

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JUN 21 2013

STATE OF NORTH DAKOTA

Stark County, a political)	
subdivision of the)	
State of North Dakota,)	
)	
Plaintiff/Appellant,)	Supreme Court No. 20130102
)	
vs.)	Stark County No. 452012CV-00503
)	
A motor vehicle described as a 1998 Peterbilt)	
truck, VIN: 1NPFXB9X8WD470613,)	
owned by H & H Earthworks, Inc., and)	
driven by Tadd N. Strozzi,)	
)	
Defendant/Appellee,)	
and)	
)	
Ryan Strozzi,)	
Third-Party Defendant/Appellee.)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT
STARK COUNTY, NORTH DAKOTA
THE HONORABLE WILLIAM HERAUF, DISTRICT JUDGE

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STATEMENT OF ISSUE

1 The issue in this case is whether the trial judge erred in his determination of the facts and application of the law in this case.

STATEMENT OF THE CASE

2 On Sunday, June 25, 2012, a John Deere Trackhoe 350D was delivered to the Greenvale Subdivision in Stark County, North Dakota, by a semi-tractor truck and low-boy trailer belonging to H & H Earthworks, Inc. The location to which the trackhoe was delivered was restricted at both points of entry to the subdivision by signs limiting loads to 5 tons per axle and a total of 60,000 pounds on the road. The trackhoe then commenced to excavate a trench across the road and refill it. The presence of the John Deere Trackhoe was reported by a resident and that report was forwarded to Stark County Road Superintendent Allen Heiser. On Monday morning, June 26, 2012, Superintendent Heiser went to the site of the excavation and observed the trackhoe and determined that, in his estimation, any vehicle hauling the machine into the subdivision could not have been within the load restrictions for the subdivision. He then made a request to the Stark County Sheriff's Office to have the deputy in charge of truck regulation come to the site. Shortly thereafter, Sheriff Clarence Tuhy arrived along with Deputy Dean Franchuk. Tadd Strozzi and Defendant Ryan Strozzi were at the site loading the trackhoe onto a low-boy trailer which had been brought in by the Defendant truck. After the trackhoe was loaded onto the low-boy, the trailer was then reattached to defendant truck and the vehicle was moved from the shoulder onto to the flat part of the road. After the truck was on the road, Deputy Franchuk caused the vehicle to be moved back and forth sufficiently to enable the placement of portable scales. Deputy Franchuk determined a total vehicle overweight of 65,900 pounds on the seven axles on the tractor-trailer and obtained a personal check from defendant Ryan Strozzi for bond to release the

truck. A complaint was filed and served by the Appellant/Plaintiff and defendant Ryan Strozzi filed an answer as third party defendant. No answer or appearance was made by the defendant truck. Trial was had to the Court, the Honorable William A. Herauf at Dickinson on February 21, 2013. Following presentation of evidence, the Court allowed closing argument briefs to be filed. The Court issued its Finding of Fact, Conclusions of Law and Order for Judgment on March 7, 2013, dismissing the case and ordering refund of the bond to defendant Strozzi.

STATEMENT OF FACTS

3 The appeal at hand is based upon a complaint filed by the plaintiff against the defendant vehicle, a 1998 Peterbilt truck owned by H & H Earthworks, Inc. The complaint alleges a violation by the defendant of Chapter 39-12 of the North Dakota Century Code for extraordinary use of highways, streets, or roads. On June 25, 2012, a passerby observed a large excavating machine in the Greenvale Subdivision in Stark County, North Dakota. That machine was later determined to be a John Deere Trackhoe 350D. At the time of the observation, it was excavating a trench across a road in the subdivision. The subdivision has a road restriction of five tons per axle and a total of 60,000 pounds due to a high water table in the area. The presence of this machine was reported to Stark County Road Superintendent Allen Heiser and Mr. Heiser went to the location on the morning of Monday, June 25, 2012. He observed the trackhoe being loaded onto a low-boy trailer which trailer had been detached from the defendant vehicle for the purpose of loading the track hoe onto the trailer. Mr. Heiser had also advised the Sheriff's Office of the matter and the Sheriff and Deputy Dean Franchuk arrived at the scene shortly after Mr. Heiser. When Sheriff Clarence Tuhy and Deputy Dean Franchuk arrived, Superintendent Heiser joined them and they approached the men who were in the process of loading the trackhoe onto the low-boy trailer. Those persons turned out to be Tadd Strozzi and Ryan Strozzi. Tadd Strozzi was operating the defendant truck.

