

**NORTH DAKOTA SUPREME COURT:
QUIETLY LETTING THE LEGISLATURE PROTECT LIFE**
Eric C. Bohnet¹

The Supreme Court of North Dakota (“Court”) has been surprisingly quiet on life issues. Unlike most states, North Dakota does not have an intermediate appellate court but instead allows cases to be appealed directly and automatically to its state supreme court. As such, this Court lacks the ability to avoid issues by refusing discretionary review. On the other hand, most of its cases are the type of routine appeals that would typically be resolved by an intermediate court in most states.

A review of the state’s statutes reveals it to be a strongly pro-life state. Nearly every effort to protect the right to life within the confines of federal law has been enacted by the North Dakota legislature. There are numerous restrictions on abortion, such as a parental consent law, a waiting period, clinic regulations, and an informed consent law. Other statutes prohibit assisted suicide, cloning, and embryo-destroying research, while protecting unborn children from murder, assault, and other crimes.

Many similar laws have been struck down or given a narrowing interpretation by state courts elsewhere, but it appears no one has ever brought such a case in North Dakota’s state courts or at least none resulting in an appeal. Such challenges to North Dakota statutes have only been made in federal courts.

I. LIFE ISSUES

North Dakota’s legislature has been prolific in its enactment of pro-life legislation. Somewhat surprisingly, none of the legislation has been reviewed or interpreted by the state’s high court.

¹ Eric C. Bohnet, Attorney at Law, Indianapolis, Indiana.

The Court has, however, addressed abortion on the periphery in several cases involving private efforts to reduce abortion. It has consistently ruled against pro-life protestors around abortion clinics. Most troubling, it allowed an abortion clinic to recover “false advertising” damages against a crisis pregnancy clinic, including an assessment of punitive damages.

Abortion

Aside from the limitations set by the federal courts, North Dakota’s policy towards abortion has been set by its legislature without hindrance or assistance from the state courts. The legislature has declared a policy “that normal childbirth is to be given preference, encouragement, and support” over abortion and has barred state funds from being spent on abortions or the promotion of abortion except to save the life of the woman.² Abortions may be performed only by a licensed physician and are prohibited where the fetus is viable, unless necessary to save the life of the woman or to avoid a substantial risk of grave impairment of her physical and mental health.³ The legislature has required that minors obtain the written consent of both parents before having an abortion and that a married woman obtain the consent of her husband if not voluntarily separated.⁴ It has passed a series of informed consent statutes requiring information be provided to a woman at least 24 hours before the abortion. Such required information includes: the medical risks of abortion and with carrying her child to term; the availability of medical assistance benefits for prenatal, childbirth, and neonatal care; that the father is liable to assist in support; and that she has the right to review materials regarding fetal development and agencies that could assist her through the pregnancy.⁵ A woman who receives an abortion without giving such informed consent can sue the abortion provider for treble damages plus \$10,000 in punitive damages.⁶ Some of these laws have been upheld or struck down by federal courts, but none have been challenged or interpreted in the state supreme court.

² N.D. CENT. CODE § 14-02.3-01 (2007). Another exception to the funding ban is added by the federal Hyde Amendment, which requires Medicaid funding for abortions in cases of rape and incest.

³ *Id.* § 14-02.1-04.

⁴ *Id.* § 14-02.1-03.1.

⁵ *Id.* § 14-02.1-02.

⁶ *Id.* § 14-02.1-03.2.

