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Sovereign Immunity-Judicial Abrogatoin of North Dakota's Sovereign Immunity Results in Its Possible Legislative Reassertion and Legislation to Provide Injured Parties a Remedy for the Torts Committed by the State or Its Agents

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SOVEREIGN IMMUNITY–JUDICIAL ABROGATION OF NORTH DAKOTA'S SOVEREIGN IMMUNITY RESULTS IN ITS POSSIBLE LEGISLATIVE REASSERTION AND LEGISLATION TO PROVIDE INJURED PARTIES A REMEDY FOR THE TORTS COMMITTED BY THE STATE OR ITS AGENTS

Bulman v. Hulstrand Constr. Co.,
521 N.W.2d 632 (N.D. 1994)

I. FACTS

On December 20, 1991, Lloyd C. Bulman, Jr. was killed when the pickup he was driving through an unfinished construction project left the road and rolled.[1] Bulman's pickup left the road just after passing a semi-truck and shortly after the point where the road changed from a hardened surface to loose gravel.[2] The Hulstrand Construction Company [hereinafter Hulstrand] was the general contractor for the State of North Dakota [hereinafter The State] conducted construction project which had been temporarily suspended for the winter.[3] The contract between Hulstrand and the State provided that the State would be responsible for maintaining the roadway and traffic control devices during Hulstrand's winter shut down period.[4]

Judy Ann Bulman, Lloyd's wife, brought suit[5] against Hulstrand and the State of North Dakota. Bulman claimed that the State negligently failed to: inspect and maintain the roadway, provide adequate signs

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1. Appellant's Brief at 2, Bulman v. Hulstrand Constr. Co., 521 N.W.2d 632 (N.D. 1994) (No. 940047). Bulman had been traveling south on North Dakota Highway 85, south of Amidon, North Dakota. Bulman v. Hulstrand Constr. Co., 521 N.W.2d 632, 633 (N.D. 1994).

2. Appellant's Brief at 2, *Bulman* (No. 940047).

3. *Id.*

4. *Bulman*, 521 N.W.2d at 640. The contract between the State of North Dakota and Hulstrand provided:

> Temporary Suspension. A temporary suspension of work will not relieve the Contractor of his responsibility for maintaining and protecting traffic. When operations are suspended for the winter or are indefinitely suspended by the Engineer for reasons beyond the Contractor's control, the roadway and the traffic control devices will be maintained by the Department at its expense.
>
> Before suspending operations for the winter, the Contractor shall construct adequate approaches to all crossroads or intersecting roads which have been disturbed by construction operations. He shall provide access to the roadway from abutting property. Warning signs, barricades, and other traffic control devices shall be erected (or existing devices removed) as directed by the Engineer.

Id.

5. Appellant's Brief at 1, *Bulman* (No. 940047). Judy Ann Bulman brought a wrongful death action on behalf of herself and Lloyd C. Bulman's four surviving daughters pursuant to North Dakota's Death by Wrongful Act provisions codified in sections 32-21-01 through 32-21-06 of the North Dakota Century Code. *Id.* *See* N.D. CENT. CODE §§ 32-21-01 to 06 (1976 & Supp. 1993). The North Dakota Supreme Court had refused to address the doctrine of sovereign immunity with respect to Judy Ann Bulman's claim on a previous appeal since the entire case had not yet been decided. Bulman v. Hulstrand Constr. Co., 503 N.W.2d 240 (N.D. 1993).

and warnings, and supervise Hulstrand's work.[6] Bulman further claimed that Hulstrand's liability arose out of its negligence in preparing for the winter suspension of construction.[7]

The district court dismissed the actions against both defendants.[8] The district court reasoned that Bulman's action against the State was barred by the doctrine of sovereign immunity and that Hulstrand owed no duty to Bulman since the roadway was under the control of the State during the winter suspension period.[9] Bulman appealed both of the district court's rulings.[10]

On appeal, the North Dakota Supreme Court[11] affirmed the district court's granting of summary judgment for Hulstrand, but reversed the dismissal of the claim against the State, and remanded the case to the trial court for further proceedings.[12] In doing so, the supreme court *held* that the State's sovereign immunity for tort was abrogated.[13] This Comment will focus on the North Dakota Supreme Court's abrogation of sovereign immunity and how the North Dakota Legislature has responded.

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6. Appellant's Brief at 2, *Bulman* (No. 940047). Appellant contended that there were actually two changes in the road surface; from a prime to a hardened surface and from a hardened to a loose gravel surface. *Id.* at 2-4. Appellant also argued that warning signs were inadequately placed to only warn travelers of the first change in the road surface from prime to a hardened surface and not from the hardened to the loose gravel surface. *Id.* at 3. Warning signs were located approximately 4,000 feet from the change in road condition from a hardened surface to loose gravel. *Id.* Appellant argued that the changes in road surface and the inadequate placement of warning signs were proximate causes of the accident. *Id.* at 4. The Appellant did not define "prime" or "hardened surface." However, the Appellee, Hulstrand Construction Company, defined "prime" as a loose gravel surface which has been covered with an oil primer. Brief of Appellee at 2-3, Bulman v. Hulstrand Constr. Co., 521 N.W.2d 632 (N.D. 1994) (No. 940047). According to Hulstrand, the road surface changed from asphalt to prime to loose gravel. *Id.* at 1-3. Hulstrand further claimed that warning signs were placed where the road surface changed from prime to loose gravel. *Id.* at 3.

7. Appellant's Brief at 2, *Bulman* (No. 940047). The winter suspension period began on November 19, 1991, and ended on an unspecified date in the spring of 1992. Appellee's Brief at 2-4, *Bulman* (No. 940047).

8. Appellant's Brief at 1, *Bulman*, (No. 940047).

9. Bulman v. Hustrand Constr. Co., 521 N.W.2d 632, 633-34 (N.D. 1994).

10. *Id.* at 634. Bulman appealed both summary judgment dismissals of the State of North Dakota and of Hulstrand Construction Company. Appellant's Brief at 1, *Bulman*, (No. 940047).

11. The North Dakota Supreme Court was comprised of Chief Justice Gerald W. VandeWalle, and Justices Beryl J. Levine, William A. Neumann, Dale V. Sandstrom and Bert L. Wilson (sitting in place of Justice Herbert L. Meschke, disqualified). *Bulman*, 521 N.W.2d at 641.

12. *Id.*

13. *Id.* at 639.

II. LEGAL HISTORY

A. ENGLISH ORIGIN AND AMERICAN ADOPTION OF SOVEREIGN IMMUNITY

The common-law doctrine of sovereign immunity has its origin in the medieval English traditions of the 13th century[14] and is often associated with the maxim "the king can do no wrong."[15] Actually, this adage did not mean that the king was privileged to do wrong, but rather that the courts lacked jurisdiction over him absent his consent.[16] However, the king was still politically and morally obligated to follow the law upon which his authority rested.[17]

Although it was the king's prerogative to refuse his consent to being sued, such consent was routinely given upon a showing of a prima facie legal claim.[18] Procedurally, an injured party would present a "petition of right" to the king, then the king, or his council, could consent by directing the petition to a tribunal where the action would be litigated.[19] As the king's powers were transferred to the state during the 16th century, the king's prerogative evolved into the government's sovereign immunity.[20]

Although early American legal practitioners were well acquainted with English common-law, including the doctrine of sovereign immunity,[21] and did not permit states to be impleaded without their consent,[22]

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14. 9 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 9-10 (3rd ed. 1926). It is believed that the concept of the sovereign's immunity from suit in his own court dates back to at least the time of King Henry III (1216-72). *Id.* at 8.

15. 3 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 462 (3rd ed. 1923). For a comprehensive analysis of the origin, judicial development, and criticisms of sovereign immunity and its purported basis within the North Dakota Constitution, see William R. Hartl, Note, *Sovereign Immunity: An Outdated Doctrine Faces Demise in a Changing Judicial Arena*, 69 N.D. L. REV. 401 (1993) (arguing that the State's sovereign immunity for tort is unjust and should be judicially abrogated).

16. 3 HOLDSWORTH, *supra* note 15, at 462. In Old English Law it was believed "[t]he king can do wrong; he can break the law; he is below the law, though he is below no man and below no court of law." 1 FREDRICK POLLOCK & FREDRICK W. MAITLAND, THE HISTORY OF ENGLISH LAW 515-16 (2d ed. 1968) (1895).

