20160457
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
APRIL 26, 2017
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Beach Railport, LLC, Plaintiff and Appellee, v. Donnell F. Michels and Jeanne Michels, Husband and Wife, Defendants and Appellants. --- Donnell F. Michels and Jeanne Michels, Husband and Wife, Third-Party Plaintiffs and Appellants v. North Dakota Guarantee and Title Company, A North Dakota Corporation, doing business as Dickinson Guarantee and Title Company, Third-Party Defendant.	Supreme Court No. 20160457

Appeal from Judgment entered on October 31, 2016,
Civil No. 17-2015-CV-00021,
County of Golden Valley, Southwest Judicial District,
The Honorable Dann Greenwood, District Judge, Presiding

BRIEF OF APPELLANTS DONNELL F. MICHELS AND JEANNE MICHELS

FREDRIKSON & BYRON, P.A.

LAWRENCE BENDER, ND Bar #03908
SPENCER D. PTACEK, ND Bar #08295
1133 College Drive, Suite 1000
Bismarck, ND 58501-1215
lbender@fredlaw.com
sptacek@fredlaw.com
Telephone: 701.221.8700
Facsimile: 701.221.8750

Attorneys for Appellants
Donnell F. Michels and Jeanne Michels

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Paragraph

CASES

STATUTES

CONSTITUTIONS

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶ 1] Whether the district court's decision to adopt the referee's findings of fact as its own is clearly erroneous;

[¶ 2] Whether the district court erred in not holding an evidentiary hearing at the request of the Michels; and

[¶ 3] Whether the district court erred in concluding that the Report of the Referee complies with N.D.C.C. ch. 32-16 and North Dakota common law considerations with respect to partition matters.

STATEMENT OF THE CASE

[¶ 4] The present action for partition of real property was initiated by Appellee Beach Railport, LLC ("Beach Railport") on April 29, 2015, against Appellants Donnell F. Michels and Jeanne Michels, husband and wife (the "Michels"). On January 8, 2016, the district court issued an order declaring that each of the parties owned an undivided one-half interest in the Subject Property and appointing a referee to partition the Subject Property between Beach Railport and the Michels. On July 6, 2016, the referee submitted his report to the district court, in which he determined that the Subject Property should be partitioned along the east-west quarter-quarter line and that Beach Railport should receive the north half of the Subject Property and the Michels should receive the south half of the Subject Property. On October 17, 2016, the district court held a hearing on whether it should confirm the referee's report. At the close of this hearing, the district court confirmed the referee's report and adopted the report's findings and conclusions for its own order for judgment, issued on October 31, 2016.

[¶ 5] The Michels appealed the district court's decision on December 30, 2016. The issues raised by the Michels' appeal concern the sufficiency of the referee's and the district court's findings of fact, the appropriate procedure for partition actions, and the factors relied upon by the referee and the district court in support of their respective partition decisions.

STATEMENT OF FACTS

[¶ 6] The present appeal concerns partition of the following property located in Golden Valley County, North Dakota:

Township 140 North, Range 106 West
Section 22: SW1/4SE1/4, NW1/4SE1/4

(the "Subject Property"). *See, e.g.*, Appendix of Appellants Donnell F. Michels and Jeanne Michels ("App."), pp. 66–67. The SW1/4SE1/4 of Section 22 is referred to herein as the "South Forty (40)," and the NW1/4SE1/4 of Section 22 is referred to herein as the "North Forty (40)."

[¶ 7] The parties do not dispute that at all times material to the present action, the Michels owned an undivided one-half interest in the Subject Property, and that Donnell F. Michels has used such property for agricultural purposes. *See, e.g.*, *id.*, p. 34. On March 22, 2013, Paul Michels and Colleen Michels, husband and wife, and as Trustees for the Revocable Trust Agreement of Paul Michels, and Robert T. Michels and Nancy Michels, husband and wife, purported to convey the North Forty (40) to Williston Basin Management, LLC ("Williston Basin"), an affiliate of Beach Railport, by a Warranty Deed. *Id.*, pp. 14–21. Williston Basin paid $4,000 per acre, or $160,000 total, for this property. *Id.*, pp. 61–24. Williston Basin conveyed its interest in the North Forty (40) to Beach Railport by Quit Claim deed on April 12, 2013. *Id.*, pp. 22–24. Subsequent

to these conveyances, and at least as of March 2014, Beach Railport learned of the Michels interest in the Subject Property. *See id.*, pp. 50–51. Thereafter, on December 12, 2014, Paul Michels and Colleen Michels, husband and wife, and as Trustees for the Revocable Trust Agreement of Paul Michels, and Robert T. Michels and Nancy Michels, husband and wife, conveyed the South Forty (40) to Beach Railport by Quit Claim deed. *Id.*, pp. 25–28.

