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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEB 16 2007
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Dean Kessel,)	
)	
Plaintiff,)	Supreme Court No. 20060267
)	
-vs-)	District Court No. 04-C-1681
)	
Robert Rutherford,)	
)	
Defendant and)	
Third Party Plaintiff)	
)	
-vs-)	
)	
Jamie Leingang,)	
)	
Defendant and)	
Third Party Defendant)	
)	

Brief of Defendant/ Appellant Robert Rutherford

Appeal from Civil Judgement entered on
April 28, 2006, In District Court, County of Burleigh
State of North Dakota, Honorable Sonna Anderson

Robert Rutherford
2521 Circle Drive
Jamestown, North Dakota
58401

Defendant Pro-Se

TABLE OF CONTENTS

Table of contents i
Table of authorities ii
Statement of the issues 1
Statement of the case 1
Statement of the facts 1

Arguments

I.

DID THE TRIAL COURT ABUSE ITS DISCRETION BY FAILING TO CONCISELY STATE ITS REASONING FOR DENYING RULE 59 IN ITS MEMORANDUM AND OPINION?

II.

WAS THE JUDGMENT EXCESSIVE TO INDICATE PASSION OR PREJUDICE?

III.

DID THE JURY AWARD EXCESSIVE NON-ECONOMIC DAMAGES BASED UPON PASSION OR PREJUDICE?

IV.

SHOULD THE DEFENDANT HAVE BEEN ALLOWED TO APPEAR TELEPHONICALLY TO REBUT THE FALSE TESTIMONY?

Conclusion

TABLE OF AUTHORITIES

Cases

Estelle v. Williams, 96 S.C. 1691 (1976)

Muchow v. Lindbland, 435 N.W. 2nd 918 (ND. 1989)

Nelson v. Trinity Medical Center, 419 N.W. 2nd (ND 1998)

Skjoodsby v. Ness, 221, N.w. 2nd 71 (ND 1974)

STATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion by failing to concisely state its reasoning in its memorandum and opinion?
2. Whether the judgment was excessive to indicate passion or prejudice?
3. Whether the jury awarded excessive non-economical damages based upon passion or prejudice?
4. Whether the evidence was prejudicial to the Defendant and denied him of a fair trial?
5. Whether the Defendant should have been allowed to appear telephonically to rebut the false testimony?

STATEMENT OF THE CASE

This is an appeal by Robert Rutherford, from the Civil Judgment and the denial of the Defendant's Rule 59 Motion entered by the Honorable Sonna Anderson, Judge of the District Court, South Central Judicial District Court on September 6, 2006.

(Appendix Docket 157). Appellant Robert Rutherford (Hereinafter known as Mr. Rutherford). On May 1, 2006, the court signed the judgment in which the jury awarded in the amount of \$239,348.50 plus cost (90%) of \$1,066.97 for a total of \$240,415.47. This from the April 17, 18, and 19, 2006, civil trial. It was a jury of nine.

STATEMENT OF THE FACTS

On May 27, 2004, the Defendant, Robert Rutherford and three other individuals: Jaimie Leingang, his girlfriend, Kim Helgeson, and Jaimie Leingang's bestfriend, Brandon Ulmer left the Broken Oar and drove to Dean Kessle's house.

On September 17, 2004, Mr. Rutherford was served with a

summons for allegedly assaulting Dean Kessle at his house. On April 17, 18, 19, 2006, Mr. Rutherford's trial was held while he was an inmate at Appleton Prison in Appleton, Minnesota, and a judgment was rendered in his absence. Mr. Rutherford was only allowed limited communication with his attorney and was allowed no means of communication with the court or his attorney during the three-days of his trial. In fact, the Defendant, Mr. Rutherford, had not seen nor met with his attorney as he (the attorney) was retained by Mr. Rutherford's sister.

On April 17, 18, and 19, 2006, Co-Defendant, Jaimie Leingang, was allowed to testify adversely in person during the hearing. On April 19, 2006, the jury rendered its verdict and awarded the Plaintiff, Dean Kessle, \$240,415,47 in damages. On September 6, 2006, Rule 59 was received, filed and denied by Judge Sonna Anderson.

I.

