

**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

**REPLY BRIEF OF APPELLANTS
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LAW AND ARGUMENT

I. The District Court Was Required to Review the Evidence Underlying the Referee's Report.

¶ 1 Beach Railport contends that “[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.” See Brief of Appellee, Beach Railport, LLC (“Appellee’s Brief”), ¶ 32. In support of this contention, Beach Railport cites *In re Estate of Loomer*, 2010 ND 93, 782 N.W.2d 649. But the *Loomer* Court merely notes, as a factual circumstance of that case, that the district court “adopted [the referee’s] report.” See *id.* at ¶¶ 7, 19, 782 N.W.2d at 650, 653; see also *First Trust Co. of N.D. v. Mast*, 385 N.W.2d 104, 105 (N.D. 1986) (noting only that the trial court “adopted the referee’s report”); cf. Brief of Appellants Donnell F. Michels and Jeanne Michels (“Appellants’ Brief”), ¶¶ 17–23 (outlining the legal issues concerning a district court’s review of a referee’s report). The *Loomer* Court does not indicate that its decision would have been any different had the district court prepared its own findings of fact, rather than adopting the referee’s. See, e.g., *City of Bismarck v. McCormick*, 2012 ND 53, ¶ 14, 813 N.W.2d 599, 604 (“Any comment in an opinion which is not essential to the determination of the case and which is not necessarily involved in the action is dictum and not controlling in subsequent cases.” (quoting *Bakke v. St. Thomas Pub. Sch. Dist. No. 43*, 359 N.W.2d 117, 120 (N.D. 1984))). Furthermore, at no point does the *Loomer* Court indicate that the report was adopted “without looking into the underlying evidence relied upon by the referee”; instead, the *Loomer* Court merely states that “[t]here is evidence in this record to support the court’s decision,” without identifying what that evidence was. *Loomer*, 2010 ND 93 at ¶ 19, 782 N.W.2d at 653. Accordingly, *Loomer* provides no support for Beach

Railport's contention that a district court may approve a disputed referee's report without reviewing any of the evidence underlying that report.

[¶ 2] Beach Railport also attempts to address the Michels' citation to *Schmidt v. Frank*, 140 N.W.2d 588 (N.D. 1966) by distinguishing *Schmidt* from the present case, noting that the referee in that case failed to submit a report as required by statute, whereas the referee in this case did submit a report. Beach Railport's argument ignores the portion of the *Schmidt* opinion cited by the Michels, wherein the court states that on remand, when the district court does receive a referee's report, "[i]f the appraiser's report is to be used by the referee or referees, it should be made a part of the record." *Id.* at 596. In other words, when a referee's report is submitted to and considered by the court, as it was in this case, any appraiser's report relied upon by the referee should likewise be submitted to the court and made a part of the record for review by the trial and/or appellate court. In this case, none of the evidence considered by the referee, appraiser's reports or otherwise, was made a part of the record. Accordingly, reversal and remand are warranted, and Beach Railport's focus on immaterial factual distinctions between this case and *Schmidt* does not warrant otherwise.

[¶ 3] Ultimately, the Michels do not, as incorrectly asserted by Beach Railport, argue that a district court is prohibited, under any circumstances, from adopting the report of a referee. Rather, the Michels argued in their opening brief that the district court is not *required* to defer to the findings of a referee, as the district court in this case erroneously believed. *See* Appellants' Brief, ¶¶ 19–20; Appendix of Appellants Donnell F. Michels and Jeanne Michels ("App."), p. 82 ("[I]sn't my position when it comes to the referee essentially like an appellate court with regard to an administrative matter, where if I

understand that all of the evidence that you're disputing was presented to him, *I have to defer to the referee* because he had greater opportunity to view and consider it than the Court does?" (emphasis added)). As noted in the Michels' initial brief, when a district court reviews administrative matters, for example, it must actually review the evidence the agency considered to determine whether substantial, credible evidence supports the agency's decision. *See* Appellants' Brief, ¶ 20. Accordingly, while a district court may adopt the report of a referee under certain circumstances, the court is never required to do so, and when a report is challenged the court must determine whether the report is actually supported by the evidence relied upon. *Cf.* Appellants' Brief, ¶ 13 (noting that a district court abuses its discretion in a partition action when the district court acts in an "arbitrary" manner or when it fails to make a "reasoned determination").

II. The District Court Was Required to Hold an Evidentiary Hearing at the Michels' Request.

[¶ 4] In support of their argument that the district court should have held an evidentiary hearing, the Michels cited and discussed *Britton v. Brown*, 2013 MT 30, 300 P.3d 667. Appellants' Brief, ¶ 24. Beach Railport does not take issue with the reasoning or the conclusions in *Britton*, but instead attempts to distinguish it from the present case, arguing that the appellant in *Britton* made a motion to change, modify, or set aside the referee's report whereas the Michels did not. Appellee's Brief, ¶¶ 47–48. The *Britton* Court does not indicate at any point in its opinion that the appellant's filing of a motion was somehow essential to the due process analysis it conducted. *See Britton*, 2013 MT 30 at ¶ 31, 300 P.3d at 674. Thus the factual difference identified by Beach Railport is immaterial, and the Court should consider *Britton* for guidance in the present case.