[¶ 8] Prior to the initiation of the present action, Beach Railport acquired various tracts of land near to or contiguous with the Subject Property for the purpose of constructing a rail transload facility. *Id.*, pp. 50–51, 38–40. Beach Railport's acquisition of the North Forty (40) was part of its planned construction of the rail transload facility. *See id.*, p. 50. Beach Railport's plan for the construction of its rail transload facility did not include development on the South Forty (40). *See id.*, pp. 29–31. Among the other tracts that Beach Railport did acquire is a 53.07-acre tract located in the NW1/4 of Section 22, near the Subject Property, which Beach Railport purchased from Daniel L. Spiegelberg, as Trustee of the Jennie L. Spiegelberg Revocable Trust, for $7,500 per acre, or $398,025 total. *Id.*, pp. 56–60.

[¶ 9] Beach Railport initiated the present action seeking a partition of the Subject Property that would result in its obtaining sole ownership of the North Forty (40). *Id.*, p. 51. In response, the Michels have sought a partition of the Subject Property that would instead result in their obtaining sole ownership of one half of the North Forty (40) and one half of the South Forty (40). *Id.*, p. 35. On January 8, 2016, the district court issued an Order for Partition of Real Property and for the Appointment of a Referee ("Order for Partition"). *Id.*, pp. 39–42. In this order, the district court concluded that the

parties each owned an undivided half interest in the Subject Property and ordered that the Subject Property "be partitioned among the owners according to their respective interests . . . quality and quantity relatively considered, and that after the partition the parties hold the property severally and not jointly." *Id.*, p. 41. By the Order for Partition the district court also appointed Steven A. Wild ("Wild") as the referee to partition the Subject Property "into two parcels, one for each of the cotenants of the land in the same proportion with respect to value and extent as to their respective interests in the land." *Id.* The Order for Partition required that Wild "report his proceedings under this judgment, specifying the manner in which he has executed [his] trust, and describing the property divided and the shares allotted to each party, with a particular description of each share," within 180 days thereafter. *Id.*, p. 42.

[¶ 10] Wild submitted his report on July 6, 2016. *Id.*, pp. 43–49. Wild determined that the property should be divided on the east-west quarter-quarter line, giving Beach Railport the North Forty (40) and the Michels the South Forty (40), based on various findings of fact and conclusions of law. *Id.*, p. 48. In support of the report's conclusion, Wild found the Subject Property "to be equal in value whether used for agricultural purposes or industrial purposes regardless of how partitioned," though Wild did not assign any specific values to the Subject Property as a whole or to any of its parts. *Id.*, p. 47. Wild also found that Beach Railport "has spent hundreds of thousands of dollars, traveled several times to the [Subject Property] from Salt Lake City, Utah, made presentations to government officials and solely obtained a change in zoning of the [North Forty (40)] to 'industrial' from 'agricultural.'" *Id.* Wild specifically stated that his decision to give Beach Railport the North Forty (40) and the Michels the South Forty

(40) "was made due to the fact that the only reason the [North Forty (40)] is arguably more valuable than the [South Forty (40)] is due to the substantial investment made by [Beach Railport]." *Id.*, p. 48.

