

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Beach Railport, LLC,)	
)	
Plaintiff and Appellee,)	
)	Supreme Court No. 20160457
)	
)	
Donnell F. Michels and Jeanne Michels,)	
Husband and Wife,)	
)	Golden Valley County District Court
Defendants and Appellants,)	File No. 17-2015-CV-21
)	
vs.)	
)	
)	
North Dakota Guarantee and Title)	
Company, A North Dakota Corporation,)	
Doing business as Dickinson Guarantee)	
And Title Company,)	
)	
Third-Party Defendant.)	

BRIEF OF APPELLEE, BEACH RAILPORT, LLC

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

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STATEMENT OF ISSUES

- I. **WHETHER THE DISTRICT COURT PROPERLY CONFIRMED THE REPORT OF THE REFEREE.**

STATEMENT OF THE CASE

I. Nature of the Case and Course of Proceeding.

¶1 This is an appeal by Donnell F. Michels and Jeanne Michels, Husband and Wife, (hereinafter “the Michels”) from the Judgment entered by the Southwest Judicial District Court, on October 31, 2016, upon the Court’s Order Granting Plaintiff Beach Railport, LLC (hereinafter “Beach Railport”)’s Motion for Confirmation of Report of Referee (*Supp. App. 1-8*).

¶2 Beach Railport commenced this action against the Michels to partition real property located in the County of Golden Valley, North Dakota (hereinafter “Property”) (*App. 46-52*). The parties stipulated to the appointment of Steven J. Wild (hereinafter “Mr. Wild”) to serve as the referee pursuant to N.D.C.C. §32-16-46. (*Supp. App. 11-12*). The Court appointed Mr. Wild to be the referee in its Order dated January 11, 2016. (*App. 53-56*). The Order outlined the various responsibilities Mr. Wild was charged with in his role as referee and required Mr. Wild file his Referee’s Report (hereinafter “Report”) within 180 days. (*Id.*).

¶3 Mr. Wild filed his Report on July 8, 2016, wherein his findings and recommendations with regard to the partition of the Property were outlined for the Court. (*App. 57-63*). Beach Railport filed and served a Motion for Confirmation of the Report of Referee along with a brief in support of its Motion and a Notice as required by N.D.R.Ct. 3.2. (*Supp. App. 17-28*). The Michels filed a Response and Opposition to the Motion for Confirmation of the Report of Referee which was supported by the Affidavit of Donnell Michels, the Affidavit of Gene Skoglund, and other documents. (*Supp. App. 29-59*). In turn, Beach Railport filed its Reply Brief which was supported by the Affidavits of Jack

Andrews, a Managing Member of Beach Railport and the Affidavit of Erin P. B. Zasada attesting to documents received from the City of Beach and Golden Valley County. (*Supp. App. 60-99*).

¶4 A hearing on the Motion for Confirmation of the Report of Referee was held on October 17, 2016. After hearing argument from both parties and reviewing the motion documents and any response thereto and having considered all the pleadings, evidence, and the documents on file, the Court entered an Order which confirmed Mr. Wild's findings and recommendations for partition of the Property. (*App. 1-8*). The Court's confirmation of Mr. Wild's report was incorporated into Findings of Fact, Conclusions of Law, and Order for Judgment on October 31, 2016 with Judgment being entered the same day. (*Id. and Supp. App. 100-103*). The Michels' Notice of Appeal was filed on December 30, 2016. (*Supp. App. 104-106*).

I. Facts.

¶5 There are two tracts of land involved in this matter which total eighty acres. (*App. 53-56 at ¶2*). For purposes of identification, the tracts of land will be referred to herein as "the North 40 acres" and "the South 40 acres." The legal description for each tract is as follows:

"The North Forty (40) Acres"

A tract of land located in the Southeast Quarter (SE $\frac{1}{4}$) of Section 22, Township 140 North, Range 106 West of the 5th Principal Meridian, Golden Valley County, North Dakota, more particularly described as follows:

The Northwest Quarter of the Southeast Quarter of said Section 22 described as; Beginning at the northeast corner of the Southeast Quarter; thence westerly along the north line of said Southeast Quarter an azimuth of 270°01'52" a distance of 1320.72 feet to the northeast corner of the Northwest Quarter of the Southeast Quarter;

thence along the east line of said Northwest Quarter of the Southeast Quarter on an azimuth of 179°59'29" a distance of 1319.63 feet of the southeast corner of said Northwest Quarter of the Southeast Quarter; thence along the south line of said Northwest Quarter of the Southeast Quarter on an azimuth of 270°00'53" a distance of 1320.48 feet to the southwest corner of said Northwest Quarter of the Southeast Quarter; thence along the west line of said Northwest Quarter of the Southeast Quarter on an azimuth of 359°58'52" a distance of 1320.01 feet to the northwest corner of said Northwest Quarter of the Southeast Quarter; thence along the north line of said Northwest Quarter of the Southeast Quarter on an azimuth of 090°01'52" a distance of 1320.72 feet to the POINT OF BEGGINNG. (sic)

Said tract contains 40.00 acres.

