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IN JUSTICE BERYL LEVINE'S VIEW: HER MOST SIGNIFICANT OPINIONS

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I. INTRODUCTION

When I was asked by the 1995-96 Articles Editor of the *North Dakota Law Review* to write an article for the *Law Review* edition honoring Justice Beryl J. Levine, I asked Justice Levine to send me a list of what she considered to be her ten most important decisions. She sent me a list which included some titles to cases and some cases described by content. From that list, my co-author identified one dozen cases.

We have elected to analyze these cases by breaking them down into categories without attempting to rank them by their importance to North Dakota jurisprudence. They are not limited to, but they are particularly indicative of, Justice Levine's serious advocacy of individual rights in the field of criminal law and her strong belief in the primary caretaker's rights in the field of domestic relations. Through her majority, specially concurring, and dissenting opinions in different areas of the law, she has definitely made her mark as the first woman Justice of the North Dakota Supreme Court.

Others will no doubt write in detail of her many achievements while a member of the court, but this article will be limited to an analysis of the cases she herself deemed most crucial. She described them in her note to us as her "favorite opinions."

II. THE OPINIONS

A. CRIMINAL JURISPRUDENCE: *STATE V. ORR*

In *State v. Orr*,[1] Justice Levine, writing for the court, concluded that the North Dakota Constitution protected an offender convicted of driving under the influence from sentence enhancement based on a prior uncounseled guilty plea.[2]

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** Smith, Bakke, Hovland & Oppegard, P.C., Bismarck, N.D.; J.D., 1995, University of North Dakota. Served as Justice Levine's law clerk for the majority of her last year on the court.

1. 375 N.W.2d 171 (N.D. 1985).

2. State v. Orr, 375 N.W.2d 171, 178 (N.D. 1985).

Kenneth Orr was convicted of DUI after a bench trial.[3] Because it was his second DUI conviction, the court sentenced him to four days in jail plus a fine, in conformity with statutory requirements for sentencing DUI offenders.[4] Orr argued that it was unconstitutional for the court to use his prior DUI conviction as a basis for enhancing his sentence because "there was no proof that he was advised of, and waived, his right to counsel before pleading guilty to the earlier DUI charge."[5]

Justice Levine first addressed the issue of whether the trial court indeed sentenced Orr as a second-time DUI offender.[6] Justice Levine wrote that, while "the trial court failed to articulate its reasons for imposing the particular sentence" the record showed that the trial court sentenced Orr "to incarceration solely because he was a second offender."[7] Justice Levine then considered whether the trial court erred in concluding that Orr had waived his right to counsel before his prior conviction.[8] Because there was nothing in the record of Orr's prior conviction indicating affirmatively that Orr waived his right to counsel, she concluded the trial court erred in deciding that Orr had validly waived his right.[9]

Therefore, the court was left with the issue of whether Orr could be sentenced as a second-time DUI offender based on a prior uncounseled DUI conviction.[10] Orr argued that the United States Supreme Court's decision in *Baldasar v. Illinois*[11] barred use of his prior conviction to enhance his present sentence.[12] After a thorough analysis of *Baldasar*, however, Justice Levine concluded that it did not apply to Orr's case because his prior uncounseled conviction was not for a crime punishable by more than six months imprisonment.[13]

The State, on the other hand, argued that the United States Supreme Court's decision in *Lewis v. United States*[14] supported its argument as to the validity of using Orr's prior uncounseled conviction to enhance his present sentence.[15] Justice Levine, however, indicated that *Lewis* was inapplicable because the North Dakota statute requiring sentence enhancement when an offender accumulates multiple DUI convictions, in contrast to the federal statute at issue in *Lewis*, "necessarily focuses on

3. *Id.* at 173.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 173-74.
8. *Id.* at 174.
9. *Id.* at 174-75.
10. *Id.* at 175.
11. 446 U.S. 222 (1980).
12. *Orr*, 375 N.W.2d at 175.
13. *Id.* at 176.
14. 445 U.S. 55 (1980).
15. *Orr*, 375 N.W.2d at 176.

the reliability of the first conviction, and not on the mere fact of its occurrence."[16] She concluded that *Lewis*, therefore, was not a controlling precedent.[17]

Justice Levine next turned to Orr's argument that his sentence was imposed in violation of Article I, Section 12, of the North Dakota Constitution, which grants persons accused of crimes "the right 'to appear and defend in person and with counsel.'"[18] She observed that this right is one that "has long been zealously guarded not only by the courts of this State . . . but also by the Legislature as far back as 1895."[19] Therefore, she explained, it was a right that, in North Dakota, "has been exercised independently of any compulsion under federal law or the federal constitution."[20] Justice Levine further indicated that state and federal caselaw on uncounseled convictions showed that such convictions "are to be rightly regarded with skepticism. They are unreliable."[21]

Given the questionable reliability of uncounseled convictions and the special importance of the right to counsel in North Dakota, Justice Levine concluded that "absent a valid waiver of the right to counsel the resulting conviction cannot . . . be used to enhance a term of imprisonment for a subsequent offense."[22] Therefore, Justice Levine advised, all courts "must obtain a valid waiver of counsel on the record or afford a nonindigent defendant the opportunity to retain counsel, or appoint counsel for an indigent DUI defendant regardless of the penalty to be imposed, if enhancement of punishment for a subsequent conviction is not to be precluded."[23]

The "final issue" presented in *Orr* was the question of whose burden it would be to prove the validity of a prior uncounseled conviction "when the record is silent on waiver."[24] Justice Levine answered this question quickly, relying on *Burgett v. Texas*,[25] in which the Supreme Court "held that a prior felony conviction was presumed void and could not be used to enhance punishment, where the record did not indicate that the defendant had, or waived, counsel."[26] Justice Levine asserted that the Court's reasoning in *Burgett* applied to Orr's case, and indicated that "the silent record is insufficient to overcome the presumption that

16. *Id.* at 177.
17. *Id.*
18. *Id.* (citing N.D CONST., art. I, § 12).
19. *Id.* (citations omitted).
20. *Id.* at 178.
21. *Id.*
22. *Id.* at 178-79.
23. *Id.* at 179.
24. *Id.*
25. 389 U.S. 109 (1967).
26. *Orr*, 375 N.W.2d at 179.

the prior uncounseled conviction was void for enhancement purposes."[27] Because the State did not introduce other evidence tending to show the validity of Orr's prior uncounseled conviction, Justice Levine concluded that the State failed to overcome the presumption that Orr's prior conviction was void for enhancement purposes.[28] The court therefore reversed Orr's sentence.[29]

Justice Levine was joined in the *Orr* majority by Justice Herbert L. Meschke and Justice Herman "Sparky" Gierke.[30] Then-Justice Gerald W. VandeWalle, joined by then-Chief Justice Ralph J. Erickstad, concurred specially, arguing that it was inappropriate for the court to require the State to prove the invalidity of Orr's prior conviction when Orr did not claim he was not advised of his right to counsel at his prior trial, but rather that he simply could not remember whether he was advised of this right.[31] Justice VandeWalle also indicated that he was not convinced that the *Lewis* case was inapplicable to Orr's situation.[32] Finally, and perhaps most significantly, Justice VandeWalle stated that he did not believe that the North Dakota Constitution necessarily provided any greater protection to an accused's right to counsel than the United States Constitution.[33] He concluded, however, that under Rule 11(f) of the North Dakota Rules of Criminal Procedure, the fact that the record of Orr's prior conviction did not reflect a valid waiver of counsel provided "sufficient reason" to conclude that it could not be used to enhance his current conviction.[34] Given this, he asserted that the "significant constitutional issue" addressed by the majority should have been left for another day.[35]

Irrespective of the philosophical undergirdings of the *Orr* opinion, it has likely had a salutary effect upon the trial judges of North Dakota, causing them to be more careful in the advice they give defendants in criminal cases and in the records they keep, all of which should contribute not only to justice, but to the appearance of justice.

Should it be asserted that the North Dakota Supreme Court concerned itself with trifles in *Orr*, it should be noted that, in *City of Bismarck v. Altevogt*,[36] the court confirmed that it would jealously guard a defendant's right to a jury trial even in the case of minor offenses.[37]

27. *Id.*
28. *Id.* at 180.
29. *Id.*
30. *Id.* at 180.
31. *Id.* at 180-81 (VandeWalle, J., concurring specially).
32. *Id.*
33. *Id.*
34. *Id.* at 181.
35. *Id.*
36. 353 N.W.2d 760 (N.D. 1984).
37. *See* City of Bismarck v. Altevogt, 353 N.W.2d 760, 764-66 (N.D. 1984).

Justice Levine refers to *Altevogt* in support of her statement in *Orr* that "we have often recognized that our constitution may afford broader rights than those granted under the federal constitution."[38]

B. DOMESTIC RELATIONS

1. Child Custody—Domestic Violence: Schestler v. Schestler and Heck v. Reed

In her dissent to *Schestler v. Schestler*,[39] Justice Levine challenged the court's interpretation of North Dakota's statutory presumption against awarding child custody to a perpetrator of domestic violence.[40] Wanda and Charles Schestler were divorced in 1991.[41] The trial court determined that it would be in the best interests of the couple's two children to be in Charles' custody.[42] Wanda argued on appeal that the trial court did not properly consider the impact of Charles' physical abuse of her in making its custody decision.[43]

The *Schestler* majority, speaking through Justice J. Phillip Johnson, affirmed the trial court.[44] The majority recognized that, under North Dakota law, when "credible evidence of domestic violence" exists, it creates "a rebuttable presumption against awarding custody . . . to the abusive party."[45] The majority, however, did not interpret the domestic violence statutes and supporting legislation to give "a priority for this factor over other statutory factors the court is required to consider in deciding the delicate issue of child custody."[46] At that time, the law of North Dakota required the court to consider listed factors and "[a]ny other factors considered by the court to be relevant to a particular child custody dispute."[47] Based on its interpretation of the law and an examination of the circumstances of this case, the majority concluded:

> Having carefully reviewed both the evidentiary record in this case and the trial court's findings, we are satisfied that the trial court gave consideration to the domestic violence factor and applied the statutory provisions on domestic violence. We are not convinced that the trial court made a mistake in finding that the statutory presumption against placing custody with Charles was

38. *Orr*, 375 N.W.2d at 178 n.6.
39. 486 N.W.2d 509 (N.D. 1992).
40. Schestler v. Schestler, 486 N.W.2d 509, 514-15 (N.D. 1992) (Levine, J., dissenting).
41. *Id.* at 510.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 511.
46. *Id.*
47. *See* N.D. CENT. CODE § 14-09-06.2(1) (1995).

