

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff and Appellant,)	Supreme Court No. 20160301
vs.)	District Ct. No. 09-2015-CR-04077
)	
Caroline Marie Conrad,)	
)	
Defendant and Appellee.)	

APPELLANT’S BRIEF

Appeal from the August 5, 2016 Order Granting Defendant’s Motion to Dismiss
Pursuant to N.D.R.Crim.P. 12(b)(3)(v)
East Central Judicial District
the Honorable Steven E. McCullough, Presiding

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[¶ 3] STATEMENT OF ISSUE

[¶ 4] I. Whether the district court erred in concluding that factual disputes about Morrell's intent and whether a gift occurred constitute a unique question of law supporting dismissal of criminal charges under the civil dispute doctrine.

[¶ 5] STATEMENT OF CASE

[¶ 6] The State appeals from the district court's pre-trial order dismissing criminal charges of exploitation of vulnerable adult and theft. (App. 26.) The charges were based on assertions that the Defendant used approximately \$479,000 of funds that the Defendant's elderly mother, Monica Morrell, had deposited in a bank account, which listed Morrell as primary member and the Defendant as a joint owner. (Tr. of March 23, 2016 Preliminary Hearing, Doc ID# 80, "Prelim. Tr." 10:8-11:24, 14:1-7.)

[¶ 7] Referencing the civil dispute doctrine, the district court analyzed whether a gift (of the account funds) had occurred from Morrell to the Defendant. (App. 18-23.) The court reasoned that precedent and parol evidence rules precluded consideration of evidence beyond the contract with the bank to determine "donative intent." (App. 21-22.) Because the bank contract listed the Defendant as joint account owner with authority to access the funds, the court concluded "that a legitimate dispute exists as to Ms. Morrell's donative intent." (App. 22.) The court also indicated there was no dispute that a delivery of the gift occurred and no dispute that acceptance of the gift occurred because the Defendant "used these funds herself." (App. 22.) Dismissal, the court concluded, was required. (App. 23.)

[¶ 8] Seeking

about Morrell's intent and whether a gift occurred constituted a unique question of law supporting dismissal of criminal charges under the civil dispute

doctrine. Further, the district court's actual analysis and controlling precedent on intent and gift law show that the issues are factual - not legal, and contract law principles do not convert the intent and gift law issues into questions of law. The State requests that this Court overturn the district court's order and remand the case so a jury can decide the factual issues.

[¶ 9] STATEMENT OF FACTS

[¶ 10] Alleging that the Defendant unlawfully took more than \$50,000 from Morrell, the State charged the Defendant in late 2015 with exploitation of a vulnerable adult and theft. (App. 5.) The State asserted that the Defendant committed the crimes between about June 9, 2014, and October 31, 2015. (App. 5.)

[¶ 11] A. The Preliminary Hearing.

[¶ 12] A preliminary hearing was held in March 2016. Fargo Police Detective Sara Gunther was the only witness called at the hearing. (Prelim. Tr. 2.) She testified that Morrell, who was eighty-one years old at the time of the hearing, moved in with the Defendant in April 2014 (Prelim. Tr. 10:20-21, 11:7-8); that Morrell opened an account ("Account") at Affinity Credit Union ("Affinity") and ultimately deposited more than half a million dollars ("Funds") into the Account (Prelim. Tr. 12:12-25); that Morrell was listed as the primary member and the Defendant was listed as a joint owner on the Account, but Morell indicated that the Funds were to be used only for Morrell's purposes (Prelim. Tr. 11:9-24, 18:1-15); and that the Defendant had taken a large portion of the Funds without Morrell's knowledge or permission (Prelim. Tr. 11:13-15).

[¶ 13] Detective Gunther detailed more specific information about the Defendant's conduct and its impact. For instance, Morrell reported that when she inquired about Account statements, the Defendant would say the statements never came or were not in the post office box. (Prelim. Tr. 18:16-21.) In addition, the

Defendant had Morrell trespassed from the Defendant's residence in early December 2014, and during that same month, transferred approximately \$370,000 from the Account to the Defendant's individual account. (Prelim. Tr. 20:14-25, 14:1-4.) Further, when Morrell moved to Bismarck, planning to enter an assisted living facility, Morrell learned that the Funds were largely gone. (Prelim. Tr. 19:21-20:4.)