[¶ 11] As indicated in Wild's report, the parties each submitted appraisals of the Subject Property and position statements to Wild. *Id.*, p. 44. Wild does not expressly endorse any valuation of the Subject Property offered by either of the parties' appraisers. *See generally id.*, pp. 43–49. The only specific value that Wild identifies for any part of the Subject Property is the $14,000 value he assigns to three grain bins. *Id.*, p. 47. Wild states in his report that he traveled to and personally viewed the Subject Property, and that on this basis he concluded "[e]ven though the soil types vary throughout the [Subject Property], it did not appear that there was any significant disparity or difference in the ability of the [Subject Property] to produce crops." *Id.*, p. 45. The district court did not review the documents or other evidence on which Wild relied in preparing his report. *See generally id.* pp. 80–96. The district court did not personally view the Subject Property. *See generally id.* pp. 80–96. At a hearing on Beach Railport's motion to confirm Wild's report, held on October 17, 2016, the district court adopted Wild's findings of fact. *Id.* p. 95.

[¶ 12] The Michels dispute the accuracy of Wild's and the district court's findings of fact, particularly those findings that expressly or impliedly establish the value of the Subject Property and its constituent parts.

STANDARD OF REVIEW

[¶ 13] A trial court exercises its judicial discretion in partition actions to "do equity" and to make a fair and just division of the property between the parties. *Eastman*

v. Nelson, 319 N.W.2d 134, 136 (N.D. 1982). "A trial court's determination of the proper division of property or proceeds between the parties and the form of relief granted will not be disturbed on appeal unless the trial court has abused its discretion." *Id.* A district court abuses its discretion "when it acts in an arbitrary, unreasonable, or unconscionable manner, when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination." *Mitzel v. Larson*, 2017 ND 48, ¶ 7, 890 N.W.2d 817, 820.

[¶ 14] "A district court's findings in a partition action will not be reversed on appeal unless clearly erroneous." *In re Estate of Loomer*, 2010 ND 93, ¶ 18, 782 N.W.2d 648, 653. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after reviewing all the evidence, [the Court] are left with a definite and firm conviction a mistake has been made." *Id.* (quoting *Higgins v. Trauger*, 2003 ND 3, ¶ 10, 656 N.W.2d 9).

[¶ 15] Whether a district court has properly applied state case law is a question of law. *O'Hara v. Schneider*, 2017 ND 53, ¶ 13, 890 N.W.2d 831, 837. Whether a district court has properly applied state statutory law is a question of law. *Id.* ¶ 20. A district court's conclusions of law are fully reviewable on appeal. *See, e.g., Larson v. Midland Hosp. Supply, Inc.*, 2016 ND 214, ¶ 9, 891 N.W.2d 364, 369.

LAW AND ARGUMENT

I. Introduction

[¶ 16] The district court abused its discretion in allotting the North Forty (40) to Beach Railport and the South Forty (40) to the Michels. As explained below, the district court erred in adopting Wild's findings of fact without reviewing any of the evidence that Wild purportedly relied upon. The district court also erred in refusing the Michels'

request for an evidentiary hearing even though the Michels had presented evidence sufficient to dispute the findings in Wild's report. Finally, the district court erred in accepting Wild's conclusions of law, which were based on a misapplication of North Dakota case and statutory law applicable to partition actions. Accordingly, the district court's decision should be reversed and, if the Court deems necessary, this case should be remanded so that the district court may review additional evidence as submitted by the parties and may modify or set aside Wild's report and appoint a new referee as needed.

II. The District Court's Decision to Adopt the Findings of Fact Set Forth in Wild's Report Is Clearly Erroneous.

A. The District Court Misconstrued Its Obligations Under N.D.C.C. Ch. 32-16 with Respect to the Referee's Report.

[¶ 17] N.D.C.C. ch. 32-16 contemplates the district court's appointment of a referee in partition actions and contemplates that referee's preparation of a report "of their proceedings, specifying therein the manner in which they executed their trust, and describing the property divided and the share allotted to each party with a particular description of each share." N.D.C.C. § 32-16-14. A district court may then "confirm, change, modify, or set aside the report of the referee[] and, if necessary, may appoint new referees." *Id.* § 32-16-15.

[¶ 18] The district court stated at the October 17, 2016 hearing that it was adopting the findings of Wild's report. App., p. 95. It based this decision on its belief that N.D.C.C. ch. 32-16 requires that "the Court, when it appoints a referee, will defer to the referee's finding absent some glaring error," and that it did not find such a "glaring error." *Id.* The district court further explained its perceived role as follows:

> I have reviewed the briefs, I have reviewed the report of the referee. I note that he, in fact, specifies what he reviewed. It included appraisals both from Mr. Efta's clients and from Ms. Zasada's clients, respective

> appraisals . . . . I believe that my role in this instance is more in the nature of determining whether or not there was substantial evidence upon which the referee could make his decisions. I find that there is a substantial basis for him to make the ultimate decision, regardless of whether or not there were substantial basis for some of the minor aspects of that, and I think the reference to the hundreds of thousands or tens of thousands dollars is not one that was particularly determinative of the referee's opinion.

