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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
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Deb Coon, Randal Coon, Carolyn Dostert, Alan Dostert, Lee Fraase, Carol Hoveskeland, Lee Fischer, Arnetta Frueh, Jan Kasowski, Paul Kasowski, Bill Marcks, Jackie Marcks, Gerald Marcks, David Percel, Liana Stout, Roy Thompson, Shiela Thompson, Judith VonBank, Robert VonBank, Craig Wendt, and Vicki Wendt, Appellants, vs. North Dakota Department of Health, and Rolling Green Family Farms, RE, LLP, Appellees.	)	Supreme Court No. 20170089 Cass County District Court Case No.: 09-2016-CV-02561

Appeal from Judgment Entered on March 6, 2017
Case No. 09-2016-CV-02561
County of Cass, East Central Judicial District
The Honorable Douglas R. Herman, Presiding

PETITION FOR REHEARING

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I. Rule 61 of the North Dakota Rules of Civil Procedure Is Not Applicable

[¶ 1] In its Opinion filed on August 30, 2017, this Court concluded that "the Department erred by failing to apply its administrative rules but reversing the Department's decision would be futile because Rolling Green could successfully challenge the denial under N.D.C.C. § 23-01-04.1(5)." 2017 ND 215, ¶ 21 ("Opinion"). This conclusion is based on N.D.R.Civ.P. 61, but Rule 61 is not applicable to the permitting decision in this case.

[¶ 2] This Court has stated that when a North Dakota rule "is derived from a federal rule, [it] may look to the federal courts' interpretation or construction of identical or similar language as persuasive authority for interpreting our rule." *State v. Trevino*, 2011 ND 232, ¶ 9, 807 N.W.2d 211. North Dakota's Rule 61 is identical to the corresponding federal rule.

[¶ 3] The history and purpose of Rule 61 is important because it was never intended to allow a court to refuse to enforce substantive law. "The theory of the harmless-error rule generally is that *procedure* is a practical means to an end, the requirements of which should be no more exacting than efficiency requires." 11 Fed. Prac. & Proc. Civ. § 2881 (3d ed.) (History and Purpose of Rule) (emphasis added). The purpose of this rule is to require "courts to ignore *procedural errors* save when they have affected the substantial rights of the parties...." *Id*. Indeed, the *sine qua non* of error affecting the substantial rights of the parties is an error that changes the end result of the case. "[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is

impossible to conclude that substantial rights were not affected." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

II. The Error by the Department Was Not Harmless and this Court's Ruling Constitutes an Advisory Opinion

[¶ 4] "The prohibition of advisory opinions requires an actual controversy before a court can properly adjudicate an issue. *State v. Hansen*, 2006 ND 139, ¶ 7, 717 N.W.2d 541. "[M]erely because an issue may arise in the future does not authorize this Court to render a purely advisory opinion." *Id*. at ¶ 8.

[¶ 5] The Court has rendered an advisory opinion based on speculation regarding what might happen if the Department's decision were reversed. While this discussion in the Opinion would normally be considered dicta, in this case the Court based its judgment on that speculation. Further, Appellants Coon et al. (hereafter "the Buffalo Community") disagree with the Court's speculation that Rolling Green could successfully challenge a denial of its permit under N.D.C.C. § 23-01-04.1(5). That section applies "unless the more stringent rule of the department has been adopted in compliance with this section." *Id*. "In this case the Department did not adopt the state rule when the federal regulation was less stringent. Therefore, the Department was not required to make written findings that the federal regulations were not adequate to protect public health and the environment to support the more stringent rule." Opinion, ¶ 16. The regulations at issue here were adopted in compliance with N.D.C.C. § 23-01-04.1, so the defense at subsection 5 is inapplicable.

A. The Court's speculation about the effect of reversing the Department is incorrect.

[¶ 6] The Court stated that "reversing the Department's decision would be futile because Rolling Green could successfully challenge the denial under N.D.C.C. § 23-01-

04.1(5)." Opinion, ¶ 21. This is not true. Rolling Green applied for and received a state AFO permit under N.D.A.C. ch. 33-16-03.1. The regulations applicable to this AFO permit are *not* more stringent than any federal regulation, so N.D.C.C. § 23-01-04.1 does not apply to the permit granted to Rolling Green and Rolling Green could not use the defense at N.D.C.C. § 23-01-04.1(5) in response to a denial of the state AFO permit for that reason.

B. The actual effect of reversing the Department leads to three possible scenarios.

[¶ 7] If the Court reverses the Department, Rolling Green will no longer have a state AFO permit under N.D.A.C. ch. 33-16-03.1. This is as it should be, because as this Court agreed, the Department has no authority to issue such a permit to a large CAFO. Opinion, ¶ 18. Thus, Rolling Green would have three options. First, it could proceed to construct its facility without a permit, and if the Department issues a "notice of violation," it has a "partial defense to that notice" pursuant to N.D.C.C. § 23-01-04.1(5). Alternatively, it could apply for a NDPDES permit as required by North Dakota law, and either obtain this permit, or if the NDDH denies the permit, it "may assert a partial ... challenge to that denial." *Id*. Finally, Rolling Green could petition the Department to change its rules pursuant to N.D.C.C. § 23-01-04.1(3). In each circumstance, the Department would be forced to conduct rule-making or adopt written findings to justify the current rules.