[¶ 14] Relaying information from Morrell's medical records, Detective Gunther indicated that they contained the following statements of the Defendant: that in June 2014, Morrell was getting more forgetful (Prelim. Tr. 22:7-10); that in July 2014, Morrell had moved from Oregon to Fargo and had gone through periods of "severe confusion" (Prelim. Tr. 22:15-17); and that also in July 2014, Morrell had suffered through episodes where Morrell did not remember where Morrell was or who Morrell's daughter was (Prelim. Tr. 22:11-14).

[¶ 15] Highlighting portions of interviews, Detective Gunther testified that the Defendant made the following assertions directly to Gunther: that the Funds belonged to Morrell and the Defendant had never used the Funds for the Defendant's personal use (Prelim. Tr. 27:4-17); that \$165,000 from the Funds had been earmarked for Morrell's nursing care and burial expenses (Prelim. Tr. 28:5-18); that Morrell had authorized other portions of the Funds to be used for various purposes, including to give away, to "fix [the Defendant's] face, and to wire to relatives (Prelim. Tr. 29:10-30:22); and that the Defendant had portions of the Funds delivered in cash to Morrell in Bismarck (Prelim. Tr. 30:1-6).

[¶ 16] Exhibits admitted at the preliminary hearing included Morrell's membership application to Affinity, which listed Morrell as primary member and the Defendant as a joint owner, and Affinity's terms and conditions booklet, which indicated that a joint account is owned by two or more persons and in a "control of joint accounts" section, that any owner may withdraw all the funds in the account. (Ex. 5 & 6, March 23, 2016.)

[¶ 17] At the end of the hearing, the district court concluded that probable cause existed. (Prelim. Tr. 64:12-14.) The Defendant pleaded not guilty to the charges. (Prelim. Tr. 66:5-14.)

[¶ 18] **B. The Defendant's Motion to Dismiss Based on the Civil Dispute Doctrine.**

[¶ 19] About a week after the preliminary hearing, the Defendant submitted a motion to dismiss the charges based on the civil dispute doctrine. The Defendant argued that there was a legitimate dispute regarding a unique property right. (Br. in Supp. of Def.'s Mot. to Dismiss Pursuant to Civil Dispute Doctrine at ¶¶ 12 & 15, March 31, 2016.) No exhibits were included with the Defendant's motion,¹ and no hearing was requested.

[¶ 20] **C. The State's Response to the Motion to Dismiss.**

[¶ 21] Opposing the motion, the State filed a response, which included an affidavit of Detective Gunther. Through the affidavit, Detective Gunther

¹ With a separate motion, seeking dismissal under N.D.R.Crim.P. 12(b), the Defendant did submit exhibits, including Morrell's membership application to Affinity and Affinity's terms and conditions booklet. (Certificate of Service, Doc. ID# 68, March 31, 2016.)

confirmed information obtained about Morrell's intent for the Funds, Morrell's mental condition, the Defendant's statements regarding ownership of the Funds, and the Defendant's conduct toward Morrell and the Funds. (Aff. of Det. Sara Gunther "Gunther Aff.", April 12, 2016; State's Resp. to Def.'s Mot. to Dismiss Pursuant to Civil Dispute Doctrine "Resp.", April 12, 2016.)

[¶ 22] Regarding Morrell's intent for the Funds, Detective Gunther verified that Morrell indicated she did not authorize the Defendant to use the Funds, and the Defendant made no deposits to the Account. (Gunther Aff.; Resp. at 2, 4.)

[¶ 23] Regarding Morrell's mental condition, Detective Gunther confirmed that between May and December 2014, multiple medical providers documented concerns about Morrell, including forgetfulness, lack of stability, and severe confusion. (Gunther Aff.; Resp. at 3.) Detective Gunther further indicated that in mid-July 2014, the Defendant reported to a provider that Morell had actually improved since moving to Fargo, suggesting that a relative in Oregon had previously been giving medications to Morrell that affected Morrell's judgment, but that also in July 2014, the Defendant acknowledged the propriety of admitting Morrell into a facility that cared for persons with dementia. (Gunther Aff.; Resp. at 3.)

[¶ 24] Regarding the Defendant's statements about ownership of the Funds, Detective Gunther indicated that the Defendant herself repeatedly confirmed that the Funds belonged to Morrell; that in April 2015, the Defendant asserted that Morrell still had more than \$350,000 and that if Morrell's nephew had drawn the

balance down, the Defendant was concerned; and that the Defendant claimed in June 2015, after being confronted about the transfers of Funds from the Account to the Defendant's individual account, that she had delivered portions of the Funds in cash to Morrell. (Gunther Aff.; Resp. at 4-6.)

