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SUPREME COURT NO. 20150122  
Burleigh County No. 08-2014-CV-00628

FILED  
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CLERK OF SUPREME COURT

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

JUL 1 2015

STATE OF NORTH DAKOTA

Paul Rusgrove,  
Plaintiff and Appellant,

v.

Wayne Goter, *WR*  
Defendant and Appellee.

BRIEF OF APPELLANT PAUL RUSGROVE

Appeal from the Memorandum Opinion And Order For Summary Judgment dated March 5, 2015, and Judgment Of Dismissal with Prejudice dated March 9, 2015; the Honorable Michael G. Sturdevant, Presiding.

RESPECTFULLY SUBMITTED this 29 day of June, 2015.



Paul Rusgrove, pro se  
James River Correctional Center-#19097  
2521 Circle Drive  
Jamestown, ND 58401

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SUPREME COURT JUL 20 2015

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**[¶3] STATEMENT OF THE ISSUES**

**[¶4] ISSUE:** Whether the district court erred in summarily dismissing Plaintiff-Appellant's lawsuit against Wayne Goter.

A. Whether an indigent pro se litigant of a lawsuit, which has a statute of limitations should be allowed to use government employees to testify inside their expertise, training and professional obligations, instead of using a paid expert witness(es).

B. Whether the district court should have applied a less stringent standard to Plaintiff-Appellant, because he is an incarcerated pro se litigant, and lacks of experience and education regarding the legal process.

C. Whether Rebecca S. Thiem, counsel for defendant, during the original proceeding, contacted Plaintiff-Appellant's endorsed witnesses, without the proper approval from the district court.

**[¶5] STATEMENT OF THE CASE**

[¶6] In March of 2003, Plaintiff-Appellant ("Appellant") was arrested for the offense of possession with intent to deliver methamphetamine within 1,000 feet of a school. (See, Burleigh County Crininal Case No. 08-03-K-01607 ("Criminal Case"), DOC. ID# 2<sup>1</sup><sub>P.R.</sub>; App. # 8 ). On March 31, 2003, Wayne D. Goter ("Defendant") was appointed as Appellant's counsel for this matter. (See, Criminal Case, DOC. ID##3 and 5). There were also two other offenses Appellant was arrested for, but for this matter these two other offenses have no significance.

[¶7] On April 14, 2003, Appellant was officially charged with the underlying offense in this matter by Information. (See, Criminal Case, DOC. ID# 10 ; App. # 8 ). In July of 2003, Appellant entered a plea of guilty, pursuant to a plea agreement, which was secured between Defendant and the State,

which provided that Appellant would be sentenced to a period of two (2) years, credit for one-hundred-eight (108) days served, with a term of five (5) years supervised probation. (See, Criminal Judgment, Criminal Case, DOC. ID# 13 ; App. # 8 ). On June 10, 2005, Appellant's probation was revoked and Appellant was sentenced to a period of ten (10) years, with six (6) years suspended and credit for two (2) years and seventy-eight (78) days in custody, with a term of five (5) years probation. (See, Third Amended Criminal Judgment, Criminal Case, DOC. ID# 28 ; App. # 8 ).

[¶8] On June 7, 2007, this Court, stated that the North Dakota Legislature did not intend for N.D.C.C. §19-03.1-23.1 to apply to possession with intent to deliver within 1,000 feet of a school zone. (See, State v. Dennis, 2007 ND 87, 733 N.W. 2d 241).

[¶9] On March 28, 2008, Appellant's probation was again revoked and Appellant was sentenced to a period of eight (8) years, with credit for four (4) years and fifteen days while in custody (See, Fourth Amended Criminal Judgment, Criminal Case, DOC. ID# 37 ; App. # 8 ).

[¶10] On or about December 23, 2012, Appellant was informed that the crime of possession with intent to deliver within 1,000 feet of a school zone, a class AA felony, was not a cognizable offense under North Dakota law by another inmate at the James River Correctional Center, because of this

Court's holding in State v. Dennis. (See, Affidavit of Paul Smestad, App. # 24 ).