4 When the tractor-trailer had been loaded and moved up onto the road, Deputy Franchuk commenced to use portable scales to weigh the outfit and made a determination that it's axles were overweight to a total of 65,900 pounds on the seven axles. He

calculated the overweight fee by a fee schedule contained in Chapter 39-12 and arrived at an overweight fee of \$13,200.00. He informed the Strozzi's of the option of a voluntary settlement at the scene or the posting of the bond for the overweight fee for release of the vehicle. Defendant Strozzi provided a check for the amount of the fee.

5 At trial, both Deputy Franchuk and defendant Strozzi referred to the truck having to be moved, either forward or backward, on the road in order for the truck to be placed upon the scales. Defendant Ryan Strozzi testified that he worked as an operator for H & H Earthworks, and that he received permission to borrow the trackhoe from his superintendent. He further testified that he scheduled it for Sunday, June 24, 2012, and the tractor-trailer which had delivered the trackhoe had left the site and Mr. Strozzi had made arrangements for the trackhoe to be retrieved by an H & H Earthworks semi-tractor trailer on the morning of Monday, June 25, 2012. (Transcript pgs. 44, line 14 - pg. 47, line 4).

6 Testimony from Deputy Franchuk indicated that no permits had been obtained for the delivery of the trackhoe to the site and no permits had been obtained for the removal of the trackhoe from the site. He further testified that the subdivision had load restriction signs at each of two entries to the subdivision. (Transcript. pg. 20, line 25- pg. 21, line 19). Deputy Franchuk testified that a ton-mile permit was obtained later in the week to move the semi-tractor-trailer and load out of the subdivision. (Transcript. pg. 35, lines 6-16).

ARGUMENT

I.

7 The Plaintiff herein, Stark County, maintains that the Court's finding as to movement of the defendant vehicle is clearly erroneous. This standard is set out in State ex. rel. W.R. Hjelle, v. a motor vehicle described as a 1973 Brockway Tractor-Trailer, 229 NW2d 557 (1980). In that case, the Supreme Court affirmed the District Court ruling on behalf of the Plaintiff/Appellee, forfeiting the cash bond deposit to the Plaintiff by reason of extraordinary use of the highways as governed by N.D.C.C. Chapter 9-12.

8 The applicable statute in this matter is N.D.C.C. 39-12-17. This statute provides, in part,

“At the trial of the action, the Court shall hear testimony concerning the facts and if it is found that such vehicle or vehicles were moved upon the highways, streets, or roads of this state at a weight in excess of the limitations imposed under the provisions Section 39-12-03 or as limited by the provisions of 39-12-05, charges for the extraordinary use of the highways, streets, or roads must be assessed as follows:”. (NDCC 39-12-17).

The undersigned suggests that the trial judge was clearly erroneous in his finding that there was no testimony the subject vehicle was moved. See Findings of Fact, Conclusions of Law and Order for Judgment, paragraph 5.