[¶ 25] Regarding the Defendant's conduct, Detective Gunther confirmed that when Morrell first arrived in Fargo, the Defendant took Morrell to multiple banks and Morrell had difficulty understanding; that in early December 2014, the Defendant contacted police and indicated she no longer wanted Morrell to live in the Defendant's residence; that within one week of contacting police, the Defendant transferred \$374,000 from the Account to the Defendant's individual account; that between April 2014, and March 2015, the Defendant transferred a total of \$479,000 from the Account to the Defendant's individual account; and that the Defendant withdrew the transferred funds primarily in cash. (Gunther Aff.; Resp. at 3-5.)

[¶ 26] **D. The District Court's Order Dismissing the Charges.**

[¶ 27] In July 2016, the district court ordered the parties to submit additional briefs. Both parties did. No hearing was ever requested or held.

[¶ 28] On August 5, 2016, the court issued its order dismissing the charges. Outlining the civil dispute doctrine, the court indicated that it applied when either of two situations exists: (1) there is a legitimate dispute about a unique issue of property, contract, or civil law, or (2) there is a legitimate dispute about an issue traditionally and more appropriately settled in a civil forum. (App. 17.)

[¶ 29] Citing First Nat'l Bank & Trust Co. v. Green, 262 N.W. 596 (N.D. 1936), the court reasoned that placing funds in a joint account creates a joint tenancy. (App. 19-20.) Citing In re Estate of Paulson, 219 N.W.2d 132 (N.D. 1974) and In re Kaspari's Estate, 71 N.W.2d 558 (N.D. 1955), the court recognized that donative intent was crucial, and identified the three elements of an inter vivos gift: (1) intent to give, (2) delivery of the gift, and (3) acceptance by the donee. (App. 21.)

[¶ 30] The court rejected the State's arguments that under controlling precedent, the circumstances must be assessed to determine donative intent. (App. 19-21.) Reasoning that this Court only permitted parol evidence if the contract with the financial institution was unclear, the court focused on contract statutes, namely N.D.C.C. § 9-07-02's provision that contract language governs interpretation if it is clear and explicit and does not involve an absurdity and N.D.C.C. § 9-07-04's provision that when a contract is written, the parties' intent is to be ascertained from the writing alone, if possible. (App. 21-22.)

[¶ 31] Because Morrell's account application and the contract with Affinity listed the Defendant as a joint owner with access to the Funds in the Account, the court concluded "that a legitimate dispute exists as to Ms. Morrell's donative intent." (App. 22.) The court added that "there is no dispute that a delivery of the gift (from [Morrell's] sole ownership to joint ownership with [the Defendant]) was accomplished" and that "there is no dispute that [the Defendant] used these funds herself[.]" and "[t]his establishes acceptance of the gift." (App. 22.) The court

further reasoned that the Defendant "has met her burden of providing [sic] reasonable grounds showing a legitimate dispute on a fairly unique underlying issue of property or civil law." (App. 22-23.) Dismissal of the charges, the court concluded, was necessary. (App. 23.)

[¶ 32] STANDARD OF REVIEW

[¶ 33] "Questions of law decided at a preliminary hearing are fully reviewable." State v. Perreault, 2002 ND 14, ¶ 6, 638 N.W.2d 541. Whether a criminal case presents a unique question of law requiring dismissal under the civil dispute doctrine thus is fully reviewable. See id. at ¶¶ 10-11 (reversing dismissal of a theft charge where the case did not present a unique property law question and the lower court "essentially determined that there was insufficient evidence to find that [the defendant's] actions were unauthorized"); see also State v. Herzig, 2012 ND 247, ¶ 21, 825 N.W.2d 235 (reversing a trespass conviction where a legitimate dispute existed as to whether the area trespassed upon was a public road by prescription - an issue traditionally resolved through civil litigation).

[¶ 34] LAW AND ARGUMENT

[¶ 35] When a criminal case presents a unique question of law, dismissal under the civil dispute doctrine may be warranted. The doctrine is equity-based; it has historically been applied when it would be unfair to resolve the matter through trial in a criminal case. For instance, this Court reversed a man's theft convictions where he harvested crops planted on land that was later partitioned and awarded to a bank. State v. Brakke, 474 N.W.2d 878 (N.D. 1991). The Court recognized inconsistent legal authority existed regarding ownership of the crops. Id. at 881-82. In particular, the Court noted "equitable exceptions" to the general rule that ownership of crops ordinarily passes with the land, identifying an equally well-settled rule that one who plants, cultivates, and harvests crops on another's land

and remains in possession through harvesting, is entitled to the crops. Id. at 881. Reasoning that the ownership issues had never been decided by it before, the Court concluded a theft trial was not the proper means of resolving the dispute. Id. at 882.