The closest the court has come to addressing the legal status of abortion was in its rejection of the “necessity defense” raised by several abortion protesters convicted of trespassing at an abortion clinic.⁷ The Court never actually addressed the moral status of abortion but simply found that, for the necessity defense to be available, “the evil, harm, or injury sought to be avoided . . . must be legally cognizable.”⁸ Since abortion was legal under the United States Supreme Court’s (“USSC”) decision in *Roe v. Wade*,⁹ the prevention of a legal abortion could not provide the basis for a necessity defense.¹⁰

Justice VandeWalle, the only remaining justice from the *Sahr* court, wrote a thoughtful concurrence that would not have foreclosed the necessity defense. He instead recognized the Court had previously observed otherwise criminal conduct could be excused “because the actor believed that circumstances actually existed which would justify his conduct when in fact they did not.”¹¹ He found the defendants before him had not asserted this subjective defense but had instead sought to introduce evidence that abortion was an objectively greater evil than trespass.¹² He rejected this defense, because the USSC’s decision in *Roe v. Wade* “effectively prevents us from concluding that abortion is a greater harm, notwithstanding the Supreme Court’s statements that it need not decide when life begins and the belief of the defendants that life begins at conception.”¹³

Another case that touched on abortion allowed an abortion clinic to sue a crisis pregnancy center for false advertising, recovering \$23,500 in damages plus another \$5,500 in punitive

⁷ *State v. Sahr*, 470 N.W.2d 185 (N.D. 1991).

⁸ *Id.* at 191.

⁹ 410 U.S. 113 (1973).

¹⁰ *Id.*

¹¹ *Sahr*, 470 N.W.2d at 195 (VandeWalle, J., concurring).

¹² *Id.* at 196.

¹³ *Id.*

damages.¹⁴ The Court had previously upheld a preliminary injunction and a contempt order against the center.¹⁵

Justice VandeWalle wrote separately in all three decisions, each time urging a more limited result. On the contempt decision, he dissented in part because “the conclusion of the majority may lead one to believe that if a woman is pregnant and doesn’t want to be, the only alternative is an abortion. I reject that implication.”¹⁶ He also pointed out that one of the ads that had provided the basis for contempt actually provided reasonable notice the organization did not perform abortions because it “contains at the bottom the words ‘Pro-Life.’ . . . A ‘reasonable’ interpretation of this particular advertisement would be that the group did not perform abortions.”¹⁷ He also wrote separately to disagree with the false advertising basis for damages, though he joined the result, because a wrongful interference with business theory could also support the damages.¹⁸ His view was later adopted in a decision overruling *Fargo Women’s III*.¹⁹

Because the legal basis for the decision has since been rejected, the case has little precedential value. Nonetheless, it does suggest a willingness to bend the law to advance abortion. However, Chief Justice VandeWalle is the only remaining justice who participated in those decisions, so it is unknown whether this bias lingers in the current Court. Most of the current justices rejected a request for injunction against an abortion clinic for violating the false advertising act by distributing materials denying a link between abortion and breast cancer.²⁰ While this decision rejected a pro-life claim against an abortion clinic that was in some regards the mirror image of the abortion clinic’s claim against the pro-life center in the *Fargo Women’s* cases, the two suits are distinguishable in several respects. One of these was followed by the

¹⁴ *Fargo Women’s Health Org. v. FM Women’s Help and Caring Connection (Fargo Women’s III)*, 444 N.W.2d 683 (N.D. 1989).

¹⁵ *Fargo Women’s Health Org. v. FM Women’s Help and Caring Connection (“Fargo Women’s I”)*, 381 N.W.2d 176 (N.D. 1986); *Fargo Women’s Health Org. v. FM Women’s Help and Caring Connection (“Fargo Women’s II”)*, 391 N.W.2d 627 (N.D. 1986).

¹⁶ *Fargo Women’s II*, 391 N.W.2d at 635-36 (VandeWalle, J., concurring in part and dissenting in part).

¹⁷ *Id.*

¹⁸ *Fargo Women’s III*, 444 N.W.2d at 686-88 (VandeWalle, J., concurring).

¹⁹ *Trade ‘N Post, L.L.C. v. World Duty Free Americas, Inc.*, 628 N.W.2d 707 (N.D. 2001).

²⁰ *Kjolsrud v. MKB Mgmt. Corp.*, 669 N.W.2d 82 (N.D. 2003).

