

NO. 20160060

20160060

IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

LA VERNE KOENIG,

PLAINTIFF/APPELLANT,

VS

KENNETH SCHUH, JASON SCHUH, MARY
SCHUH, PATRICIA SCHUH AND DOES 1-10
INCLUSIVE,

DEFENDANTS/APPELLEES.

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JUN 24 2016

STATE OF NORTH DAKOTA

APPELLANT'S APPEAL BRIEF

APPEAL FROM JUDGMENT NELSON COUNTY
DISTRICT COURT, JUDGE JON J. JENSEN
NELSON COUNTY NO. 2014-CV-00039

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STATEMENT OF THE ISSUES RAISED ON APPEAL

This is a personal injury action, wherein the Plaintiff was seriously injured due to the deliberate, intentional actions of Defendant Jason Schuh, on rural family farm property owned by Defendant Patricia Schuh and operated by Kenneth and Mary Schuh and their siblings. The District Court granted partial summary judgment to Patricia and Mary Schuh, even though their attorneys represented that, as alleged, a business transaction had occurred at the time of the injury to Plaintiff.

The first issue raised is did the trial court err in granting Defendant's partial summary judgment in view of the representations made by their counsel?

Due to the severity of the injuries, Plaintiff is forced to live on Social Security and only receives Six Hundred and Twenty Dollars (\$620.00) monthly and is unable to borrow money to pay for the transcription of the Voir Dire and Jury Trial Transcripts.

The second issue raised is Does the lack of a trial transcript deny plaintiff a full and fair appellate review of the errors of the district court during the jury trial and other pre-trial and post trial proceedings?

As noted, this is a personal injury action. The District Court refused to allow any of Plaintiff's medical doctors testify, ordered all subpoenas quashed; refused to allow any medical records introduced into evidence; refused to allow an admission against interest made by Defendant Kenneth Schuh to their Insurance Company Investigator introduced into evidence; and denied most all other material evidence introduced into evidence; only allowed the parties fifteen minutes to conduct voir dire, although faced with a potential jury pool containing immediate relatives of the Defendants, and 95-97% of them when

asked certain questions had personal, social and/or business relations with the Defendants.

The third issue the District Court Errors that deprived Plaintiff of a full and fair trial by jury.

STATEMENT OF THE FACTS

This personal injury action was the result of Plaintiff purchasing large round hay bales from the Schuh family. Plaintiff received call from Cory Schuh in March, 2013 about hay bales they had for sale. Plaintiff agreed to meet at the Schuh farm located South East of Lakota North Dakota on March 30, 2013. Upon Plaintiff's inspection, Plaintiff agreed to purchase the 100 bales of hay offered at the price quoted. Thereafter, Cory and Kenneth Schuh proceeded to load Plaintiff's trailer with 17 bales. Plaintiff secured the load by himself, paid Cory for the purchase and agreed to return the following Saturday for another load.

On April 6, 2013, Plaintiff again returned to the Schuh family farm, observed the Schuh's out in the hay lot moving hay bales, Plaintiff proceeded to that location following the route taken the week before. Upon inspection again (some hay bales the strings had rotted off and would not haul so the Schuh's kept them for their own livestock) the younger Schuh, later identified as Jason, used a skid steer loader and loaded the first twelve bales on Plaintiff's trailer. Plaintiff's only communication with Jason was hand signals in the placement of the bales, keeping the rows straight and equal overhang on the trailer. Kenneth thereafter using a farmhand loader tractor, with higher reach, started loading a row of bales down the center. Plaintiff having experienced Ken's inability to get the top row centered, from the load the week before, crawled upon the load and gave hand motions/directions in the placement of the bales before Ken opened up the grapple fork and moved away. Plaintiff got down from the load and got his tie down straps and placed them on the first row of bales, thereafter crawled upon the load, as Ken came with