DID THE TRIAL COURT ABUSE ITS DISCRETION BY FAILING TO CONCISELY STATE ITS REASONING FOR DENYING RULE 59 IN ITS MEMORANDUM AND OPINION?

Rule 59 (f) Memorandum of Decision on Motion for New Trial-with all orders granting or refusing a new trial, the judge shall file a written memorandum concisely stating the different grounds on which the ruling is based. And unless the insufficiency or unsatisfactory nature of the evidence is expressly stated in the memorandum as a reason for granting the new trial, it must be presumed, on appeal, that it was not on that ground.

Rutherford states that it is very apparent that the trial judge failed to comply with Rule 59 (f) of the N.D.R.C.P. in that there is no memorandum and opinion with the judge's November 2005 order. Nothing concisely stating the ground in which the judge based her ruling.

II.

WAS THE JUDGMENT EXCESSIVE TO INDICATE PASSION OR PREJUDICE?

Rule 59 (b) (5) of the North Dakota Rule of Civil Procedure provides as follows:

b. Cause for a new trial. The former verdict or other decision may be vacated and a new trial granted on the application of a party aggrieved for any of the following causes materially affecting the substantial rights of the party:

5. Excessive damages appearing to have been given under the influence of passion or prejudice, but when a trial is asked for on this ground, and it appears that the passion and prejudice affected only the amount of damages allowed and did

not influence the findings of the jury on other issues in the case, the trial court, on hearing the motion and the Supreme Court, on appeal, may order a reduction of the verdict in lieu of a new trial, or order a new trial be had unless the party in whose favor the verdict was given remits the excess of damages both compensatory and punitive.

The jury was also influenced by the numerous pictures of the scene and of the Plaintiff. There were approximately fifty picture exhibits allowed over the objection of the Defendant which involved the scene after the Plaintiff's injuries. The excessive number of pictures and the implication that the Plaintiff's damages must be severe based upon these pictures caused the jury to award damages based upon passion or prejudice. Likewise, pictures were submitted to the jury, over the objection of the defendant, showing the defendant in prison garb. The other pictures clearly showed that the defendant was a member of the Armed Forces Division United States Marine Corp Rangers. These pictures caused the jury to award damages based upon passion or prejudice. (See) Estelle v. Williams, 96 S.C. 1691 (1976) It is well established that a Defendant is prejudiced when forced to attend his trial while wearing prison garb. In this present case, Rutherford was shown wearing prison garb, and yet he was not present at his trial to defend against said pictures; therefore, these pictures left an impression on the jury which caused the jury to award damages based upon passion or prejudice.

Rule 59(g) of the North Dakota Rules of Civil Procedure also provides, in pertinent part:

The verdict of a jury also may be vacated and a new trial granted by the court in which the action is pending on its own motion without application of either of the parties, when there has been such plain disregard by the jury of the instructions of the Court or of the evidence in the case as to satisfy the Court that the verdict was rendered under a missapprehension of the instructions

or under the influence of passion or prejudice.

In determining whether the verdict was motivated by passion or prejudice, "passion" means moved by feelings or emotions, or may include sympathy as moving influence without conscious violation of duty, "prejudice" includes forming an opinion without due knowledge or examination." Skjonsby v. Ness, 221, NW 2d 71 (ND 1974); Nelson v. Trinity Medical Center, 419 N.W. 2d (ND. 1998).

III.

DID THE JURY AWARD EXCESSIVE NON-ECONOMIC DAMAGES BASED UPON PASSION OR PREJUDICE?

As the Plaintiff obviously had no physical impairment of disfigurement, the jury awarded the plaintiff no damages for those two items. However, as to the other items, it appears that the jury felt it was compelled to make some awards for each category, regardless of the definition of the award or whether or not the Plaintiff actually incurred such damages and if it was supported by the evidence presented to the Court.

The jury awarded the Plaintiff \$30,000.00 for pain and suffering, but no award for physical impairment or disfigurement. As such, the Plaintiff received \$30,000.00 for pain and suffering, which, by the Plaintiff's own admission, had subsided in a relatively short period of time.

The jury also awarded the Plaintiff the sum of \$10,000.00 for inconvenience. Black's Law Dictionary defines inconvenience is the equivalency of punitive damages and as such, it appears the

jury did not understand the definition of inconvenience.