17. Ludwick Ehlrich, *Proceedings Against The Crown* (1216-1377), *in* OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY 70 (Sir Paul Vinogradoff ed., 1921).

18. 9 HOLDSWORTH, *supra* note 14, at 15; CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 6 (1972). A prima facie legal claim constitutes a legal claim "so far as can be judged from the first disclosure." *See* BLACK'S LAW DICTIONARY 1189 (6th ed. 1990) (defining "prima facie").

19. Ehlrich, *supra* note 17, at 21-23. *See* 9 HOLDSWORTH, *supra* note 14, at 13-22 (providing a history of the petition of right).

20. Biello v. Pennsylvania Liquor Control Bd., 301 A.2d 849, 853 (Pa. 1973) (Nix, J., dissenting), *overruled by* Mayle v. Pennsylvania Dept. of Highways, 388 A.2d 709 (Pa. 1978); 9 HOLDSWORTH, *supra* note 14, at 15-16.

21. JACOBS, *supra* note 18, at 7.

22. *See* Respublica v. Sparhawk, 1 U.S. (1 Dall.) 357, 362-63 (1788) (denying a claim against Pennsylvania). In *Sparhawk*, the Pennsylvania Board of War, acting pursuant to a Congressional resolution which required the Board to prevent articles which might have been useful to the British

they apparently did not adopt the procedural remedy of the "petition of right" for uncertain reasons.[23] Although applied, it was not until 1834 in *United States v. Clarke*[24] that the United States Supreme Court expressly confirmed in obiter dictum that the doctrine of sovereign immunity applied to both federal and state governments.[25]

Whether the drafters of the United States Constitution intended the doctrine of sovereign immunity to apply to our democratic form of government is not certain.[26] During the state conventions for the ratification of the United States Constitution, there was considerable disagreement as to whether Article III[27] would allow states to be sued in federal courts, whether consenting or not.[28] Subsequently, the United States Supreme Court in *Chisholm v. Georgia*[29] interpreted Article III as granting federal courts jurisdiction to hear suits instituted against states, whether consenting or not, by citizens of other states or foreign na-

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from falling into their hands, seized and moved Sparhawk's flour to a depot located outside of Philadelphia for safe storage. *Id.* at 357-58. The depot was subsequently seized by the British. *Id.* The Supreme Court of Pennsylvania held for the Commonwealth and stated that had the seizure not occurred during time of war, the state would have been liable for trespass. *Id.* at 362. However, Pennsylvania's Attorney General cited to William Blackstone's *Commentaries on the Laws of England* in stating "that a sovereign is not amenable in any court unless by his own consent." *Id.* at 359; *see also* JACOBS, supra note 18, at 13 (discussing Nathan v. Virginia, 1 Dall. 77 (Court of Common Pleas, Philadelphia, 1784) which denied a claim against Virginia). In *Nathan*, property belonging to the state of Virginia was confiscated under a foreign attachment in Philadelphia. *Nathan*, 1 U.S. (1 Dall.) at 77. Virginia's congressional delegates argued that this violated the laws of nations and infringed upon the state of Virginia's sovereignty. *Id.* at 77-79. The Philadelphia Court of Common Pleas upheld Virginia's claim of immunity. *Id.* at 80.

23. JACOBS, *supra* note 18, at 6-8. To what extent the English procedural remedies were transferred to the colonies is uncertain since colonial records have not yet been comprehensively studied. *Id.* at 6-7. How the doctrine of sovereign immunity came to be adopted in the United States is a legal mystery. Edwin M. Borchard, *Governmental Liability in Tort*, 34 YALE L. J. 1, 4 (1924).

24. 33 U.S. (8 Pet.) 436 (1834).

25. United States v. Clarke, 33 U.S. (8 Pet.) 436, 445 (1834). "Obiter dictum" is defined as "an opinion entirely unnecessary for the decision of the case." BLACK'S LAW DICTIONARY 1072 (6th ed. 1990).

26. JACOBS, *supra* note 18, at 40. As stated by Alexander Hamilton,

> It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal.

THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

27. U.S. CONST. art. III, § 2. Article III, Section 2 of the United States Constitution provides in relevant part: "[t]he judicial Power shall extend to all Cases, in Law and Equity . . . between a State and Citizens of another State . . . and between a State . . . and foreign States, Citizens or Subjects." *Id.*

28. JACOBS, *supra* note 18, at 27-40. Some advocates for ratification of the United States Constitution, including James Wilson and Edmund Randolph, had interpreted Article III as making states suable in federal courts by individuals. *Id.* at 28, 39. However, Federalists James Madison and Alexander Hamilton, along with John Marshall, argued that individuals could not sue a state without the state's consent. *Id.* at 39. Others called for an amendment to expressly restrict the power of the federal courts with respect to suits instituted against the states. *Id.* at 28.

29. 2 U.S. (2 Dall.) 419 (1793).

tions.[30] This interpretation of Article III appeared to have expressly abrogated the government's sovereign immunity.[31] However, the *Chisholm* decision led to immediate and considerable pressure upon Congress for the passage of the Eleventh Amendment in 1798 from states fearing that the Supreme Court would compel the repayment of debt accrued during the Revolutionary war.[32] The passage of the Eleventh Amendment effectively immunized unconsenting states from litigation instituted by citizens of other states and foreign nations in federal courts.[33] The state's immunity from suits instituted by its own citizens in federal courts was not confirmed by the United States Supreme Court as being based in the Eleventh Amendment until 1890 in *Hans v. Louisiana*.[34]

Although Eleventh Amendment immunity is distinct from common-law sovereign immunity in that Eleventh Amendment immunity is granted through a constitutional provision,[35] several states, including North Dakota, have maintained that their state constitutions have elevated the common-law doctrine of sovereign immunity to a constitutional status.[36]

B. SOVEREIGN IMMUNITY AND ITS PURPORTED BASIS WITHIN ARTICLE I, SECTION 9 OF THE NORTH DAKOTA CONSTITUTION

Just as the state government's immunity from suit in federal courts had obtained a basis within the United States Constitution,[37] North Dakota's sovereign immunity from suit in state court also purportedly

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30. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 420-24 (1793).

31. PETER H. SCHUCK, SUING GOVERNMENT 35-36 (1983).

32. JACOBS, *supra* note 18, at 67-68. It has been suggested that the Eleventh Amendment received little opposition because the state legislators that framed the United States Constitution had intended the states to be immune from suits instituted by individuals. *Id.*

33. *See* U.S. CONST. amend. XI (providing that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

34. *See* 134 U.S. 1, 21 (1890) (determining that the Eleventh Amendment to the United States Constitution also precludes federal courts from hearing suits against states commenced or prosecuted by citizens of that state).

35. SHEPARD'S, CIVIL ACTIONS AGAINST STATE GOVERNMENT, ITS DIVISIONS, AGENCIES AND OFFICERS 169-70 (1982). The immunity provided through the Eleventh Amendment is distinct from common-law state sovereign immunity in that the former "shield[s] state governmental functions from intrusion by the federal government via the federal judiciary," while the latter "prohibit[s] both courts and plaintiffs from interfering in governmental affairs." *Id.*

36. *See infra* note 42 and accompanying text for a list of states which at some time interpreted their respective state constitutions as having elevated the common-law doctrine of sovereign immunity to a constitutional status.

37. *See supra* note 33 and accompanying text (providing relevant text of U.S. CONST. amend. XI for states' immunity to suit in federal courts unless consented to); Hans v. Louisiana, 134 U.S. 1, 21 (1890) (stating that states may not be impleaded in federal courts without the state's consent).

obtained a basis within the North Dakota Constitution's Declaration of Rights.[38] Article I, section 9 provides:

> All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.[39]

Adopted in 1889, the North Dakota Constitution is a conglomeration of provisions which were drafted while numerous other state constitutions were taken into consideration.[40] Although the origin of article I, section 9 has been credited to "constitutions generally,"[41] it is also argued that article I, section 9 was derived from a nearly identical Pennsylvania constitutional provision.[42]

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38. Wirtz v. Nestos, 200 N.W. 524, 534 (N.D. 1924).

39. N.D. CONST. art. I, § 9.

40. *See generally* Justice Herbert L. Meschke & Larry Spears, *Model Constitution (Peddrick Draft #2, 1889)*, 65 N.D. L. REV. 415, 481-90 (1989) [hereinafter Meschke & Spears] (providing a partial list of authorities for what is purported to be one of three draft constitutions examined by North Dakota's constitutional draftors at the 1889 North Dakota Constitutional Convention).

