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February 8, 2021

To: Representative Mike Lefor
Chairman, North Dakota House of Representative Committee on
Industry, Business, and Labor

From: Larry Richards, Attorney at Law

RE: Testimony House Bill No. 1454—Unlawful Interference with Business Relation

Mr. Chairman and members of the committee I have reviewed this proposed bill and wanted to make note of a couple of things which you may or may not be aware of. To start, I will qualify my testimony by stating that I am by no means a “legal scholar” on this subject. However, I do have some experience with litigating this type of tort in North Dakota courts so I am just giving you my “two cents” as you might say.

First, it needs to be noted that the North Dakota Supreme Court recognized the tort of “unlawful interference with business” in 2001. See Trade ‘N Post, L.L.C. vs. World Duty Free Americas, et. al., 2001 N.D. 116. In doing do, the North Dakota Supreme Court, after a lengthy judicial analysis of various elements used by other courts, established that the elements of this tort for North Dakota as follows:

“[A] plaintiff must prove the following essential elements: (1) the existence of a valid business relationship or expectancy; (2) knowledge by the interferer of the relationship or expectancy; (3) an independently tortious or otherwise unlawful act of interference by the interferer; (4) proof that the interference caused the harm sustained; and (5) actual damages to the party whose relationship or expectancy was disrupted. See, e.g., Wal-Mart Stores, Inc. v. Sturges, 44 Tex. Sup. Ct. J. 486, No. 98-1107, 2001 WL 228139, at *1 (Tex. Mar. 8, 2001); see also Schneider, 1999 ND 235, ¶ 26, 603 N.W.2d 869 (actual damages are an essential element of the tort).”

Second, the North Dakota Supreme Court has also recognized the separate and distinct tort of “tortious interference with an existing contract”. This common law tort was detailed in a series of cases in 1997 and 1998. Messiha v. State, 1998 ND 149, ¶ 10, 583 N.W.2d 385; Tracy v. Central Cass Pub. Sch. Dist., 1998 ND 12, ¶ 9, 574 N.W.2d 11 781; Fronteer Directory Co. v. Maley, 1997 ND 162, ¶ 14, 567 N.W.2d 826. In North Dakota, the elements of “tortious interference with an existing contract” is as follows:

“(1) a contract existed, (2) the contract was breached, (3) the defendant instigated the breach, and (4) the defendant instigated the breach without justification.” Hilton v. N.D. Educ. Ass’n, 2002 ND 209, ¶ 24, 655 N.W.2d 60. “Tortious interference requires a person who is not a party to the contract to interfere with the contract.” Van Sickel v. Hallmark & Assocs., Inc., 2008 ND 12, ¶ 25, 744 N.W.2d 532

Thimjon Farms Partnership vs. First International Bank & Trust, 2013 N.D. 160, ¶11.

As I review this statute, this bill appears to create, incorporate and possible merges both of these torts. While it would remain an open question for the North Dakota Supreme Court, the enactment of this bill may—and I would argue probably will—result in the abrogation of the existing torts. In other words, it would replace the common law. This significantly impacts the law in that it casts in doubt the relevance and application of twenty years of North Dakota Supreme Court precedents on these torts as well as that from other states.

I would further argue that the adoption of this bill expands these causes of action. For example, the bill states that a Plaintiff must prove “defendant intentionally and improperly interfered with the contractual of business relationship”. However, with regard to the “unlawful interference with business” tort, the North Dakota Supreme Court refused to adopt the “malicious” or “improper” conduct elements in favor of what I would say is the more burdensome “independently tortious or otherwise unlawful” conduct element. See Trade ‘N Post, L.L.C. vs. World Duty Free America, 2001 N.D. 116, ¶¶37-42. I believe it is more burdensome because I

would say it's harder to show someone acted "possibly unlawfully" rather than just "improperly". In other words, there are situations where you can show someone did something wrong which is not technically conduct that could be unlawful or actionable by law, but was still wrong (i.e. improper) by most persons thinking.

I would also say that proving "[a]ctual, compensatory, incidental, or consequential damages" is a further expansion. Again, in reference to the "unlawful interference with business" tort, in Trade 'N Post, the North Dakota Supreme Court specifically adopted the "actual damages" element. 2001 N.D. 116, ¶36. As an element, "actual damages" is a "stringent standard" where "it is not enough that the Plaintiff shows a reasonable possibility that he would obtained some economic benefit", but show that he or she "would have obtained a benefit". Schneider vs. Schaff, 1999 N.D. 235, ¶26, 603 N.W.2d 869. In adopting this requirement in the Schneider case, the North Dakota Supreme Court specifically quoted the leading legal treatise on the subject—Prosser & Keeton. The addition of other types of damages in this bill does add things. For instance, "consequential damages" adds losses which are merely "reasonably foreseeable" at the time of the wrongdoing or breach of contract, usually stemming from the Plaintiff's involvement with third parties not involved in the case. See Hoffman vs. Stoller, 320 N.W.2d 786, 792 (N.D. 1982).

I give this testimony not to necessarily dissuade you from enacting or changing this area of the law. I do so just to highlight the great impact it could have as well as how important it is that, if you do so, you should be aware of how the language used could greatly impact the rights and privileges current North Dakota citizens have in seeking legal recourse in our Courts.

Finally, please note that, while I am an attorney, I present this testimony in my individual capacity. I do not present this testimony on behalf on any individual, corporation or other entity. I have not and will not receive any compensation for the presentation of this testimony.

Testimony on HB 1454

Pg. 4

2/8/21

Thank you for your time and consideration as well as your service to the State of North Dakota

Sincerely,

/s/ Larry J. Richards

Larry J. Richards
Attorney at Law

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