"The South Forty (40) Acres"

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

Said tract contains 40.00 acres.

¶6 Beach Railport commenced this action against the Michels seeking to partition real property located in the County of Golden Valley, North Dakota. (*App. 46-52*).

¶7 Beach Railport and the Michels entered into a Stipulation Agreement in which they agreed that attorney Steven J. Wild, of Sadowsky & Wild Law Office in Bowman, North Dakota, be appointed to serve as the referee to partition the real property into two parcels. (*Supp. App. 11-12*).

¶8 The Court issued an Order based upon the Stipulation for Appointment of a Referee. (*App 46-52; Docket ID # 51*). In its Order, the Court found that Beach Railport and the Michels owned, in fee, an undivided half interest in the Property and ordered that the Property be partitioned among the Michels and Beach Railport according to their respective interest in the Property. (*Docket ID # 51*).

¶9 The Court further ordered that Mr. Wild be appointed referee to partition the real 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.*) Mr. Wild was ordered to view the real property and partition it in accordance with the law governing partition of real property. (*Id.*) If Mr. Wild determined that he could not make a fair and equitable division of the land in accordance with the respective rights and interests of the parties, he was ordered to determine whether the shares among the parties could be equalized by way of owelty and was required to report to the court the amount of money to be paid. (*Id.*) Mr. Wild was ordered to file his report within 180 days after the entry of the Court’s interlocutory order. (*Id.*).

¶10 The Michels and Beach Railport each hired appraisers to appraise the Property. The Michels hired Roger M. Cymbaluk of Basin Brokers in Willison, ND. (*App.* 58). Beach Railport hired William D. Gion, a North Dakota certified General Appraiser. (*Id.*) Mr. Wild reviewed the appraisals submitted by each party in addition to position papers in which the parties set forth arguments supporting their respective positions. (*Id.*)

¶11 Mr. Wild filed his “Report of Referee” with the Court on July 8, 2016. (*App.* 57-63). In his Report of Referee, Mr. Wild made the following findings:

- (i) That the Property is of equal value regardless of whether it is being used for industrial or agricultural purposes. (*App.* 59 at ¶ 5, ¶ 7, *App.* 61 at ¶ 14). Mr. Wild made this finding upon on his personal inspection of the Property on June 28, 2016, and his observation of the crop growing thereon, in which he found it did not appear that there was any significant disparity or difference in the ability of the 80 acres to produce crops. (*App.* 59 at ¶ 5).

Additionally, Mr. Wild noted in his Report of Referee **that neither appraiser set forth a difference in the agricultural value of the Property.** (*Emphasis added*). (*Id.*);

- (ii) That regardless of how the Property is partitioned, the character of the land and the size of each tract are virtually identical; (*App. 61 at 18*); and
- (iii) That the Michels are best situated to use the Property for agricultural purposes and that Beach Railport is best situated to use the Property for industrial purposes. (*App. 61*).

¶12 Ultimately, Mr. Wild determined that the Property should be partitioned so that Beach Railport take the “North Forty (40) acres” and the Michels receive the “South Forty (40) acres”. (*App. 62 at ¶ 22*). Mr. Wild concluded that partition of the Property in this manner provided an equitable division of the Property and that no compensation by one party to the other would be required. (*App. 62 at ¶ 25*).

¶13 Beach Railport filed a Motion for Confirmation of the Report of the Referee. (*Supp. App. 17-18*). In support of its motion, Beach Railport filed and served a brief, a Notice of Motion, and a Request for a Hearing on the motion. (*Supp. App. 13-28*).

¶14 The Michels filed a Response and Objection to Motion for Confirmation of the Report of the Referee. (*Supp. App. 29-59*). In support of their brief in opposition, the Michels filed over fifty pages of various exhibits which included the written testimony of Donnell Michels and Gene Skoglund, Treasurer of Golden Valley County and a member of the Golden Valley County Zoning Board. (*Supp. App. 25-59*). The Michels’ main argument was that the Report did not make an equitable distribution of the property because it was based on several erroneous assumptions and not supported by evidence. (*Id.*). The

Michels claimed that each party should receive an equal amount of property zoned industrial and an equal amount of property zoned agricultural. (*Supp. App.* 30-32). The Michels concluded that the Court should set aside the Referee's Report or modify it in an east-west division; and that the matter should be tried in District Court. (*Supp. App.* 37).