41. *See id.* at 481 (citing article III, section 22 of the North Dakota Constitution as the basis for the modern article I, section 9).

42. *See, e.g.*, Schloesser v. Larson, 458 N.W.2d 257, 261-62 (N.D. 1990) (Meschke, J., dissenting) (stating that North Dakota's "open courts" declaration contained in article I, section 9 "can be traced back to 1790 when Pennsylvania . . . adopted a provision identical in wording"); Hartl, *supra* note 15, at 414 (providing a history of article I, section 9 of the North Dakota Constitution). Article I, section 11 of the Pennsylvania Constitution was adopted in 1790 and contains nearly identical language as North Dakota's article I, section 9 and provides:

> All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

PA. CONST. art. I, § 11. In *Mayle v. Pennsylvania Department of Highways*, the Pennsylvania Supreme Court determined that this constitutional provision did not elevate the common-law doctrine of sovereign immunity to a constitutional status, but rather granted the state legislature the authority to choose the cases in which the state would be immune. Mayle v. Pennsylvania Dept. of Highways, 388 A.2d 709, 716-17 (Pa. 1978). The court stated that the second sentence was neutral in that it neither required nor prohibited the state's sovereign immunity. *Id.* (citing Biello v. Pennsylvania Liquor Control Bd., 301 A.2d 849, 854 (Pa. 1973) (Nix, J., joined by Roberts, J., dissenting), *overruled by* Mayle v. Pennsylvania Dept. of Highways, 388 A.2d 709 (Pa. 1978). The court noted that its prior decisions which maintained that this constitutional provision compelled the state's sovereign immunity were "errors of history, logic and policy" and went on to abrogate the doctrine of sovereign immunity. *Id.* at 719. However, numerous other states also have similar constitutional provisions. States which have constitutional provisions similar to North Dakota's include: Alaska, Arizona, California, Connecticut, Delaware, Florida, Georgia, Indiana, Kentucky, Nebraska, Nevada, New York, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Washington, Wisconsin, and Wyoming. *See* ALASKA CONST. art. II, § 21 (providing that "[t]he legislature shall establish procedures for suits against the State"); ARIZ. CONST. art. 4, pt. 2, § 18 (providing that "[t]he Legislature shall direct by law in what manner and in what courts suits may be brought against the State"); CAL. CONST. art. 3, § 5 (providing that "[s]uits may be brought against the state in such manner and in such courts as shall be directed by law"); CONN. CONST. art. 11, § 4 (providing that "[c]laims against the state shall be

The first sentence of article I, section 9 has been labeled the "open courts" clause and grants all individuals the right to redress and remedy

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resolved in such manner as may be provided by law"); DEL. CONST. art. I, § 9 (providing in part that "[a]ll courts shall be open; and every man for an injury done him . . . shall have remedy by the due course of law . . . without sale, denial, or unreasonable delay or expense [and that] [s]uits may be brought against the State, according to such regulations as shall be made by law"); FLA. CONST. art. X, § 13 (providing that "[p]rovision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating"); GA. CONST. art. 1, § 2, ¶ IX (providing in relevant part that "[t]he General Assembly may waive the state's sovereign immunity from suit . . . by law"); IND. CONST. art. 4, § 24 (providing that "[p]rovision may be made, by general law, for bringing suit against the State; but no special law authorizing such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed"); KY. CONST. § 231 (providing that "[t]he General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth"); NEB. CONST. art. V, § 22 (providing that "[t]he state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought"); NEV. CONST. art. 4, § 22 (providing that "[p]rovision may be made by general law for bringing suit against the State as to all liabilities originating after the adoption of this Constitution"); N.Y. CONST. art. 6, § 18(b) (providing that "[t]he legislature may provide for the manner of trial of actions and proceedings involving claims against the state"); OHIO CONST. art. I, § 16 (providing that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay . . . [and that] [s]uits may be brought against the state, in such courts and in such manner, as may be provided by law"); OR. CONST. art. IV, § 24 (providing that "[p]rovision may be made by general law, for bringing suit against the State, as to all liabilities originating after, or existing at the time of the adoption of this Constitution; but no special act authorizeing (sic) such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed"); PA. CONST. art. 1, § 11 (providing that "[a]ll courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay [and that] [s]uits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct"); S.C. CONST. art. XVII, § 2 (providing that "[t]he General Assembly may direct, by law, in what manner claims against the State may be established and adjusted"); S.D. CONST. art. III, § 27 (providing that "[t]he Legislature shall direct by law in what manner and in what courts suits may be brought against the state"); TENN. CONST. art. 1, § 17 (providing that "[t]hat all courts shall be open; and every man, for injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay [and that] [s]uits may be brought against the State in such manner and in such courts as the Legislature may be law direct"); WASH. CONST. art. 2, § 26 (providing that "[t]he legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state"); WIS. CONST. art. 4, § 27 (providing that "[t]he legislature shall direct by law in what manner and in what courts suits may be brought against the state"); WYO. CONST. art. 1, § 8 (providing that "[a]ll courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or delay. Suits may be brought against the state in such manner and in such courts as the legislature may by law direct"). This compilation of similar constitutional provisions and their text are provided in Brief of Appellee State of North Dakota at A-1 to A-5, Bulman v. Hustrand Constr. Co., 521 N.W.2d 632 (N.D. 1994) (No. 940047). At least three of these states, Arkansas, Wisconsin, and Kentucky, had interpreted their constitutional provisions prior to North Dakota's adoption of article I, section 9. Brief of Appellee State of North Dakota, at 12-13, *Bulman* (No. 940047). All three states interpreted their constitutional provisions as granting to the state legislatures the right to direct by law the cases in which the state may be impleaded. *Id.* at 13. *See* Turner v. State, 27 Ark. 337 (1871) (interpreting Arkansas' constitution as granting to the state legislature the right to direct by law the cases in which the state may be impleaded); C., M. & St. P. Ry. Co. v. State, 10 N.W. 560 (Wis. 1881) (interpreting Wisconsin's constitution as granting to the state legislature the right to direct by law the cases in which the state may be impleaded); Tate v. Salmon, 79 Ky. 540 (1881) (interpreting Kentucky's constitution as granting to the state legislature the right to direct by law the cases in which the state may be impleaded).

in court.[43] In contrast, the second sentence has been interpreted as limiting the right granted by the first sentence by granting to the state legislature the sole authority to waive or modify the State's sovereign immunity.[44] This interpretation of the second sentence by the North Dakota Supreme Court has been the basis of recent criticism.[45]

C. JUDICIAL DEVELOPMENT OF SOVEREIGN IMMUNITY IN NORTH DAKOTA

1. *Sovereign Versus Governmental Immunity*

Sovereign immunity is a common-law doctrine which precludes litigation against an unconsenting government.[46] Prior to 1974, the North Dakota Supreme Court did not differentiate between "sovereign immunity" and "governmental immunity" and used the terms interchangeably.[47] In 1974, the Court determined that the language of article I, section 9 of the North Dakota Constitution only prohibited suits against the State, but did not preclude suits against the State's governing bodies.[48] Therefore, a distinction between the governmental immunity of the State's governing bodies other than the State and the sovereign immunity of the State itself was required.[49] Despite having statutorily

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43. *See, e.g.*, Leadbetter v. Rose, 467 N.W.2d 431, 435 (N.D. 1991) (discussing the "open courts" clause of article I, section 9 of the North Dakota Constitution).