the second of five bales to be placed on the top row. After Ken had placed the second bale, and gone to get the third one, Jason told Plaintiff to stay atop the load, he would fasten the tie down straps. Plaintiff thereafter gave Jason specific, clear instructions in where to fasten the tie down hooks, in the chains secured to the stake pockets with the hook facing out (away from the trailer), then to pull up on the strap to remove the slack and prevent it from coming unhooked until Plaintiff had the opportunity to further pull the slack out and throw the other end of the tie down mechanism down the other side. Jason correctly followed these instructions on the first four bales/tie down straps. On the fifth one, he hooked it wrong, hook facing in, and walked away. Failing to pull up on it to prevent it from coming unhooked. Plaintiff thereafter pulled on the strap, the same as he had done on the previous four, but this time he went over backwards as the strap had come unhooked. Plaintiff fell backwards off the load of hay, falling ten to twelve feet to the frozen ground below, ultimately breaking his left hand in two places and severely injuring his hip and left foot. After a time laying on the cold frozen ground, Plaintiff managed to get into his pickup truck and the Schuh's Ken and Jason finished loading and securing all the tie down straps. Ken then approached Plaintiff's vehicle advised Plaintiff that they had finished loading and securing the load. Plaintiff being in extreme pain, informed Ken that he was unable to take the load at that time, asked if Ken wanted to leave the loaded trailer in his hay yard or up by the farmhouse. Due to the spring thaw, Ken elected to put it up by the farmhouse. Plaintiff thereafter got out of the drivers door and limped around the vehicle, letting Ken drive, and got into the passenger side. After some discussion, Ken decided to have Plaintiff drive one of their vehicles home, instead

of unhooking Plaintiff's trailer. Ken's other vehicle was located at a residence in Lakota, so he drove Plaintiff there, unloaded some fishing gear and Plaintiff was on his way home. After approximately two hours to drive the sixty miles to Grand Forks, Plaintiff decided that he could not make it home or to Fargo to the hospital, located the hospital in Grand Forks and finally managed to make it to the Emergency room. Whereupon emergency room personnel represented that they accepted/honored the Sanford Medical Plan that Plaintiff was on, so Plaintiff allowed their medical doctors to proceed. Plaintiff's blood pressure was at 90, medical personnel was fearful that Plaintiff was in shock, and immediately started an IV. Upon further examination, by x-rays, it was discovered that Plaintiff's left hand was broken in two places. Nothing showed up at that time with the hip or ankle, even though the ankle was black and blue and severely swollen. Medical doctors pinned Plaintiff's hand with four pins, casted the hand from the finger tips to past the elbow and hospitalized Plaintiff overnight, although wanting Plaintiff to stay through Monday. Upon releasing Plaintiff, Plaintiff again complained about the left ankle being sore and swollen, so the medical personnel obtained a ankle sleeve and wheeled Plaintiff to the vehicle. Plaintiff upon arriving home, attempted to feed the livestock and especially the baby calves, but was unable to do so, contacted a neighbor, who came over with his hired man and he helped Plaintiff out for many months thereafter. Plaintiff took a picture of his ankle and showed it to the doctors at his next scheduled appointment, at which time, the doctor represented that they should have sent Plaintiff home in a Cam boot, to stabilize the ankle. Thereafter issuing one. The ankle didn't get any better, so the Doctor ordered a MRI done, and one was done in July, 2013. No results were ever

communicated to Plaintiff by anyone from the Grand Forks hospital(Altru). The hand was casted, x-rayed and recasted three times by Altru doctors, but it didn't heal properly.

On April 26, 2014, Plaintiff was attempting to feed the livestock, when his vision got blurry and he couldn't see anything. After about 5 minutes, it cleared up, so Plaintiff continued to attempt to feed the livestock, and suddenly everything was spinning. Shortly, Plaintiff was on his hands and knees trying to call 911, but unable to see the key pad, plus the mud, eventually after 15-20 tries, Plaintiff was able to get through to 911. Operator said to stay calm and on ground, a deputy was about two miles away. Deputy arrived and asked Plaintiff if he could get up and stand, which Plaintiff did, and they communicated until the ambulance arrived. Plaintiff was hospitalized at Sanford in Fargo, for three days undergoing extensive tests to determine what had happened. No negative results were found. A Neurosurgeon recommended Plaintiff see an Eye doctor. Plaintiff's eye doctor found nothing negative either. Plaintiff still being unable to walk got a referral to a foot specialists, whom later obtained the MRI from Altru in Grand Forks and represented that there was a dead inflamed bone in the middle of Plaintiff's ankle. Surgery was performed in January 2015. Plaintiff was on crutches for over four months, yet the ankle continued to be painful and sore, so a new MRI was done July 2015. This MRI revealed even more bone fragments, inflammation etc, surgery was again performed in August, 2015. Plaintiff was wheelchair bound until late December, 2015. Earlier, Plaintiff was still experiencing pain in his left hand, so consulted with hand specialists at Sanford, Fargo. It was determined that the pinned bone was shorter than the other bone, resulting in the painful sore movement of the wrist. Surgery was had in May, 2015, to saw off the other bone and