Id., pp. 94–95. The district court also indicated that it either was not permitted or had no obligation to review any of the evidence submitted to Wild. When the Michels' counsel objected to the district court's deference to Wild's report, stating that the report "[had] to be supported by substantial, credible evidence . . . [and he] makes no findings specific to the evidence submitted by anyone," the district court responded that "[t]he question isn't whether he made the findings so much as whether he had the evidence." *Id.*, p. 82. The district court specifically considered, and impliedly rejected, the possibility that it was reviewing Wild's report "de novo." *Id.*, pp. 93–94.

[¶ 19] The deferential standard of review adopted by the district court does not have any basis in the provisions of N.D.C.C. ch. 32-16. Section 32-16-15 merely states that the court may "may confirm, change, modify, or set aside the report of the referee." There does not appear to be significant case law interpreting this provision in North Dakota, but courts in other states construing materially identical language in their own partition statutes have concluded that a referee's report constitutes "only a proposal for the court's consideration." *Englehart v. Larson*, 1997 SD 84, ¶ 23, 566 N.W.2d 152, 157. Courts have rejected the notion that a court is in any way bound to accept such a report. *See Tillett v. Lippert*, 909 P.2d 1158, 1160 (Mont. 1996) (overruling prior decisions, which held that a referee's report may be rejected by the district court "only for reasons that would justify the reversal of a jury's verdict," because such decisions were contrary

to statutory language permitting court to "confirm, change, modify, or set aside the [referee's] report").

[¶ 20] The above construction is borne out by a comparison of N.D.C.C. § 32-16-15 with statutory review provisions that actually require deference. For example, in this case the district court compared itself to "an appellate court with regard to an administrative matter." App., p. 82. In appeals of administrative decisions, district courts are expressly required to affirm the agency's decisions unless certain circumstances are present. *See* N.D.C.C. § 28-32-46 ("[T]he court *must affirm* the order of the agency unless it finds that [certain circumstances are present]." (emphasis added)); *Haynes v. Dir., Dep't of Transp.*, 2014 ND 161, ¶ 6, 851 N.W.2d 172, 175 (explaining deferential standard of review of agency decisions). Similarly, a district court is expressly required to sustain an order of the North Dakota Industrial Commission unless certain limited circumstances are present. *See* N.D.C.C. § 38-08-14 ("Orders of the commission *must be sustained* by the district court if the commission has regularly pursued its authority and its findings and conclusions are sustained by the law and by substantial and credible evidence." (emphasis added)); *Amoco Prod. Co. v. N. Dakota Indus. Comm'n*, 307 N.W.2d 839, 842 (N.D. 1981) (noting that the "substantial evidence" test applies to review of Industrial Commission decisions, unlike review of other state agency decisions). These statutes, which this Court has held require some degree of deference, expressly provide that a reviewing court "must" affirm or sustain the decision reviewed, absent certain circumstances. Section 32-16-15, on the other hand, merely provides that a court "may" confirm a referee's report, just as it "may" reject or modify the report. *See, e.g.*, *Hagel v. Hagel*, 2006 ND 181, ¶ 7, 721 N.W.2d 1, 4 ("The word 'may' is usually

employed to imply permissive, optional, or discretional, and not mandatory, action or conduct.").

[¶ 21] Based on the foregoing, N.D.C.C. § 32-16-15 does not require that a court defer to a referee's report in a partition action. The district court's decision to adopt Wild's findings was thus induced by an erroneous view of the law. Accordingly, the district court's decision to adopt Wild's findings of fact is clearly erroneous and should be reversed.

B. Even if the District Court Determined the Proper Standard for Reviewing the Referee's Report, the District Court Misapplied that Standard.