> rebutted by other credible evidence. Consequently, we will not set aside that finding.[48]

Justice Levine dissented from the majority decision, arguing that the majority's interpretation of the effect of the statutory domestic violence presumption "undermine[d] the purpose of the [law] and weaken[ed] the legislative resolve."[49] She asserted that the legislature amended North Dakota child custody law to include the domestic violence presumption because of the "failure of judges to treat seriously allegations of domestic violence" and "to acknowledge that the perpetrator of family violence is ordinarily not a proper person to have custody of children."[50]

Justice Levine granted that the trial court, after finding the existence of domestic violence, recognized that a presumption arose against awarding custody to the perpetrator.[51] She argued that the trial court erred, however, in finding the presumption to be rebutted because none of the violence was directed at the children.[52] Through this action, Justice Levine claimed, the trial court "denuded the statute of its good intent."[53] She asked:

> What good is a statutory presumption that is based on the legislature's recognition of the devastating effect on the entire family of domestic violence perpetrated against any family member, if that presumption may be overcome by a finding that the family violence does not include beating the children? That really is a ludicrous reading of a well-intentioned statute and it gives us a ludicrous, and pathetic, result insofar as it condones domestic violence that is not directly aimed at the children. It turns the statute on its head while thumbing our nose at the legislature.[54]

Justice Levine urged that legislative history indicated that the domestic abuse presumption was designed to put the burden of proof on the abuser to show fitness to be a custodial parent.[55] She argued that the trial court, "ignoring any propensity of the perpetrator toward violence, took the burden of proof that the legislature had removed from the shoulders of the victim of abuse and dropped it squarely back on."[56]

48. *Schestler*, 486 N.W.2d at 512.
49. *Id.* at 513 (Levine, J., dissenting).
50. *Id.*
51. *Id.* at 514.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*

By finding the domestic violence presumption to be overcome by evidence that the perpetrator did not direct violence toward the children, Justice Levine claimed, "the trial court misconstrued, misinterpreted and misapplied the statute."[57]

In addition, Justice Levine argued the majority compounded the trial court's error by holding "that domestic violence is but one factor to be considered along with other statutory factors."[58] She indicated that this was the state of the law "[p]rior to the addition of the statutory presumption."[59] Because the legislature does not perform idle acts, she argued "the new statutory presumption must be interpreted as giving domestic violence more weight in custody disputes than the other statutory factors."[60] By failing to give the presumption its proper weight, Justice Levine claimed, the majority "repealed the enactment of the statutory presumption."[61]

Justice Levine did not speculate as to what the result in this case would have been had the trial court given the domestic violence presumption the effect she interpreted the law to require.[62] She simply asked that the case be reversed and remanded so that the trial court could "do it over and do it right."[63] In concluding, Justice Levine said that "[d]omestic violence is not just one factor among many to be considered. It is the only factor blessed by a presumption."[64]

In *Heck v. Reed*,[65] the North Dakota Supreme Court had the opportunity to interpret a newly amended version of North Dakota's child custody statute in an opinion written by Justice Levine.[66]

Heck stemmed from a custody dispute between Christie Reed and Shane Heck.[67] Heck and Reed lived together, "on and off," for about two years and had two children.[68] After the pair separated for the last time, Heck sought sole custody of the children.[69] At the custody hearing, Reed introduced evidence, which the trial court found credible, that Heck had "physically and verbally" abused her.[70] The trial court,

57. *Id.*
58. *Id.* at 515.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*; *see also id.* at 512 (applying equally the statutory best interests factors). It should be noted that, in *Swanston v. Swanston*, 502 N.W.2d 506 (N.D. 1993), Justice Levine wrote for the majority and applied the rule enunciated by the *Schestler* majority in affirming a trial court's custody decision.
65. 529 N.W.2d 155 (N.D. 1995).
66. Heck v. Reed, 529 N.W.2d 155, 158 (N.D. 1995).
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*

however, granted custody to Heck, finding that "the interaction of Shane's parents' with the children, Shane's 'desire to provide for the children's needs,' Shane's 'more settled' living arrangement and 'Christie's smoking habits' to rebut the presumption against awarding custody to Shane, a parent who had perpetrated domestic violence."[71]

In analyzing whether the trial court erred in granting custody to Heck, Justice Levine first looked at the history and interpretation of North Dakota's statutory presumption against awarding child custody to a perpetrator of domestic violence.[72] She concluded that the *Schestler* court, which had interpreted the statute, held that evidence of domestic violence "was no more important than the other factors the court must consider when making its custody decision."[73] In the wake of *Schestler*, Justice Levine observed, the legislature "significantly changed" the language of the statutory domestic violence presumption, presumably with an intent to change its meaning and in response to the court's construction of the prior statute in *Schestler*.[74] Under the amended statute, Justice Levine asserted, "the presumption against awarding custody to a parent who has perpetrated domestic violence may only be rebutted by clear and convincing evidence."[75]

Justice Levine said that, through this change, "the legislature imposed a higher burden on the perpetrating parent than that required under our previous law."[76] She next analyzed the requirements for overcoming this burden and rebutting the presumption.[77] Justice Levine observed that the legislature put the burden of proof on the perpetrator of domestic violence to show that "the best interests of the children *require* that the perpetrator be a custodial parent."[78] She indicated that this is a high standard, meaning that the best interests of the child must compel or demand placement of the child with the domestic violence perpetrator before that person can be given custody.[79]

Justice Levine suggested that, to show the best interests of the child require custody in the perpetrator of domestic violence, that person must meet the same "heightened standard of necessity" a parent seeking custody modification or a non-parent seeking custody must meet.[80] In

71. *Id.*
72. *Id.* at 159-61.
73. *Id.* at 161.
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 162.
78. *Id.*
79. *Id.*
80. *Id.*

other words, the abusive party must show "compelling or exceptional circumstances" to overcome the presumption.[81]

In light of this conclusion, Justice Levine wrote that it would be contrary to the intent of the legislature for a trial court, when the statutory presumption against awarding custody to a perpetrator of domestic violence is present, to find the presumption overcome "by weighing in the perpetrator's favor some of . . . [the] customary best-interest factors."[82]

Heck argued that the trial court found the presumption to be overcome based on its findings that he had never directed violence to the children and that Reed's smoking posed a threat to their asthmatic child.[83] Justice Levine and the court disagreed that this was enough to overcome the presumption.[84]

Justice Levine explained that the domestic violence statute precludes an award of custody to a perpetrator of domestic violence regardless of whether or not the perpetrator directed violence toward a child.[85] She indicated that if the legislature had desired to forbid awards of custody only to those who are violent toward children, it would have used a more restrictive term than "domestic violence," such as "child abuse."[86] Instead, the legislature used the term "domestic violence" and defined that term as "harm to family and household members."[87]

Justice Levine suggested that the court believed that the legislature's use and definition of the term "domestic violence" in the statute reflected a "legislative finding that domestic violence has an adverse effect on children which may be presumed whenever violence is present in the household."[88] In support of this conclusion, she reviewed some of the "growing body of research" extant at the time of the legislature's amendment of the statute, research indicating that "children are victimized by the climate of violence created by domestic violence between their parents, even if they are not direct targets of abuse."[89] She concluded that, in light of this research, it would be an absurd and unjust result to interpret the domestic violence statute to permit the presumption against awarding custody to a perpetrator of domestic violence "to be rebutted because the domestic violence was perpetrated on another household member, and not the particular child."[90]

81. *Id.*
82. *Id.* at 163.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 164.

Justice Levine also found the trial court's conclusion that there was "'little likelihood of continued violence toward anyone'" to be mysterious considering research indicating that domestic violence is a "learned pattern of behavior."[91] She wrote that, in the absence of any evidence in the record that Heck had sought treatment or had been rehabilitated since he last perpetrated violence on Reed, it was clear error for the trial court to have concluded that Heck "will no longer use domestic violence as a means of controlling his intimate partners."[92]

Finally, Justice Levine considered Heck's contention that Reed's smoking was a harm to the children capable of rebutting the domestic violence presumption.[93] She agreed that smoking was an appropriate factor to consider in custody deliberations, and that second-hand smoke can be harmful, especially to an asthmatic child, but she explained that the court did not agree that the fact that "victim-parent" smokes to be enough to trump the domestic violence presumption.[94] She suggested that a court order prohibiting the smoking parent from smoking in the presence of the children would be an appropriate step, rather than a change of custody.[95] She concluded, overall, that the trial court erred in finding that the presumption against awarding custody to a perpetrator of domestic violence was overcome in this case.[96]

Justice Levine's opinion was joined wholly only by Justice Meschke.[97] Chief Justice VandeWalle concurred in the result, interpreting the majority opinion to state that the statute "requires that the perpetrator of domestic violence not be awarded custody of a child unless the other parent is unfit."[98] Justice Dale Sandstrom, joined by Justice William Neumann,[99] agreed that the case should be returned to the trial court "for specific findings and reconsideration as may be appropriate," but did not agree with the majority's supplementation of the record or its "trivializing the harm of cigarette smoke to an asthmatic child."[100] Justice Sandstrom asserted that "a judge's order should not be necessary to create an obligation to stop smoking in the child's presence" if that smoking threatens the child's health.[101]