Court, which rejected the breast cancer suit for lack of standing, as the plaintiff had not herself suffered an injury from the allegedly false statements.²¹ In contrast, the abortion clinic in *Fargo Women's* had a plausible claim that it was losing customers when women were persuaded not to have abortions. This reliance on standing in *Kjolsrud* may actually have helped the pro-life position, because it allowed the Court to avoid analyzing the truth of the challenged materials. Since the district court had held a bench trial and found the clinic's statements to be "neither untrue nor misleading,"²² any analysis of the truth of the abortion clinic's claims would have been made under a standard very deferential to the clinic's position. By dismissing the claim for lack of standing, the Court made it easier for the abortion-breast cancer link to be established in a later proceeding.

Protection of the Unborn from Criminal Violence

Unborn children in North Dakota are protected from criminal violence by a series of statutes creating criminal "Offenses Against Unborn Children" that provide for the same penalties and largely the same elements as the criminal statutes protecting those already born.²³ These statutes do exempt abortions performed by a licensed physician to which the pregnant woman has consented.²⁴ The state's Supreme Court has not had occasion to review or interpret these statutes.

Assisted Suicide

Assisted suicide is a class C felony in North Dakota or a class AA felony if suicide is willfully caused by deception, coercion, or duress.²⁵ Additionally, a healthcare provider who assists a suicide may lose his or her license or certification to provide health care.²⁶ There is no reported caselaw addressing or interpreting this provision.

²¹ *Id.* at 88.

²² *Id.* at 84.

²³ N.D. CENT. CODE §§ 12.1-17.1-01 – 12.1-17.1-08-.

²⁴ *Id.* § 12.1-17.1-07.

²⁵ *Id.* § 12.1-16-04.

²⁶ *Id.* § 12.1-16-08.

Healthcare Rights of Conscience

Although Article 1, section 3 of North Dakota's constitution includes a guarantee of religious liberty similar to those in the federal First Amendment, this provision does not appear to have ever been applied or interpreted by the state's Supreme Court. The Court has decided several cases involving religious freedom but has always resolved them based upon the federal constitution without deciding whether the state constitution provided additional protection.

Regardless of whether the state constitution protects the right not to perform abortions, the state legislature has acted to protect the right of conscience of healthcare providers from being forced to participate in abortions.²⁷ This law provides that if any hospital or person objects to an abortion, they are under no duty by either law or contract to participate in the performance of an abortion. The law specifies that it protects hospitals, physicians, nurses, hospital employees, and "any other person." It further provides that "[n]o such person or institution may be discriminated against because the person or institution so objects."²⁸ This law provides protections beyond what a state constitution would typically provide, because it protects employees of private hospitals as well as public facilities.

This statute appears in the section of the code addressing the licensing of medical hospitals, but its broad language covering "any other persons," arguably, should encompass pharmacists as well. However, there is a risk that "abortion" would be held not to include the effects of such drugs as "morning-after pills" or methods of birth control that block the implantation of embryos after fertilization. There do not appear to be any explicit protections for pharmacists who object to dispensing such abortifacient drugs.

Cloning

Human cloning is a felony offense in North Dakota.²⁹ There is no reported caselaw regarding these statutes.

²⁷ N.D. CENT. CODE § 23-16-14.

²⁸ *Id.*

²⁹ N.D. CENT. CODE §§ 12.1-39-01 – 12.1-39-02.

Destructive Embryo Research

North Dakota prohibits experimentation on a live or aborted human fetus.³⁰ This would presumably preclude human embryonic stem cell research and any other research that would destroy a human fetus. However, there is no reported caselaw interpreting or reviewing this statute or otherwise addressing this issue.