put a plate and screws in. Plaintiff was informed that he would lose Sanford Health Insurance coverage October 1, 2015. Plaintiff had been experiencing a lot of pain in both his left hand and left ankle, and obtained a TENS unit from a party in California and had agreed to pay a rental fee for its usage. It had been represented that it was a prescription item, and Plaintiff's inquiry of the Sanford doctors they would not prescribe and/or did not understand its usage or purpose.

Sometime in June, July or August, of 2013, Plaintiff had received monthly bills from Altru for the emergency room and hospitalization, believing that due to the injury occurring on the Schuh farm, their liability insurance should cover the injury, so Plaintiff drove to Lakota and gave a copy of the billing statement to Ken Schuh. Ken represented he would give it to his insurance agent. After numerous phone calls from the collection department at Altru and the passage of months, Plaintiff again drove to Lakota with the latest bill, and unable to locate Ken, gave it to Mary Schuh. Mary represented to Plaintiff that her information the load of hay bales was loaded out on the gravel road in front of the farm, so they weren't liable. Plaintiff advised her that the loads had been loaded in the hay yard, he didn't know where she got her information from. At some point in time shortly thereafter Ken Schuh called Plaintiff and advised him that their insurance agent wanted to talk to Plaintiff, and Ken gave Plaintiff a telephone number. Plaintiff called the insurance agent, who made the same representations as Mary had. Plaintiff informed him that those representations were incorrect. And also that the load being on Plaintiffs' vehicle had nothing to do with the injury caused by Jason's deliberate actions. Said agent stated he disagreed with Plaintiff but that he would turn it into the company. After

continued phone calls from Altru collection department, Plaintiff consulted with legal counsel Brett Brudvik. At some point in March, 2014, Mr Brudvik filed a Complaint (but did not give Plaintiff a copy thereof). During that time, an Investigator with the Schuh's insurance company conducted an interview with Kenneth and Jason Schuh. Mr. Brudvik obtained a copy of the investigators report, contained therein, Kenneth Schuh admitted to the Investigator that Jason had caused the injury to Plaintiff. The District Court, Judge Jon J. Jensen refused to allow this Report introduced into evidence at the jury trial, even though it is admissible as an admission against interest.

Attorney Brudvik, later filed an Amended Complaint, naming Patricia Schuh as a party defendant, the owner of the Schuh family farm. Very limited discovery was undertaken by Brudvik into Patricia Schuh's involvement/knowledge/relationship/etc. Unbeknown to Plaintiff during the ensuing months, Attorney Brudvik was engaged in negotiations with the Traill County States Attorneys Office, to join offices. Plaintiff had retained attorney Brudvik to handle a misdemeanor livestock running at large charge and had discussed a traffic infraction, some time prior thereto. Plaintiff discovered, for the first time, that they had joined their offices October 1, 2015, the criminal charges were still pending at that time. Mr. Brudvik turned Plaintiffs' case over to a newly acquired associate, Ross Nilson, who did not support the complaint/claims that Mr. Brudvik had filed, so in August, 2015 he withdrew their representation, which the district court granted without hearing or prior notice to plaintiff.

Defendants immediately moved for summary judgment. Plaintiff did not have the files to know what discovery had been undertaken, except for the deposition testimony and