9 It is beyond question from the admissions contained in the testimony of Defendant Strozzi that the excavator was delivered to the site by a tractor-trailer combination operated by H & H Construction on Sunday morning, June 24, 2012, and that it was being picked up for removal on Monday morning, June 25, 2012, when Superintendent Heiser and Sheriff Tuhy and Deputy Franchuk arrived. It is also beyond contest that the

delivery itself was in violation of law as there were no permits obtained by anyone to access the area with an overweight vehicle, either for the delivery or for the removal. It is also clear that the defendant vehicle was moved at the site as the testimony indicates that the loaded rig had to be moved at the site in order to get it off the shoulder of the road and then it was further moved in order to place scales under the axles. (Transcript pg. 50, line 5 - page 51 through line 17.) Clearly the loaded rig had to be moved to be positioned onto the road for departure and then had to be moved again, at least twice, in order to be weighed.

10 We know that the John Deere Trackhoe 350D was transported into the Greenvale Subdivision in violation of load restrictions as the weight of the trackhoe alone exceeded the posted weight limitation of 60,000 pounds. According to the testimony of Superintendent Heiser the approximate gross weight of the implement is 76,000 pounds.(Transcript pg. 10, L. 12-16). In other words, the trackhoe itself exceeded the maximum allowed weight limitation by 8 tons. The gross weight of the loaded tractor-trailer was 133,200 pounds (Findings of Fact, Conclusions of Law and Order Judgment, paragraph 9). This vehicle, which was then more than double the weight of the posted road restriction, was pulled onto the road loaded and then moved at least twice in order to be weighed. Plaintiff submits that the Courts' determination that there was no testimony that the subject vehicle was moved is clearly erroneous.

II.

11 Plaintiff further asserts that the Court's Findings of Fact promote an absurd result.

“The charge under section 39-12-17, N.D.C.C. is for extraordinary use of the highway, not for actual damage, and there is no burden on the state to prove actual damage, the charge is not assessed on the basis of number of miles driven on the road but rather assessed on a pro-rata basis for exceeding the legal weight restriction. We believe this is a reasonable manner for a state to police the weight requirements for its highways and, whether or not the pro-rata charges are excessive is a matter best left to the Legislature.” (State ex rel Hjelle, supra, at pg. 563).

12 The ruling of the trial judge means that, despite the fact that defendant Strozzi arranged the delivery by H & H Earthworks, Inc., to the site with the equipment, which itself violated the road restrictions, and that the vehicle had been loaded for purposes of removal and that no permits were obtained for either entry or exit, that the matter should be dismissed because the Court found there was no testimony that the Defendant truck had moved in the Court's judgment. The statute merely requires that “such vehicle or vehicles were moved upon the highways, streets, or roads of this state at a weight in excess of the limitations imposed under the provisions of ...(Chapter 39-12)” (Emphasis added). (N.D.C.C. 39-12-17)

13 This Court has stated several times that the interpretation of a statute is a question of law and that statutes must be construed to avoid absurd and ludicrous results. See State v. Wetzel, 208 ND 186, 756 NW2d 775 (2008), M.M. v. Fargo Public School District No. 1, 2010 ND 102, 783 NW2d 806(2010), and Blomdahl v. Blomdahl, 2011 ND 78, 796 NW2d 649 (2011).

14 In State v. Wetzel, supra, the defendant entered a conditional plea and appealed to this Court that the Burleigh County State’s Attorney did not have jurisdiction over incidents which occurred on the Missouri River on the east side of the main channel near Kimball Bottom. The defendant asserted that no jurisdiction existed since the boundaries between Burleigh and Morton Counties lay “along the main channel” of the Missouri River as described in N.D.C.C. §§ 11-01-09 and 11-01-31 and that he was in the channel itself. Wetzel, supra at pg. 776. This Court rejected his assertion and cited Baukol Builders, Inc., v. County of Grand Forks, 2008 ND 116, 751 NW2d 191.

