that construction. Thus, the Legislature's failure to amend N.D.C.C. 32-12.2-04(1) is evidence the court's interpretation is in accordance with the legislative intent."

(The citation of court cases not quoted.)

First:

There is no testimony from the Legislature or other testimonial evidence saying the Legislature is aware the courts are doing this to their statute, and that it acquiesces or gives in to or accepts that construction and that this is their intent.

This rule creates evidence and makes it a matter of record. Facts must be introduced by the witness. A party or court can not testify for a witness! This violates Rule 602, NDREv. A witness may not testify if they lack personal knowledge of the fact. Cf. Gassman v. Stanton, 472 N.W.2d 741, 745 (N.D. 1991) (Affidavits on summary judgment must be made on personal knowledge.). This rule violates due process of law.

Second:

This rule creates a fact based upon the silence or non-activity of the Legislature, the failure to amend the statute.

This rule is an interpretation of the meaning of the silence or non-activity of the Legislature. It says the silence, the failure to amend was intended as an assertion or statement of acquiescence, and it was used to prove the truth of the matter asserted, to prove that the Legislature acquiesced in the court's construction of their statute and that the court's construction is their intent.

This violates the rule against hearsay evidence.

This is contrary to Rules 801 and 802, NDREV.

Third:

This rule is a rule of presumption.

It does not follow from the fact that one has done something that another person is aware that one did it. And even if one is aware of the other's conduct, it does not necessarily follow that one has consented to or agrees with or accepts that person's conduct simply because he remained silent, simply because he did not react to or respond to the act.

A presumption which is arbitrary is void, is contrary to due process of law. Bandini Petroleum Co. v. Superior Court of State of Cal. in and for Los Angeles County, 284 U.S. 8, 19, 52 S.Ct. 103, 107 (1931) (Where there is no manifest connection between the fact proved and the fact presumed, the presumption is arbitrary.); Western & R.R. v. Henderson, 279 U.S. 639, 642-643, 49 S.Ct. 445, 447 (1929) (Rule making proof of one fact evidence of another fact or which presumes another fact is void if it is arbitrary, that is, if there is no rational connection between what is proved and what is to be presumed.); Serafin v. Serafin, 241 N.W.2d 272, 274-275 (Mich.App. 1976) (A court rule saying that a child born to a man's wife is his simply because he was married to the mother at the time is contrary to due process of law.).

Both presumptions in this rule are void, contrary to due process of law.

Fourth:

This rule has one presumption piled on top of another or dependant on another in order to reach the desired conclusion.

This rule (1) presumes the Legislature knows about the conduct of the courts which have 'legislated' or amended N.D.C.C. 32-12.2-04(1). And, since the Legislature knows about this, (2) the failure of the Legislature to amend the statute presumes or means that the Legislature has acquiesced in the court's construction and thus the court's construction is in accordance with their intent.

This double presumption is void because one presumption is used to prove another presumption.¹

Fifth:

This rule says that the legislative intent was created and is because the Legislature acquiesced to the conduct of the courts.

Saying that acquiescence is involved is an acknowledgement that the Judicial Branch has dominated the Legislative Branch, is telling the Legislative Branch how it is going to be, if you fail to amend the statute to specifically and pointedly make it say what you want it to say, then it will mean what we want it to mean, and this will be

1. Larson had cases already researched on this point which say a double presumption is void. But the prison has confiscated Larson's files. Larson hopefully will be able to re-research and send cases to this Court later.

your intent.

That is, the courts dominated or interfered with or bullied or told the Legislature how it will be, told the Legislature what their intent will be. The Judicial Branch is exercising control over the Legislative Branch (and also the Executive Branch, over the Governor).

The Balance of Power Principle means that one Branch shall not impose its will on another Branch, shall not interfere with another Branch's independence, shall not tell another Branch what to do or how it shall be.

(The Checks and Balances Principle comes in to play only if the Branch acted outside the sphere of its authorization. Then one Branch can 'check' another Branch's unlawful activity. For example, the Judicial Branch can 'check' the Legislative Branch, can declare a statute unconstitutional because it violates the Constitution or because it is vague or uncertain in meaning and thus contrary to due process of law, etc.)

Balance of Power means a distribution and opposition of forces so that one shall not be in a position to impose its will on another or interfere with another's independence. Black's Law Dictionary, Fourth Edition, defining balance and Balance of Power.

Conduct by one Branch which appears to change the scope and function of another Branch violates the Balance of Power Principle. State ex rel. Link v. Olson, 286 N.W.2d 262, 266 (N.D. 1979) (The constitutionality of legislative

action which appears to change the scope and function of the office of lieutenant governor affects or involves the Balance of Powers between the legislative and executive branches of government. Statute which created and assigned a duty to the lieutenant governor infringed upon the governor's power to choose to assign duties to the lieutenant governor. *Id.*, page 274.).