Plaintiffs' answers to Defendants Interrogatories. Some time after Plaintiff had responded to Defendants Summary Judgment motions Plaintiff discovered a package from Brudvik law containing their discovery, in total disarray and took considerable time to sort out and appreciate the contents. In the meantime, the court had scheduled a summary judgment hearing at which time Counsel for Defendants represented to the Court that a business transaction had taken place between the Plaintiff and Defendants which resulted in Plaintiff being seriously injured. District court disregarded their representations and granted partial summary judgment. Plaintiff filed an order for the Summary Judgment transcripts and obtained them some time later. At a pre trial conference Plaintiff requested a continuance in an to attempt to obtain new legal counsel. The district court refused a continuance. Plaintiff was unable to obtain new counsel and forced to proceed pro se thereafter. Plaintiff discovered that Brudvik law had not filed the ordered discovery or items that the court had wanted filed, and attempted to do so, but the judge denied the request. Plaintiff attempted to subpoena his medical doctors to testify, but Judge Jon J. Jones, ordered that those subpoena's be quashed. Plaintiff attempted to offer his Medical Records into evidence. Judge Jones denied that request. Plaintiff attempted to offer the medical expenses expended for his medical care. Judge denied that request. Plaintiff attempted to introduce the Insurance Investigators report, where Ken Schuh told the investigator that Jason had caused the injury to Plaintiff. Judge Jones denied that request. The voir dire, Judge Jones only allowed the parties fifteen (15) minutes to conduct their voir dire. A number of potential jurors stated they were related to the Schuhs. 95-97 percent stated (raised their hands) that they had social,

personal and/or business relations with the Schuhs. Plaintiff was not allowed to remove or challenge the whole panel for cause.

During the Jury trial, Plaintiff made three Motions for Mistrial, which Judge Jones denied, without giving Plaintiff an opportunity to be heard and which his rulings were: “denied, you can take my ruling(s) up on appeal.” This was his basic ruling on the numerous motions made throughout the pre-trial and Jury trial proceedings.

A timely Notice of Appeal and Order for Jury Trial Transcripts was filed. Court Reporter informed that the Voir Dire was not a part of those transcripts, a Order for Transcripts of the Voir Dire was submitted.

Plaintiff lives on Social Security of \$620.00 month and is unable to borrow money to pay for the transcripts, a Motion to Proceed In Forma Pauperis with attached Affidavit of Indigency, based on 28 U.S.C. Sec. 1915(a)(1) was filed. Judge Jones denied it, but made no finding of indigency status. Plaintiff filed an Amended Motion with attached Affidavit. Judge Jones again denied it, but still made no finding of indigency status. Plaintiff filed a third Amended/Corrected Motion with attached Affidavit. Judge Jones again denied it, but made no findings concerning indigency status. Plaintiff filed a similar motion with this Court, but Chief Justice Vande Welle denied it, also made no findings concerning Plaintiffs indigency status.

Plaintiff attempted to amend the pleadings prior to trial and at the conclusion of the trial. Judge Jones denied both requests. Plaintiff made a motion for directed verdict, which was also denied by Judge Jones. Plaintiff testified at trial that he would have to undergo at least two additional surgeries, which will leave Plaintiff permanently disabled.

STANDARD OF APPELLATE REVIEW

The proper standard for review of the District Court's grant of partial summary judgment to Defendants Patricia and Mary Schuh Issue I, is de novo.

The proper standard for review of the District Courts' refusal to grant Plaintiff In Forma Pauperis, Issue II, is de novo.

The proper standard for review of the District Courts' errors before, during and after the jury trial Issue III, is de novo.

ARGUMENT

I. Did the trial court err in granting Defendant's partial summary judgment in view of the representations made by their counsel?

The trial court committed reversible error when it granted Defendant's partial summary judgment. The Plaintiff's Complaint alleged that Plaintiffs' relationship with Defendants was due to a business deal, wherein Plaintiff was purchasing hay bales from the Schuh family farm.

Defendant Patricia Schuh was liable under Respondeat Superior liability. The trial court granted Defendant Patricia Schuh's summary judgment, due to her not being present and not having anything to do with the loading of the hay bales. Essentially concluding, there was no business dealings with her as she wasn't even present.

Motions for Summary Judgment impose a difficult standard on the moving party, for it must be obvious that no rational trier of fact could find for the nonmoving party. **Miller v. Federal Deposit Ins. Corp.**, 906 F. 2d 972, 974 (4th Cir. 1990).

This Court held in **Olson v. Alerus Financial Corp.**, 2015 ND 209, that the district court, Judge Jon Jensen has misapplied the Rules in Summary Judgment actions, held the non-moving party to a higher standard of burden of proof than the law requires, had shifted the burden of proof to the non-moving party contrary to the Rules. In essence, the underlying court had dismissed the case based on their own view of the evidence. **Tolan v. Cotton**, 572 U. S. ____, 134 S. Ct. 1861 (2014).