C. Failure to reverse harms the Buffalo Community.

[¶ 8] It is worth recalling the reasons the EPA attempted to require NPDES permits for CAFOs in the first place.

> CAFOs are the largest of the nation's 238,000 or so "animal feeding operations"—"agriculture enterprises where animals are kept and raised in confinement." Such "agriculture enterprises" are not, however, of a kind the Founding Fathers likely would have envisioned populating America's

> "yeoman republic." On the contrary, CAFOs are large-scale industrial operations that raise extraordinary numbers of livestock.
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> ***
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> The EPA has focused on the industry because CAFOs also generate millions of tons of manure every year, and "when improperly managed, [this manure] can pose substantial risks to the environment and public health

Waterkeeper All., Inc. v. U.S. E.P.A., 399 F.3d 486, 492 (2d Cir. 2005) (internal citations removed). The Department should adopt more stringent rules for the facilities rather than simply defaulting to rules that it has no authority to apply to such facilities.

[¶ 9] During oral argument in this matter, the Department indicated that it was in the process of reviewing rules regarding CAFOs. This Court stated that the "Department should amend its rule to make it consistent with the federal regulation or make findings explaining the deviation, but the current rule remains in effect until amended." Opinion, ¶ 18. This admonition rings hollow, however, given that this Court has indicated that it will allow the Department to fail to apply its own rules. A reversal of the Department's decision would force it to promulgate new rules or make a written finding, but the Court's opinion and failure to reverse have now left the Buffalo Community with a frail suggestion of intent from the Department regarding rulemaking, and a mere suggestion from this Court that it should remedy the situation. As the quote above from *Waterkeeper* makes clear, stricter regulation of large CAFOs is easily justified if the Department has the political will to do so. This could come in the form of written findings that the current regulation should remain, or more stringent rules for large CAFOs than the rules for other feeding operations regulated by the Department. The Buffalo Community would have demanded through comments that the Department maintain the current rule requiring Rolling Green to obtain a NDPDES permit, and to simultaneously make a written finding explaining why the stricter rule is justified. This door has been slammed in their faces by this Court's decision.

Whether the Department adopts those findings or not, Rolling Green has now been given a free pass.

D. The Court's speculation and the decision based on that speculation render the decision an improper advisory opinion.

[¶ 10] This Court has engaged in speculation, and is ruling on facts and circumstances that are not before the Court. "[M]erely because an issue may arise in the future does not authorize this Court to render a purely advisory opinion." *State v. Hansen*, 2006 ND 139, ¶ 7, 717 N.W.2d 541.

III. The Court Is Setting a Dangerous Precedent by Hinging Its Decision on Rule 61.

[¶ 11] This Court is well aware of the doctrine of harmless error, and its historical application. Simply put, it has no applicability here. Beyond the erroneous application of this doctrine, however, there is a much more dangerous problem that arises by upending precedent and sending a message to district courts that the present appeal from an agency is an appropriate situation in which to use this doctrine.

[¶ 12] This Court has previously shown much more concern with the rule of law, and the standards set forth in its prior jurisprudence. In *Hamilton v. Woll*, the district court ruled on summary judgment based on a *stipulated record*, and this Court nonetheless reminded the district court that it is not permissible to grant summary judgment when different inferences could be made from those facts. 2012 ND 238, 823 N.W.2d 754. In a concurring opinion, Justice Crothers noted that the opinion might leave the district court wondering what additional evidence could be submitted, since the parties had stipulated to the facts in the case. *Id*. at ¶ 17. Justice Crothers specifically noted that his opinion might have made it appear that the reversal and remand was a mere exercise in formality, but explained that the opinions were written to ensure that the district courts understood the

Supreme Court's jurisprudence and how to apply it in the future. It is difficult to square the Court's reasoning in *Hamilton* with its opinion in this case.

[¶ 13] The Opinion is a remarkable departure from this Court's own precedent and constitutional norms. It is an unconstitutional advisory opinion that significantly expands N.D.R.Civ.P. 61 into a new doctrine -- the futility doctrine -- without citing a single case as authority, and that further shuts the door on any guarantee that the Department will update its rules on the basis of language that would normally be dicta. Additionally, it forecloses Appellants' and the public's right to advocate for "more stringent" permitting of CAFOs in that rulemaking process pursuant to N.D.C.C. 23-01-04.1(2) and other authority. The Opinion impermissibly expands agency power by abdicating the Courts' role of safeguarding due process rights by substituting agency deference for judicial review—again without citation to authority.

[¶ 14] If this Court allows its opinion to stand, it is difficult, and alarming, to consider what message the district courts might discern from the Court's guidance in this case; perhaps it is that the rule of law need not be enforced so long as the judge does not hold a subjective belief that, in the end, it will make much of a difference.

Conclusion

[¶ 15] Unfortunately, it does make a difference to the Buffalo Community, and their calls for due process may have fallen on deaf ears, and their search for justice may have found only a dead end. A loss of faith in the rule of law and the system of justice this democracy created to uphold it is the greatest harm that could result from this legal proceeding. The Buffalo Community therefore asks this Court one last time to enforce the rule of law, else it lose meaning for those who seek justice in North Dakota.

DATED this 13th day of September, 2017.

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I hereby certify that on September 13, 2017, I electronically filed with the Clerk of the North Dakota Supreme Court the following documents:

1. PETITION FOR REHEARING

and served the same electronically upon the following:

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