44. *E.g., id.* at 434. The North Dakota Supreme Court has interpreted the second sentence as granting to the state legislature alone the authority to waive or modify the State's sovereign immunity in the following cases: Leadbetter v. Rose, 467 N.W.2d 431, 434 (N.D. 1991); Schloesser v. Larson, 458 N.W.2d 257, 258-59 (N.D. 1990); Dickinson Pub. Sch. Dist. v. Sanstead, 425 N.W.2d 906, 908 (N.D. 1988); Patch v. Sebelius, 320 N.W.2d 511, 513 (N.D. 1982); Senger v. Hulstrand Constr., Inc., 320 N.W.2d 507, 508 (N.D. 1982); Kitto v. Minot Park Dist., 224 N.W.2d 795, 800 (N.D. 1974); Wright v. State, 189 N.W.2d 675, 679 (N.D. 1971); Spielman v. State, 91 N.W.2d 627, 630 (N.D. 1958); Dunham Lumber Co. v. Gresz, 295 N.W. 500, 502 (N.D. 1940); Shafer v. Lowe, 210 N.W. 501, 503 (N.D. 1926); Wirtz v. Nestos, 200 N.W. 524, 534 (N.D. 1924). The legislative, judicial, and executive branches of government are coequal, "and each branch is supreme in its own sphere." Riverview Place, Inc. v. Cass County, 448 N.W.2d 635, 638 n.3 (N.D. 1989) (quoting State ex rel. Spaeth v. Meiers, 403 N.W.2d 392, 394 (N.D. 1987)). *See* N.D. CONST. art. XI, § 26 (stating that the state's three branches of government are coequal). When the three branches of a state's government are created by a constitutional provision, it is implied that each is excluded from exercising the functions of the others. *Riverview Place*, 448 N.W.2d at 638 n.3. Great restraint is exercised by the judiciary when it is asked to impinge upon the functions of the other branches of government. *Id.*

45. *See* Leadbetter v. Rose, 467 N.W.2d 431, 437-38 (N.D. 1991) (Meschke, J., dissenting); Schloesser v. Larson, 458 N.W.2d 257, 261-63 (N.D. 1990) (Meschke, J., dissenting); Dickinson Pub. Sch. Dist. v. Sanstead, 425 N.W.2d 906, 910-14 (N.D. 1988) (Meschke, J., concurring) (promoting judicial abrogation of sovereign immunity); Hartl, *supra* note 15, at 416-21.

46. RESTATEMENT (SECOND) OF TORTS § 895B (1979); BLACK'S LAW DICTIONARY 1396 (6th ed. 1990).

47. *See* Wright v. State, 189 N.W.2d 675, 676 (N.D. 1971) (claiming governmental immunity on behalf of the State of North Dakota).

48. Kitto v. Minot Park Dist., 224 N.W.2d 795, 800-01 (N.D. 1974).

49. *Id.* at 800-01. *See* SHEPARD'S, *supra* note 35, § 2.1 (1982) (stating that numerous states differentiate between the state's sovereign immunity and the governmental immunity afforded to the state's political subdivisions). Governmental bodies have been defined to include counties, townships,

waived its sovereign immunity in some contexts,[50] North Dakota has retained its sovereign immunity for tort.

2. *Judicial Interpretation of Article I, Section 9 of the North Dakota Constitution as a Basis for the State's Sovereign Immunity*

Although prior cases addressed the government's liability for tort,[51] the first case in North Dakota to address the State's sovereign immunity and its basis within the North Dakota Constitution was *Wirtz v. Nestos*.[52] In *Wirtz*, the court interpreted the North Dakota Constitution as precluding suits against the State unless such suits were provided for by statute.[53]

The State's sovereign immunity for tort was established in 1958 in *Spielman v. State*.[54] In *Spielman*, the North Dakota Supreme Court held

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cities, park districts, school districts, and other local political or governmental subdivisions. Leadbetter v. Rose, 467 N.W.2d 431, 434 (N.D. 1991). Although sovereign and governmental immunity protects the respective governmental body from liability for the torts committed by their respective agents and employees, such agents and employees may still be subject to personal liability for their own tortious conduct. SHEPARD'S, *supra* note 35, § 2.23. It is a general principal of agency law that the principal's immunity does not insulate the agent from personal liability for the agent's tortious conduct. *Id.* However, state agents and employees may be absolved of personal liability if the state is the actual party in interest to the action. *Id. See* Kristensen v. Strinden, 343 N.W.2d 67, 74, 78 (N.D. 1983) (dismissing suit after determining that the State was the real party in interest). In addition, a state public official may be entitled to official immunity for the performance of an official duty within the scope of the public official's authority. SHEPARD'S, *supra* note 35, § 6.3.

50. *See* N.D. CENT. CODE § 06-09-27 (Supp. 1995) (authorizing civil actions against the Bank of North Dakota); N.D. CENT. CODE § 28-01-22.1 (1991) (providing a three-year statute of limitations on the commencement of an action against the state); N.D. CENT. CODE § 28-26-22 (1991) (providing that the state is liable for costs as are private parties); N.D. CENT. CODE § 32-09.1-02 (Supp. 1995) (authorizing garnishment proceedings against the state by creditors); N.D. CENT. CODE § 32-12-02 (Supp. 1995) (authorizing actions against the state which involve title to property or arising upon contract); N.D. CENT. CODE § 32-12-04 (1976), amended by 1995 N.D. Laws Ch. 329, § 6 (authorizing warrants to be issued upon final judgment against the state).

51. *See* Vail v. Town of Amenia, 59 N.W. 1092, 1096 (N.D. 1894) (holding a quasi-municipal corporation not liable for tort); Larson v. City of Grand Forks, 19 N.W. 414, 416 (1884) (holding a municipal corporation liable for the negligent maintenance of a street).

52. 200 N.W. 524 (N.D. 1924). In *Wirtz*, depositors of insolvent banks brought suit in equity against the State Depositor's Guarantee Fund Commission to compel the Commission to pay the insolvent banks amounts necessary to reimburse unsecured depositors. Wirtz v. Nestos, 200 N.W. 524, 525-26 (N.D. 1924). The North Dakota Supreme Court determined that the Commission was a branch of the State's executive department and therefore could not be sued without the State's consent through legislative enactment. *Id.* at 531. The court added that to hold the Commission open to suit would consume its time and funds in litigation. *Id.* at 534. However, the court also stated that the Commission could be sued to compel the performance of a non-governmental official or legal duty and that their decision was not to be interpreted as precluding suits against officials for the redress of injuries resulting from an arbitrary refusal to perform an official or legal duty. *Id.*

53. Wirtz v. Nestos, 200 N.W. 524, 534 (N.D. 1924). The North Dakota Supreme Court interpreted article I, section 22 of the North Dakota Constitution. *Id.* Article I, section 22 was renumbered in 1981 as article I, section 9 pursuant to section 46-03-11.1 of the North Dakota Century Code. *See* N.D. CONST. art. I, § 9 (formerly codified as article I, section 22); N.D. CENT. CODE § 46-03-11.1 (1993) (authorizing the renumbering of constitutional provisions).

54. 91 N.W.2d 627 (N.D. 1958).

that the legislative enactment of a statute which authorized the State to obtain liability insurance did not constitute a waiver of the State's sovereign immunity.[55] Again interpreting article I, section 9 of the North Dakota Constitution, the court stated that "[t]he immunity of the state from liability for tort is not waived by legislative enactment unless waiver appears by express provisions of the statute or necessary inference therefrom."[56]

Foretelling the fate of governmental immunity, the court in *Shermoen v. Lindsay*[57] in 1968 questioned the justifications behind the government's immunity for tort.[58] Although the court upheld the political subdivision's immunity, it stated that "it is manifestly unfair that an innocent victim of a tort should be without recourse when the tort is perpetrated by a governmental agency, employee or agent."[59]

Six years after the court's criticism of the government's immunity for tort in *Shermoen*, the North Dakota Supreme Court abrogated the doctrine of governmental immunity for tort in *Kitto v. Minot Park District*.[60] The court held that the governmental immunity of the State's

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55. Spielman v. State, 91 N.W.2d 627, 630 (N.D. 1958). The court affirmed this interpretation in 1971 in *Wright v. State*, by holding that the State's purchase of liability insurance did not amount to a waiver of its sovereign immunity. Wright v. State, 189 N.W.2d 675, 680 (N.D. 1971).

56. *Spielman*, 91 N.W.2d at 630.

57. 163 N.W.2d 738 (N.D. 1968).

58. Shermoen v. Lindsay, 163 N.W.2d 738 (N.D. 1968). The North Dakota Supreme Court listed three bases of general classifications on which governmental immunity had been preserved, which include:

> (1) The sovereign is immune from suit, which under our system of government would include the state and political subdivisions of the state who are considered to be representatives or agencies of the sovereign;
> (2) The curious philosophy that it is more expedient that isolated individuals should suffer than that society in general be inconvenienced; and
> (3) That from a practical view of public policy, governments and governmental agencies will perform their duties more efficiently and effectively if not jeopardized by the threat of tort liability.