The Summary Judgment proceedings, attest to the fact that the District court, Judge Jensen shifted the burden of proof to the nonmoving party as counsel for the Defendants'

admitted that there was a business transaction, the reason for Plaintiff to be on Defendant's property, and the ultimate serious injury caused by Defendant's agents, employees, of Defendant's Patricia, Kenneth and Mary Schuh.

MR. AAMODT: “.. There --*it's a business transaction*, the Plaintiff is at the Schuh farm which is owned by Patricia Schuh. *He's there with his pickup and his trailer and is purchasing these large bales of hay from the Schuhs...*in the process of strapping those down with the assistance of Jason Schuh, who is the son of Kenneth and Mary Schuh and grandson of Patricia Schuh...” [Emphasis added]

See Summary Judgment Transcripts, page 3 lines 11-21.

See also, MR. MARRIN: “... *I would generally agree with Mr. Aamodt's recitation of the facts in this matter.* Regarding our client, Patricia Schuh, her involvement in this action arises purely out of her ownership of the subject property where Plaintiff alleges the incident took place. That fact is not in dispute...” *Id.*, page 6, lines 23-25, page 7, lines 1-4. *Id.* Summary Judgment Transcripts.

Family Partnership exists under North Dakota law as well as agency created by the relationship. Whether Defendant Patricia Schuh acting as the principal was present or not, had any impute in the selling, loading or payment of the hay bales is irrelevant to her liability for Plaintiff's serious injuries. See ND Pattern Jury Instruction No. 55.01; NDCC 3-01-01; 3-01-04-05; 3-01-07; Hector v. Metro Centers, Inc., 498 NW 2d 113, 118 (ND 1993).

Respondeat Superior Liability is a long standing doctrine in this state's jurisprudence. Binstock v. Fort Yates Pub. Sch. Dist., 463 NW 2d 837, 841-432 (ND 1990). Partnership liability is recognized under North Dakota Statutory Law, NDCC 45-15-06, Olson v. Fraase, 421 NW 2d 820 (ND 1988). In North Dakota a “partnership”

agreement, may be oral. **Jones v. Jones**, 310 NW 2d 753, 755 (ND 1981). The Schuh farm enterprise is a joint venture, which imposes liability. **Thompson v. Danner**, 507 NW 2d 550, 556 (ND 1993).

The moving party's failure to prove that there is no genuine issue as to any material fact. Defendant Patricia Schuh's answer to Plaintiff's Interrogatories, Interrogatory No. 3 asked:

For each person physically present at the time and place of the incident, please state:

- a. His or her name, address, and telephone number;
- b. Job title as to the date of the incident;
- c. **Whether he or she was on duty at the time of the incident;**
- d. **The job function he or she was performing at the time of the incident...**

ANSWER: "...my sons, Jason and Ken, were in the area at the time..." [Emphasis added].

Defendant's Answer is evasive, incomplete and a failure to answer under the Rules, Rule 37(a)(3).

NDCC 3-01-01; 3-02-04-05 and 3-01-07 provides that "Agency is the relationship created when one person, called the principal authorizes another called the agent, to act for the principal in dealing with others." **See Hector v. Metro Centers, Inc.**, 498 NW 2d 113, 118 (ND 1993). The principal is responsible for acts of agents, including wrongful and negligent acts or omissions, if the agent is acting in the scope of agent's authority.

NDCC 3-02-07; 3-03-01; 3-03-09. **Hector, supra**.

Respondeat Superior liability does not require the Employer to be personally present, to be held liable for the negligent acts of the Employee, yet, the district court concluded that since Defendant's Patricia and Mary Schuh were not personally present and involved

in the sale of and loading of the hay bales, they weren't liable for Plaintiff's serious injuries caused by their agents, and granted partial summary judgment to them.

A properly instructed jury could have found that Kenneth and Jason Schuh were agents for Principal Patricia and Mary Schuh and were acting within their authority in selling, loading and securing the hay bales sold to Plaintiff on April 06, 2013.

Plaintiff's Interrogatory No 7, asked:

At the time of plaintiff's injury, do you contend that any person or entity other than *you and your employees and agents* was responsible for the maintenance of the premises on which the plaintiff was injured?

ANSWER: No [Kenneth's answer]
No [Mary's answer]
No [Jason's answer]

Not a single defendant objected to the format of the question. Not a single defendant stated that they were not employees. Not a single defendant stated that they were not agents. Not a single defendant stated that they were not responsible for the maintenance of the premises.