91. *Id.*
92. *Id.* at 165.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 166.
98. *Id.* (VandeWalle, C.J., concurring in the result).
99. *Id.* at 167 (Neumann, J., concurring).
100. *Id.* at 166 (Sandstrom, J., concurring in the result).
101. *Id.*

2. *Child Custody—Primary Caretaker: Gravning v. Gravning*

In *Gravning v. Gravning*,[102] Justice Levine wrote separately to urge the court to adopt the primary caretaker test in child custody cases.[103]

When Nancy and Greg Gravning divorced, the trial court gave each of them custody of one of their two children.[104] Both Nancy and Greg argued that the trial court erred; Nancy argued she should have custody of both children, and Greg argued that he should have custody.[105] Justice Meschke, writing for the majority in *Gravning*, indicated that "the trial court was concerned about a lack of cooperation in visitation, while both children were in Nancy's custody during the year of separation," and it observed that divided custody is a legitimate approach to address visitation problems.[106] The court, therefore, affirmed the trial court's decision, concluding "that divided custody was an appropriate 'Solomonic' approach to the circumstances that the trial court encountered in this case."[107]

The court had previously characterized the "split custody" of a single child for six months out of each year to each parent in *Lapp v. Lapp*[108] as "Solomonic."[109] In *Lapp*, the court said:

> While there are certain disadvantages to split or alternating custody awards, there are also important advantages and benefits to this Solomonic arrangement which are readily apparent. Children need interaction and interrelationship with their parents, siblings, and other persons who may significantly affect the child's best interests.[110]

Justice Levine, dissenting, agreed that the trial court did not have an easy task in determining custody, but argued that upholding the trial court's decision was incorrect in the absence of "adequate factual findings."[111] Justice Levine indicated that, when split custody is ordered, "the trial court's findings and conclusions should explicitly, and in a particularized fashion, explain and justify why splitting custody is in the children's best interests."[112] Applying this test, Justice Levine

102. 389 N.W.2d 621 (N.D. 1986).
103. Gravning v. Gravning, 389 N.W.2d 621, 625 (N.D. 1986) (Levine, J., dissenting).
104. *Id.* at 622.
105. *Id.*
106. *Id.* at 623.
107. *Id.*
108. 293 N.W.2d 121 (N.D. 1980).
109. Lapp v. Lapp, 293 N.W.2d 121, 130 (N.D. 1980).
110. *Id.*
111. *Gravning*, 389 N.W.2d at 624 (Levine, J., dissenting).
112. *Id.*

concluded the trial court's findings were "simply insufficient" to support its decision.[113]

Justice Levine argued that the court should not affirm the trial court's order, but instead should "adopt the rule that when equally fit parents seek custody of children too young to express a preference, and one parent has been the primary caretaker of the children, custody should be awarded to the primary caretaker."[114]

Justice Levine gave four reasons why adoption of the primary caretaker rule would be advantageous.[115] First, she claimed it would "generally be in the child's best interest to be with the primary caretaker because of the "vital bonding" between this parent and the child.[116] Second, she claimed "continuity of care with the primary caretaker" is a "predictor of a child's welfare about which there is agreement" and using it as a standard would "inject a measure of needed certainty into custody disputes."[117] Third, she suggested that the primary caretaker rule would "benefit the negotiation process between divorcing parents" by giving the primary caretaker more bargaining leverage.[118] Last, she argued that the rule was gender neutral, and could benefit either parent.[119] Justice Levine urged that, if the primary caretaker rule were in effect, the facts of the case would dictate that Nancy be awarded custody of both children.[120]

Finally, Justice Levine also indicated that she believed the majority to be condoning the trial court's decision to split custody to punish Nancy for her lack of cooperation in visitation.[121] She stated she disagreed with such an approach, and observed that "[t]he weight of authority is that a custody award should not be used to punish a parent for bad behavior."[122] She argued the proper means to deal with visitation problems was by contempt or modification proceedings.[123]

113. *Id.*
114. *Id.* at 624-25 (footnote omitted).
115. *Id.* at 625.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* (citation omitted).
123. *Id.* at 626.

3. *Spousal Support: Dick v. Dick, Beals v. Beals, and Wiege v. Wiege*

In *Dick v. Dick*,[124] Justice Levine addressed the issue of spousal support in a dissenting opinion.[125] *Dick* involved an appeal from a trial court's award of spousal support and its division of property in a divorce action.[126] The trial court awarded Maxine Dick $1,000 a month in spousal support, to continue for four months after the divorce, and a cash award of $85,165, which Justice Meschke, as author of the majority opinion asserted, made up nearly half of the marital estate.[127] The *Dick* majority affirmed the trial court's spousal support award, and its property division, concluding that neither was "clearly erroneous."[128] In reaching this conclusion, the court said:

> We apply a limited scope of review to many of the issues raised in appeals from divorce judgments. The determination of the value of marital property is treated as a finding of fact. A trial court's determinations on spousal support and property division are findings of fact, which will not be set aside on appeal unless clearly erroneous. Findings of fact are presumptively correct. The complaining party bears the burden of demonstrating that findings are erroneous, and a finding is clearly erroneous only when the reviewing court is left with a definite and firm conviction that a mistake has been made. Simply because we might have viewed the evidence differently does not entitle us to reverse the trial court. A choice between two permissible views of the weight of the evidence is not clearly erroneous.[129]

Justice Levine disagreed with the majority opinion, arguing the majority gave the spousal support issue "undeserved short shrift."[130] She observed that Maxine concentrated on a "homemaking career" during her seventeen-year marriage and was therefore "necessarily disadvantaged" by the divorce, both because it was no longer possible for her to continue as a homemaker and because she was not qualified to work in other than minimum wage jobs outside the home.[131] Justice Levine noted that Maxine's interest in seeking education so she could

124. 414 N.W.2d 288 (N.D. 1987).
125. Dick v. Dick, 414 N.W.2d 288, 293 (N.D. 1987).
126. *Id.* at 290.
127. *Id.*
128. *Id.* at 292.
129. *Id.* at 290 (citations omitted).
130. *Id.* at 292 (Levine, J., dissenting).
131. *Id.* at 293.

pursue a career was "appropriate and realistic" given that she otherwise would be forced to rely on a minimum wage job for support, and therefore characterized the trial court's conclusion that Maxine was not interested in educating herself as cavalier.[132] Justice Levine concluded that "[i]t is a mistake to deprive [Maxine] of a crack at improving her life" and urged reversal and remand so the trial court could award "a reasonable amount of spousal support for a reasonable duration."[133]

Justice Levine revisited the topic of spousal support in 1994 in separate concurring opinions in *Beals v. Beals*,[134] and *Wiege v. Wiege*.[135]

Beals was the appeal of a divorce action, in which a trial court divided property and awarded child support and spousal support.[136] Ken Beals argued the trial court's award of $800 per month in spousal support to his former spouse Cindy, to be paid for six years following the divorce, exceeded both his ability to pay and Cindy's needs.[137] The *Beals* majority, in an opinion written by Chief Justice VandeWalle, affirmed the trial court's spousal support award, observing that the North Dakota Supreme Court looked "favorably upon awards of 'rehabilitative' spousal support" as awarded by the trial court.[138] The majority defined rehabilitative spousal support as "limited in duration and . . . designed to afford disadvantaged spouses the opportunity to gain the education, training, and experience necessary to become self-sufficient."[139]

Justice Levine specially concurred suggesting that "in a marriage of long duration like the one at bar, rehabilitative support for a term of years may not accomplish the rehabilitation intended."[140] Rehabilitative support is not a cure-all, Justice Levine asserted, because "the economic consequences of divorce for women are devastating."[141] Justice Levine pointed out that a woman's net worth declines after divorce, sometimes into the negative range, while a man's typically improves.[142] Newly divorced women, especially those who have worked as homemakers for long periods of time, may not be in a position to seek degrees or specialized training, Justice Levine explained.[143] Moreover, even with training, these women may not be able to gain employment or a significant

132. *Id.*
133. *Id.*
134. 517 N.W.2d 413, 418 (N.D. 1994).
135. 518 N.W.2d 708, 712-14 (N.D. 1994).
136. Beals v. Beals, 517 N.W.2d 413, 415 (N.D. 1994).
137. *Id.*
138. *Id.* at 416.
139. *Id.* (citations omitted).
140. *Id.* at 418 (Levine, J., specially concurring).
141. *Id.*
142. *Id.*
143. *Id.*

income due to their long absence from the job market.[144] Therefore, Justice Levine concluded, Cindy and others in her position should be entitled to permanent support if rehabilitative support does not allow them to "overcome [their] lack of training, foregone education and absence from the job market."[145]

In her separate opinion in *Wiege*, Justice Levine presented a direct challenge to the North Dakota Supreme Court's "oft-stated 'preference' for temporary rehabilitative support" and its precedent requiring "automatic termination of support upon the recipient's remarriage."[146] In *Wiege*, the trial court divided the marital estate equally, with Larry Wiege keeping the farm and Dianne Wiege receiving $33,000 over ten years at seven percent interest, with interest offset by spousal support paid.[147] The trial court also awarded Dianne Wiege $1,000 monthly spousal support to continue for six years, or until Dianne received a college degree, whichever came first, and then $300 a month spousal support for life.[148] Larry Wiege, Dianne's former spouse, argued that the trial court erred in awarding spousal support.[149] Both parties characterized the trial court as having awarded Dianne $700 a month in rehabilitative support for up to six years, and $300 a month permanent support.[150]

The *Wiege* majority, speaking through Justice Meschke, in analyzing whether the trial court's support award was proper, said:

> A spouse must be disadvantaged as a result of the divorce for rehabilitation or maintenance to be appropriate. We prefer temporary rehabilitative support to remedy this disadvantage, and indefinite permanent support is appropriate only if a spouse "cannot be adequately restored to independent economic status." Therefore, a trial court should consider rehabilitative support first because it may eliminate the need for permanent support.[151]

It may have been this statement in the majority opinion which precipitated Justice Levine's special concurrence, but a dispassionate analysis supports the view that the award was based more upon fundamental principles than it was upon the preference for temporary rehabilitative support. The *Wiege* majority referred specifically to the *Ruff-Fisher*

144. *Id.*
145. *Id.*
146. Wiege v. Wiege, 518 N.W.2d 708, 712 (1994) (Levine, J., concurring).
147. *Id.* at 710.
148. *Id.*
149. *Id.*
150. *Id.* at 711.
151. *Id.* (citations omitted).

guidelines when it made its support award.[152] These guidelines are outlined in *Weir v. Weir*.[153] In *Wiege*, the guideline allowing consideration of "such other factors as may be material" may have been especially significant.[154]

The *Wiege* majority ultimately affirmed the spousal support award, concluding the trial court did not clearly err in finding Dianne disadvantaged by the divorce and in need of rehabilitative support and finding Dianne likely not to be capable of complete rehabilitation and in need of permanent support.[155] The *Weige* majority also deflected Larry's argument that the trial court erred by failing to order termination of support on Dianne's remarriage, indicating that Larry could seek modification of the support order if Dianne ever remarried.[156] The majority, however, indicated that the trial court's failure to specify that Dianne's support would end if she ever remarried was error, because "[u]nless there are extraordinary circumstances, spousal support will terminate when the disadvantaged spouse remarries."[157]

In her concurrence, Justice Levine first addressed the matter of the court's "preference" for rehabilitative rather than permanent spousal support.[158] She asserted that rehabilitative support has "varied" purposes: it can be used to restore a disadvantaged spouse to "independent economic status" and also to "equalize the burden" of a divorce.[159] She also observed, however, that rehabilitative support is not always effective in achieving these ends, and that, in some instances, only permanent support can remedy the "permanent disparity in earning capacity" that divorce often places on a divorcing woman.[160]

Justice Levine explained that, in marriage, one partner often forgoes "career opportunities and advancement" so that the other can seek greater earning capacity—a mutually beneficial decision.[161] She observed:

> Permanent support is the price to be paid for the earlier mutual decision about the role to be played by each marital partner when, in fact, the economically disadvantaged partner cannot obtain, after training and reasonable time, the income necessary to live a life comparable to the one prior to divorce or

152. *Id.*
153. 374 N.W.2d 858 (N.D. 1985).
154. *See Wiege*, 518 N.W.2d at 711.
155. *Id.*
156. *Id.* at 712.
157. *Id.* at 711.
158. *Id.* at 712 (Levine, J., concurring).
159. *Id.*
160. *Id.* at 713.
161. *Id.*

comparable to the higher earner's post-divorce reduced standard of living.[162]

Permanent support, Justice Levine concluded, "is another part of the arsenal available to restore economic equity to a partner of a failed marital enterprise" and should not be "overlooked" due to a "preference" for rehabilitative support.[163]

Furthermore, Justice Levine wrote, if spousal support "is viewed properly as compensation for lost career opportunities and advancement, then a recipient's remarriage should not automatically terminate that support . . . the debtor's obligation to repay those debts should continue whether or not the creditor forms a new enterprise."[164] Justice Levine conjectured that the trial court may have decided to omit a support termination provision from the support order because it determined that Larry owed Dianne a debt, compensation for her "economic disability," regardless of whether or not she remarried.[165] Justice Levine suggested that such an approach made sense under the modern view of marriage as a partnership, rather than the former view of marriage as an institution in which the husband assumed permanent support for his wife until another husband came along to support her.[166] Post divorce support, concluded Justice Levine, is "a cost of the failed marriage," and should continue until "economic parity is obtained" between the two former partners or "if such parity is unattainable, for the duration established in the judgment."[167]

C. CONSTITUTIONAL LAW

1. First Amendment: City of Bismarck v. Schoppert

A city disorderly conduct ordinance collided with the First Amendment in *City of Bismarck v. Schoppert*.[168] The court, in an opinion written by Justice Levine, reversed Thomas Schoppert's disorderly conduct conviction, concluding the jury instructions given were flawed and the evidence presented did not support the verdict.[169]

162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 714.
167. *Id.* This position is in contradistinction with the views expressed in prior decisions by the court that, except under extraordinary circumstances, a party's obligation to support a marital partner ends when the other partner to the marriage marries another. *See* Nastrom v. Nastrom, 262 N.W.2d 487, 490 (N.D. 1978); Nugent v. Nugent, 152 N.W.2d 323, 327 (N.D. 1967).
168. 469 N.W.2d 808 (N.D. 1991).
169. City of Bismarck v. Schoppert, 469 N.W.2d 808, 813 (N.D. 1991).

The case arose from an incident in which Schoppert directed foul language and vulgar gestures toward several Bismarck police officers during an early-morning confrontation.[170] The police arrested Schoppert for disorderly conduct, and he was ultimately convicted by a jury for the offense.[171]

Schoppert appealed, arguing that Bismarck's disorderly conduct ordinance, as applied to him, violated the First Amendment.[172] In particular, Schoppert challenged the jury instructions given by the court, which stated (in part) that:

> A person who, with intent to harass, annoy, or alarm another person knowingly or in reckless disregard of the fact that another person is harassed, annoyed or alarmed by his behavior, in a public place uses abusive or obscene language, or makes an obscene gesture, which language or gesture by its very utterance or gesture inflicts injury or tends to incite an immediate breach of the peace, is guilty of disorderly conduct.[173]

Schoppert argued that including the phrase "inflicts injury" in the instruction, in his case, "allowed the jury to convict him for conduct that is constitutionally protected."[174] Justice Levine, writing for the court, agreed.[175]

In her analysis of the instructions, Justice Levine reviewed a series of the United States Supreme Court's First Amendment cases.[176] She observed that the "inflicts injury" language contained in the challenged jury instructions and in the Bismarck disorderly conduct ordinance was derived from *Chaplinsky v. New Hampshire*,[177] in which the Court said the First Amendment "does not prevent a state from punishing the speaking of 'insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.'"[178]

Justice Levine indicated that the Court did not define the term "inflict injury" in *Chaplinsky*, and that the Court later "edited" the phrase out of the *Chaplinsky* test.[179] Justice Levine observed that the Court made clear, in the process of refining the *Chaplinsky* test, that "the

170. *Id.* at 809.
171. *Id.* at 809-10.
172. *Id.* at 810.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 810-13.
177. 315 U.S. 568 (1942).
178. *Schoppert*, 469 N.W.2d at 810-11 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).
179. *Id.* at 811.

fact that words are vulgar or offensive is not sufficient to remove them from the protection of the first amendment and into the arena in which the state can make conduct criminal."[180] She concluded that "[i]t is thus not a crime in this country to be a boor, absent resort to fighting words," which are "'personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.'"[181]

Justice Levine next discussed the existence of a "police officers' exception" to the "fighting words doctrine."[182] Schoppert claimed that the North Dakota Supreme Court had adopted such an exception in *City of Bismarck v. Nassif*.[183] Under the "police officers' exception," police officers would be required to "exercise a higher degree of restraint" to fighting words than the average person.[184] Responding to Schoppert's argument, Justice Levine rejected the suggestion that the *Nassif* court adopted the exception, but she said "that whether particular words are 'fighting words' depends on the circumstances of their utterance and the fact that the words are spoken to police is a significant circumstance."[185]

Based on her analysis of First Amendment law, Justice Levine examined the challenged jury instructions.[186] She indicated that "the instructions given by the trial court allowed the jury to convict if it found Schoppert used abusive language that either (1) tended to incite an immediate breach of the peace or (2) inflicted injury by its very utterance."[187] She concluded that only the first option met constitutional requirements.[188] Because a conviction based on unconstitutional grounds cannot stand, Justice Levine, shifted her focus to whether the evidence supported Schoppert's conviction on constitutional grounds—for using language tending "to incite an immediate breach of the peace."[189]

Justice Levine reported that the police witnesses had testified that Schoppert's conduct "angered," "alarmed," and "agitated" them, but they also testified "that Schoppert's vulgar speech would not incite them to violence."[190] Viewing the evidence in the light most favorable to the verdict, Justice Levine concluded the evidence was not sufficient to

180. *Id.*
181. *Id.* at 811-12 (quoting Cohen v. California, 403 U.S. 15, 20 (1971)).
182. *Id.* at 812.
183. *Id.* at 811 (citing City of Bismarck v. Nassif, 449 N.W.2d 789 (N.D. 1989)).
184. *Id.* at 812 (quoting Lewis v. New Orleans, 415 U.S. 130, 135 (1974) (Powell, J., concurring)).
185. *Id.* (agreeing with Justice Powell's "fighting words" doctrine set out in *Lewis*, 415 U.S. at 135-36).
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 813.

support Schoppert's conviction.[191] The court ordered the vacation of Schoppert's conviction and entry of judgment of acquittal.[192]

While Justice Levine's opinion in *Schoppert* was the opinion of the court, she was joined fully only by Justice Meschke.[193] Then-Chief Justice Erickstad concurred in the result "reluctantly," and wrote separately to express his displeasure at the behavior displayed by Schoppert, a lawyer.[194] He warned that "being uncouth, foul-mouthed, and vulgar is not something we should encourage on the part of members of the bar."[195] Then-Justice VandeWalle, joined by Justice Gierke, also concurred in the result, agreeing that the First Amendment protects even "offensive deportment by those whom we expect to exhibit better judgment."[196] He emphasized, however, that he did not concede that "the fact the person at whom epithets are directed is a police officer" should be "the only factor or the controlling factor" in determining whether words are fighting words.[197]