¶15 Beach Railport submitted a Reply Brief in Support of its Motion for Confirmation of the Report of the Referee. (*Supp. App.* 60-73). In response to the Michels' claim that the Report was inequitable due to erroneous assumptions and lack of evidence, Beach Railport argued that the Referee's suggested division of the Property was based on evidence in the form of appraisal reports and position papers submitted by the Parties and upon the Referee's independent personal observation by the Referee of the Property. (*Supp. App.* 66). Beach Railport argued that the Michels' opposition to the Referee's recommendation did not evidence a definite and firm conviction that the Referee made a mistake in dividing the Property to warrant setting aside the report. (*Id.*) First, the Michels did not cite to any authority supporting their position that "it would only be equitable if each of the parties received an equal amount of property zoned industrial and an equal amount of property zoned agricultural" and such argument is contrary to the Referee's finding that all 80 acres had equal value for agricultural and industrial purposes. (*Supp. App.* 30; *App.* 59--62). Beach Railport further argued that that the Michels were put on notice that the City of Beach/County of Golden Valley was holding public hearings and seeking public comment on Beach Railport's application to rezone a portion of the Property. (*Supp. App.* 66-68). In addition, the amount of money Beach Railport expended in pursuit of the zoning application was irrelevant to whether the Referee fairly and equitably divided the Property. (*Supp. App.* 70-71). In response to the Michels' claim that

the Referee assigned values unsupported by any facts, Beach Railport stated that the Michels' claim was based on their own assumptions that the Referee had adopted various valuations which were not indicated in the actual report. (*Supp. App. 71*). Finally, Beach Railport argued that the Deed and Statement of Full Consideration submitted by the Michels was entirely speculative as to the value of the North 40 acres and was completely irrelevant to the issue of whether the Referee's report should have been confirmed. (*Supp. App. 66*). Reasoning that partition of the Property was accomplished in accordance with North Dakota law, Beach Railport concluded its reply with the request that the Court proceed in partitioning the Property in accordance with North Dakota law and enter an Order confirming the Report of the Referee. (*Supp. App. 73*).

¶16 The District Court held a hearing on Beach Railport's Motion for Confirmation of Report of Referee on October 17, 2016. (*Supp. App. 107*). The Michels and Beach Railport were both represented by counsel. (*Supp. App. 107-108*). Beach Railport argued that it was not clearly erroneous for the District Court to confirm Mr. Wild's Report because Mr. Wild properly discharged the duties he was tasked with, he equitably divided the Property based on evidence from appraisals and position papers submitted by both parties, that he filed a report that complies with North Dakota law, and that the District Court should confirm his Report. (*Supp. App. 109-110*).

¶17 In response, the Michels argued that the court could not confirm the Report because it was not supported by uncontroverted evidence and that Mr. Wild apparently relied on whatever Beach Railport told him without considering the appraisal submitted by the Michels. (*Supp. App. 111*). The Michels argued that Mr. Wild was heavily influenced by the amount of money Beach Railport spent changing the zoning of the "North 40 acres".

(*Id.*). The Michels argued that the amount of time, money, and effort contributed by Beach Railport to have the property rezoned as “industrial” property was disputed. The Michels argued they should be able to cross-examine Beach Railport as to the amount it spent rezoning the North 40 acres. (*Supp. App. 111*) Counsel for the Michels also argued that Mr. Wild failed to properly value the Property, and that the appraisal submitted by the appraiser hired by Beach Railport was not supported by the evidence.

¶18 The Michels focused on Finding of Fact 23 in the Report to support their argument that findings made by Mr. Wild with regard to the value of the North 40 acres were not supported by any evidence. (*Supp. App. 117*). The District Court, however, opined that Finding of Fact 23 in the Report was not indicative that the Referee placed any more value on the North 40 acres.

MR. EFTA: When he made his determination that an equitable distribution would be north and south, finding No. 23 say: This determination is made due to the fact that the only reason the North 40 is arguably more valuable than the South 40 is the substantial investment made by Beach Railport, and that’s based on a finding unsupported by evidence as near as I can tell.

THE COURT: But the language that the referee uses tells me that he’s not placing a lot of weight on that. He says “if”, and arguably – but that connotes that if there is any difference, it’s a minor difference, and it’s just a fact he took into consideration.

¶19 The Michels argued that, due to the disputed issues of fact about valuation of the Property, a trial was necessary. (*Supp. App. 118*).

¶20 When the District Court requested the Michels provide authority for their claim to entitlement to a trial, the Michels were unable to cite the Court to any authority to support their claim other than to reference the statute that allows the court “set aside [the report]” or appoint a new referee (N.D.C.C. § 32-16-15). (*Supp. App. 118-119*). The Michels argued that if a trial was not an available option, that the Court should simply

partition the property in the manner that the Michels preferred, that being an east/west division as opposed to a north/south partition as recommended by Mr. Wild. (*Supp. App. 119*).