[¶11] On January 27, 2014, at 9:48 a.m. o'clock, Appellant served Defendant a Summons (See, App. # 25 ) and Complaint (See, App. # 26 ), by and through the Burleigh County Sheriff's Department. (See, Sheriff's Return, App. # 29 ).

[¶12] On March 5, 2012, the Honorable Michael G. Sturdevant, Judge of the District Court issued it's Memorandum Opinion and Order for Summary Judgment (See, App. # 31 ) and on March 9, 2015, the Judgment of Dismissal with Prejudice. (See, App. # 33 ); see also, (Paul Rusgrove vs. Wayne Goter, Burleigh County Civil Case No. 08-2014-CV-00628).

[¶13] On April 18, 2015, Appellant filed his Notice of Appeal. (See, App. # 7 ).

#### [¶14] STATEMENT OF THE FACTS

[¶15] In March 2003, Appellant was arrested for the offense of possession with intent to deliver methamphetamine within 1,000 feet of a school. (See, App. # 8 ). There were also two other offenses Appellant was arrested for, but for this matter these two other offenses have no significance.

[¶16] On March 31, 2003, Defendant was appointed as Appellant's court-appointed counsel. (See, Criminal Case, DOC. ID##3 and 5; App. # ~~\_\_\_\_\_~~ <sup>P.R.</sup> ).

[¶17] On April 14, 2003, Appellant was finally officially charged with the offense of possession of methamphetamine with intent to deliver within 1,000 feet of a school and the two other counts of possession of drug paraphernalia which have no significance in this matter. (See, App. # 8 ).

[¶18] In July, 2003, Appellant entered a plea of guilty, pursuant to a plea agreement, which was secured between Defendant and the State, which provided that Appellant would plead guilty to the underlying offense in this matter and would be sentenced to ten (10) years incarceration with eight (8) years suspended and credit for one-hundred-eight (108) days served, with a term of five (5) years supervised probation following the release from incarceration. (~~See, App.~~ #           ). P.R.

[¶19] Appellant on advice and recommendation of Defendant agreed to the terms of the plea agreement reached between Defendant and the State.

[¶20] On July 9, 2003, the trial court accepted the plea agreement reached between Defendant and the State. Appellant was committed to the legal and physical custody of the North Dakota Department of Corrections and Rehabilitation for a period of two (2) years commencing at twelve o'clock noon on July 9, 2003, followed by five (5) years supervised probation (See, App. # 17 ).

[¶21] On or about July 9, 2003, Appellant was transported to the North Dakota State Penitentiary and served a period of approximately seventeen (17) months, and then was placed in a half-way house for approximately three (3) months, once Appellant completed the half-way house placement, Appellant was released on probation.

[¶22] On March 24, 2005, the State filed it's first Petition For Revocation of Probation. (See, App. # 34 ). On June 10, 2005, the trial court issued it's Third Amended Criminal Judgment stating that Appellant was again committed to the legal and physical custody of the North Dakota Department of Corrections and Rehabilitation for a period of ten (10) years, with six (6) years suspended and credit for two (2) years and seventy-eight (78) days in custody, commencing at twelve o' clock noon on June 9, 2005. (See, Third Amended Criminal Judgment, ~~Criminal Case, DOC. ID# 28~~<sub>p.2</sub>; App. # 20 ).

[¶23] On June 7, 2007, this Court, stated that the North Dakota Legislature did not intend for N.D.C.C. 19-03.1-23.1 to apply to possession with intent to deliver within a 1,000 feet of a school zone. (See, State v. Dennis, 2007 ND 87, 733 N.W.2d 241).

[¶24] On March 13, 2008, the State filed it's second Petition For Revocation of Probation. (See, App. # 36 ). On March 28, 2008, the court issued it's Fourth Amended Criminal Judgment stating that Appellant was again committed to the legal and

physical custody of the North Dakota Department of Corrections and Rehabilitation for a period of eight (8) years, with credit for four (4) years and fifteen (15) days while in custody, commencing at twelve o'clock noon on March 28, 2008. (See, Fourth Amended Criminal Judgment, ~~Criminal Case~~, DOC. ID# <sup>P.R.</sup>           ; App. # 22 ).