2. *Equal Protection—Juries: City of Mandan v. Fern*

In *City of Mandan v. Fern*,[198] Justice Levine, writing for the North Dakota Supreme Court, confronted the question of whether or not the Constitution bars gender-based peremptory challenges.[199] Scott Fern was convicted of driving under the influence by a jury of four women and two men.[200] The prosecutor had used three peremptory challenges to strike three men from the jury.[201] Fern argued that the prosecutor's use of gender-based peremptory challenges violated his right to equal protection under *Batson v. Kentucky*[202] and the Fourteenth Amendment to the Federal Constitution.[203]

In *Batson*, the United States Supreme Court concluded that the use of race-based peremptory challenges violated equal protection because it "harms the excluded jurors, undermines public confidence in the judicial system and stimulates community prejudice."[204] The *Batson* decision overruled the Supreme Court's prior decision in *Swain v.*

191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* (Erickstad, C.J., concurring specially).
195. *Id.*
196. *Id.* (VandeWalle, J., concurring specially).
197. *Id.*
198. 501 N.W.2d 739 (N.D. 1993).
199. City of Mandan v. Fern, 501 N.W.2d 739, 742 (N.D. 1993).
200. *Id.* at 742.
201. *Id.*
202. 476 U.S. 79 (1986).
203. *Fern*, 501 N.W.2d at 742.
204. *Id.* at 743 (citing Batson v. Kentucky, 476 U.S. 79, 87 (1986)).

Alabama,[205] in which the Court held that race-based peremptory challenges violated the Equal Protection Clause and, at the same time, imposed an "unforgiving evidentiary burden" for proving such violations.[206] Under *Swain*, a defendant claiming "purposeful discrimination" was required to show a pattern of discriminatory peremptory challenges over time to make a prima facie case.[207] Under *Batson*, a defendant was allowed to make a showing of "purposeful discrimination during jury selection based solely on the facts of that particular defendant's case."[208]

At the time of the *Fern* decision, the United States Supreme Court had not decided whether or not gender-based peremptory challenges violated equal protection.[209] Therefore, Justice Levine relied on a series of cases from federal circuit courts of appeal and state appellate courts in deciding if the Constitution barred gender-based peremptory challenges.[210] In particular, Justice Levine found the reasoning of the Ninth Circuit Court of Appeals in *United States v. DeGross*[211] to be "enlightened and enlightening."[212]

The court in *DeGross* concluded that gender-based peremptory challenges were harmful for many of the same reasons race-based peremptory challenges were harmful: both types stimulate community prejudice and "bear no relationship to an individual's qualifications or ability to perform."[213] Moreover, both types of discriminatory challenges "are based either on the false assumption that members of a certain group are either unqualified to serve as jurors, or unable to consider impartially the case against a member . . . of their group."[214]

Justice Levine pointed out that courts review claims of "alleged sex discrimination" under an intermediate standard of review.[215] Under this standard, the key question in *Fern*, was "whether a peremptory challenge which is grounded on a venireperson's sex is substantially related to achieving a fair and impartial jury."[216] Justice Levine stated that the court in *DeGross* decided gender-base peremptory challenges to be unconstitutional because "gender-based challenges do not aid in achieving [a] fair and impartial jur[y]."[217]

205. 380 U.S. 202 (1965).
206. *Fern*, 501 N.W.2d at 743.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.* at 744-46.
211. 960 F.2d 1433 (9th Cir. 1991).
212. *Fern*, 501 N.W.2d at 744.
213. *Id.* (citing United States v. DeGross, 960 F.2d 1433, 1438-39 (9th Cir. 1991)).
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* at 745.

Justice Levine compared the efforts of the courts in eliminating racial, as compared to gender, discrimination in the courtroom.[218] She observed that more than a century of jurisprudence had been devoted to eliminating "'race prejudice within the jury selection process.'"[219] On the other hand, Justice Levine asserted, "[g]ender bias in the courtroom has only lately been acknowledged and addressed."[220] She also significantly pointed out that "[i]t was not until 1971 that gender discrimination was first held to violate the equal protection clause of the fourteenth amendment."[221] Justice Levine commented that as a result of years of gender bias in the courts, gender stereotypes lived on in jury selection.[222] Therefore, she concluded, "there is both need and justification . . . to extend *Batson* principles to gender discrimination."[223]

Justice Levine explained that, in deciding that gender-based peremptory challenges were violative of equal protection, the court rejected the view expressed in *United States v. Broussard*,[224] which had upheld such challenges as constitutional.[225] The court in *Fern* agreed with the court in *Broussard* which concluded that race-based classifications were essentially different from gender-based classifications, in part because "'women are not numerical minorities.'"[226] Justice Levine characterized this as a "fling-the-gauntlet rationale" that "overlooks entirely the excluded venireperson's right to equal protection."[227]

In selecting a jury, Justice Levine wrote:

> Process, not product, is the key. When the process is riddled with unfair, unseemly and unacceptable gender discrimination, it is of small moment that the process did not entirely contaminate the product. What it does contaminate is public confidence in a judicial process that condones systematic, blatant gender discrimination in the selection of juries.[228]

If the court did not extend *Batson*, Justice Levine observed, it would be perpetuating institutionalized gender-bias.[229]

Justice Levine noted that the trial court had not decided "whether Fern established a prima facie case of gender discrimination."[230] She

218. *Id.*
219. *Id.* (quoting Edmonson v. Leesville Concrete Co., Inc., 111 S. Ct. 2077, 2081 (1991)).
220. *Id.*
221. *Id.* at 746.
222. *Id.*
223. *Id.*
224. 987 F.2d 215 (5th Cir. 1993).
225. *Fern*, 501 N.W.2d at 747.
226. *Id.* (quoting United States v. Broussard, 987 F.2d 215, 220 (5th Cir. 1993)).
227. *Id.* at 747-48.
228. *Id.* at 748.
229. *Id.*
230. *Id.*

observed that this determination, along with the decision as to whether the prosecution could offer a gender-neutral explanation for its challenges, was one for the trial court.[231] She therefore provided guidance, based on *Batson*, on how the trial court should evaluate gender-bias claims and responses and the case was remanded for "proceedings consistent" with the opinion.[232]

Justice Levine was joined wholly in the *Fern* opinion only by Justice Meschke.[233] Chief Justice VandeWalle concurred specially, joined by Justices Sandstrom and Neumann.[234] Chief Justice VandeWalle agreed that the court "should not condone gender discrimination in jury selection or elsewhere."[235] He questioned, however, whether trial courts should apply the procedure outlined in *Batson* to determine if a defendant had raised a prima-facie case of gender discrimination in jury selection.[236] He indicated that, under the *Batson* procedure, every peremptory strike could be questioned because "[e]very peremptory strike will necessarily involve a woman or a man."[237]

Instead, Chief Justice VandeWalle suggested that the *Swain* procedure might better suit cases of alleged gender discrimination in jury selection.[238] Under this procedure, a defendant could make a prima-facie showing of gender discrimination by showing "that the prosecution in case after case" removed persons of a given gender from juries in given situations.[239] Chief Justice VandeWalle asserted that "[t]here may be other procedures which would accomplish the purpose of protecting against gender discrimination in the selection of a jury panel" and indicated a willingness to consider such alternatives.[240] Ultimately, he agreed that a remand was required in Fern's case.[241]

The United States Supreme Court, a year after the *Fern* decision, held in *J.E.B. v. Alabama ex rel. T.B.*[242] that gender-based peremptory challenges violate equal protection.[243] It appears that the highest court in the land applied a rationale similar to that used by Justice Levine.[244] The Supreme Court in *J.E.B.*, like Justice Levine in *Fern*, concluded that

231. *Id.*
232. *Id.* at 748-50.
233. *Id.* at 750.
234. *Id.*
235. *Id.* (VandeWalle, C.J., concurring specially).
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. 114 S. Ct. 1419 (1994).
243. J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1430 (1994).
244. *See id.* (stating that if persons are excluded from the jury process based solely on gender then the integrity of the judicial system would be compromised).

the *Batson* standard should be applied to determine whether or not a given peremptory challenge is discriminatory.[245]

D. TORT LAW

1. Fraud: Holcomb v. Zinke

In *Holcomb v. Zinke*,[246] the North Dakota Supreme Court concluded that the age-old doctrine of *caveat emptor* does not necessarily continue to govern transactions between strangers.[247] The Zinkes sought to sell a home they owned in rural Jamestown and listed the home with a local real estate agency.[248] Real estate agents showed the home to the Holcombs, who decided to buy it.[249] After moving into the home, however, the Holcombs discovered the home had numerous problems, none of which had been disclosed to them prior to the purchase and which apparently were not evident upon casual perusal.[250] For example, the sellers' agents represented that "the house was almost new, in excellent shape, and that everything was in good condition as far as they knew."[251] Notwithstanding that representation, soon after the Holcombs moved in "they discovered that the tap water emitted an offensive odor, and that the dishwasher, garbage disposal, TV antenna, water softener, and kitchen heating system were defective. On December 1, 1981, and on several occasions thereafter, the sewage system backed up, flooding the basement."[252]

The Holcombs had "viewed the premises for about one hour but did not inspect the appliances, the sewage system, or the water system" prior to moving in.[253] They attempted to fix the problems, but ultimate-

245. *Id.* at 1429-30. Justice O'Connor, in a special concurrence to *J.E.B.*, gave what appears to be a caveat to the majority decision. She wrote that "today's important blow against gender discrimination is not costless." *Id.* at 1431. She further asserted that "today's holding should be limited to the *government's* use of gender-based peremptory strikes." *Id.* Justice O'Connor indicated that she took this position because "today's decision further erodes the role of the peremptory challenge." *Id.* It is also significant that Chief Justice Rehnquist authored a dissenting opinion in *J.E.B.* and with Justice Thomas joined in Justice Scalia's dissent, in which Justice Scalia asserted that: "[M]uch damage has been done. It has been done, first and foremost, to the peremptory challenge system, which loses it whole character when (in order to defend against 'impermissible stereotyping' claims) 'reasons' for strikes must be given." *Id.* at 1438 (Scalia, J., dissenting). Justice Scalia, further, could not discern how the complaining party had suffered injury when, "for every man struck by the government petitioner's own lawyer struck a woman." *Id.* at 1437. Justice Scalia, however, did not deny that the jurors' rights and duties to serve were affected by the gender-based strikes.