¶21 At the conclusion of the hearing, the District Court found (i) “there [was] a substantial basis for [Mr. Wild] to make the ultimate decision”; (ii) that the reference to the [money spent by Beach Railport] is not one that was particularly determinative of the referee’s opinion”; (iii) “that the evidence indicates that the referee did have substantial evidence upon which to base his report”; (iv) that the statutes do not contemplate a trial in a partition action; and (v) that the Court may defer to the findings of the referee unless the Court finds a glaring error which would support a determination that the court should either reject or modify the referee’s report. (*Supp. App. 126-127*). Ultimately, the District Court adopted the findings made by the Referee. (*App. 6*).

¶22 The Findings of Fact, Conclusions of Law, and Order for Judgment were entered on October 31, 2016. (*App. 8*). The District Court expressly noted it reviewed all motion documents, responses, all pleadings, evidence and documents on file in the case. (*App. 1*). The District Court found that Mr. Wild gave equal consideration to the Michels and Beach Railport with respect to the sentimental attachment to the land, the situation of the owners, the location and character of the land, the usefulness of the respective tracts after partition, and the existence of improvements on the respective tracts. (*App. 4-5*).

¶23 The District Court concluded that Mr. Wild properly discharged all the duties tasked to him and that his report was in compliance with N.D.C.C. §§ 32-16-13 and 32-16-14 and North Dakota common law and, accordingly, confirmed the Report of the Referee filed as Doc ID #92 and adopted the findings made by Mr. Wild. (*App 1-8*).

II. Standard of Review

¶24 “District Courts have ‘wide judicial discretion in partition actions to do equity and to make a fair and just division of the property or proceeds between the parties,’ and ‘great flexibility in fashioning appropriate relief for the parties.’” *In re Estate of Loomer*, 2010 ND 93, ¶ 17, 782 N.W.2d 648, 653.

¶25 “A District Court’s findings in a partition action will not be reversed on appeal unless clearly erroneous.” *Id* at ¶ 18. “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 it, after reviewing all the evidence, we are left with a definitely and firm conviction a mistake has been made.” *Id*. A trial Court’s conclusions of law are fully reviewable on appeal. *Fladeland v. Gudbranson*, 2004 ND 118, ¶ 6, 681 N.W.2d 431, 435.

III. Argument

A. The District Court Properly Confirmed the Report of the Referee.

¶26 While various issues are addressed within Appellants brief, it is submitted that the heart of the Michels appeal revolves around the District Court’s decision not to hold an evidentiary hearing as suggested by the Michels. Each of the issues outlined by Appellants ultimately relate back to an inability to determine whether the evidence relied upon by Mr. Wild and the District Court were sufficient.

¶27 The Michels argue on appeal that, because they introduced evidence contrary to the findings made by Mr. Wild, especially with respect to the value of the Property, that the findings made by Mr. Wild are clearly erroneous and the court was required to hold an evidentiary hearing. (*Appellant’s Brief* ¶10).

¶28 Mr. Wild did give consideration, however, to all information submitted by the parties, including information presented by the Michels' own appraiser, Roger Cymbaluk of Basin Brokers in Williston, ND. The Michels' argument is based more so on the fact that they want to be awarded a portion of the North 40 acres because they believe the North 40 acres has a greater value than the South 40 acres, a fact that was expressly refuted by Mr. Wild's findings in his Report and was not supported by the Michels' own appraiser. (*See App. 59-61 wherein the Referee "[found] the [Property] to be equal in value whether used for agricultural purposes or industrial purposes regardless of how partitioned" and observed that "neither appraisal set forth a difference in agricultural value of the acreage"*).

¶29 The Michels did file objections to Beach Railport's Motion to Confirm the Report of the Referee. (*Supp. App. 29-38*). To support their objections the Michels introduced affidavits and documents. (*Supp. App.39-59*). At the hearing on Beach Railport's Motion to Confirm the Report of the Referee, their counsel engaged in a lengthy oral argument with the court. Ultimately, the affidavits submitted by the Michels, the arguments presented in their opposition brief, and the answers and arguments made by their counsel did not persuade the District Court that Mr. Wild had erred in making findings in such that the District Court could not confirm the Report.

¶30 After considering the issues argued at the hearing on Beach Railport's Motion for Confirmation of the Report of the Referee, the District Court issued its Findings of Fact, Conclusions of Law, and Order dated October 31, 2016, and granted an Order on Beach Railport's Motion for Confirmation of the Report of the Referee. Judgment on the Court's Order was entered on October 31, 2016. The Michels have not demonstrated why

it was clearly erroneous for the District Court to issue an Order confirming the Referee's Report.

i. The District Court May Defer to the Findings of a Referee.