The Supreme Court of North Dakota has unanimously found that a state statute “authorizes a wrongful-death action against one whose tortuous conduct causes the death of a viable unborn child.”³¹ Notably, a key premise of this decision was that “We believe that it is commonly understood that an unborn child is a human being or person which has life and which, even prior to the process of birth, can experience death.”³² This statement could be useful in future litigation either as a justification of laws restricting abortion, or potentially in expanding the protection of unborn life after action overturning the federal constitutional right to abortion. The decision also explained, “there is no perceptible reason why there should be a legally recognized difference between a death that occurs immediately before birth and one that occurs immediately after . . .”³³

The legislature has also acted to bar claims for “wrongful life” based on the claim that someone else’s act or omission prevented the claimant from being aborted.³⁴ However, this issue has not been addressed by the state supreme court.

There has been minimal action on life issues in North Dakota's Supreme Court. Instead, the chief battlegrounds for the State's policy on these issues have been the State's Legislature and its federal courts. Thanks to the Legislature, North Dakota is a national leader in the protection and respect accorded to human life. Its State courts have done little to interfere with this policy.

³⁰ N.D. CENT. CODE § 14-02.2-01.

³¹ *Hopkins v. McBane*, 359 N.W.2d 862, 865 (N.D. 1984).

³² *Id.* at 865.

³³ *Id.* at 864.

³⁴ N.D. CENT. CODE § 32-03-43.

II. JUDICIAL RESTRAINT

The North Dakota constitution limits the ability of the state courts to invalidate legislation, providing “the Supreme Court shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide.”³⁵ This provision has prevented at least one major activist ruling when only three justices voted to declare the state’s system of public school financing to be unconstitutional.³⁶ Many other state supreme courts have declared their state’s public school finance systems to be unconstitutionally inequitable, often resulting in tax increases and greater state control over public education. Notably, the two dissenters whose votes precluded a declaration of unconstitutionality, Chief Justice VandeWalle and Justice Sandstrom, are the only active justices remaining from that opinion. Justice Sandstrom disputed the majority’s conclusion and instead argued “there is no constitutional right to equal education financing.”³⁷ The Chief Justice also dissented, arguing the state constitution set a minimum standard that all funding must reach rather than a requirement of equality. He refused to hold the system unconstitutional, because the plaintiffs “have not, in this case, proven they have been denied a minimum curriculum taught by qualified teachers or that, by objective testing they have been denied a minimum uniform education” even though “that proof may well be evident in the future under the present scheme.”³⁸

It should be noted there has been new litigation regarding the equity of North Dakota’s school financing system. The *Bismarck Tribune* reported in March 2006 that members of the state supreme court were prodding lawmakers to reform the system. The article reports on “casual conversations” between justices and Lt. Gov. Jack Dalrymple, Chair of the state Commission on Education Improvement, of which Dalrymple explained, “They feel that if we

³⁵ N.D. CONST. art. VI, § 4.

³⁶ *Bismarck Public School Dist. No. 1 v. State By and Through North Dakota*, 511 N.W.2d 247 (N.D. 1994).

³⁷ *Id.* at 263 (Sandstrom, J., dissenting).

³⁸ *Id.* at 276 (VandeWalle, C.J., dissenting).

fail here, they will be, I think, more inclined to get active . . . We're getting a chance to do it ourselves. And if we don't, I think we're going to get punished worse."³⁹

The Court has explained the power to hold legislative acts invalid "is exercised with restraint, caution, and reluctance" and that "a statute is presumptively correct and valid, enjoying a conclusive presumption of constitutionality unless clearly shown to contravene the state or federal constitution."⁴⁰

These presumptions appear to have been reversed in the decision to strike the state's 10-year statute of repose for product liability claims under the state's equal protection clause because there was "not sufficient evidence or findings to demonstrate a close correspondence between the legislative goals and the classification created by the 1995 statute."⁴¹ The departure from the *Hoff* presumption may be attributable to the *stare decisis* element to the case since the Court had previously "declared unconstitutional a substantively identical statute of repose."⁴² However, the *Hanson* Court also looked to whether the legislative record demonstrated "close correspondence between the classification . . . and the stated legislative goals as would justify the unequal treatment wrought by this statute."⁴³ Chief Justice Erickstad wrote a lengthy dissent, agreeing with the majority's use of "intermediate scrutiny" but concluding the statutory distinction survived such analysis.⁴⁴ The Court subsequently upheld another 10-year statute of repose that cut off claims based on the planning, design, or construction of improvements to real property, distinguishing between such claims and the product manufacturing claims at issue in *Hanson*.⁴⁵