[¶ 22] Even assuming that the district court correctly determined the standard it must follow in reviewing Wild's report, the district court failed to follow that standard. The district court indicated at the October 17, 2016 hearing that it was reviewing the referee's report to determine whether "substantial evidence" supported it. App., pp. 94–95. This Court has applied the "substantial evidence" rule when reviewing decisions of the North Dakota Industrial Commission. *See, e.g.*, *Hanson v. Indus. Comm'n of N. Dakota*, 466 N.W.2d 587, 590 (N.D. 1991). In applying this standard a court determines whether a reasoning mind could have determined that the factual conclusions reached by the agency were proved by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* Significantly, a court must actually review the evidence considered by the agency to determine whether it is substantial enough to support the agency's decision. *See id.* at 591–92 (reviewing testimony presented to the Industrial Commission by a party's expert witnesses in determining whether substantial evidence supported the Commission's decision).

[¶ 23] In this case, the district court determined that substantial evidence existed to support the referee's findings of fact based only on his review of the parties' briefs and the report of the referee. App., pp. 94–95. The district court appears to have concluded that the appraisals submitted by the parties to, and purportedly reviewed by, Wild were the "substantial basis" for Wild's findings of fact, yet the district court admitted to never having seen the appraisals themselves. *Id.*, pp. 81, 94–95. In fact, the district court does not indicate that it reviewed any of the evidence that ostensibly supported the factual findings in Wild's report, despite repeated protestations by the Michels' counsel that such review was necessary. *See, e.g., id.*, p. 82. Because, under the "substantial evidence" rule, a court must *actually review* all evidence presented in order to determine whether substantial evidence supports the factual findings in question, the district court's review in this case does not meet that standard. *Cf. Schmidt v. Frank*, 140 N.W.2d 588, 595–96 (N.D. 1966) (reversing the district court's partition of land for lack of a referee's report and for the failure to include an appraiser's report relied upon by the court in the record, and stating that on remand, "[i]f the appraiser's report is to be used by the referee or [new] referees, it should be made a part of the record"); *Britton v. Brown*, 2013 MT 30, ¶ 26, 300 P.3d 667, 673 ("Because the District Court did not hold an evidentiary hearing or a trial, none of the documents found in the District Court record—including the referees' final report—was ever admitted into evidence and the credibility of those documents was never tested. In the absence of such a record, we cannot say whether the court's Final Partition Judgment was supported by substantial credible evidence or whether the District Court made a mistake in entering the judgment."). Accordingly, because there is no

evidence in the record supporting the factual findings of the district court, such findings are clearly erroneous and should be reversed.

III. The District Court Erred in Refusing to Hold an Evidentiary Hearing at the Request of the Michels.

[¶ 24] At the October 17, 2016 hearing the Michels' counsel requested an opportunity to cross-examine Beach Railport's appraiser and to otherwise present evidence to the district court in support of the Michels' proposed partition of the Subject Property. *See, e.g.*, *id.*, p. 67. The district court rejected the Michels' request, stating, "I believe, having reviewed the statutes for partition, that it is not contemplated that there would be a trial." *Id.*, p. 82. Though there do not appear to be any North Dakota cases addressing the propriety of a trial or evidentiary hearing in partition actions, the Montana Supreme Court has concluded that constitutional due process requires an evidentiary hearing in partition actions under certain circumstances. *See Britton*, 2013 MT 30, ¶ 29, 300 P.3d at 674. In *Britton*, one of the parties to a partition action contended that the court's entrance of an order partitioning property in kind without a trial or full evidentiary hearing denied her due process rights. *Id.* at ¶ 17, 300 P.3d at 672. Based on its review of case law in other states, the Montana Supreme Court concluded that the due process clause of Montana's Constitution requires that if a referee's report becomes a matter of legitimate dispute due to the submission of sufficient evidence, the report is subject to challenge in an evidentiary hearing. *Id.* at ¶ 29, 300 P.3d at 674; *see also* Mont. Const. art. II, § 17 ("No person shall be deprived of life, liberty, or property without due process of law."). If a party that has submitted sufficient evidence to challenge the report is not allowed an evidentiary hearing, that party is denied due process. *Britton*, 2013 MT 30, ¶ 29, 300 P.3d at 674.