By failing to properly resolve disputed issues in favor of the non moving party, the district court improperly "weighed the evidence" and resolved disputed issues in favor of the moving party. The district court granted Defendant Mary Schuh's motion for summary judgment that she was not liable for plaintiff's injuries.

The existence of an agency relationship is a question of fact. **Johnson v. Production Credit Association of Fargo**, 345 NW 2d 371 (ND 1981). A plaintiff is entitled to offer evidence of factual matters to prove an agency relationship, about which the courts do not speculate at the summary judgment stage of proceedings. **Farmers & Merchants**

National Bank v. Ostlie, 336 NW 2d 348, 351 (ND 1983).

Under North Dakota law, a Plaintiff is also allowed to show an act or omission is part of ratification by the principal. Ratification is the acceptance by a principal of an act done or supposedly done for the principal. A principal may ratify an act expressly or by conduct inconsistent with an intent to avoid responsibility for the act. Ratification of part of an indivisibly transaction is a ratification of the entire transaction. **NDCC 3-01-08**; **Meier v. Novak**, 338 NW 2d 631, 634 (ND 1983); **Farmers Union Oil v. Wood**, 301 NW 2d 129 (ND 1980).

“Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.”

Tuhy v. Schlabsz, 574 NW 2d 823, 826-827 (ND 1998).

The district court erred in granting Defendant’s partial summary judgment invaded the Jury function, shifted the burden of persuasion to the non moving party and amounted to his weighing the evidence contrary to established Summary Judgment law. *See, e. g.*

Tolan v. Cotton, 134 U. S. 1861 (2014); **Olson v. Alerus Financial Center**, 2015 ND 209, warranting a reversal and remand.

II. DOES THE LACK OF A TRIAL TRANSCRIPT DENY PLAINTIFF A FULL AND FAIR APPELLATE REVIEW OF THE ERRORS OF THE DISTRICT COURT DURING THE JURY TRIAL AND OTHER PRE-TRIAL AND POST TRIAL PROCEEDINGS?

The lack of a trial transcript does deny Plaintiff a full and fair appellate review.

This Court has consistently stated that without a transcript of the lower courts

proceedings, it had an inadequate record to review and base a decision upon.

Swearingen v. North Dakota, 2013 ND 125 P. 14; **State v. Kensmoe**, 2001 ND 190, P. 14, 636 NW 2d 183.

Plaintiff timely filed an Order for Transcripts, filed a Motion to Proceed In Forma Pauperis to obtain a copy of the trial transcripts. Clerks Docket Entry Nos.

The right to sue **in forma pauperis** is controlled by statute in most jurisdictions. *See **Cook v. District Court in & for Weld County***, 670 P. 2d 758, 760-761 (Colo. 1983) [except in the case of petitioner's bad faith or plain frivolity, *a trial court's discretion consists only of a determination of whether or not the petitioner is unable to pay*].

The exercise of judicial discretion is not a matter of grace, but should be consistent with sound legal principles fairly applied to the circumstances. **Chapman v. Dorsey**, 230 Minn. 279, 41 NW 2d 438 (1950). The district court has never addressed the issue of Plaintiff's indigency status, but has denied Plaintiff's request, three times.

This court has not yet set forth the standard of review which is applicable to an appeal from the denial of a petitioner's request to proceed **in forma pauperis** in a civil action. North Dakota Statute 27-01-07 provides for waiver of filing fees. While the Legislature intended that a court is entitled to exercise its discretion in examining a request to proceed **in forma pauperis**, at the same time, the Legislature contemplated that a court would not be allowed to arbitrarily deny such a request. Here, the District Court narrowly read the statute, that transcription costs are not part of the filing fee waiver, arbitrarily denied the request without ever addressing Petitioner's indigency status.

The right of an indigent civil litigant to proceed in forma pauperis is grounded in a

Common law right of access to the courts and constitutional principles of due process.