Id. at 742. In *Shermoen*, a personal injury suit was brought against the Fargo Park District for negligence. *Id.* at 740. A ten-year-old boy had been swinging from a rope which was tied to a branch of a tree located on property under the control of the Fargo Park District. *Id.* The boy sustained injury from a fall after he swung over a street and a passing car caught the end of the rope. *Id.* Although the Park District was found to be entitled to governmental immunity, the court noted that the government's ability to obtain indemnity and liability insurance seemed to negate the justifications supporting the doctrine of governmental immunity. *Id.* at 742. The court noted that governmental immunity had been criticized in recent years and that many states had already abrogated it, either legislatively or judicially. *Id.* Numerous states had already judicially abrogated governmental immunity before North Dakota including Arkansas, Arizona, California, Colorado, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, Pennsylvania, Rhode Island, and Wisconsin. *See* SHEPARD'S, *supra* note 35 at 23 (providing an incomplete list of citations to cases in which the governmental immunity of state governing bodies other than the state have been judicially abrogated).

59. *Shermoen*, 163 N.W.2d at 742-43.

60. 224 N.W.2d 795 (N.D. 1974). In *Kitto*, a 12-year-old boy died as a result of a near drowning in a Minot city park pond. Kitto v. Minot Park Dist., 224 N.W.2d 795, 796-97 (N.D. 1974). The boy's mother brought suit against the city park district alleging that the pond constituted an attractive

political subdivisions was not constitutionally mandated and therefore the court was entitled to abrogate the judicial doctrine of governmental immunity.[61] However, the court noted that unlike governmental immunity, sovereign immunity could only be modified by legislative action as provided in article I, section 9.[62] The court also invited the State Legislature to follow suit by abolishing sovereign immunity since, like governmental immunity, it was unjust.[63]

With the legislative response that the court invited in *Kitto* not having materialized eight years later, the court again examined whether they could abrogate sovereign immunity in *Senger v. Hulstrand Construction, Inc*.[64] In *Senger*, the North Dakota Supreme Court refused to judicially abrogate sovereign immunity, noting that the legislature's response to the abrogation of governmental immunity indicated the state's intention to retain sovereign immunity.[65] The court maintained that article I, section 9 delegates to the legislature alone the power to modify its amenability to suit.[66] However, this interpretation was soon to draw criticism from within the North Dakota Supreme Court.

Although the court upheld the State's sovereign immunity in *Dickinson Public School District. v. Sanstead*,[67] Justice Meschke openly rejected the contention that article I, section 9 precluded the judiciary from abrogating sovereign immunity and called for its judicial abrogation.[68] Despite the majority's continued upholding of the State's

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nuisance. *Id.* at 797. See SHEPARD'S, *supra* note 35, § 2.7 (providing a list of cases in which states have judicially abrogated governmental immunity, updated as of November of 1989).

61. Kitto, 224 N.W.2d at 801.

62. *Id.* at 803.

63. *Id.* The court stated that "[t]he matter of sovereign immunity of the state itself, . . . is one on which we would solicit legislative action." *Id.*

64. 320 N.W.2d 507 (N.D. 1982). The plaintiff brought suit against the State and Hulstrand Construction alleging that the plaintiff suffered injuries in a head-on collision due to the defendant's alleged negligence in failing to adequately maintain the construction site and warn travelers of the hazardous road conditions. Senger v. Hulstrand Constr., Inc., 320 N.W.2d 507 (N.D. 1982). The plaintiff argued that North Dakota's article I, section 9 did not expressly prohibit the judiciary from abrogating the judicial doctrine of sovereign immunity on its own. *Id.* at 508-09.

65. *Id.* at 510. The North Dakota Supreme Court noted that section 32-12.1-03 (4) of the North Dakota Century Code provided that the state did not waive or abrogate its sovereign immunity by authorizing the state and the state's governing bodies to obtain insurance coverage within the chapter. *Id.* N.D. CENT. CODE § 32-12.1-03(4) (Supp. 1993).

66. *Senger*, 320 N.W.2d at 510.

67. 425 N.W.2d 906 (N.D. 1988).

68. Dickinson Pub. Sch. Dist. v. Sanstead, 425 N.W.2d 906, 910-11 (N.D. 1988) (Meschke, J., concurring). Although not a tort action, *Sanstead* was the first case in which a Supreme Court justice openly rejected the contention that article I, section 9 precluded the judiciary from abrogating sovereign immunity and called for its judicial abrogation. *Id.* at 910-11 (Meschke, J., concurring). In his concurring opinion, Justice Meschke stated that sovereign immunity was a "hallmark of totalitarianism . . . contrary to our constitution" and was a "discredited doctrine" "of mysterious origin." *Id.* at 911 (Meschke, J., concurring). Holding true to form, the majority upheld the State's sovereign immunity. *Id.* at 910.

sovereign immunity in *Schloesser v. Larson*[69] and *Leadbetter v. Rose*,[70] Justice Meschke, now joined by Justice Levine, continued to argue that "sovereign immunity is textually unfounded, lacks historical accuracy, and is judicially irrational."[71]

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69. 458 N.W.2d 257 (N.D. 1990).

70. 467 N.W.2d 431 (N.D. 1991). *Leadbetter v. Rose* was the last case in which the North Dakota Supreme Court barred a tort action against the State. Leadbetter v. Rose, 467 N.W.2d 431, 434 (N.D. 1991). In *Leadbetter*, a student brought suit against the University of North Dakota alleging a negligent failure to investigate her claim of sexual assault by a Department Chairman. *Id.* at 432. The plaintiff argued that sovereign immunity: was a judicial doctrine and could therefore be judicially abrogated, *id.* at 434; violates the "open courts" provision of article I, section 9, *id.* at 435; violates equal protection, *id.* at 435-36; and burdens interstate commerce and the plaintiff's right to travel, *id.* at 437. In addition, the plaintiff argued that the First and Fourteenth Amendments of the United States Constitution had eliminated the requirement that states must consent to suits instituted by its own citizens as provided within the Eleventh Amendment. *Id.* *See* U.S. CONST. amend. I (providing that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances"); U.S. CONST. amend. XIV (providing that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws"). Once again, the court maintained that only the State Legislature may modify the State's sovereign immunity. *Leadbetter*, 467 N.W.2d at 434. The court also determined that the "open courts" provision did not guarantee an absolute remedy since the second sentence of article I, section 9 limited the first sentence by leaving the State's sovereign immunity to the Legislature's discretion. *Id.* at 435. In response to the equal protection challenge, the Court applied the rational basis test to find that sovereign immunity was rationally related to a legitimate government interest. *Id.* at 436. The majority added that sovereign immunity was an equal part of North Dakota's Constitution and therefore, did not violate other provisions of the North Dakota Constitution. *Id.* at 437. The Court did not address the right to travel or interstate commerce arguments since the plaintiff's case was unsupported. *Id.* Furthermore, the court stated that their interpretation of sovereign immunity and the Eleventh Amendment was consistent with the United States Supreme Court's interpretation in *Hans v. Louisiana*, 134 U.S. 1 (1890). *Leadbetter*, 467 N.W.2d at 437. *See supra* notes 27-34 and accompanying text for a discussion of the history of Article III of the United States Constitution and the Eleventh Amendment.

71. *Leadbetter*, 467 N.W.2d at 438 (Meschke, J., dissenting). In dissent to the majority's upholding the State's sovereign immunity in *Schloesser v. Larson*, Justice Meschke, now joined by Justice Levine, expanded his position as stated in *Sanstead* by questioning the majority's interpretation of *Wirtz* as determining that the second sentence of article I, section 9 provides a constitutional basis for sovereign immunity. Schloesser v. Larson, 458 N.W.2d 257, 262 (N.D. 1990) (Meschke J., dissenting); Wirtz v. Nestos, 200 N.W. 524 (N.D. 1924). Dickinson Pub. Sch. Dist. v. Sanstead, 425 N.W. 2d 906 (N.D. 1988). He noted that *Wirtz* gave assurances that injured parties could seek redress and remedy against the State for the arbitrary refusal to perform an official or legal duty. *Schloesser*, 458 N.W.2d at 262-63 (Meschke, J., dissenting). Justice Meschke also argued that it was not logical to allow the "subordinate" second sentence to supervene the declared rights granted in the first sentence of article I, section 9. *Id.* at 262. In addition, Justice Meschke argued that sovereign immunity violated equal protection and due process guarantees provided in both federal and state constitutions. *Id.* "In a democracy that safeguards individual rights in a constitution, the judiciary cannot be impotent to rectify private injustices inflicted in the name of public interest." *Id.* at 263. Again in *Leadbetter*, Justice Meschke, joined by Justice Levine, dissented by restating his arguments in *Schloesser* that "sovereign immunity is textually unfounded, lacks historical accuracy, and is judicially irrational." *Leadbetter*, 647 N.W.2d at 438 (Meschke, J., dissenting). Recalling that the court had invited legislative action in *Kitto*, Justice Meschke argued that State sovereign immunity was being upheld on precedent and not reason. *Id.* Kitto v. Minot Park Dist., 224 N.W.2d 795 (N.D. 1974). In response to the majority's Eleventh Amendment argument, Justice Meschke argued that the Eleventh Amendment did not enshrine the State's sovereign immunity and that the Eleventh Amendment did not apply in state courts. *Leadbetter*, 467 N.W.2d at 438 (Meschke, J., dissenting). *See* U.S. CONST. amend. XI. The Eleventh Amendment addresses a states amenability to suit in federal courts. *Id.* *See also supra* note 34 (containing relevant text of U.S. CONST. amend XI).