[¶ 25] In this case, the Michels challenged several of the findings made in Wild's report regarding the value of the Subject Property and parts thereof. Wild specifically concluded that three grain bins on the property were worth a total of $14,000, but did not indicate the basis for this valuation. App., p. 47. The Michels presented an affidavit of Donnell Michels explaining that the total value of the grain bins is, at most, $500. *Id.*, pp. 53–54; *see also Eberle v. Eberle*, 2010 ND 107, ¶ 17, 783 N.W.2d 254, 260 ("An owner of real property may testify as to the value of the land without any further qualification or special knowledge."). Wild also concluded that the North Forty (40) and the South Forty (40) were of equal value for agricultural purposes, even though he also noted that the Michels' appraiser had indicated that a hilltop located in the South Forty (40) that "may be less productive." App., p. 45. The Michels contested this conclusion, and Donnell Michels explained in his affidavit that because the soil in the southern, hilly portion of the Subject Property was less productive, he incurred greater expense each year to achieve crop yields comparable to the yields from the better soil in the northern, lowlands portion of the Subject Property; this made the South Forty (40) less valuable than the North Forty (40) for agricultural purposes. *Id.*, p. 54. Finally, though Wild did not actually identify a value for the Subject Property, or specific values for the North Forty (40) and South Forty (40), Wild did indicate in his report that Beach Railport's appraiser had assigned a value of $134,000 to the South Forty (40) and $95,000 to the North Forty (40), as well as a value of $134,000 to the east half of the Subject Property and a value of $116,000 to the west half of the Subject Property. *Id.*, p. 46. The Michels presented evidence of sales of real estate comparable to the North Forty (40) for $4,000 per acre ($160,000 for 40 acres) and $7,500 per acre ($398,025 for 53.07 acres) to contest the Beach Railport appraiser's

valuation as included in Wild's report. *Id.*, pp. 56–60, 61–64. Wild does not indicate if or how he resolved any conflicting valuations submitted by the parties, nor does he indicate the basis for his own determination of value. *See id.*, pp. 46–47.

[¶ 26] Because the evidence presented by the Michels is contrary to the findings made by Wild, and because Wild did not actually explain how he reconciled the apparently conflicting evidence submitted by the parties, Wild's findings of fact are a matter of legitimate dispute. The district court should therefore have held an evidentiary hearing before entering its order partitioning the Subject Property.

IV. The Referee's Report Does Not Comply with N.D.C.C. Ch. 32-16 and North Dakota Common Law Considerations with Respect to Partition Matters and the District Court Erred in So Concluding.

A. The Referee and the District Court's Reliance on the *Schnell* Factors Is Improper.

[¶ 27] The district court ruled that Wild's report complied with "N.D.C.C. §§ 32-16-13 and 32-16-14 and North Dakota common law considerations with respect to partition matters." *Id.*, p. 70. The district court did not itself cite or discuss any case or statutory law in its order for judgment. *See generally id.*, pp. 65–72. When partitioning property, a referee must "divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court." N.D.C.C. § 32-16-13.

[¶ 28] In this case, Wild's report indicates that he considered the parties' sentimental attachment to the Subject Property, the parties' situation, the location, character, and size of the Subject Property, the existence of improvements on the Subject Property, and the usefulness of the respective parts of the Subject Property after partition, based on North Dakota case law. App., pp. 47–48. The district court approved these

considerations. *Id.*, pp. 68–69. Wild appears to have derived these considerations from this Court's decision in *Schnell v. Schnell*, 346 N.W.2d 713 (N.D. 1984). *See also In re Estate of Loomer*, 2010 ND 93, ¶ 17, 782 N.W.2d 648, 653 (citing *Schnell* for these factors). Wild's reliance on the *Schnell* factors is improper, however, because the *Schnell* court used these factors solely to determine whether partition in kind could be made without great prejudice to the owners of the property under consideration. *Schnell*, 346 N.W.2d at 715. This determination of whether great prejudice can be avoided is necessary to determine whether property should be sold, under N.D.C.C. § 32-16-12, not whether property has been partitioned and allotted, "quality and quantity relatively considered, according to the respective rights of the parties" under N.D.C.C. § 32-16-13. Application of the *Schnell* factors in the present case is thus a misinterpretation of North Dakota's common law of partition.