Earls v. Superior Court, (1971) 6 Cal. 3d 109, 113-114 [98 Cal. Rptr. 302, 490 P. 2d 814]; **Ferguson v. Keays**, (1971) 4 Cal. 3d 649, 653-655, fn. 8 [94 Cal. Rptr. 398, 484 P. 2d 70. Restricting an indigent's access to the courts because of his poverty...Contravenes the fundamental notions of equality and fairness which since the earliest days of the common law have found expression in the right to proceed in forma pauperis. **Isrin v. Superior Court** (1965) 63 Cal. 2d 153, 165 [45 Cal. Rptr. 320, 403 P. 2d 728. **Isrin** gives rise to their being a constitutionally protected right to proceed in forma pauperis. North Dakota Constitution grants constitutional rights greater than the United States Constitution. **State v. Ringquist**, 433 NW 2d 207, 212 (ND 1988).

Boddie v. Connecticut, (1971) 401 U. S. 371, stands for the concept that a court may not refuse an indigent the right to file an action for divorce on the ground that a the filing fee has not been paid, if the action is commenced in good faith. The Supreme Court held that such refusal amounted to a denial of due process of law since it deprives an appellant, solely by reason of poverty, of an opportunity to be heard upon the claimed right to a dissolution of marriage. *Id.*

Prior to **Boddie**, the Courts were deemed to have the inherent power to permit an indigent civil litigant to sue in forma pauperis and to *waive fees and costs*. **Earls v. Superior Court**, (1971) 6 Cal. 3d 109, 113-114 [98 Cal. Rptr. 302, 490 P. 2d 815].

Congress first enacted an in forma pauperis statute in 1892. Congress recognized that *"no citizen should be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, in any court of the United States, solely because his poverty*

makes it impossible for him to pay or secure the costs. It therefore permitted a citizen to “commence and prosecute to conclusion any such ... action without being required to prepay fees or costs, or give security therefore before or after bringing suit. The current statute permits an individual to litigate an action in forma pauperis if the individual files an affidavit stating, among other things, that he or she is unable to prepay fees or give security therefore. 28 U.S.C. Sec. 915(a)(1). Adkins v. E.I. DuPont de Nemours & Co., 335 U. S. 331, 342 (1948). Adkins was relied upon recently in Coleman v. Tollefson, 135 S. Ct. 1759 (decided May 18, 2015).

28 U.S.C. Sec. 915 (e)(1) provides:

“The court may request an attorney to represent any person unable to afford counsel...”

The refusal to waive the transcription fees and appoint appellate counsel in a civil case, also violates the Privileges and Immunities Clause of the United States Constitution.

Chambers v. Baltimore & Ohio RR, 207 U. S. 142, 148 (1907); McKnett v. St. Louis & S.F. Ry Co., 292 U. S. 230, 233 (1934). Cf. Cruz v. Superior Court, 120 Cal. App. 4th 175 (2004).

There does exist a federal right to proceed in forma pauperis, which *right includes commencing and prosecuting to conclusion any such action without being required to prepay fees or costs or give security therefore before or after bringing suit.*

A constitutionally protected right for an indigent to have a free copy of the trial transcripts, in a civil tort action, does exist.

III. THE DISTRICT COURT ERRORS THAT DEPRIVED PLAINTIFF OF A FULL AND FAIR TRIAL BY JURY

The District Court's Voir Dire process, denied Plaintiff of a meaningful examination of potential jurors. It only allowed 15 minutes for the parties to conduct their voir dire. Some Jurors on the panel were related to the defendants; 95-97% had social, personal and business relations with the defendants, actually raised their hands in response to questions thereto; were uncooperative in responding to direct questions propounded by Plaintiff.

This personal injury action was the result of deliberate acts by Defendants which caused Plaintiff serious medical injuries, yet the District Court refused to allow any of Plaintiff's medical personnel testify; no medical records were allowed into evidence; Defendant's admissions against interest were not allowed, admissions that Defendant Jason Schuh was the cause of Plaintiff's serious injuries, *See* Appendix P.55, End of long Answer. None of Defendant's Answers to Plaintiff's Interrogatories was allowed into evidence; No evidence of insurance coverage was allowed into evidence, or even testimony concerning insurance, even though all witnesses testified that there was a business transaction that was the underlying cause that resulted in Plaintiff being severely injured; the district court refused to give Plaintiff's proposed jury instructions, even though the evidence supported the giving of those jury instructions; took issues away from the Jury that they should have made the determination upon based upon their view of the evidence; denied a request for continuance so that Plaintiff had a meaningful opportunity to obtain new counsel after the previous counsel withdrew, actually because of an actual conflict of interest, even though their withdrawal motion didn't state that fact.[fn1]

1. Plaintiff contacted approximately 20 different lawyers/law firms in attempt to obtain legal counsel after Brudvik Law Firm withdrew. Either they had conflict of interest; did not have time to prepare for jury trial scheduled for 2 months out; didn't get involved in some other attorneys case that was already filed and scheduled for trial; too busy or scheduling conflicts; didn't handle personal injury cases; wouldn't take on a case before the assigned judge. As a result, Plaintiff was forced to proceed pro se.