On the whole, this does not appear to be a particularly activist court. Other than the *Hanson* line of cases, there do not appear to be any decisions striking down high profile statutes or utilizing particularly dubious reasoning. The closest appears to be the *Hoff* decision itself,

³⁹ Dale Wetzel, *School Finance Changes Offered*, The Bismarck Tribune, Mar. 2, 2006, available at <http://www.bismarcktribune.com/articles/2006/03/02/news/state/110831.txt>

⁴⁰ *Hoff v. Berg*, 595 N.W.2d 285, 288 (N.D. 1999) (citation omitted).

⁴¹ *Dickie v. Farmers Union Oil Company of LaMoure*, 611 N.W.2d 168 (N.D. 2000).

⁴² *Id.* at 170 (citing *Hanson v. Williams County*, 389 N.W.2d 319, 328 (N.D. 1986)).

⁴³ *Hanson*, 389 N.W.2d at 328.

⁴⁴ *Id.* at 330-346 (Erickstad, C.J., dissenting).

⁴⁵ *Bellemare v. Gateway Builders, Inc.*, 420 N.W.2d 733 (N.D. 1988).

which concluded an amendment to a child custody statute “is unconstitutional to the extent it requires courts to grant grandparents visitation rights” under a presumption that grandparent visitation was in the best interests of the child ‘because it violates parent’s fundamental liberty interest in controlling the persons with whom their children may associate, which is protected by the due process clause of our state and federal constitutions.”⁴⁶ But though the “substantive due process” doctrine has often been a vehicle for judicial activism, this decision seems to be a reasonable application of that doctrine. The right of parents to control the upbringing and associations of their children has been an important part of American law since the founding and has been explicitly recognized as grounds for judicial review since at least the 1920’s.⁴⁷

One major source of judicial activism in other states has been the striking of public education financing, which this court has so far avoided, due to the four-vote rule as discussed above. Life issues are another common area of activism North Dakota has avoided. Generally, the Court looks heavily to federal law for guidance in constitutional cases and seldom finds North Dakota constitutional provisions restrict the legislature from actions that would be permitted by the federal constitution.

The lack of electoral competition for the Court (discussed in the following section) also suggests the state’s judiciary is not widely perceived as having asserted itself as a third political branch. If it had, one would expect rival factions to have been recruiting candidates for the Court. Similarly, the lack of cases on life issues suggests those who oppose the legislature’s strong pro-life efforts have not viewed the state’s Supreme Court as likely to strike down those laws.

III. THE COURT

The five Justices of the North Dakota Supreme Court are elected to 10-year terms by statewide non-partisan ballot, with terms staggered so that one seat is filled in each even-numbered year. Justices are nominated in a non-partisan primary, with the top two vote-getters

⁴⁶ *Id.* at 291.

⁴⁷ *See Meyer v. Nebraska* 262 U.S. 390 (1923).

advancing to the general election. Elections are often uncontested, with Justice Kapsner's 56%-44% victory in 2000 being the most recent contested election.

When vacancies occur between elections, a new justice is appointed by the governor. Four of the current justices were originally appointed to their seats, three by Republicans and one by a Democrat.

In recent years, incumbent justices have very seldom lost elections. The last one to do so was Justice J. Philip Johnson, in 1992. Oddly enough, he is also the second to last incumbent to lose, having also lost a re-election bid in 1974. On each occasion, he had been appointed to the post less than a year before the election. Prior to Justice Johnson, several other newly-appointed justices also lost their first election bids. The last justice to lose a re-election bid after having previously won an election to the court was Justice James Robinson, in 1922. Defeating incumbents appears to have been fairly common prior to that time.