B. The Referee and the District Court's Application of the *Schnell* Factors Is Improper.

[¶ 29] Even if the Court determines that the *Schnell* factors are applicable to the present case, the Court should still conclude that they were misapplied. If the *Schnell* factors are applicable to the present action, they must be used to aid the district court in partitioning and allocating the Subject Property, "quality and quantity relatively considered," to the parties according to their rights. *See* N.D.C.C. § 32-16-13. Construing similar language in its own statute, the Maine Supreme Court has concluded the goal of partition in a case such as this, where the parties have equal interests in the property to be partitioned, is to leave each party "equally favored by the decision." *Eaton v. Hackett*, 352 A.2d 748, 750 (Me. 1976). The *Eaton* Court went on to explain,

> It seems indisputable that a particular portion of a parcel of land might have a greater desirability to one party than to the other, for either

> financial, utilitarian or sentimental advantages. Or both parties may indicate a preference for a particular portion of the property. Only one can have it. The one so favored must expect some corresponding advantage to the other party if a substantial equality of division is to obtain.

Id. Accordingly, in partitioning property a court or referee must use the *Schnell* factors to determine the advantages and disadvantages conferred on each party and to determine which partition scenario will benefit the parties most evenly. *See also* N.D.C.C. § 32-16-41 (permitting a court to order compensation between the parties when "it appears that the partition cannot be made equal between the parties according to their respective rights"); *Eaton*, 352 A.2d at 750 ("V[al]ue, we think, means the full range of the benefit the parties may be expected to derive from their ownership of their respective shares.").

[¶ 30] It appears that Wild tried to balance the advantages conveyed to either party by giving Beach Railport the North Forty (40), which it was "uniquely situated to use" for its planned rail transload facility, and by giving the Michels the South Forty (40), which had three grain bins on it. App., p. 48. In all other respects, Wild's report indicates that he viewed all the parts of the Subject Property as completely equal in value to both parties. *Id.*, p. 47–48. It is undisputed, however, that both parties desired some or all of the North Forty (40): the Michels desired it for its superior soil quality and its higher resale value, and Beach Railport desired it as necessary for the construction of its rail transload facility. *See, e.g.*, *id.*, pp. 44–46, 87–88. Wild also acknowledged in his report that the Michels viewed the grain bins as essentially worthless and were indifferent to which party received them. *Id.*, p. 46. Wild thus partitioned the Subject Property in a manner that gave Beach Railport all of the property that it wanted but gave the Michels none of the property that they wanted. Wild purported to apply the *Schnell* factors, and the district court concluded that Wild properly divided the property, "quality and quantity

relatively considered," yet based on the undisputed facts of this case, both parties were not "equally favored" by Wild's report or the district court's decision.

[¶ 31] Wild's report suggests that he was aware of the unfairness of awarding the North Forty (40) to Beach Railport, and that he justified this by stating that "the only reason the [North Forty (40)] is arguably more valuable than the [South Forty (40)] is due to the substantial investment made by Beach Railport." *Id.*, p. 48. There is, however, no basis for this justification in North Dakota's partition case law. To the contrary, North Dakota cases have held that a cotenant may not charge another cotenant for improvements made by the former to the shared property, unless such improvements are made with the latter's consent or such improvements are "necessary, useful, substantial, and permanent, enhancing the value of the estate." *Gjerstadengen v. Hartzell*, 9 N.D. 268, 83 N.W. 230, 233 (1900); *see also Berg v. Kremers*, 181 N.W.2d 730, 736–37 (N.D. 1970). Neither Wild nor the district court concluded that the Michels specifically consented to Beach Railport's investment of various, unaccounted "resources," *see generally* App. pp. 65–72, 43–49, , nor did Wild or the district court determine that such investment was "necessary, useful, substantial, and permanent," *see generally id.*, pp. 65–72, 43–49. Accordingly, there is no basis for allocating the burden of this investment on the Michels, as Wild and the district court have implicitly done.