The Plaintiff was also awarded \$20,000.00 for mental anguish \$2,000.00 for humiliation, \$15,000.00 for fear of injury, nothing for fear of loss, and \$20,000.00 for emotional distress. Mental anguish is defined as: "When connected with a physical injury, this term includes both the resultant mental sensations of pain and also the accompanying feelings of distress, fright, and anxiety...." Black's Law Dictionary. Humiliation needs no explanation, nor does fear of injury and fear and loss. However, all of these definitions fall under the description of emotional distress.

Emotion distress applies to all forms of emotional disturbance, including temporary fright, nervous shock, nausea, grief, rage, and humiliation. See: Muchow v. Lindblad, 435 N.W. 2nd 918 (ND 1989). Likewise, how could the jury have awarded \$15,000.00 for fear of injury, but nothing for fear of loss. The jury's decision to consider each element, entitles the Defendant to Rule 59 relief.

The jury was also inconsistent in determining that the Defendant Robert Rutherford was ninety percent at fault whereas the Defendant Jamie Leingang was only ten percent at fault. At no time did the Plaintiff allege that the two Defendants were acting in concert. As such, the jury must have determined that Jamie Leingang personally committed some act and therein caused injuries to the Plaintiff.

In fact, the testimony from Jamie Leingang's girlfriend and friends were clear that they were told by Jamie Leingang that he broke down the door and caused the Plaintiff's damages. Kent Nuisema testified he saw Jamie Leingang break down the door. The Defendant Robert Rutherford testified that Jamie Leingang broke down the door

and that he had to pull Jaimie Leingang off to prevent him from further hurting the Plaintiff. The only testimony to the contrary was that of Jaimie Leingang who stated he did not break down the door. The Plaintiff testified that he saw Robert Rutherford in the house and that he thinks Robert Rutherford broke down the door. However, based upon the injuries he suffered, his recollection of the timing of those events is suspect at best.

As such, the jury completely disregarded the evidence that was presented to it. Why? Is it because Robert Rutherford was not present to testify or perhaps because he was convicted and sentenced to jail, and Jaimie Leingang elected to reach a plea agreement? regardless of the reasons why, the jury failed to properly consider the evidence that was presented.

The Defendant, Robert Rutherford, should also have had the opportunity to be present at this trial. He has been deprived of his right to confront witnesses that testified against him. He also should have had the opportunity to present rebuttal testimony to the allegations that were made. Even had a trial deposition been taken of the Defendant, nothing would have granted him the opportunity to rebut the allegations that were made at the trial. As the court will recall, in one particular instance, the jury had to be excused and the witness informed of the consequences of perjury based upon his changes in this testimony.

In addition, the Defendant would have had the opportunity to address the allegations of his net worth on rebuttal. This would have given the jury a true picture of the fact that the defendant is a blue collar worker and does not have hundreds

of thousands of dollars worth in assets as the jury must have believed in order to award such a large award.

CONCLUSION

The Judgment of the trial Court should be reversed, and this Court should order the entry of a reversal for a new trial.

Respectfully submitted this 13th day of February 2007



Robert Rutherford
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Jamestown, ND 58401

CERTIFICATE OF SERVICE BY MAIL

I, Robert Rutherford, do hereby certify that, on the 13th day of February, 2007, I served the Brief of Defendant/Appellant upon the following, by placing true and correct copies in envelopes addressed as follows:

Ms. Penny Miller
Clerk of the Supreme Court
Judicial Wing, 1st Floor
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Bismarck, North Dakota
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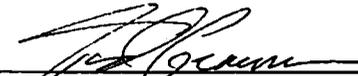
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and deposing the same, with postage prepaid, in the United States Mail at James River Correctional Center, Stutsman County, Jamestown, North Dakota, 58401

Dated this 13 day of February, 2007.


Robert Rutherford
2521 Circle Drive
Jamestown, North Dakota
58401

Subscribed and sworn before me this 13th day of February 2007 in
Stutsman Co., North Dakota


NOTARY PUBLIC:

TAD GRANMOE
Notary Public
State of North Dakota
My Commission Expires MARCH 7, 2012