Biographical information on the current justices of the Supreme Court of North Dakota

Member	Appointed by/ Year	Term Expires	Miscellaneous
Gerald W. VandeWalle, Chief Justice	Link/ 1978.	2014	<ul style="list-style-type: none"> - Biographical information: J.D. University of North Dakota School of Law 1958; B.S. School of Business 1955; Worked for 20 years in State Attorney General's office. - Political/professional affiliations: Past co-chair of the ABA Bar Admissions Committee and past chair of the Federal-State Tribal Relations Committee of the Conference of Chief Justices; past chair of the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association; past President of the Conference of Chief Justices; past chair of the National Center for State Courts; past chair of the National Center for State Court's Research Advisory Council. - Noteworthy opinions/dissents: Is the only remaining justice from most of the decisions

			discussed above; has frequently written separate opinions in these cases indicating somewhat narrower grounds than the majority opinion, and sometimes including statements suggesting a pro-life orientation. These have usually been concurrences, but a few have been partial dissents; also wrote the opinion recognizing wrongful death actions for stillborn infants and recognizing fetuses as living persons in <i>Hopkins</i> . ⁴⁸
Dale V. Sandstrom	Elected 1992.	2016	<ul style="list-style-type: none"> - Biographical information: J.D. University of North Dakota School of Law 1975; B.A. North Dakota State; U.S. Senate staffer for Sen. Milton R. Young; worked in North Dakota as Assistant Attorney General heading the Consumer Fraud and Antitrust Division, as State Securities Commissioner, and as President of the Public Service Commission. - Political/professional affiliations: a graduate of the National Judicial College; a member of the Court Technology Committee; Chair of the Joint Procedure Committee, and the North Dakota Advisory Commission on Cameras in the Courtroom; immediate past Chair of the North Dakota Judicial Conference. - Other: married to District Judge Gail Hagerty; they have three children.
Mary Muehlen Maring	Schafer/ 1996.	2008	<ul style="list-style-type: none"> - Biographical information: J.D. University of North Dakota School of Law; B.A. Moorhead State University 1972; clerked for a Minnesota district judge; private practice from 1976-1996. - Professional/political affiliations: Served as president of the North Dakota Trial Lawyers Association and served as president of the East Central Judicial District Bar Association, North Dakota Trial Lawyers Association, and Clay County Minnesota

⁴⁸ 359 N.W.2d 862.

			Bar; acted as arbitrator for the American Arbitration Association, North Dakota Workers Compensation Bureau, and the Better Business Bureau and private parties; chair of the Gender Fairness Implementation Committee of the Supreme Court and was a member of the Joint Dispute Resolution Committee.
Carol Ronning Kapsner	Schafer/ 1998.	2010	- Biographical information: J.D. University of Colorado School of Law 1977; M.A. in English Literature from Indiana University; B.A. College of St. Catherine; Private practice from 1977-1998. - Professional affiliations: Served as president of the Burleigh County Bar Association; appointed by the Bar Association to serve on the Judicial Conference from 1988 to 1996.
Daniel J. Crothers	Hoeven/ 2005.	2012	- Biographical information: J.D. University of North Dakota School of Law 1982; B.A. University of North Dakota 1979; served brief stints as a clerk for Judge Ramona Lopez of the New Mexico Court of Appeals, and as an Assistant State's Attorney; private practice from 1986-2005. - Professional affiliations: President of State Bar Association 2001-2002.

CONCLUSION

The North Dakota Supreme Court has largely stood aside and allowed its legislature to set the state's policy on life issues. Much of this has been due to a lack of cases challenging the many statutes the legislature has enacted to protect the right to life. But the Court appears fairly deferential to the Legislature on other issues and has acted to protect life on the rare occasions it has been asked to do so.