[¶ 32] Finally, it must be noted that under the value allocation framework set forth above, Beach Railport cannot equitably be allocated the entirety of the North Forty (40). It is undisputed that both parties desire some or all of the North Forty (40) and neither party desire any particular part of the South Forty (40). As a result, if one party is allocated the entirety of the North Forty (40) there is no "corresponding advantage" left

to allocate to the other party, and a partition of the Subject Property into its North and South halves will inevitable be unfair to one of the parties. The only way to make an equitable division of the Subject Property based on its value to the parties would be to: (a) allocate equal portions of the desired North Forty (40) and the undesired South Forty (40) to each of the parties, as the Michels originally requested; or (b) allocate all of the desired North Forty (40) to one party and allocate to the other party the undesired South Forty (40) plus additional compensation under N.D.C.C. § 32-16-41. Wild and the district court erred as a matter of law in not implementing either of these alternatives.

[¶ 33] Based on the foregoing, it is apparent that Wild and the district court misapplied the *Schnell* factors and that the parties were not "equally favored" by district court's decision.

CONCLUSION

[¶ 34] The district court abused its discretion in allotting the North Forty (40) to Beach Railport and the South Forty (40) to the Michels. The district court erred when it confirmed the factual findings and legal conclusions in Wild's report and erred when it refused to conduct an evidentiary hearing as requested by the Michels. For these reasons, as explained in more detail above, the district court's decision should be reversed and, if the Court deems it necessary, this case should be remanded so that the district court may review evidence and may modify or set aside Wild's report as necessary to equitably apportion the Subject Property among the parties.

Dated this 26th day of April, 2017

FREDRIKSON & BYRON, P.A.

By /s/ Spencer D. Ptacek

LAWRENCE BENDER, ND Bar #03908
SPENCER D. PTACEK, ND Bar #08295
1133 College Drive, Suite 1000
Bismarck, ND 58501-1215
lbender@fredlaw.com
sptacek@fredlaw.com
Telephone: 701.221.8700
Facsimile: 701.221.8750

Attorneys for Appellants
Donnell F. Michels and Jeanne Michels

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Donnell F. Michels and Jeanne Michels, husband and wife, Appellants, v. Beach Railport, LLC, Appellee.	Supreme Court No. 20160457

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

CERTIFICATE OF SERVICE

I hereby certify that on April 26th, 2017, I electronically filed the following documents:

Brief of Appellants Donnell F. Michels and Jeanne Michels; and

Appendix of Appellants Donnell F. Michels and Jeanne Michels.

with the Clerk of the North Dakota Supreme Court and served by E-mail on the following:

Erin P. B. Zasada
ezasada@northdakotalaw.net

FREDRIKSON & BYRON, P.A.

By /s/ Spencer D. Ptacek

LAWRENCE BENDER, ND Bar #03908
SPENCER D. PTACEK, ND Bar #08295
1133 College Drive, Suite 1000
Bismarck, ND 58501-1215
lbender@fredlaw.com
sptacek@fredlaw.com
Telephone: 701.221.8700
Facsimile: 701.221.8750

Attorneys for Appellants
Donnell F. Michels and Jeanne Michels

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Beach Railport, LLC, Plaintiff and Appellee, v. Donnell F. Michels and Jeanne Michels, Husband and Wife, Defendants and Appellants. --------- Donnell F. Michels and Jeanne Michels, Husband and Wife, Third-Party Plaintiffs and Appellants v. North Dakota Guarantee and Title Company, A North Dakota Corporation, doing business as Dickinson Guarantee and Title Company, Third-Party Defendant.	Supreme Court No. 20160457

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

CERTIFICATE OF SERVICE

I hereby certify that on April 27th, 2017, I electronically filed the following documents:

Brief of Appellants Donnell F. Michels and Jeanne Michels; and

Appendix of Appellants Donnell F. Michels and Jeanne Michels.

with the Clerk of the North Dakota Supreme Court and served by E-mail on the following:

Erin P. B. Zasada
ezasada@northdakotalaw.net

FREDRIKSON & BYRON, P.A.

By /s/ Spencer D. Ptacek
LAWRENCE BENDER, ND Bar #03908
SPENCER D. PTACEK, ND Bar #08295
1133 College Drive, Suite 1000
Bismarck, ND 58501-1215
lbender@fredlaw.com
sptacek@fredlaw.com
Telephone: 701.221.8700
Facsimile: 701.221.8750

Attorneys for Appellants
Donnell F. Michels and Jeanne Michels