III. ANALYSIS

In *Bulman v. Hulstrand Construction Co.*,[72] the North Dakota Supreme Court addressed the issue of whether the common-law doctrine of sovereign immunity had obtained a constitutional basis in article I, section 9 of the North Dakota Constitution, which could only be waived or modified by the State Legislature.[73] The court noted that although the first sentence of article I, section 9 guaranteed access to, but not a remedy in court, the second sentence had been historically interpreted as providing a constitutional basis for the doctrine of sovereign immunity which could only be waived by the State Legislature.[74] Due to recent questioning of this interpretation,[75] the court reconsidered it by examining its prior decisions with respect to the State's sovereign immunity,[76] by applying rules of constitutional construction to article I, section 9,[77] and by evaluating past justifications for the State's sovereign immunity for tort.[78]

The court's examination of the prior decisions began with and focused primarily on *Wirtz v. Nestos*.[79] The court determined that *Wirtz* had been interpreted wrongly in subsequent cases since *Wirtz* only prohibited unconsented suits against the State which compelled the State to perform official duties of a discretionary nature.[80] In *Bulman*, the supreme court stated that *Wirtz* did not preclude, but rather affirmed the right to redress and remedy against the State "under the fundamental law of the land."[81]

To determine the intent of the people who adopted article I, section 9, the court applied rules of construction to the constitutional provision.[82] The court determined that the express language of the second

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72. 521 N.W.2d 632 (N.D. 1994).

73. Bulman v. Hulstrand Constr. Co., 521 N.W.2d 632, 634 (N.D. 1994).

74. *Id.* *See supra* note 44 for a complete list of cases in which the North Dakota Supreme Court has interpreted article I, section 9 of the North Dakota Constitution as providing a constitutional basis for the doctrine of sovereign immunity which can only be waived by the state legislature.

75. *See supra* text accompanying notes 41-45 (discussing criticisms of the majority's interpretation of the relationship between the common-law doctrine of sovereign immunity and article I, section 9 of the North Dakota Constitution).

76. *Bulman*, 521 N.W.2d at 634-36.

77. *Id.* at 636-37.

78. *Id.* at 638-39.

79. *Id.* at 634-35. Wirtz v. Nestos, 200 N.W. 524 (N.D. 1924). *See supra* note 52 (providing a synopsis of the *Wirtz* case).

80. *Bulman*, 521 N.W.2d at 635.

81. *Id.* (quoting *Wirtz*, 200 N.W. at 535).

82. *Id.* at 636-37. To fulfill the Court's overriding objective of giving effect to the intent and purpose of article I, section 9's draftors, the Court applied "general principles of statutory construction, giving effect and meaning to every word, phrase, and sentence and harmonizing, if possible, potentially conflicting provisions." *Id.* at 636. *See* Johnson v. Wells County Water Resource Board, 410 N.W.2d 525 (N.D. 1987) (stating that, if possible, a constitutional provision's intent and

sentence was neutral on its face and therefore did not prohibit suits against the State or prevent the judiciary from abolishing the common-law doctrine of sovereign immunity.[83] Instead, the court explained, the second sentence is permissive and "merely authorizes the Legislature to direct the manner, the courts, and the cases in which suits may be brought against the State."[84]

Next, the court evaluated its past justifications for the doctrine of sovereign immunity, which included the English medieval principle that "the king could do no wrong,"[85] the potential retardation of the State's growth due to the diversion of funds for other governmental purposes,[86] the potential ineffective and inefficient performance of the State's duties as a result of a possible floodgate of tort litigation,[87] and the expedience of allowing the individual to suffer, rather than to inconvenience society.[88] The court determined that these justifications were no longer valid since sovereign immunity perpetuates injustice by prohibiting recovery solely on the wrongdoer's status, contradicts the tort principle that liability follow negligence, and is "counterintuitive to any ordinary person's sense of justice."[89] Furthermore, according to the majority, the doctrine of stare decisis should not prevent the court from abolishing a

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purpose is to be determined from its language).

83. *Bulman*, 521 N.W.2d at 637. *See supra* note 42 (discussing the Pennsylvania Supreme Court's similar interpretation of a nearly identical constitutional provision). The Court noted that a legal scholar had interpreted identical language in Pennsylvania's constitution as only precluding "suits in equity" and not "actions at law." *Bulman*, 521 N.W.2d at 637 n.5. *See* Jerome S. Sloan, *Lessons in Constitutional Interpretation: Sovereign Immunity in Pennsylvania*, 82 DICK. L. REV. 209 (1978) (analyzing article I, section 11 of the Pennsylvania Constitution and its relationship with the common-law doctrine of sovereign immunity).

84. *Bulman*, 521 N.W.2d at 637.

85. *See* Shermoen v. Lindsay, 163 N.W.2d 738, 742 (N.D. 1968) (listing historical justifications for governmental immunity including that the "sovereign is immune from suit").

86. *See* Kitto v. Minot Park Dist., 224 N.W.2d 795, 799 (N.D. 1974) (noting that governmental immunity had been justified as protecting the development of sparsely populated towns); Vail v. Town of Amenia, 59 N.W. 1092, 1095 (N.D. 1894) (stating that to hold the town financially liable would seriously retard its growth).

87. *See* Watland v. North Dakota Workmen's Compensation Bureau, 225 N.W. 812, 814 (N.D. 1929) (stating that sovereign immunity for tort is justified since it would be grievous to require general taxpayers to pay for an official's negligence and that money raised for specific purposes would be consumed in liquidation of liabilities); Shafer v. Lowe, 210 N.W. 501, 503 (N.D. 1926) (stating that to hold the state financially liable would impinge upon the public service and safety functions of government and would interfere with its administration).

88. *Bulman*, 521 N.W.2d at 638.

89. *Id.*

harsh and outdated doctrine which has no persuasive public policy justification.[90]

For these reasons, the court overruled its prior decisions which held that sovereign immunity had a constitutional basis in article I, section 9, which could only be waived or modified by the State Legislature.[91] The court then abrogated the common-law doctrine of sovereign immunity.[92]

However, the court placed two limitations on its holding. First, the State is still immune from tort liability for the performance of official duties of a discretionary nature,[93] including judicial, quasi-judicial, legislative, and quasi-legislative functions.[94] Second, except for the present case and two others,[95] the court's abrogation of sovereign

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90. *Id.* at 638-39. The Court noted that it had abandoned outdated common-law principles in the past. *See* First Trust Co. v. Scheels Hardware, 429 N.W.2d 5, 10 (N.D. 1988) (abandoning the common-law principle that a parent may not recover for the loss of a child's society and companionship); Hopkins v. McBane, 427 N.W.2d 85, 92-93 (N.D. 1988) (abandoning the common-law principle that parents are limited in recovery to their pecuniary or economic loss for the wrongful death of their minor child and permitting their recovery for mental anguish, loss of society, companionship, and comfort); Kitto v. Minot Park District, 224 N.W.2d 795, 804 (N.D. 1974) (abrogating governmental immunity for governing bodies other than the state); Lembke v. Unke, 171 N.W.2d 837, 847 (N.D. 1969) (abandoning the common-law principle that only heirs, legatees, or next of kin may waive the physician-patient privilege on behalf of a decedent and determining that to allow a testator's attending physician to testify as to the testator's testamentary capacity would not violate the physician-patient privilege since the determination of truth as to the testator's mental capacity was in the best interests of justice).