[¶25] On or about December 23, 2012, Appellant was informed that the crime of possession with intent to deliver within 1,000 feet of a school zone, was no a cognizable offense under North Dakota law, by another inmate at the James River Correctional Center. (See, App. # 24 ).

[¶26] As soon as Appellant was made aware that he was convicted of an offense, which was not justified or allowed under North Dakota law, Appellant was diligent in locating all papers, documents and transcripts needed to determine the facts, including a Case Summary of Burleigh County Criminal Case No. 08-03-K-01607 purchased from the Burleigh County Clerk of District Court. (See, Burleigh County Criminal Case No. 08-03-K-01607, Case Summary, App. # 8 ). Appellant received the requested Case Summary in March of 2013 and purchased pertinent papers, documents and transcripts from the District Court Clerk in April of 2013. Appellant received the requested papers and documents in April of 2013. Appellant received the requested transcript of Hearing on Petition For Revocation of Probation, held March 28, 2008, in Burleigh County, North Dakota in September, 2013. (See, Transcript, App. # 39 ).

[¶27] On January 27, 2014, at 9:48 a.m. o'clock, Appellant served Defendant a Summons (See, App. # 25) and Complanint (See, App. # 26). This Summons and Complaint was served by and through Beth Orthman, Burleigh County Sheriff's Department. (See, App. # 29).

[¶28] On or about September 12, 2014, Appellant, filed and served a Notice and Endorsement of Witnesses. (See, App. # 61). Along with this Notice and Endorsement of Witnesses, Appellant filed and served a Certificate of Service, (See, App. # 62), certifying service of said documents on Defendant. In this Notice and Endorsement of Witnesses, Appellant endorsed the following two witnesses:

Penny Miller, Secretary  
Disciplinary Board of the Supreme Court  
600 East Boulevard Avenue  
Bismarck, ND 58505-0530

H. Jean Delaney  
Commission on Legal Counsel for Indigents  
P.O. Box 149  
Valley City, ND 58072

Also, enclosed was a letter addressed to each endorsed witness. (See, App. ## 64 and 65; see also, Letter to Rebecca S. Thiem, attorney for Defendant, dated September 9, 2014, App. # 65) which states:

"Enclosed, please find a Notice and Endorsement of Witnesses and supporting papers and letters."  
(emphasis added).

These letters addressed to each endorsed Witness clearly define each Witness as an Expert, as each letter states:

" Enclosed, please find a Notice and Endorsement of Witnesses, in which I state that I will be calling you to offer testimony." and

"This testimony will involve questions inside your expertise, training and professional obligations." (emphasis added).

(See Letter to: Penny Miller, Secretary, dated September 9, 2014, App. # 63 ; and Letter to: H. Jean Delany, dated September 9, 2014, App. # 64 ).

[¶29] On March 5, 2015, the Honorable Michael G. Sturdevant, Judge of the District Court issued it's Memorandum Opinion and Order for Summary Judgment (See, App. # 31 ) and on March 9, 2015, the Judgment of Dismissal with Prejudice. (See, App. # 33 ).

#### [¶30] LAW AND ARGUMENT

[¶31] ISSUE: Whether the district court erred in summarily dismissing Plaintiff-Appellant's lawsuit against Wayne Goter.

[¶32] Appellant's action for legal malpractice is centered on the fact that Defendant failed to inform Appellant, prior to or during the second revocation of probation hearing, held on Friday, March 28, 2008, before the Honorable David E. Reich, District Judge, that it was not an AA Felony crime to possess methamphetamine with intent to deliver within 1,000 feet of a school zone, because of the North Dakota Supreme Court decision in State v. Dennis, 2007 ND 87, 733 N.W.2d 241.

[¶33] Clearly the Dennis Court's decision were final and law before the March 28th, 2008, hearing on petition for revocation of probation, in-fact the Defendant stated at this hearing:

"I guess that and I -- I would note that although this is charged as a AA felony, I think the State versus Dennis case would say that you don't have possession with intent to deliver within a thousand feet of a school, it's technically not a AA felony, so it's not as serious as it looks on paper, I think."