¶31 Chapter 32-16 of the North Dakota Century Code governs actions for the partition of real property. The Chapter provides in relevant part:

32-16-13 Method and rule of partition

In making the partition, referees 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, pursuant to the provisions of this chapter, designating the several portions by proper landmarks, and may employ a surveyor with the necessary assistants to aid them. Before making partition or sale the referees, whenever it will be for the advantage of those interested, may set apart a portion of the property for a way, road, or street, and the portion so set apart shall not be assigned to any of the parties, nor sold, but shall remain an open and public way, road, or street, unless the referees shall set the same apart as a private way for the use of the parties interested, or some of them, their heirs or assign, in which case it shall remain such private way.

32-16-14 Referee's report.

The referees must make 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.

32-16-46 Single Referee.

The court, with the consent of the parties or when the complaint petitions and prays for the appointment of a single referee and there is no objection thereto, may appoint a single referee instead of three referees in the proceeding under this chapter, and the single referee, when thus appointed, has all the powers and may perform all the duties of the three referees.

32-16-15 Judgment on report – Effect

The Court may confirm, change, modify, or set aside the report of the referees and, if necessary, may appoint new referees. Upon the confirmation of the report, judgment must be rendered that such partition be effectual forever, and such judgment shall be binding and conclusive.

¶32 A District Court can adopt the report of a referee in a partition action without looking into the underlying evidence relied upon by the Referee. (*In re Estate of*

Loomer, 2010 ND 93, ¶¶ 7, 19, 782 N.W.2d 648, 653; (District Court adopted the report of a referee) *First Trust Co. of N. Dakota v. Mast*, 385 N.W.2d 104, 105 (N.D. 1986) (District Court adopted the referee's report over the objection of a co-tenant and entered judgment of partition accordingly).

¶33 In *Loomer*, a decedent appealed a District Court's decision to adopt a referee's report for partition. The decedent had stipulated to the appointment of three referees to assist in the sale or partition of land he had inherited with his two brothers from his mother's estate. The Court in *Loomer* ordered similar duties of the referees as the District Court in this case, citing N.D.C.C. § 32-16-12. *Loomer*, 2010 ND 93, ¶3. Two reports were submitted to the District Court in *Loomer*: (i) a joint report which partitioned the property into three tracts but awarded two of the tracts to two brothers as tenants in common and one tract to the appellant decedent and (ii) an individually prepared report, objected to by the appellant, which partitioned the land into three tracts with each decedent being awarded a tract. *Loomer*, 2010 ND 93, ¶¶ 4-5.

¶34 The District Court in *Loomer* adopted the individually prepared report of the referee and ordered the property be partitioned in accordance with that report without conducting a trial. *Loomer*, 2010 ND 93, ¶ 7. The appellant brought a motion for reconsideration, which was denied by the District Court. The appellant decedent appealed the District Court's decision.

¶35 This Court held that the decision of the District Court in adopting the individually prepared report was not clearly erroneous. *Loomer*, 2010 N.D. at ¶19. This Court cited to the fact that the District Court properly considered the report which had been prepared using the factors outlined in *Schnell v. Schnell*, 346 N.W.2d 713 (N.D.1984)

Loomer, 2010 ND 93, ¶19. Additionally, this Court held that there was evidence in the record to support the Court’s decisions. (*Id.*)

¶36 As in *Loomer*, the District Court in this case evaluated the report submitted by Mr. Wild and found that there was sufficient evidence in the record to support the confirmation of Mr. Wild’s report. (*Supp App. 127*). Specifically, the District Court cited Mr. Wild’s report which outlined the information Mr. Wild reviewed in making his determination. (*Id.*) This information consisted of the following:

- (i) an appraisal submitted on behalf of the Michels prepared by Roger M. Cymbaluk of Basin Brokers in Williston, ND.
- (ii) an appraisal submitted on behalf of Beach Railport, LLC, prepared by William D. Gion, North Dakota Certified General Appraiser;
- (iii) a Memorandum to Referee submitted on behalf of Beach Railport, and;
- (iv) a Position Statement of the Michels.

(*App. 58*).

¶37 The Michels assert, without providing legal support, that the District Court had an obligation to review not only the report and further evidence submitted by the parties, but the underlying supporting documents supplied to Mr. Wild as well. The District Court, however, advised the Michels it believed its role was “to determine whether or not there was substantial evidence upon which the referee could make his decision.” (*Supp. App. 127*).