Denied Plaintiff's three separate motions for mistrial, all denied without reasons, all issues, the district court simply stated, denied, you can take it up on appeal; ultimately denied a full and fair trial before an impartial judge.

CONCLUSION

The District Court erred in granting partial summary judgment in light of the representations made by defense counsel and its shifting the burden of proof to the nonmoving party was contrary to well established law and the Rules. Its denial of a continuance so that Plaintiff had a meaningful opportunity to obtain new legal counsel denied Plaintiff of a fair trial.

The denial of a meaningful opportunity to conduct voir dire denied Plaintiff of an impartial jury in view of fact that they all had some sort of relationship with Defendants.

The denial of all of Plaintiff's medical records; the denial of all medical doctors and others testimony, in a personal injury action amounted to a miscarriage of justice, Denial of Plaintiff's Exhibits of loss income, medical expenses and other expenses caused by the injury was a miscarriage of justice in a personal injury action; refusal to grant a mistrial and the district court judge's personal attitude towards Plaintiff amounted to the Jury trial being a travesty, a grave miscarriage of justice.

The District Court's Denial of Petitioner's Motion to Proceed In Forma Pauperis, without making any findings concerning Petitioner's indigency, is an abuse of discretion.

RELIEF REQUESTED

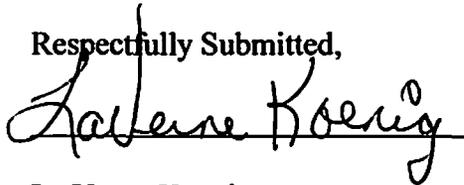
Appellant requests this Court Reverse and Remand the Judgment of the District Court, Ordering a new trial, setting aside the Judgment of the District Court's Order granting

partial Summary Judgment to Defendant's Mary and Patricia Schuh, and Ordering District Court Judge, Jon J. Jensen to reclude himself from any further proceedings. For this Court to set forth the Standard of review which is applicable to an appeal from the denial of a petitioner's request to proceed in forma pauperis in a civil tort action and interpretation of NDCC 27-01-07, the waiver of filing fees, includes all costs including transcription costs, if inconsistent with Federal Statute 28 U.S.C. Sect. 1951(a)(1).

And for such other relief as is appropriate and just.

Request is made for Oral Argument of thirty (30) minutes.

Respectfully Submitted,

A handwritten signature in black ink that reads "La Verne Koenig". The signature is written in a cursive style and is positioned above the typed name and address.

La Verne Koenig
15520 Hwy 200A SE
Blanchard, North Dakota 58009

701-430-0096

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20160060

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RE: Koenig v. Schuh, S. Ct. No. 20160060

JUN 24 2016

Heather Keller:

STATE OF NORTH DAKOTA

Pursuant to your email, I have attempted to comply with the rules and had to redo the brief somewhat also.

Find enclosed seven bound copies of Appellant's Brief and Appendix and one unbound copy of the same.

I am also serving Mr. Paul Aamodt with a copy of the same, Appellate Brief and Appendix, as required.

Please note, for some unknown reason I was unable to find, or had not received the Nelson County Clerk's Register of Actions. I emailed Becky and she sent me a email copy, but it may not get placed in the Appendix in the front and numbered accordingly. I did have her supplemental one's and they are in the front of the appended items. It will depend on whether I can find someone who knows how to download them from my cell phone to a computer or printer and print them off.

Also I do not have the ability to send you a electronic copy/disc of the appellate brief. My only internet is on my cell phone, and I don't know how to take stuff from the computer and transfer it to a disc or to my cell phone and email it to you.

Thank you for your patience. Any questions please advise, or call me at 701-430-0096

Respectfully,

La Verne Koenig
15520 Hwy 200A SE
Blanchard, ND 58009-9326
701-430-0096

Enclosures

Cc: Mr. Aamodt