[¶ 36] The civil dispute doctrine has also been applied when a legitimate dispute exists regarding an issue traditionally resolved through civil litigation. In Meyer, for instance, this Court reversed a man's obstructing conviction where the obstructed road crossed the man's own land and was not declared public until three months after his conviction. State v. Meyer, 361 N.W.2d 221, 222 (N.D. 1985); see also Herzig, 2012 ND 247, ¶ 19, 825 N.W.2d (overturning a man's conviction for trespassing on his ex-wife's land because a legitimate dispute existed regarding whether the property purportedly trespassed upon was actually a public road by prescription).

[¶ 37] On the other hand, the Court has rejected application of the doctrine when equity did not support a solely civil determination and the issue did not involve a unique question of civil law or an issue traditionally resolved through civil litigation. In Trosen, for example, the Court upheld an accountant's theft conviction where he argued that the issue was a contractual one, i.e., whether extra duties warranted additional compensation, but he actually engaged in double-billing. State v. Trosen, 547 N.W.2d 735, 738 (N.D. 1996). And in Perreault, the Court reversed dismissal of a man's theft charge where the man (who was one of three business principals) was alleged to have exceeded his authority by writing

checks for personal matters on the business's line of credit. State v. Perreault, 2002 ND 14, ¶¶ 10-11, 638 N.W.2d 541. In such instances, a court cannot dismiss based on a defense that merely "raises factual questions embraced in the general issue." Id. at ¶ 11.

[¶ 38] In this case, the district court properly identified the legal issue: whether a unique question of law existed warranting dismissal under the civil dispute doctrine. The court simply misapplied the law and erred in concluding dismissal was warranted.

[¶ 39] I. **The district court erred in concluding that factual disputes about Morrell's intent and whether a gift occurred constitute a unique question of law supporting dismissal of criminal charges under the civil dispute doctrine.**

[¶ 40] The district court's error is illuminated by three factors. First, the court's own analysis demonstrates that the issues are factual, not legal. Second, controlling precedent on a depositor's intent and on gift law shows that the issues are factual, not legal. Third, contract law principles do not convert the intent and gift law issues into questions of law.

[¶ 41] A. **The court's analysis shows that the issues are factual, not legal.**

[¶ 42] The court correctly recognized that the issue is whether a gift was made and that Morrell's intent was critical to that issue. (App. 21.) The court also appropriately identified the three elements of a gift: intent, delivery, and acceptance. (App. 21.) Where the court erred was applying these elements to the

facts. That analysis involves factual determinations - what Morrell's intent was, whether delivery was made, and whether the Defendant accepted the gift.

[¶ 43] The district court cited information that demonstrates the factual nature of the issues. For instance, the court highlighted one piece of Det. Gunther's testimony, where she indicated that the Defendant "did not tell [Gunther] that Morell intended a gift." (App. 22.) In contrast, the State would focus on more specific details of the Defendant's statements - that the Funds belonged to Morrell (Prelim. Tr. 27:4-9; Gunther Aff.; Resp. at 4-6); that the Defendant had not used the Funds for herself (Prelim. Tr. 27:10-17; Gunther Aff.; Resp. at 4-6); that if someone else had drawn down Morrell's account, the Defendant was concerned (Gunther Aff.; Resp. at 4-6); that Morrell still had \$350,000 (Gunther Aff.; Resp. at 4-6); that Morrell had authorized certain expenditures (Prelim. Tr. 26:18-27:3, 28:5-30:22; (Gunther Aff.; Resp. at 4-6); and that the Defendant had withdrawn sums and delivered portions in cash to Morrell (Prelim. Tr. 30:1-6; Gunther Aff.; Resp. at 4-6). In addition, the court characterized the fact that the Defendant "used these funds herself" as acceptance of a gift. (App. 22.) In contrast, the State would assert that the Defendant's use of the funds for herself showed completion of a theft, especially given the evidence that the Defendant denounced the notion of a gift. These contrasts amount to arguments about the facts. And indeed, the court's primary conclusion reveals a factual dispute: "a legitimate dispute exists as to Ms. Morrell's donative intent." (App. 22.)