[¶ 5] Beach Railport also argues that the district court could not have held an evidentiary hearing because the Michels did not make a motion and request one. Appellee’s Brief, ¶¶ 50–51. Whether the Michels made their own motion is irrelevant, however, because Beach Railport made a motion to which the Michels responded. In addition to the request for an opportunity to present evidence at the hearing, *see* App., pp. 80–81, the Michels also requested an opportunity to cross examine witnesses and present exhibits in their written response to Beach Railport’s motion, *see* Supplemental Appendix of Appellee, Beach Railport, LLC (“Supp. App.”), p. 37. Rule 3.2(a)(3) of the North Dakota Rules of Court allows “any party who has timely served and filed a brief” in connection with a motion to request oral argument thereon. This Court has previously recognized that a district court must consider a request for oral argument even when it is contained in a reply brief. *See Matter of Guardianship & Conservatorship of Norman*, 521 N.W.2d 395, 397 (N.D. 1994).

[¶ 6] Rule 3.2(b) also provides that “[a]fter reviewing the parties’ submissions [on a motion], the court may require oral argument *and may allow or require evidence on a motion.*” (emphasis added); *cf. Anton v. Anton*, 442 N.W.2d 445, 446 (N.D. 1989) (construing an older version of N.D.R.Ct. 3.2). The district court was thus incorrect in concluding that it was not permitted to hold an evidentiary hearing on Beach Railport’s motion or conduct a trial in the action. *See, e.g.,* App, p. 95 (stating that the district court did not believe the partition statutes contemplate a “trial”); *see also* N.D.R.Ct. 1.1 (stating that the Rules of Court “apply to all trial courts of this state in all civil, criminal and juvenile cases”). And not only was the district court permitted to hold such a hearing, but as explained in *Britton*, due process requires that such a hearing be held where, as here, a

party has presented evidence sufficient to make the referee's report a matter of legitimate dispute. *See* Appellants' Brief, ¶¶ 24–26. Accordingly, Beach Railport fails to refute the Michels' argument that the district court abused its discretion in denying the Michels' request for an evidentiary hearing.

[¶ 7] Finally, it should be noted that a motion contesting Wild's report or the district court's judgment would likely have been futile if filed after the hearing on Beach Railport's motion. *Cf. Britton*, 2013 MT 30 at ¶ 17, 300 P.3d at 672 (noting that the appellant objected to the appellee's proposed judgment, arguing, among other things, that it denied her due process rights). At the close of the hearing in this case the district court stated to counsel for the Michels, "if you think the Court has made an error in the approach that . . . I believe that I am essentially constrained to follow, then I guess we'll have to let the Supreme Court decide that." App., p. 95. Because the court indicated that the Michels' only recourse would be to appeal, the Michels' decision not to move for an evidentiary hearing thereafter was reasonable under the circumstances. *See, e.g.*, N.D.C.C. § 31-11-05(23) ("The law neither does nor requires idle acts.").

III. The District Court Misinterpreted the *Schnell* Decision and Misapplied the *Schnell* Factors.

[¶ 8] The Michels' argued that the referee and the district court's consideration of the *Schnell* factors was improper, because *Schnell* concerned whether a property should be partitioned or sold, not how a property should be partitioned. Appellants' Brief, ¶¶ 27–28. Beach Railport does not address the substance of the Michels' argument, but rather cites *Loomer*, in which this Court impliedly approved the district court's consideration of the *Schnell* factors in determining how to partition property. Appellee's Brief, ¶¶ 54–55. Though this is an accurate characterization of the *Loomer* decision, the

court in *Loomer* made only slight reference to *Schnell* and did not acknowledge that *Schnell* involved a separate legal issue. *See Loomer*, 2010 ND 93 at ¶ 19, 782 N.W.2d at 653. “When precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule's creator to destroy it.” *Sack v. Sack*, 2006 ND 57, ¶ 12, 711 N.W.2d 157, 160 (quoting *Francis v. Southern Pac. Co.*, 333 U.S. 445, 471 (1948) (Black, J., dissenting)). Because the previous decisions approving use of the *Schnell* factors in this context appear to be merely an unconsidered error, rather than the product of deliberate decision-making, this Court need not perpetuate such error in this case.

[¶ 9] The Michels also argued that even if the *Schnell* factors were appropriate to consider in this case, they were misapplied by the referee and by the district court because they did not leave both parties “equally favored” by the district court’s partition decision. Appellants’ Brief, ¶¶ 29–33. Beach Railport does not appear to address this argument, and the Michels’ arguments on this point should therefore be deemed admitted. *See, e.g., In re Commitment of Krueger*, 626 N.W.2d 83, 98 (Wis. Ct. App. 2001).

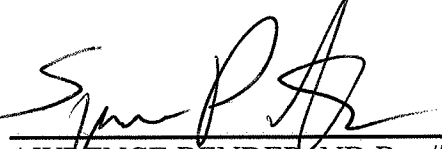
CONCLUSION

[¶ 10] As explained by the foregoing, Beach Railport has failed to refute or properly address the arguments raised by the Michels in their initial brief. As previously argued by the Michels, the district court abused its discretion in allotting the North Forty (40) to Beach Railport and the South Forty (40) to the Michels by erroneously confirming the factual findings and legal conclusions contained in Steven Wild’s report and by refusing the Michels’ request for an evidentiary hearing on Beach Railport’s motion to confirm Wild’s report. For these reasons, the district court’s decision should be reversed

and, if the Court deems it necessary, this case should be remanded to the district court for further proceedings.

Dated this 13th day of June, 2017.

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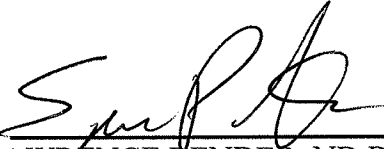
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