(See, Transcript of Hearing on Petition for Revocation of Probation at page 7, lines 15-20; App. # 39 , lines 15-20). The State of North Dakota, by and through Cynthia M. Feland further stated during this March 28th Hearing:

"MS. FELAND: Yep. And I -- Mr. Goter is correct, Your Honor, that there is a case that indicates the possession with intent -- there's no enhancement for being within a thousand feet of a school, so I will modify the judgment to reflect that it's an A felony as opposed to a AA."

(See, Transcript of Hearing on Petition for Revocation of Probation at page 12, lines 22-25 and page 13, lines 1-2; App. # 39 , lines 22-25, App. # 39 , lines 1-2). It is clear from these statements that Defendant was informed and had knowledge of the Dennis decision prior to the March 28th Hearing, but basically chose not to inform Appellant, and allow the State to "modify the judgment to reflect that it's an A Felony as opposed to a AA."

[¶34] Clearly there was a breach of the standard of care involving negligence, lack of skill and lack of diligence, because Defendant failed to inform or file and serve the proper papers and documents required to vacate Appellant's illegal sentence as an AA Felony. This omission is nonfeasance, as it was an act that ought to be performed by Defendant.

[¶35] There is no doubt that had not Defendant negligently failed to file the proper papers and documents required to vacate Appellant's illegal sentence there is a reasonable probability that Appellant would not have received a four (4) year sentence of incarceration.

[¶36] Because of the complexity of the legal issues in this case, expert testimony is necessary to establish the standard of care in the case and whether Defendant breached the standard of care in recommending the plea agreement, not filing the proper papers and documents to vacate the illegal sentence and not challenging the applicability of N.D.C.C. §19-03.1-23.1. In addition, in order to establish causation in a legal negligence case, this Court has stated that "expert testimony is required if the issue is beyond the area of common knowledge or lay comprehension, or the issue is 'not within the ordinary experience of the jurors.'" (See, Klimple v. Bahl, 2007 ND 13, ¶6, 727 N.W.2d 256. The causation of an attorney's actions in determining trial strategy in a criminal proceeding is a matter outside the common knowledge of a juror. (See, Klimple). As a result, in this matter, expert testimony would be required to address the fourth element of damages and whether any were proximately caused by the Defendant's actions. (See, Klimple; see also, Dan Nelson Constr., Inc. v. Nodland & Dickson, 2000 ND 61, ¶14, 608 N.W.2d 267.

[¶37] In the absence of expert testimony, the nuances and variations of the practice of law make indispensable expert

teismony to acquaint the trier-of-fact with the applicable standard of care and any deviation therefrom, (See, Wastvedt v. Vaaler, 430 N.W.2d 561, 566 (N.D. 1988)), and in the absence of expert testimony the material facts would not be before the trier-of-the-facts.

[¶38] Whether an indigent pro se litigant of a lawsuit, which has a statute of limitations should be allowed to use government employees to testify inside their expertise, training and professional obligations, instead of using a paid expert witness(es).

[¶39] In the present matter Appellant is proceeding pro se, and is incarcerated at the James River Correctional Center until well past the time the statute of limitations would have run. Appellant is also indigent and can not afford to pay an expert witness(es) up to \$270.00 (two-hundred seventy, U.S. dollars) per hour to consider the substance of Appellant's allegations and form and opinion regarding Appellant's claim(s). Therefore Appellant can not hire a private expert for this matter.

[¶40] Therefore, Appellant endorsed Penny Miller, Secretary of the Disciplinary Board of the Supreme Court and H. Jean Delaney, Commission on Legal Counsel for Indigents, because each would be able to testify generally that when a court-appointed attorney in a criminal matter was aware that the North Dakota Supreme Court had ruled that the offense for which the indigent defendant was charged with was not cognizable, and failed to file the proper papers or documents to

correct the illegal sentence, or to inform the indigent defendant that the offense was not cognizable under North Dakota law, that such court-appointed attorney's actions were unreasonable and thus, negligent. Each would testify without discussing details of anything confidential or intimate.

[¶41] Neither of the endorsed witnesses contacted Appellant stating that they were unable to testify within their expertise, training, or professional obligations, because of conflicts, lack of retainer(s), failure to consider the substance of Appellant's allegations or failure to form any opinion(s) regarding Appellant's claim(s). Therefore, Appellant was of the understanding that both endorsed witnesses would appear when subpoena'd and offer testimony.