¶38 The Michels do not dispute the fact that Mr. Wild considered both an appraisal submitted by Roger M. Cymbaluk of Basin Brokers in Williston, ND, on behalf of the Michels as well as an appraisal submitted on behalf of Beach Railport, LLC, prepared

by William D. Gion, North Dakota Certified General Appraiser. Instead, the Michels arbitrarily dispute the acceptance of the appraisal submitted on behalf of Beach Railport over the appraisal submitted on behalf of the Michels. It is clear from the Findings of Fact, Conclusions of Law, and Order for Judgment that the Court relied on Mr. Wild's Report and that the Report was supported by evidence which was, indisputably provided and reviewed by Mr. Wild in making his determination. The Michels displeasure with the outcome of Mr. Wild's determinations does not evidence or warrant, a determination that the District Court's acceptance of Mr. Wild's report was clearly erroneous.

¶39 The Michels cite non-binding legal authority in support of their claim that a District Court may not defer to the findings of a Referee. However, this argument, if accepted, would defeat the purpose of appointing Referees. In fact, North Dakota has repeatedly upheld a District Court's acceptance of a referee's report without the mention of review of any underlying evidence therein. See e.g., *In re Estate of Loomer* 2010 ND 93, ¶¶ 7, 19, (*trial court adopted referee's report and entered judgment of partition accordingly*); *First Trust Co. of N. Dakota v. Mast*, 385 N.W.2d 104, 105 (N.D. 1986) (*District Court adopted the referee's report over the objection of a co-tenant and entered judgment of partition accordingly*). The District Court's decision to confirm the Report of the Referee was made after the court made a determination that Mr. Wild did have substantial evidence upon which to base his report. (*Supp. App. 127*).

ii. N.D.C.C. § 32-16 Does Not Impose a Requirement to Hold an Evidentiary Hearing.

¶40 The crux of the Michels appeal concerns the District Court's decision not to hold an evidentiary hearing as suggested by the Michels at the hearing on Beach Railport's Motion for Confirmation of the Report of the Referee.

¶41 On appeal, the Michels argue that the decision of the District Court is clearly erroneous and warrants reversal because: (i) the District Court relied on the report of Mr. Wild; (2) the District Court failed to review the underlying evidence Mr. Wild relied upon to prepare the Referee’s Report; and (iii) the District Court failed to allow for an evidentiary hearing. To support their position, the Michels have ignored the facts relied upon cases that are from other jurisdictions and/or cases that are factually distinguishable.

¶42 The Michels first cite to *Schmidt v. Frank*, 140 N.W.2d 588, 595—96 (N.D.1966) as a basis for their contention that the Court must review underlying evidence within the referee’s report. This contention, however, is not contemplated in *Schmidt*.

¶43 In *Schmidt*, an action was brought to partition real property which was owned by a number of decedents as tenants in common. *Schmidt*, 140 N.W. 2d. at 589. Because of different claims made by the various decedents as to their respective interests in the property, the District Court appointed a referee and an appraiser. *Id.* at 590. The referee in *Schmidt* never provided a report to the Court. Instead, the Court only received and relied upon a report of the appraiser. *Id.* at 595. The findings of the appraiser were objected to by the decedents. The appellants in *Schmidt*, argued that they were deprived of due process because they were not given an opportunity in trial court to make their objection because the District Court “partitioned the land on the basis *other than the referee’s report, without giving the appellants an opportunity to submit testimony relative to the division of the property after the interests were determined.*” (*emphasis added*) *Id.*

¶44 This Court in *Schmidt*, without addressing the due process claims, held that the requirements of the statute had not been satisfied and therefore remanded with

instructions to the District Court to request a report from the referee or appoint a new referee. *Id.*

¶45 The facts in the instant case are distinguishable from *Schmidt*. Mr. Wild was appointed by the District Court to serve as a Referee based upon the stipulation of the parties. Mr. Wild submitted a report which outlined the evidence he reviewed in making his determinations. Mr. Wild considered the appraisals and position statements submitted by the Michels and Beach Railport. *Schmidt* does not hold that a District Court is unable to rely on a referee's report. Instead, *Schmidt* highlights the necessity of (i) appointing a referee, and (ii) obtaining a report from the referee in compliance with the statutory provisions. This is precisely the process that was followed in this case.

¶46 The Michels also cite *Britton v. Brown*, 300 P.3d 667, 2013 MT 30 in support of their contention that due process requires an evidentiary hearing in partition actions. *Britton* is not only non-binding authority because it is a case issued by a Montana Court, but it is also, factually distinguishable. In *Britton*, the appellant appealed a District Court's decision to confirm a report which partitioned the appellant jointly owned with her sister. The issue on appeal was whether the District Court erred by denying the appellants request for an evidentiary hearing after the appellant presented offers of proof challenging the referees' final partition report. *Britton*, 2013 MT at ¶2.