“The interpretation of a statute is a question of law.(citation omitted). This Court’s primary objective in interpreting a statute is to ascertain legislative intent. Words of a statute are given their plain, ordinary, and commonly understood meaning unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. Statutes are construed as a whole and are harmonized to give meaning to related provisions. N.D.C.C. § 1-02-07. If the language of a statute is clear and unambiguous, “the letter of [the statute] is not to be disregarded under the pretext of pursuing its spirit.” N.D.C.C. §1-02-05. If the language of a statute is ambiguous, however, a court may resort to extrinsic aids to interpret the statute. N.D.C.C. §1-02-39. Statutes must be construed to avoid absurd and ludicrous results. County of Stutsman v. State Historical Soc’y, 371 NW2d 325, (ND 1985).” State v. Wetzel, supra, pg. 775.

15 In M.M. v. Fargo Public School District No. 1, supra, this Court reversed summary judgement given to the Defendant/Appellees and refused to allow defendant Fargo Public School District No. 1 to use the defense of recreational use immunity statutes when a student had been injured in a gymnasium area that apparently was supervised by an instructor despite the fact that the accident occurred following the specific end of the class day, but there was evidence of a number of school administrators

and teachers responded to the accident, indicating that the school day had not come to an end. This Court favorably quoted from language in the case of Kappenman v. Klipfel, 2009 ND 89, ¶21, 765 NW2d 716, and proceeded to quote the above paragraph from State v. Wetzel, supra (M.M., supra at pg. 812).

16 In Blomdahl v. Blomdahl, supra, this Court cited M.M., supra, for the proposition that statutory interpretation presents a question of law which is fully reviewable on appeal and that statutes are construed to avoid absurd or illogical results. Blomdahl, supra at pages 652-653.

17 Plaintiff submits in this matter, the Court has ignored the plain language of N.D.C.C. 39-12-17 in that the Defendant truck was, in fact, moved and it was upon a “highway(s), street(s), or road(s) of this state at a weight in excess of the limitations under the provision of Section 39-12-03, or as limited by the provisions of Section 39-12-05...”.(N.D.C.C. 39-12-17).

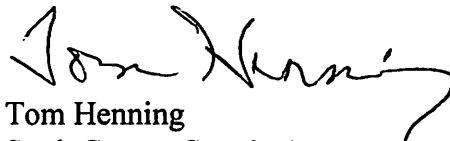
18 The Defendant vehicle was obviously moved and it was clearly on a public road. (NDCC 39-12-17). It is further clear that the statutes concerned herein were propounded by the Legislature for the purpose of assessing a statutory fee set by a table on vehicles that exceed the legal weight restrictions on public roads, which have not complied with the permitting requirements of Chapter 39-12 of the North Dakota Century Code. Thus it is absurd and illogical to require anything more than a showing of movement for the purpose of weighing the defendant vehicle when it is on a public road in an area only accessible by public road, had been delivered to that site without any permitting and no permitting was in place for the intended retrieval of the vehicle on the date that the defendant vehicle was loaded with the nearly 40 ton John Deere Trackhoe.

CONCLUSION

19 Based upon the foregoing authorities and argument, it is the motion of the Plaintiff/Appellant herein that this Court reverse the Order of the District Court and Order Judgment for the Plaintiff and forfeiture of the bond posted to Stark County.

Dated this 21st day of June, 2013, at Dickinson, North Dakota.

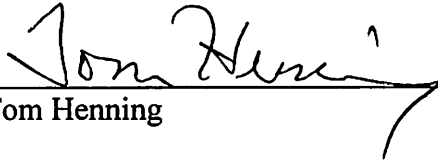
Respectfully submitted,



Tom Henning
Stark County State's Attorney
Attorney for Appellant
ND Bar ID # 03534

CERTIFICATE OF SERVICE

20 The original and seven copies along with a copy of the CD was on the 21st day of June, 2013, mailed to the N.D. Supreme Court, State Capitol, Judicial Wing, First Floor, 600 East Boulevard Avenue, Bismarck, ND 58505-0530; and a copy mailed to T.F. Murtha, IV., Attorney at Law, P.O. Box 1111, Dickinson, ND 58602.


Tom Henning