[¶42] That just because Appellant is indigent and can not pay a private expert witness, incarcerated and won't be released until after the statute of limitations has run out and is proceeding pro se, it would seem that it is OK to violate Appellant's Due Process rights. When did the Courts only serve the wealthy?

[¶43] Whether the district court should have applied a less stringent standard to Plaintiff-Appellant, because he is an incarcerated pro se litigant, and lacks of experience and education regarding the legal process.

[¶44] The district court should have relaxed certain procedural

rules to accommodate Appellant, as Appellant was a pro se litigant, such as time for filing discovery requests, and filing of the notice of endorsed witnesses, to allow Appellant to determine an appropriate approach to expert witnesses of an indigent pro se litigant. (See, Houston v. Lack, 487 U.S. 266, 270-272 (1988)(holding some procedural rules must give way for pro se prisoners because of the unique circumstances of incarceration)).

[¶45] Also, the district court should have applied less stringent standards to Appellant, because Appellant was proceeding pro se and lacks of experience and education regarding the legal process. (See, Haines v. Kevner, 404 U.S. 519, 520-521 (1972); Grant v. Cuellar, 59 F.3d 523, 524 (5th Cir. 1995) (noting the court applies less stringent standards to pro se parties); see also, State v. Noack, 2007 ND 82, ¶9, 732 N.W. 2d 389.

[¶46] Whether Rebecca S. Thiem, counsel for defendant, during the original proceeding, contacted Plaintiff-Appellant's endorsed witnesses, without the proper approval from the district court.

[¶47] It would seem that Defendant's Counsel had contacted both endorsed witnesses, without any approval of the Court or Appellant. And it would seem they discussed the pending case as the information provided and stated in the REPLY BRIEF OF WAYNE GOTER IN SUPPORT OF SUMMARY JUDGMENT MOTION (App. # PR) is both explicit and significant in scope and

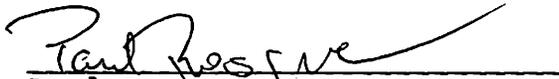
nature concerning a conversation with both endorsed witnesses, including an Affidavit of H. Jean Delaney, an endorsed witness, as an exhibit. (~~See, App. #~~ P.R.).

[¶48] Appellant brought this irregularity by Defendant Counsel to the attention of the district court, (See, App. # 66 at ¶8). But, it would also seem that the district court just wanted to remove this pro se lawsuit from his docket, because Appellant had "foolishly engaged in criminal conduct," and "now has chosen to relieve the tedium of his imprisonment by representing himself in this frivolous malpractice action against his former lawyer." (See, App. # 31 at page 1).

[¶49] CONCLUSION

[¶50] Appellant prays the Honorable Court reverse and remand to the district court for further proceedings.

[¶51] Respectfully submitted this 29 day of June, 2015.

  
Paul Rusgrove, pro se  
James River Correctional Center-#19097  
2521 Circle Drive  
Jamestown, ND 58401

[¶52] CERTIFICATE OF SERVICE

[¶53] I hereby certify that I served the BRIEF OF APPELLANT PAUL RUSGROVE and APPENDIX OF PAUL RUSGROVE, by United States Mail (Prison Mail Box System) upon the following party:

Steven Balaban  
Attorney at Law  
200 N. Mandan St.  
Bismarck, ND 58501

[¶54] Dated this 29 day of June, 2015.

  
Paul Rusgrove, pro se

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North Dakota Supreme Court

JUL 24 2015

CASE NO. 20150122

Butteley Co No 2014-CV-00628 STATE OF NORTH DAKOTA

I hereby certify that I served true and accurate copies of corrected title pages for Appellant's Brief and Appendix, by united states mail (prison mail box system) upon the following party:

Steven Balaban  
Attorney at Law  
200 N. MANDAN ST  
Bismarck, ND  
58501

RECEIVED BY CLERK  
SUPREME COURT JUL 24 2015

in the 16<sup>th</sup> day of July 2015.

Paul Rasqure

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James River Correctional Center  
2521 circle drive  
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