[¶ 44] No unique question of law exists. In Brakke, a unique question of law existed because there was conflicting authority regarding ownership of the crops. State v. Brakke, 474 N.W.2d 878, 881-82 (N.D. 1991). Some authority indicated that the planting farmer owned the crops; other authority indicated that the bank awarded the land through partition owned the crops. Id. The question in Brakke thus was what law to apply. Id.

[¶ 45] The district court here did not face that question. While assessing whether the dispute was more traditionally resolved in a civil forum (and concluding it was not), the court did note that the parties cited conflicting cases from other jurisdictions. (App. 18-19.) But those cases appropriately had no bearing on the court's analysis. (App. 18-23.) The court had no difficulty identifying the controlling precedent on donative intent: First Nat'l Bank & Trust Co. of Fargo v. Green, 262 N.W. 596 (N.D. 1936) and its progeny. (App. 19-20.) Nor did the court have any difficulty identifying the controlling precedent on gift law: In Re Estate of Paulson, 219 N.W.2d 132 (N.D. 1974) and In re Kaspari's Estate, 71 N.W.2d 558 (N.D. 1955). (App. 21.) The court simply erroneously concluded that factual issues arising upon application of the controlling precedent constituted a unique question of law.

[¶ 46] **B. Controlling precedent on a depositor's intent and on gift law shows that the issues are factual, not legal.**

[¶ 47] The district court's error is further illuminated by controlling precedent establishing that a depositor's intent and whether a gift occurred are

factual issues requiring consideration of multiple factors. When determining ownership of the funds in a joint account at a savings and loan in Green, the Court reviewed many factors. First Nat'l Bank & Trust Co. of Fargo v. Green, 262 N.W. 596, 596-97 (N.D. 1936). It did not just point out the savings and loan documents, which indicated the account holders "assign[ed] and transfer[red] [the funds] one to the other in joint tenancy[.]" Id. Instead, the Court also noted other factors - including (1) evidence of what the depositor told the joint account owner and (2) the savings and loan treasurer's testimony about what the depositor "intended to effectuate." Id. at 597.

[¶ 48] Here, the district court erroneously reasoned that "in Green the only evidence of intent presented was the creation of the joint account itself" and "[n]o parole [sic] evidence concerning the intent of the creation of the account was noted by the Court." (App. 20.) Further, the district court erred in identifying Green's holding. Citing Green, the district court reasoned "[i]t has long been the law in North Dakota that placement of money by one person into a joint account with another creates a joint tenancy interest in the money of both the co-owners of the account." (App. 19.) At the outset, one should note that a joint tenancy requires express declaration. Under N.D.C.C. § 47-02-06, a joint interest is one "created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy[.]" Nothing in Morrell's application or Affinity's terms and conditions expressly declared that a joint tenancy was created. (Ex. 5 & 6, March 23, 2016.) Moreover, the actual holding in Green was that based on the

circumstances, a completed gift had been made. 262 N.W. at 598. The Court did not decide whether a joint tenancy was created: "Since we hold that in the instance case there was a completed gift, it is immaterial as to whether a joint tenancy was created[.]" Id.

[¶ 49] A quarter century after Green, this Court in determining ownership of funds in a joint bank account again analyzed the depositor's intent as a factual issue to be based on the circumstances. In re Berzel's Estate, 101 N.W.2d 557 (N.D. 1960). Several factors showed that the depositor, a woman whose husband had died, had not intended a gift to her husband - despite opening the account in the name of herself and/or her husband. Id. at 563. Those factors included that all the monies in the account were considered property of the depositor; the husband never signed the ledger card triggering his ability to withdraw funds; and the husband never, in any manner, claimed or asserted any interest in the funds. Id. at 564-66. Summarizing the analysis, the Court explained that "[t]he effect of depositing money to the account of the owner and another person depends upon whether the deposit was intended [] [sic] by the depositor to be a gift or trust[.]" Id. at 565 (emphasis added).

[¶ 50] As with Green, the district court misinterpreted Berzel. Erroneously reasoning that Berzel's facts were too different from the facts in this case, the district court concluded Berzel was not helpful. (App. 20.) Whether funds ultimately are determined to be owned by the depositor or another party listed on a joint account does not impact the validity of the process of determining who owns

the funds, i.e., analyzing the facts to determine intent. Further, although the district court here emphasized the lack of evidence in Berzel of the contact between the bank and the account holders, this Court also twice simultaneously noted the lack of evidence of a contract between one account holder and the other account holder. 101 N.W.2d at 564-65. Thus nothing in Berzel suggests that the analysis of intent would have been limited to just the account holders' contract with the bank, had such evidence existed.