246. 365 N.W.2d 507 (N.D. 1985).

247. Holcomb v. Zinke, 365 N.W.2d 507, 511 (N.D. 1985).

248. *Id.* at 509.

249. *Id.*

250. *Id.* at 510.

251. *Id.* at 509.

252. *Id.* at 510.

253. *Id.* at 509. This case may be distinguishable from *Sperle v. Weigel*, 130 N.W.2d 315, 320 (N.D. 1964), in which a buyer brought suit against a seller of an apartment building that turned out to

ly sought rescission of the purchase.[254] The Zinkes refused to rescind, and the case went to court.[255] The trial court, among other things, found the Zinkes suppressed material facts about the home and ultimately granted rescission.[256]

Justice Levine, writing for the court, first considered whether the trial court erred in granting rescission.[257] She indicated that the law required proof that: "(1) the Holcombs' consent to enter into the contract was obtained through fraud; (2) the Holcombs exercised reasonable diligence in rescinding promptly upon discovery of the fraud; and (3) the Holcombs restored the status quo."[258]

Justice Levine observed that the trial court found the Zinkes to have suppressed material facts and their agents to have made affirmative misrepresentations, but that the trial court did not specify whether this amounted to actual or constructive fraud.[259] She wrote, however, that the trial court had relied on a case involving constructive fraud in reaching its conclusions and that the facts of the case suggested the presence of constructive fraud.[260] She explained that "[c]onstructive fraud is based on a relationship between the parties which gives rise to a duty of disclosure."[261] Justice Levine indicated that, historically, such a duty would not arise among buyers and sellers of real estate because the rule of caveat emptor protected the sellers.[262] She observed, however, that "[w]hile such a rule may have had some merit in the agrarian society in which it was applied, the same cannot be said for its continued application to the complexities of our society."[263]

Therefore, after some discussion of the history of the rule, Justice Levine concluded:

> that in cases of passive concealment by the seller of defective real property, there is an exception to the rule of caveat emptor, applicable to this case, which imposes a duty on the seller to disclose material facts which are known or should be known to the seller and which would not be discoverable by the buyer's exercise of ordinary care and diligence.[264]

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have numerous obvious or patent problems. The court in *Sperle* decided that the sellers' did not misrepresent the condition of the building prior to the sale notwithstanding that they told the buyer among other things that it was a "real good" building. *Id.* at 317.

254. *Holcomb*, 365 N.W.2d at 510.
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.* at 511 (citing N.D. CENT. CODE § § 9-09-08, 9-03-09).
260. *Id.* (citing Asleson v. West Branch Land Co., 311 N.W.2d 533 (N.D. 1981)).
261. *Id.* (quoting *Asleson*, 311 N.W.2d at 535).
262. *Id.*
263. *Id.*
264. *Id.* at 512 (citing Lingschu v. Savage, 29 Cal. Rptr. 201 (1963); Wilhite v. Mays, 232 S.E.2d

Turning to the facts of the case, Justice Levine found that the record provided ample support for the trial court's finding that the Zinkes knew about problems with their home and failed to disclose these problems to the Holcombs.[265] She further found that the record showed the problems involved in this case to be both material and not reasonably discoverable, and concluded that the Zinkes therefore breached their duty to the Holcombs by not disclosing material facts.[266] Overall, Justice Levine concluded that the trial court's finding of constructive fraud was supported by the record.[267] Based primarily on this factor, Justice Levine, writing for a unanimous court, concluded that the trial court's decision granting rescission should be affirmed.[268]

2. *Products Liability: Butz v. Werner*

In *Butz v. Werner*,[269] Justice Levine wrote a dissenting opinion which called for a products liability case relied on by the majority to be overruled.

Charles Butz, Jr., was injured while riding behind a boat on an inner-tube like device called the "Super Tube."[270] Butz brought a negligence and strict products liability action against several parties involved in the sale and distribution of the Super Tube.[271] A jury allocated fault separately on Butz's negligence and strict product liability claims, and found his damages totaled $550,479.79.[272] The trial court entered judgment for Butz on the strict products liability claim, and the seller and the distributor of the Super Tube appealed.[273]

The majority, in an opinion written by Justice Gierke, affirmed the trial court's judgment.[274] Throughout the opinion in *Butz*, Justice Gierke relied heavily on *Mauch v. Manufacturers Sales & Service, Inc.*,[275] an earlier strict products liability and negligence case written by then-Justice VandeWalle.[276] In *Mauch*, the court had held that:

> recovery sought under a negligent failure-to-warn theory and recovery sought under a products-liability theory of marketing a product which is defective and unreasonably dangerous

141 (Ga. Ct. App. 1976); Posner v. Davis, 395 N.E.2d 133 (Ill. App. Ct. 1979); Hauck v. Samus, 321 N.W.2d 68 (Neb. 1982); Smith v. National Resort Communities, Inc., 585 S.W.2d 655 (Tex. 1979)).

265. *Id.*
266. *Id.*
267. *Id.* at 513.
268. *Id.* at 514.
269. 438 N.W.2d 509 (N.D. 1989).
270. Butz v. Werner, 438 N.W.2d 509, 510 (N.D. 1989).
271. *Id.*
272. *Id.* at 510-11.
273. *Id.* at 511.
274. *Id.* at 510.
275. 345 N.W.2d 338 (N.D. 1984).
276. *See* Mauch v. Manufacturers Sales & Serv., Inc., 345 N.W.2d 338 (N.D. 1984).

> because it is not accompanied by adequate warnings are two separate and distinct theories of recovery. Thus the trial court must instruct on each where there is evidence to support both theories.[277]

In *Butz*, the defendants argued the trial court erred by not requiring the jury to allocate fault on the negligence and strict product liability claims "on a combined fault assessment form."[278] Instead, the trial court had allowed the jury to allocate fault for the two claims on two forms.[279] The majority found the trial court's actions to be proper, and concluded:

> We can discern no reason why a plaintiff who can prove two separate causes of action, and thus two separate wrongs by the defendant, should be required to risk diminution of his recovery because he prevails on both theories. If the plaintiff can prove two separate theories he is entitled to have the jury instructed on the separate theories, to have fault assessed separately on each theory, and to have judgment entered on the theory which provides the greater recovery.[280]

In a dissenting opinion joined by Justice Meschke, Justice Levine took issue with the majority's conclusion, and with the rationale undergirding it, as embodied in the *Mauch* opinion. Commenting on *Mauch*, Justice Levine observed:

> Unfortunately, this court . . . held that not only a strict liability instruction, but also, a negligence instruction must be given in failure-to-warn cases. That was unfortunate in my view and it is that aspect of *Mauch*—that both instructions should be given, that I think is untenable and should be overruled.[281]

Justice Levine granted that negligent failure to warn and strict liability failure to warn are different bases for recovery.[282] Yet, she argued "negligence and strict liability overlap on the issue of duty to warn."[283] She explained that this was the case because, while strict product liability cases generally must focus on the product itself, "the duty to warn case necessarily implicates a manufacturer's conduct over and above the dangerousness of the product because it is the manufacturer's conduct of failing to prepare an adequate warning, that renders

277. *Id.* at 345.
278. *Butz*, 438 N.W.2d at 515.
279. *Id.*
280. *Id.* at 516.
281. *Id.* at 521 (Levine, J., dissenting).
282. *Id.*
283. *Id.*

the product dangerous."[284] Therefore, she wrote, "some sort of 'reasonable person' standard inheres in the issue of a failure to warn."[285] Furthermore, "there lurks within strict liability the familiar negligence element of foreseeability that a product will be unreasonably dangerous in its foreseeable use by foreseeable users without a warning."[286]

Because of these factors, Justice Levine concluded, it is difficult, if not impossible, for juries to distinguish between strict liability and negligence issues in failure to warn cases.[287] She therefore argued that *Mauch* should be overruled, and that North Dakota "embrace the Minnesota Supreme Court's example of merging strict liability and negligence in cases of failure to warn."[288] Under such an approach, she contended, a trial court could consider the distinctions between strict liability and negligence issues in determining whether to send a case to the jury, and "to avoid the risk of perverse verdicts, the issue of failure to warn should be removed from any strict liability defective condition instruction and be submitted as a separate negligence issue."[289] In the alternative, Justice Levine suggested, a party could "elect to submit to the jury in a failure to warn case either a strict liability or negligence theory."[290] Adoption of such an approach, Justice Levine wrote, would eliminate the problems created by attempting to combine negligence and strict liability theories on one verdict form.[291] "I do see great value in presenting to the jury the issue of failure to warn in a manner that de-emphasizes doctrinal labels, obviates confusion and is comprehensible, consistent and conducive to rendering justice," she concluded.[292]

Then-Justice VandeWalle joined the majority opinion and wrote separately to respond to Justice Levine's dissent.[293] Justice VandeWalle argued that Justice Levine's conclusion "not only inhibits the growth of the law but it is elitist and denigrates the competence of the jurors."[294] "We should not promote a philosophy that only judges are capable of determining 'difficult' issues," Justice VandeWalle wrote.[295] Justice VandeWalle observed that products liability law was a fairly new development that had "exploded on the scene in the last two decades."[296] Given this, he asserted, it was not surprising products liability was not as