¶47 Distinguishable to the present matter is the fact that in *Britton*, the appellant **made a motion** for a trial following the referee's filing of their Referee's report. (Emphasis added) (*Id.* at ¶15). Appellant's motion was supported by various affidavits which attacked the conclusions of the referees. (*Id.*). The District Court ignored the Appellant's motion and ultimately entered an order confirming the report of the referee. (*Id.* at ¶16).

The appellant objected to the proposed judgment arguing that her due process rights were denied and appealed the District Court's entry of a final partition judgment to the Supreme Court of Montana. The Supreme Court of Montana held that because the appellant had filed substantiated objections, she was entitled to an evidentiary hearing. (*Id.* at ¶23).

¶48 The facts in *Britton* are distinguishable from those in the instant case. In the instant case, after Mr. Wild filed his Referee's Report, the Michels never filed a motion to modify, reject, or set aside the report. (*Cf. Britton v. Brown wherein a notice of objection to the referee's final report was filed after the referee's made their final report to the court (Britton, 2013 MT at ¶ 12); a motion for trial on the partition action was filed (Id. at ¶ 15).*) The Michels could have filed their own motion to change, modify, or set aside the Report of the Referee but failed to do so. The Michels could have filed a Motion seeking an evidentiary hearing. Instead, the Michels only filed objections to Beach Railport's Motion to Confirm the Report of the Referee and made an oral request for a hearing during the hearing on Beach Railport's Motion to Confirm the Report of the Referee.

¶49 Despite the Michels' failure to bring their own Motion which would have allowed them a hearing on the Report, the record shows that they were afforded an opportunity to be heard prior to the Court's issuance of its Order Confirming the Report of the Referee. The Michels' failure to articulate why an evidentiary hearing was appropriate does not support a finding that the court violated the Michels' due process rights by confirming the Referee's Report.

iii. The Michels Never Filed a Motion to Change, Modify, or Set Aside the Report of the Referee.

¶50 This Court acknowledged in *Schmidt*, that while N.D.C.C. § 32-16-14 **does not specifically provide for a hearing on the Referee's Report**, a hearing on the report

may be held **if a motion is properly made**. (Emphasis added). *Schmidt*, 140 N.W.2d at 595. The court referred to language in the statute of a parallel partition statute in California expressly providing that written notice is a component of a proper motion, much similar to North Dakota's own Rule 3.2. of the North Dakota Rules of Court. (*See Id.* citing to Cal. Code § 765 "Report of Referee" stating "any party to the action, after giving at least ten days' notice in writing to the other parties who have appeared therein of his intention to do so may move the court to confirm, change, modify or set aside the report.") (*Id.*). The Michels did not file any motion concerning the Referee's Report, much less a properly made motion in accordance with N.D.R.Ct. 3.2 to warrant a hearing being held.

¶51 In order to make a motion pursuant to North Dakota law, Rule of Court 3.2 requires that written notice must be served and filed with the motion and that the moving party must serve and file a brief and other supporting papers. The record reflects that following the issuance of the Referee's Report, the Michels' did not file or serve written notice, a motion, or a brief in support of any motion of any kind. (*Supp. App.* 5-9). A "Request" by the Michels for an evidentiary hearing made in court and without notice, a motion, or brief submitted in support thereof, does not satisfy the requirements of *Schmidt* that a motion to change, modify, or set aside the report of a referee be "properly" made or N.D.R.Ct.3.2 to warrant the granting of a hearing on the Referee's Report. The only motion before the District Court for which a hearing was appropriate was that of Beach Railport for confirmation of the Report of the Referee. For the reasons set forth above, the District Court did not err by not conducting an evidentiary hearing.

iv. The Referee Report Complies with N.D.C.C. § 32-16 and North Dakota Common Law Considerations.

¶52 In an attempt to provide an additional basis to find clear error by the District Court, the Michels argue that Mr. Wild's report, and the District Court's acceptance of the report which includes an analysis of the "*Schnell*" factors, is improper. This argument is not supported by North Dakota common law.

¶53 In addition to the requirements in N.D.C.C. Ch 32-16, a referee in a partition action must give equal consideration to all owners having an interest in land with respect to sentimental attachment to the land, the situation of the owners, and the location and character of the land. *Loomer*, 2010 ND 93 at ¶17 (citing *Schnell v. Schnell*, 346 N.W.2d 713, 717 (N.D. 1984)). Other factors considered by North Dakota Courts to be relevant to partition actions include the size of the land, the usefulness of the respective tracts after partition, the existence of improvements thereon, and the testimony of the witnesses with respect to values and their reasons and interests in connection therewith. *Schnell*, 346 N.W.2d at 716-21; *Berg v. Kremers*, 181 N.W.2d 730, 734-35 (N.D. 1970).