Balance of Power means that no Branch can "be dictated to or limited by another" or "be subjected to the control or supervision" of another except as authorized in the Constitution itself; and the Checks and Balances Principle means one Branch can not exceed its powers nor encroach upon the province of another Branch. *Murphy v. Townley*, 67 N.D. 560, 274 N.W. 857, 860 (1937).

It is a violation of the Balance of Power Principle to control or intrude upon the functions of another Branch. *Mistretta v. U.S.*, 488 U.S. 361, 412 note 35, 109 S.Ct. 647, 675 note 35 (1989); *Bowsher v. Synar*, 478 U.S. 714, 733-734, 106 S.Ct. 3181, 3192 (1986) (Congress retained control over the execution of the Act and thereby intruded into the executive function.).

To acquiesce to the court's saying of what the statute is going to mean and say is for the Legislature to delegate its inherent law making power to the courts, it allows the courts to be a co-designer of the statute with them. *City of New York v. Clinton*, 985 F.Supp. 168, 180-181 (D.D.C. 1998) (Giving the President line item veto authority gives

the President power to amend a statute, that is, to co-design the statute. This is an unlawful delegation of the power to legislate to the Executive.). This violates the Separation of Powers or Balance of Powers Principles. On appeal, the U.S. Supreme Court called this a Balance of Powers issue. Clinton v. City of New York, 524 U.S. 417, 428 and 448, 118 S.Ct. 2091, 2098 and 2108 (1998).

This rule relied upon by Defendants to uphold this Court's prior cases violates the Balance of Power Principle or the Separation of Powers Principle.

Sixth:

As a final reason why this rule is void, this rule says the statute, §32-12.2-04, says what it means based, not on words in the statute, but based only on legislative intent.

Legislation via intent is not statute, is not law. Intent is not law, is not a statute. Intent is not statute because it was not enacted into law according to the requirements of the Constitution.

Article IV, §13 of the N.D. Constitution requires that before there can be a statute, that a bill be acted upon by both Houses of the Legislature, that it be read twice on two separate days and adopted by a majority vote of each House and the bill must be signed by the presiding officer of each House. Then the bill must be presented to the Governor for his signature if he wants it to become statute, or to not sign it if he wants to veto it. Article

V, §9 of the N.D. Constitution.

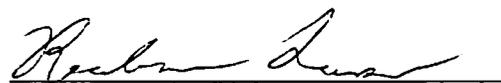
Saying that Legislative intent or adoption by acquiescence is statute, is law, violates the enactment and presentment requirements of the Constitution before a bill can become a statute, becomes law. The presentment requirement means that laws enacted by the Legislature must be presented to and approved by the Governor before taking effect. Blank v. Department of Corrections, 611 N.W.2d 530, 535 (Mich. 2000).

The Constitution does not authorize statute via legislative intent. It does not authorize statute via acquiescence. A statute must be enacted via affirmative conduct, not via acquiescence or inaction or intent.

For the above six reasons, Defendants' new argument is void, contrary to due process of law and contrary to the North Dakota Constitution. N.D.C.C. 32-12.2-04 is not a subject matter jurisdictional predicate statute.

Wherefore, Larson prays this Supreme Court to reverse the District Court's Order and allow Larson to proceed with the prosecution of his case.

Dated this 22nd day of April, 2008.


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CERTIFICATE OF SERVICE BY MAIL
 DEPARTMENT OF CORRECTIONS & REHABILITATION
 PRISONS DIVISION
 SFN 50247 (Rev. 04-2001)

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Supreme Court #20080056

STATE OF NORTH DAKOTA)
) SS. **20080056**
 COUNTY OF BURLEIGH)

The undersigned, being duly sworn under penalty of perjury, deposes and says: I'm over the age of eighteen years and on the 23rd Day of April, 2008, _____ M, I mailed the following:

Reply Brief of Appellant;
 Copy of letter address to Clerk of Court;

by placing it/them in a prepaid enveloped, and addressed as follows:

Mr. Douglas A. Bahr, Atty.
 Solicitor General
 Office of Attorney General
 500 North 9th Street
 Bismarck, N.D. 58501-4509

and depositing said envelope in the Mail, at the NDSP, P.O. Box 5521, Bismarck, North Dakota 58506-5521.

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APR 24 2008

STATE OF NORTH DAKOTA

AFFIANT

[Signature]

P.O. Box 5521
 Bismarck, North Dakota 58506-5521

Subscribed and sworn to before me this 23rd day of April, 2008.

Notary Public

[Signature]

My Commission Expires On

10-31-2008

PATRICK SCHATZ
 Notary Public
 State Of North Dakota
 My Commission Expires Oct. 31, 2008