91. *Bulman*, 521 N.W.2d at 639. *See supra* note 44 (providing citations to cases which have interpreted article I, section 9 as granting to the state legislature alone the authority to waive or modify the State's sovereign immunity).

92. *Bulman*, 521 N.W.2d at 639. In abrogating the State's sovereign immunity, the Court stated: "[w]e conclude that the State's sovereign immunity for tort liability is outdated and is no longer warranted. We expressly overrule our prior cases sustaining that obsolete doctrine, and we join those states that have judicially abolished it." *Id.* (citations omitted).

93. *Id.* at 640. In *Kitto*, the North Dakota Supreme Court stated that reference to cases involving the discretionary exception under the Federal Tort Claims Act would provide insight as to what is considered a discretionary function. *Kitto*, 224 N.W.2d at 804-05. *See* 28 U.S.C. § 2680 (a) (1972) (providing discretionary exception under the Federal Tort Claims Act). In 1992, the Court provided further guidance in determining what constitutes a discretionary function in *Richmond v. Haney*, 480 N.W.2d 751 (N.D. 1992). In *Haney*, the court noted that under the Federal Tort Claims Act, the conduct in question must involve the judgment of the individual, and such" judgment must 'be grounded in social, economic, and political policy.'" *Id.* at 759 n.13 (quoting Kinnewick Irrigation Dist. v. United States, 880 F.2d 1018, 1025 (9th Cir. 1989) (discussing the development of the discretionary function exception)). The North Dakota Supreme Court has also indicated that a list of factors contained in section 895D, comment f, of the Restatement (Second) of Torts provides a useful reference in determining what constitutes a discretionary function. Loran v. Iszler, 373 N.W.2d 870, 873 (N.D. 1985). *See* RESTATEMENT (SECOND) OF TORTS, § 895D, cmt. f (1979) (providing a list of factors to consider in determining whether a public officer's conduct falls under the discretionary function exception). The Court indicated that relevant factors would be applied on a case by case basis. *Loran*, 373 N.W.2d at 874. "Whatever reference or aid we use in determining whether or not an act is discretionary, it must be utilized with the ultimate purpose behind the discretionary function exception in mind; that is, the 'essential acts of government decision making [should not] be the subject of judicial second-guessing.'" *Haney*, 480 N.W.2d at 759 (quoting *Kitto*, 224 N.W.2d at 804).

94. *Bulman*, 521 N.W.2d at 640.

95. The two other cases for which the State's sovereign immunity will not preclude suit are Ferris v. North Dakota Centennial Comm'n, 521 N.W.2d 643 (N.D. 1994), and Hosman v. North Dakota State Univ., 521 N.W.2d 643 (N.D. 1994). These two cases were decided contemporaneously with

immunity would be applied prospectively and would take effect fifteen days after the Fifty-fourth Legislative Assembly adjourned in order to give the State legislature an opportunity to obtain liability insurance.[96]

In a special concurrence, Justice Sandstrom noted that the Declaration of Independence embodies the idea that "government receives its power from the people, not that people receive their rights from government."[97] Therefore, Justice Sandstrom added, although the "legislature may reasonably regulate suits, . . . suits cannot be barred based on 'the immunity of kings.'"[98]

Chief Justice VandeWalle dissented to what he characterized as the majority's "sleight of hand" reduction of a constitutional provision to a common-law doctrine which the majority could set aside as "no longer meet[ing] the needs of the time."[99] The Chief Justice argued that the majority's contention that the doctrine of sovereign immunity had been elevated to a constitutional status through judicial precedent was incorrect because sovereign immunity obtained a constitutional status in 1889 when the North Dakota Constitution was adopted by the State Legislature.[100] The Chief Justice stated that irrespective of whether sovereign immunity had its origins in common-law, it was a part of our constitution, and should have been afforded the same respect as other constitutional provisions.[101]

The Chief Justice also stated that the majority's interpretation of the second sentence of article I, section 9 as merely authorizing the legislature to modify or waive sovereign immunity was "indeed a surprise" because the legislature already had that power.[102] Therefore, Chief Justice VandeWalle concluded, the second sentence was intended to give

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Bulman. *Bulman*, 521 N.W.2d at 640.

96. *Bulman*, 521 N.W.2d at 640. In order for a state's waiver of its sovereign immunity to be effective, the state must consent to suit and provide funds through appropriation or by taxation with which to pay a money judgment. Board of Trustees v. John K. Ruff, Inc., 366 A.2d 360, 366 (Md. 1976).

97. *Bulman*, 521 N.W.2d at 641 (Sandstrom, J., concurring). *See supra* pp. 2-3 and accompanying notes (discussing the medieval English origin of the common-law doctrine of sovereign immunity).

98. *Bulman*, 521 N.W.2d at 641.

99. *Id.* (VandeWalle, C.J., dissenting).

100. *Id. See supra* pp. 5-8 and accompanying notes (discussing the adoption of article I, section 9 of the North Dakota Constitution).

101. *Bulman*, 521 N.W.2d at 641 (VandeWalle, C.J., dissenting). *See, e.g.*, State v. Rivinius, 328 N.W.2d 220, 228 (N.D. 1982) *cert. denied*, 460 U.S. 1070 (1983) (stating that the provisions of a state constitution have equal standing). In conclusion, Chief Justice VandeWalle attacked Justice Meschke's previous concurrence in *Sanstead* in which Justice Meschke stated that sovereign immunity was a "hallmark of totalitarianism . . . contrary to our constitutions" by asking how our constitution could be contrary to itself. *Bulman*, 521 N.W.2d at 642 (VandeWalle, C.J., dissenting). *See* Dickinson Pub. Sch. Dist. v. Sanstead, 425 N.W.2d 906, 911 (N.D. 1988) (Meschke, J., concurring) (criticizing sovereign immunity as being unjust).

102. *Bulman*, 521 N.W.2d at 641-42 (VandeWalle, C.J., dissenting).

immunity to the State.[103] Furthermore, Chief Justice VandeWalle stated that the doctrine of stare decisis should have been given additional weight in construing the meaning of a constitutional provision.[104]

Chief Justice VandeWalle stated that he personally believed that suits should be permitted against the State in certain circumstances.[105] However, he stated that such a belief does not justify "an unprincipled judiciary who contrives theories to overrule precedent and set aside constitutional provisions."[106]

IV. IMPACT

By abrogating the doctrine of sovereign immunity, the North Dakota Supreme Court has provided injured parties an opportunity to seek redress and remedy for the tortious conduct of state agents and employees while continuing to insulate the State from liability for its officials' performance of duties which are discretionary in nature.[107] In

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103. *Id.* Chief Justice VandeWalle stated that the second sentence of article I, section 9 was an exception to the first and if not for the second sentence, the first sentence would repeal sovereign immunity. *Id.* at 642. Chief Justice VandeWalle called the majority's distinction between "suits in equity" and "actions at law" a flimsy theory since, unlike Pennsylvania, North Dakota had already abolished the distinction between the two prior to the adoption of the North Dakota Constitution in 1889. *Id.* *See supra* note 83 for support of the majority's distinction between "suits in equity" and "actions at law" argument.

104. *Bulman*, 521 N.W.2d at 642 (VandeWalle, C.J., dissenting). *See* 20 AM. JUR. 2D *Courts* § 197 (1965) (stating that stare decisis is of greatest importance when construing a constitutional provision). In quoting the supreme courts of Montana and Idaho, the North Dakota Supreme Court stated:

> The general rule is that when the highest court of a state has construed a constitutional provision, the rule of stare decisis . . . applies, unless it is demonstrably made to appear that the construction manifestly is wrong. Decisions construing the Constitution should be followed, in the absence of cogent reasons to the contrary, as it is of the utmost importance that our organic law be of certain meaning and fixed in interpretation.

Estate of Nystuen v. Nystuen, 80 N.W.2d 671, 684 (N.D. 1956) (Morris, J., concurring specially) (citations omitted) (quoting State ex rel. Kain v. Fischl, 20 P.2d 1057, 1059 (Mont. 1933)). The court also stated:

> When the beneficial results to be obtained by a departure from the construction and interpretation placed by this court upon a constitutional or statutory provision will not greatly exceed the disastrous and evil effects likely to flow therefrom, the court will decline to reopen those questions, where rights and interests have become settled under such decisions, and they have been acquiesced in by the Legislature and the people for any reasonable period of time.