¶54 The Michels contend that the *Schnell* factors are not relevant because they are used "solely to determine whether partition in kind could be made without great prejudice to the owners of the property under consideration." The Michels argue that the *Schnell* factors are only analyzed when necessary to determine whether a property should be sold under N.D.C.C. § 32-16-12. This contention is contrary to the holding by this Court in *In re Estate of Loomer*. As previously discussed, *Loomer* had similar facts as in the instant case with a decedent appealing the District Court's decision to adopt a referee report, in part, due to ex parte communications between the parties to the action and the referee. More specifically, the appellant in *Loomer* objected to the adoption of one

referee's report over the other, both of which divided the land into three tracts of land and neither of which discussed the possibility of a sale of the property or great prejudice to any of the respective parties resulting in a need for sale. While no mention of a sale was discussed within this Court's analysis, the holding of the Court did acknowledge the applicability of the *Schnell* factors. This Court stated:

We are not left with a definite and firm conviction the District Court made a mistake in partitioning the land. The Court adopted Hennessy's report, which evaluated the partition under the factors discussed in *Schnell* and became the Court's decision. There is evidence in this record to support the Court's decision, and we conclude the Court's findings regarding the partition are not clearly erroneous. We therefore affirm the Court's partition of the land.

¶55 As in *Loomer*, in the instant case, Mr. Wild used the *Schnell* factors to properly determine the appropriate way to partition the land in accordance with N.D.C.C. § 32-16-13 and North Dakota Common Law. Mr. Wild considered the parties sentimental attachment to the land, the situation of each of the owners, the location and character of land and size, the existence of improvements on the subject property, and the usefulness of the respective parts of the Property after partition. The District Court acknowledged this analysis in its Order, citing specifically to this Court's determinations in *Loomer*. Thus, the District Court decision to confirm the report of Mr. Wild was not clearly erroneous.

CONCLUSION

¶56 For the forgoing reasons, the District Court did not abuse its discretion in granting Beach Railport's Motion for Confirmation of the Report of the Referee. The District Court did not err when it concluded that the Referee properly discharged his duties tasked to him by the court in its Order dated January 8, 2016 or when it confirmed the Report of the Referee and adopted the findings made therein. The District Court did not

err when it declined the Michels' request for an evidentiary hearing because the Michels never made a proper motion to make a hearing appropriate. For these reasons, Beach Railport respectfully requests this Court affirm the Judgment of the District Court.

Dated this 30th day of May, 2017.

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CERTIFICATE OF COMPLIANCE

¶57 The undersigned, as one of the attorneys representing Beach Railport and one of the authors of the above and foregoing Brief of Appellant, hereby certifies that said Brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that the Brief was prepared with proportionate typeface and that the total number of words does not exceed 8,000 from the portion of the Brief entitled Argument through the signature block on page 21 above at the end of the Brief. The word count was verified with the assistance of the undersigned's word processing software, which also counts abbreviations as words.

Dated this ____ day of May, 2017

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Beach Railport, LLC,)	
)	
Plaintiff and Appellee,)	
)	Supreme Court No. 20160457
)	
)	
Donnell F. Michels and Jeanne Michels,)	
Husband and Wife,)	
)	Golden Valley County District Court
Defendants and Appellants,)	File No. 17-2015-CV-21
)	
vs.)	
)	
)	
North Dakota Guarantee and Title)	
Company, A North Dakota Corporation,)	
Doing business as Dickinson Guarantee)	
And Title Company,)	
)	
Third-Party Defendant.)	

AFFIDAVIT OF FILING AND SERVICE BY E-MAIL

ERIN ZASADA, being first duly sworn, deposes and says that on the 30th day of May, 2017, she filed by e-mail the attached **PLAINTIFF/APPELLEE and SUPPLEMENTAL APPENDIX OF PLAINTIFF/APPELLEE** according to the N.D. Sup. Ct. Admin. Order 14 upon:

supclerkofcourt@ndcourts.com

ERIN ZASADA, being first duly sworn, deposes and says that on the 30th day of May, 2017, she served by e-mail the attached **BRIEF OF PLAINTIFF/APPELLEE and SUPPLEMENTAL APPENDIX OF PLAINTIFF/APPELLEE** as required by N.D.Sup.Ct. Admin. Order 14(D)(1), in Adobe PDF Format (document formatting and page numbering may be slightly different than Word), upon:

Lawrence Bender – lbender@fredlaw.com
Spencer D. Ptacek – sptacek@fredlaw.com

Dated this 30th day of May, 2017.

/s/ Erin Zasada

Subscribed and sworn to before me this 30th day of May, 2007.

/s/ Karen Syrstad

NOTARY PUBLIC

My Commission Expires: 6-24-2021