[¶ 51] Controlling precedent establishes that whether a gift occurred is also a factual issue to be determined based on the circumstances. In Paulson, the Court upheld the finding that the decedent made a gift inter vivos of stock to her children because of multiple factors – including the decedent’s instructions to one child to endorse the original stock certificates and have new certificates issued to herself and her children, the decedent’s actual signing of the original certificates, and the decedent’s following a procedure her husband had used when making past gifts. 219 N.W.2d at 135. And in Kaspari, the Court upheld the finding that the decedent had not made a gift of money to relatives based on “[t]he facts in this case” – including “[t]he actions of the parties[.]” 71 N.W.2d at 566-67.

[¶ 52] In sum, controlling precedent establishes that a depositor’s intent and whether a gift occurred are factual issues. The district court failed to apply this principle.

[¶ 53] **C. Contract law principles do not convert the intent and gift law issues into questions of law.**

[¶ 54] The court also erroneously applied contract law in assessing whether Morrell's deposit of the Funds in the Account constituted a gift to the Defendant. The only contract that existed was the one between the listed account owners and Affinity. It set out rights and responsibilities between “you,” meaning the persons listed on the account, and “us,” meaning Affinity. (Ex. 6 at 8, March 23, 2016.) It also provided consideration and an object (requirements of a valid contract under N.D.C.C. § 9-01-02) in one form: Affinity's banking services. (Ex. 6, March 23, 2016.) No consideration or object existed between the Defendant and Morrell. (Ex. 6, March 23, 2016.) So no contract was formed between the Defendant and Morrell.

[¶ 55] It should be noted that neither the district court nor the Defendant ever asserted that the Defendant was a third party beneficiary entitled to enforce the contract with Affinity. And that is for good reason: the Defendant would not qualify as a third-party beneficiary because the contract was not "made expressly for the benefit" of the Defendant. See N.D.C.C. § 9-02-04 (providing that "[a] contract made expressly for the benefit of a third person may be enforced by that person"). As noted, the contract with Affinity was for banking services; no provision suggested that it was created to benefit the Defendant. (Exhibits 6, March 23, 2016.)

[¶ 56] Because no contract existed between the Defendant and Morrell and because the Defendant was not a third-party beneficiary, statutes governing contract interpretation did not apply to the determination of whether a gift was

made. Indeed, if one acquires property by gift, he necessarily does not acquire it by contract; consideration must be absent for a gift to occur but present for a contract to be formed. Compare N.D.C.C. § 47-11-06 (providing that a gift is a transfer made “without consideration”) with N.D.C.C. § 9-01-02(4) (providing that it “is essential to the existence of a contract that there should be sufficient cause or consideration”). The district court accordingly erred in applying N.D.C.C. § 9-07-02 and N.D.C.C. § 9-07-04 to conclude that the contract between the account parties and Affinity was the only evidence that could be considered in determining Morrell’s intent and whether a gift occurred. As this Court’s precedent establishes, the contract with Affinity instead should have been considered just one factor in determining whether a gift occurred.

[¶ 57] What’s more is that even if the Defendant and Morrell had somehow contracted with each other, both expressly denounced the notion that the Funds belonged to anyone other than Morrell. (Gunther Aff.; Resp. at 2-6.) So the actual intent of the parties – which is again a factual issue – would still control, trumping the mistaken contractual language. See N.D.C.C. § 9-07-05 (providing that “[w]hen through fraud, mistake, or accident a written contract fails to express the real intention of the parties, such intention is to be regarded and the erroneous parts of the writing disregarded”). In short, the district court erred in deciding that the contract with Affinity was the only evidence that could be considered when assessing intent.

[¶ 58] **CONCLUSION**

[¶ 59] What Morrell's intent was and whether a gift occurred are factual issues – not unique questions of civil law. No question exists regarding the controlling precedent to apply. The district court erred in concluding that the factual issues presented a unique question of law requiring dismissal under the civil dispute doctrine. The State requests that this Court reverse the district court's order dismissing the charges and remand the case for further proceedings.

Respectfully submitted this 6th day of October, 2016.

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[¶ 60] **CERTIFICATE OF SERVICE**

[¶ 61] A true and correct copy of the foregoing document was sent by e-mail to Joseph Tamburino at jtamburino@caplanlaw.com and to Peter Welte at pwelte@vogellaw.com on the 6th day of October, 2016.