Id. (citations omitted) (quoting Walling v. Brown, 76 P. 318 (Idaho 1904)). Chief Justice VandeWalle noted that the decisions which had held that sovereign immunity was based with article I, section 9 were "neither few in number, obscure, nor ancient." *Bulman*, 521 N.W.2d at 641 (VandeWalle, C.J., dissenting).

105. *Bulman*, 521 N.W.2d at 642.

106. *Id.*

107. *See* Bulman v. Hulstrand Constr. Co., 521 N.W.2d 632, 639 (N.D. 1994) (abrogating the doctrine of sovereign immunity thereby allowing individuals to sue the state of North Dakota for tort); *id.* at 640 (retaining the state of North Dakota's immunity for tort for the exercise of official and legal duties of a discretionary nature). Included within the Court's exception for official discretionary acts

so doing, North Dakota has joined the majority of states that have already judicially or legislatively abolished or limited this outdated doctrine.[108] The court's holding does not affect the State's Eleventh Amendment immunity from suit in federal courts,[109] individual immunities,[110] or suits instituted against state officials in their personal capacity.[111]

Since the court delayed the abrogation of sovereign immunity for all but three cases until fifteen days after the Fifty-fourth Legislative Assembly adjourned, state legislators were pressed to pass legislation

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are judicial, quasi-judicial, legislative, and quasi-legislative functions. *Id.* at 640. *See supra* note 93 (discussing discretionary functions and legislative, quasi-legislative, judicial, and quasi-judicial acts).

108. *Bulman*, 521 N.W.2d at 639. States which have already judicially abrogated the common-law doctrine of sovereign immunity include Arizona, California, Colorado, Idaho, Illinois, Indiana, Louisiana, Minnesota, Mississippi, Missouri, New Jersey, New Mexico, Oklahoma, Pennsylvania, and South Carolina. *See* Stone v. Arizona Highway Comm'n, 381 P.2d 107, 109 (1963) (abrogating Arizona's sovereign immunity judicially); Muskopf v. Corning Hosp. Dist., 359 P.2d 457, 458 (Cal. 1961) (abrogating California's sovereign immunity judicially); Evans v. Board of County Comm'rs, 482 P.2d 968, 972 (Colo. 1971) (abrogating Colorado's sovereign immunity judicially); Smith v. State, 473 P.2d 937, 944 (Idaho 1970) (abrogating Idaho's sovereign immunity judicially); Molitor v. Kaneland Community Unit Dist. No. 302, 163 N.E.2d 89, 98 (Ill. 1959), *cert. denied*, 362 U.S. 968 (1960) (abrogating Illinois' sovereign immunityjudicially); Perkins v. State, 251 N.E.2d 30, 35 (Ind. 1969) (abrogating Indiana's sovereign immunity judicially); Board of Comm'rs v. Splendour Shipping & Enter. Co., 273 So.2d 19, 26 (La. 1973) (abrogating Louisiana's sovereign immunity judicially); Nieting v. Blondell, 235 N.W. 2d 597, 603 (Minn. 1975) (abrogating Minnesota's sovereign immunity judicially); Pruett v. City of Rosedale, 421 So.2d 1046, 1052 (Miss. 1982) (abrogating Mississippi's sovereign immunity judicially); Jones v. State Highway Comm'n, 557 S.W.2d 225, 230 (Mo. 1977) (abrogating Montana's sovereign immunity judicially); Willis v. Department of Conservation & Economic Dev., 264 A.2d 34, 37 (N.J. 1970) (abrogating New Jersey's sovereign immunity judicially); Hicks v. State, 544 P.2d 1153, 1155 (N.M. 1975) (abrogating New Mexico's sovereign immunity judicially); Vanderpool v. State, 672 P.2d 1153, 1156 (Okla. 1983) (abrogating Oklahoma's sovereign immunity judicially); Mayle v. Pennsylvania Dep't of Highways, 388 A.2d 709, 720 (Pa. 1978) (abrogating Pennsylvania's sovereign immunity judicially); McCall v. Batson, 329 S.E.2d 741, 742-43 (S.C. 1985) (abrogating South Carolina's sovereign immunity judicially).

109. *See* N.D. CENT CODE § 32-12.2-10 (providing a statute to preserve the State's Eleventh Amendment immunity); *see also supra* notes 28-35 and accompanying text for a discussion of the history of Article III of the United States Constitution and Eleventh Amendment immunity.

110. Employees and officers of the State of North Dakota are still entitled to the defense of statutory immunity for actions which occur within the scope of their employment. N.D. CENT. CODE § 26.1-21-10.1 (1989). State officials are entitled to qualified immunity in § 1983 actions. *See* Livingood v. Meece, 477 N.W.2d 183, 191-95 (N.D. 1991) (explaining the requirements of qualified immunity).

111. The United States Supreme Court clarified the distinction between personal-capacity suits and official-capacity suits instituted against government officials in Kentucky v. Graham, 473 U.S. 159 (1985):

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.' As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.

Id. at 165-66 (footnote omitted).

which would enable the state to cope with what some have argued will be a flood of litigation instituted against the State.[112]

In response to the *Bulman* decision, the North Dakota Legislature proposed to reassert the State's sovereign immunity legislatively.[113] This would be accomplished by amending article I, section 9 of the North Dakota Constitution by retaining only the "open courts" clause.[114] In addition, the state legislature would then create and enact a new section to the North Dakota Constitution which would expressly reinstate the State's sovereign immunity.[115] These constitutional amendments will require approval by the North Dakota electorate in 1996.[116]

In order to address the injustices which spurred the judicial abrogation of the State's sovereign immunity, the Legislature passed laws which waive the State's sovereign immunity in limited situations.[117] This legislation provides appropriations for insurance coverage and numerous limitations including caps on damage awards and notice requirements for actions instituted against the State.[118] In any case, by judicially abrogating the State's sovereign immunity for tort, whether authorized

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112. *See, e.g.*, Dale Wetzel, *Ruling Opens State Up To Lawsuits*, GRAND FORKS HERALD, Sept. 14, 1994, at 3A (quoting North Dakota Attorney General Heidi Heitkamp as stating that "the ruling may prompt a deluge of litigation that could cost taxpayers millions of dollars"); *see also* William E. Crawford, *Torts*, 54 LA. L. REV. 807 (1992-93) (arguing that Louisiana should adopt a state tort claims act to counter a real "threat of financial disaster to the state" as a result of an increase in appropriations for judgments against the state's transportation department due largely to the constitutional abrogation of the state's sovereign immunity for tort in 1974). *But see* REPORT OF THE N.D. LEGISLATIVE COUNCIL, LIABILITY INSURANCE STUDY, at 123 (1987) (indicating that during the period from 1975 to 1985 there had not been a dramatic increase in civil jury awards as a result of the abrogation of governmental immunity in 1974 and discussing possible courses of action to deal with an insurance crisis caused by dramatic increases in the cost of obtaining insurance coverage for the state's governing bodies, other than the state).

113. S. Con. Res. 4014, 54th Leg., *available in* ND-LEGIS, West's No. 387. Other states have legislatively reasserted their sovereign immunity following its judicial abrogation. *See* MO. REV. STAT. § 537.600 (Supp. 1994) (reasserting Missouri's sovereign immunity); PA. CONS. STAT. ANN. tit. 1, § 2310 (Supp. 1995) (reasserting Pennsylvania's sovereign immunity).

114. *See* S. Con. Res. 4014, 54th Leg., *available in* ND-LEGIS, West's No. 387 (amending article I, section 9 of the North Dakota Constitution by deleting the second limiting sentence which provides "[s]uits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.").

115. *Id.* (creating and enacting a new section to the North Dakota Constitution). The added Constitutional provision would provide:

> Notwithstanding any other provision of the constitution, no suit may be brought against the state or an employee of the state acting within the employee's official capacity unless the legislative assembly provides by law the type of claims and the procedure through which those claims may be brought against the state or its employees.

Id.

116. *See* N.D. CONST. art. IV, § 16 (providing that the North Dakota Constitution may only be amended by a majority vote by the North Dakota electors).

117. *See* S.B. 2080, 54th Leg., 1995 N.D. Laws ch. 329 (creating, amending and reenacting, and repealing statutes to facilitate the reassertion of the State's sovereign immunity and to waive such immunity in certain situations).

118. *Id.*

to do so or not, the North Dakota Supreme Court has accomplished what it has been striving to achieve for over twenty years–legislative action to provide injured parties a remedy against the State for its employees' and agents' tortious conduct.

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