284. *Id.* at 522 (citing Bilotta v. Kelley Co., Inc., 346 N.W.2d 616 (Minn. 1984).
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.* at 523.
289. *Id.* (citing *Bilotta*, 346 N.W.2d at 626 n.1).
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.* at 518 (VandeWalle, J., concurring specially).
294. *Id.* at 519.
295. *Id.*
296. *Id.*

developed as negligence law.[297] He said that, in the failure to warn context, some courts refused to recognize the cause of action, others (like Minnesota and the dissent) took a middle ground, and some even refused to instruct on negligence when a strict liability theory was available.[298]

Justice VandeWalle, however, indicated that he agreed "with those jurisdictions which hold that there is no valid reason to require a plaintiff to elect whether to proceed on the theory of strict liability in tort or on the theory of negligence."[299] He observed:

> It is conceivable that the plaintiff may desire instructions on both theories in order to argue to the jury those unreasonable acts of the defendant which the plaintiff believes prove the negligence theory and further to argue that if the jury determines those acts not unreasonable, and thus not negligent, it should turn its focus from those acts to the product and the danger it poses to the public. The theories are alternative and permit the plaintiff to argue to the jury a second choice, not entirely unlike the opportunity provided by a lesser-included-offense instruction in a criminal case. I do not believe the plaintiff should be denied that right because of the possibility of jury confusion. The plaintiff has as much to risk as the defendant if the jury is confused. The plaintiff should retain the right to present all theories to the jury for which there is support in the evidence.[300]

Justice VandeWalle argued that other methods, such as the use of special verdict forms and the proper instruction of juries, existed to solve the potential problem of inconsistent verdicts in failure to warn cases.[301] Adopting the dissent's approach instead, he wrote, would disrupt the orderly development of the law.[302] Justice VandeWalle concluded that "[t]he law should be permitted to take its normal course and the plaintiff should be permitted to submit to the jury all accepted theories which a plaintiff entitled to a jury trial is entitled to plead and prove."[303]

The position of Justice VandeWalle and the majority in *Butz* seems to have prevailed in North Dakota. In *Crowston v. Goodyear Tire & Rubber Co.*,[304] a failure to warn case, the court, in an opinion written by

297. *Id.*
298. *Id.*
299. *Id.* at 520.
300. *Id.*
301. *Id.* at 520-21.
302. *Id.* at 521.
303. *Id.*
304. 521 N.W.2d 401 (N.D. 1994).

Chief Justice VandeWalle, reaffirmed the principle that "negligence and strict liability in tort are separate and distinct theories of products liability, each with a different focus."[305] Chief Justice VandeWalle wrote for a unanimous court in *Crowston*, Justice Levine being disqualified due to the participation of her former law firm in the action.

3. *Intentional Infliction of Emotional Distress: Swenson v. Northern Crop Insurance, Inc.*

Justice Levine concurred specially in *Swenson v. Northern Crop Insurance, Inc.*[306] saying she joined the majority opinion "while registering but one small difference."[307] A summary of these differences in her own words follows:

> I am not prepared to say in this case, that sex discrimination in obtaining employment or a promotion, without more, may not constitute sufficiently outrageous conduct to raise a jury question. With that difference noted, I concur in the rest of the opinion authored by former Chief Justice Erickstad.[308]

In this way, Justice Levine expressed deep feelings on a subject close to her heart: the impact of gender bias.

Catherine Swenson started work at Northern Crop Insurance, Inc., as a secretary and clerk.[309] When the office manager resigned, he recommended that Swenson take his place.[310] However, John Krabseth, one of Northern's officers, allegedly told Swenson "that he needed a 'man fresh out of college' to fill the position, not a woman."[311] Nonetheless, Northern's board gave Swenson the job.[312]

After Swenson received her promotion, Krabseth allegedly began harassing her, "making derogatory and sexist comments to Swenson concerning her gender."[313] He also allegedly threatened to replace her with a man "because he would not tolerate a woman in a management position making a high salary."[314]

Krabseth reorganized the office.[315] He eliminated Swenson's management position and slashed her pay.[316] He hired "two young

305. Crowston v. Goodyear Tire & Rubber Co., 521 N.W.2d 401, 406 (N.D. 1994).
306. 498 N.W.2d 174 (N.D. 1993).
307. Swenson v. Northern Crop Ins., Inc., 498 N.W.2d 174, 187 (N.D. 1993) (Levine, J., concurring specially).
308. *Id.*
309. *Id.* at 176.
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.*
314. *Id.*
315. *Id.*
316. *Id.*

men" to fill new jobs that paid more than Swenson's.[317] Swenson complained to the board, which allegedly refused to help her; she attempted to confront Krabseth, who allegedly purposefully avoided her.[318] As a result of these alleged events, Swenson claimed, her emotional condition deteriorated and she was required to renew treatment for alcoholism.[319]

Northern, and Krabseth, on the other hand, claimed:

> that Swenson was demoted not as a result of her gender, but because her position was phased out during the reorganization—she was no longer needed in that capacity because the position no longer existed. They also assert[ed] that Swenson was not qualified for the two new positions, and that the new positions were different from any of her former positions.[320]

Swenson ultimately quit her job and sued Northern and Krabseth, claiming gender discrimination, violation of North Dakota's equal pay provisions, and intentional infliction of emotional distress.[321] It is with the latter claim that we shall devote most of our attention in this review. The trial court granted summary judgment against Swenson, and she appealed.[322]

The *Swenson* majority, speaking through Surrogate Judge Erickstad, first dealt with the issue of gender discrimination under North Dakota's anti-discrimination statute.[323] The majority concluded that, under "clear and unambiguous" statutory terms, Swenson did not qualify for relief under the anti-discrimination statute because Northern did not fit the statute's definition of "employer."[324] The majority also concluded that Swenson had failed to properly raise the issue of whether or not the Act was constitutional.[325]

The majority in *Swenson* next dealt with Swenson's claim that Northern violated North Dakota's equal pay statute in its treatment of her.[326] The majority concluded Swenson raised disputed material facts in making this claim, and that the trial court erred in granting summary judgment to Northern and Krabseth on this issue.[327] The majority,

317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.* at 177.
321. *Id.*
322. *Id.*
323. *Id.*; *see also* N.D. CENT. CODE ch. 14-02.4 (1991 & Supp. 1995) (North Dakota's antidiscrimination statute).
324. *Swenson*, 498 N.W.2d at 177.
325. *Id.*
326. *Id.* at 178-79; *see also* N.D. CENT. CODE ch. 34-06.1 (1987 & Supp. 1995) (North Dakota's equal pay statute).
327. *Id.* at 179-80.

therefore, reversed and remanded "for a determination of Swenson's equal pay claim."[328]

The most significant part of the *Swenson* majority opinion deals with Swenson's intentional infliction of emotional distress claim, which is covered under Part III of the opinion.[329] The majority reviewed the explanation of intentional infliction of emotional distress given in section 46 of the *Restatement (Second) of Torts*, which indicated that the tort "is narrowly limited to outrageous conduct which exceeds 'all possible bounds of decency.'"[330] The majority also referred to *Muchow v. Lindblad*,[331] as "[t]he leading case" on intentional infliction of emotional distress in North Dakota.[332] Under *Muchow*, which was written by Justice Levine, and the Restatement, intentional infliction of emotional distress has three elements: "(1) extreme and outrageous conduct that is (2) intentional or reckless and that causes (3) severe emotional distress."[333]

Because the trial court had dismissed Swenson's claim on summary judgment, the majority did not examine whether or not Swenson's claim could have satisfied these elements. Instead, the majority explained that "the trial court has an important and primary role" when an intentional infliction of emotional distress claim is raised because it makes the preliminary determination whether or not a given case contains conduct extreme enough to be presented to the jury.[334] Where "'reasonable [people] may differ'" on whether conduct is extreme and outrageous, it is for a jury to decide whether it warrants liability.[335]

After a careful survey of the law on the issue, and the facts of Swenson's case, the majority concluded that summary judgment of dismissal was improperly granted.[336] In reaching this decision, the majority considered not only Swenson's claim of alleged gender discrimination, but also two additional factors: (1) Swenson's status as a subordinate employee to Krabseth; and (2) Swenson's claim Krabseth allegedly conducted himself as he did with knowledge of Swenson's deteriorating emotional condition.[337] In so concluding the majority warned:

328. *Id.* at 180.
329. *Id.* at 181.
330. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d).
331. 435 N.W.2d 918 (N.D. 1989).
332. *Swenson*, 498 N.W.2d at 181.
333. *Id.* (quoting Muchow v. Lindblad, 435 N.W.2d 918, 923-24 (N.D. 1989)).
334. *Id.* at 182.
335. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. h).
336. *See id.* at 182-86.
337. *See id.*

> In reversing the summary judgment dismissal of this issue, we are not espousing the view that every instance of discrimination equals or constitutes extreme and outrageous conduct as a matter of law. Instead, we are saying that in this case it is unclear whether the alleged conduct is extreme and outrageous, or, in other words, we believe that reasonable persons could disagree as to that issue. Therefore, it is a question for the jury and an improper issue for summary judgment.[338]

The majority's final comment provided a springboard for Justice Levine's special concurrence. Justice Levine pointed to the case of Myra Bradwell, who the United States Supreme Court ruled was rightly excluded from the practice of law because of her sex.[339] Justice Levine commented that "[i]t may be that no reasonable jury in 1873 would have found Bradwell's exclusion outrageous. But, surely, the same cannot be said about juries in 1993."[340]

Justice Levine explained that, to prove intentional infliction of emotional distress, it must be shown that the conduct is "to use the vernacular, 'really gross.' It must substantially offend community notions of acceptable conduct."[341] Justice Levine then went on to demonstrate that sex discrimination should be "fairly regarded as 'atrocious and utterly intolerable in a civilized community.'"[342] She observed that "[s]ex discrimination debases, devalues and despoils."[343] She further argued that:

> Discrimination is not a tale of hurt feelings, unkind behavior or inconsiderate conduct by one against another. That it may insult is irrelevant; that it strips its victim of self-esteem, self-confidence and self-realization is the nub of its evil and the stuff of its outrageousness.[344]

Justice Levine further observed that at least some reasonable jurors in any given case surely believe that "sex discrimination, like race discrimination, goes beyond all bounds of decency and is truly atrocious and utterly intolerable in a civilized community."[345] The jury, therefore:

338. *Id.* at 186.
339. *Id.* at 187-88 n.1 (Levine, J., concurring) (citing Bradwell v. Illinois, 16 U.S. (1 Wall.) 130 (1873)).
340. *Id.* at 188.
341. *Id.*
342. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d).
343. *Id.*
344. *Id.* (citations omitted).
345. *Id.*

> should be given the opportunity to consider the question and plaintiff should be given the opportunity to educate, persuade and convince the jury in this case, that the alleged sex discrimination has no place in our society and is outrageous, extreme and wholly intolerable. The jury can take into account our changing social mores, the development of civil-rights law, and plaintiff's susceptibility as a member of a vulnerable class which has been historically discriminated against, to decide whether the conduct, that is, the sex discrimination, directed at plaintiff, constitutes the outrageous conduct necessary for plaintiff to prevail.[346]

Returning to Myra Bradwell, Justice Levine observed that the exclusion of women in Bradwell's time "rested on the belief that men, simply because they were men, belonged in the public sphere rife with power and status, and women, in the private sphere—the home."[347] She wrote that such notions had changed over time, and that North Dakota's first woman law school graduate, Helen Hamilton, received her degree in 1905.[348] She concluded that, if Helen Hamilton today was denied a job due to sex discrimination:

> she would at least have the opportunity to right that wrong by having her day in court. She should be able to get to the jury with evidence of sex discrimination, defendant's intent or reckless disregard and her severe emotional distress and she should be able to prevail if she establishes those three elements of the tort by a preponderance of the evidence. To do that, she will have to have successfully eliminated from the jury those folks who just don't get it. It may well be that stereotypes about the "proper place" of women and their need for special treatment, like old soldiers, have not died. The jury can tell us if they have faded away.[349]

Chief Justice VandeWalle expressed his disagreement with the positions of Justice Levine and the majority on sex discrimination and intentional infliction of emotional distress in a separate opinion.[350] He apparently was unimpressed by the fact that the majority opinion relative to Swenson's claim of intentional infliction of emotional distress was supported not only by allegations of gender bias, but by two additional

346. *Id.* at 189.
347. *Id.*
348. *Id.*
349. *Id.*
350. *Id.* (VandeWalle, C.J., concurring and dissenting).

elements, Swenson's subordinate position and her deteriorating emotional state.[351] Chief Justice VandeWalle argued that:

> If Swenson's alleged facts constitute conduct so outrageous in character and so extreme in degree as to go beyond *all possible* bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community, we will need to devise a new tort to encompass conduct that comes within the commonly accepted definition of those terms.[352]

Chief Justice VandeWalle said that he did not want to be viewed as condoning the conduct Swenson alleged, but that he did not believe the conduct fit into the definition of intentional infliction of emotional distress as a matter of law.[353] He observed that the opinions of Justice Levine and the majority could be read to "hold that all conduct constituting discrimination" amounts to the conduct required to show intentional infliction of emotional distress.[354] He wrote he was "apprehensive" about such a holding as it could "make nearly every accusation of intentional infliction of emotional distress a jury question in the hope that the jury, out of sympathy if nothing else, will agree with the plaintiff that the defendant's conduct goes beyond all possible bounds of decency."[355] Because of his misgivings about the positions taken by Justice Levine and the majority opinion, Chief Justice VandeWalle concluded he would have affirmed the trial court on the issue of intentional infliction of emotional distress.[356]

It should be noted that Justice Meschke merely concurred in the result of the *Swenson* majority opinion and that Justice Johnson, who was a member of the court when *Swenson* was heard, but not when it was decided, did not participate in the decision. The validity of the crucial segment of the majority opinion, therefore, has been questioned by the two justices, Justice Sandstrom and Justice Neumann, who succeeded Chief Justice Erickstad and Justice Johnson on the court and who were members of the court at the time *Swenson* was decided, but not when it was heard. In a separate opinion to *Security National Bank, Edgeley v. Wald*,[357] Justice Sandstrom asserted that the North Dakota Constitution allows a retired justice to sit as a surrogate justice only when a sitting justice is disqualified or incapacitated.[358] He wrote: "None of the

351. *See supra* text accompanying note 337 (explaining factors considered by the majority).
352. *Swenson*, 498 N.W.2d at 190 (VandeWalle, C.J., concurring and dissenting).
353. *Id.*
354. *Id.*
355. *Id.*
356. *Id.*
357. 536 N.W.2d 924 (N.D. 1995).
358. Security Nat'l Bank, Edgeley v. Wald, 536 N.W.2d 924, 930 (N.D. 1995) (Sandstrom, J., concurring specially).

specified grounds existed in *Swenson*. No justice filed a disqualification. There was no assignment of the former Chief Justice to act for a justice with a conflict of interest or for a justice physically or mentally in capacitated."[359] Justice Sandstrom, therefore, alleged that Part III of the majority opinion in *Swenson* was not supported by a majority because Surrogate Judge Erickstad's participation was contrary to the state constitution and apparently void.[360] It may, therefore, be that the "majority" opinion in *Swenson* will be of little precedential value.

The fate of the *Swenson* majority opinion, from the standpoint of substantial precedent, should not and will not diminish the significance of Justice Levine's special concurrence. Just like the dissenting opinions of Justice Oliver Wendell Holmes of years gone by (a judge Justice Levine was fond of, and quoted in her own opinions),[361] Justice Levine's special concurrence in *Swenson* may be the light that shows the way into the future when there may be zero tolerance for discrimination on the basis of gender. Only time will tell, and in the meantime, Justice Levine's views will serve as a catalyst.

III. CONCLUSION

If you have read the introductory part of this article and skipped to the end, you missed the material which generated and would explain the vintage quotations from Justice Levine:

"[A]bsent a valid waiver of the right to counsel the resulting conviction cannot . . . be used to enhance a term of imprisonment for a subsequent offense."[362]

"Domestic violence is not just one factor among many to be considered. It is the only factor blessed by a presumption."[363]

"[C]hildren are victimized by the climate of violence created by domestic violence between their parents, even if they are not direct targets of the abuse."[364]

359. *Id.*

360. *Id.* We are unable to discern why Justice Sandstrom and Justice Neumann used the special concurrence to *Wald* to assert their view that the *Swenson* majority was not a constitutional majority. It could have been an attempt or desire on their part to clarify or purify the process for the future. Or, it may have been a way of alerting all that they were reserving for the future their views on what may constitute intentional infliction of emotional distress. We should not forget that Justice Mary Muehlen Maring, Justice Levine's successor, will likely also have a significant influence in shaping the law in this area.

361. *See* Northern X-Ray Co., Inc. v. State *ex rel.* Hanson, 542 N.W.2d 733, 735 (N.D. 1996) ("As Justice Holmes cautioned, '[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.'").

362. State v. Orr, 375 N.W.2d 171, 178-79 (N.D. 1985).

363. Schestler v. Schestler, 486 N.W.2d 509, 515 (N.D. 1992) (Levine, J. dissenting).

364. Heck v. Reed, 529 N.W.2d 155, 163 (N.D. 1995).

"[W]hen equally fit parents seek custody of children too young to express a preference, and one parent has been the primary caretaker of the children, custody should be awarded to the primary caretaker."[365]

"Permanent support, often misunderstood or overlooked, is another part of the arsenal available to restore economic equity to a partner of a failed marital enterprise."[366]

"It is . . . not a crime in this country to be a boor, absent resort to fighting words."[367]

"Process, not product, is the key. When the process is riddled with unfair, unseemly and unacceptable gender discrimination, it is of small moment that the process did not entirely contaminate the product."[368]

"[I]n cases of passive concealment by the seller of defective real property, there is an exception to the rule of caveat emptor . . . ."[369]

"[N]egligence and strict liability overlap on the issue of duty to warn."[370]

"It may well be that stereotypes about the 'proper place' of women and their need for special treatment, like old soldiers, have not died. The jury can tell us if they have faded away."[371]

Because of the necessity to decide a case and move on, an appellate court must find a consensus and regularly that is accomplished in a single opinion that expresses the views of the entire court. In some cases, one can voice an opinion in the lead opinion which is quite independent of and different from the views of the justices who concur in the result, but more often it is in the special concurrences and dissents that justices are able to assert their individual views and positions which may have more influence in the future than in the present. In that light, Justice Levine's views have not only influenced the present, but will have a significant influence in the future.

365. Gravning v. Gravning, 389 N.W.2d 621, 624-25 (N.D. 1986) (Levine, J. dissenting).
366. Wiege v. Wiege, 518 N.W.2d 708, 713 (N.D. 1994) (Levine, J. concurring).
367. City of Bismarck v. Schoppert, 469 N.W.2d 808, 811 (N.D. 1991).
368. City of Mandan v. Fern, 501 N.W.2d 739, 748 (N.D. 1993).
369. Holcomb v. Zinke, 365 N.W.2d 507, 512 (N.D. 1985).
370. Butz v. Werner, 438 N.W.2d 509, 521 (N.D. 1989) (Levine, J., dissenting).
371. Swenson v. Northern Crop Ins., Inc., 498 N.W.2d 174, 189 (N.D. 1993) (Levine, J., concurring specially).