

NO. 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

AUG - 1 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

COUNSEL FOR APPELLANT
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Pro Se

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ARGUMENT AND LAW

Did the trial court err in granting summary judgment to Patricia Schuh and Mary Schuh?

Standard of Review

1. Appellee rely upon this Courts decision in **Markgraf v. Welker**, 2015 ND 303, Par. 10, 873 NW. 2d 26, 31 as the proper standard of review for summary judgment proceedings. *Id.* P. 4, Par. 10.
2. While Appellant agrees with this standard of review, the district court failed to comply thereto. *Cf. Olson v. Alerus Financial Corp.*, 2015 ND 209; **Tolan v. Cotton**, 572 U. S. ___, 134 S. Ct. 861 (2014).
3. The defendants have failed to comply with applicable summary judgment doctrine, relating to the matters of burden of proof substantively, and the burden of going forward, procedurally. It is clear that the moving party in a summary judgment setting has **both** the burden of going forward **and** the burden of proof. *See, e.g., Heng v. Rotech Medical Corporation*, 2004 ND PP 9-10 and 34, 688 N.W. 2d 389, 394 & 400 (N.D. 2004).
“Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented.” **See also, Adams v. Canterra Petroleum Inc.**, 439 N. W. 2d 540, 543 (ND 1989)
4. The district court erred in granting partial summary judgment, it shifted the burden of persuasion upon the non-moving party. Appellee presented no evidence that a business transaction had ***not occurred*** upon Patricia Schuh’s rural property. As alleged by Appellant. ***It disregarded*** the uncontested representations made by counsel for Appellee,

e.g., that there was a business relationship, Patricia Schuh was the landowner, and therefore liable under Respondeat Superior liability. Appellant argued throughout the proceedings that there was a business relationship. *See*, Clerks # 4 [First Amended Complaint]; Appellant's resistance to the Appellee summary judgment motion(s); # 50 [Resistance to Motion for Summary Judgment]; #51 [Brief in support of Resistance to Summary Judgment]; #52 [Affidavit in support of Resistance to Summary Judgment]; #56 Defendant Patricia Schuh's Answers to Plaintiff's Interrogatories; #59 Plaintiff's Response to Defendant Patricia Schuh's Interrogatories; #63 Plaintiff's Supplemental Brief in Resistance to Defendant's Summary Judgment; #91 Plaintiff's Motion to Alter and Amend Judgment; #92 Plaintiff's Affidavit with Exhibits, in support of Motion to Alter and Amend Judgment. All of which the Court Ordered denied. Clerk's #116.

Is the issue moot?

5. Appellee claims that the grant of summary judgment to Patricia and Mary Schuh is moot because the jury found Jason Schuh not negligent. **Russell v. Olson**, 22 ND 410, 133 NW 1030 (ND 1911).
6. The validity and applicability of **Russell v Olson** is questionable and distinguishable hereto. First Appellant made a timely motion for Judgment/Directed Verdict. Second, the jury only found Jason Schuh was not negligent, because the district court excluded critical, material evidence from the jury. The Jury was not allowed to hear any testimony that Kenneth Schuh had made a representation against interest, to their insurance investigator, that Jason WAS THE CAUSE of Appellants injury. *See e.g.* Clerks # 55.
7. Federal decisions hold that evidence should not be excluded and cases should be

decided on their merits wherever possible. Graphic Packaging Int'l v. C. W. Zumbiel Co., 2011 U.S. Dist. LEXIS 127320; 2011 WL 5357833 [“the exclusion of critical evidence is an extreme sanction which is not normally imposed absent a showing of willful deception or flagrant disregard of a court order by the proponent of the evidence.”] Kotes v. Super Fresh Food Mkr, Inc., 157 F.R.D. 18, 20 (E.D. Pa 1994). *Id* Graphic Packaging, at P. 3. *Cf.* Worster-Sims v. Tropicana Entm't, Inc. 2015 U.S. Dist. LEXIS 152022 at page 2 [The Court is faced with a difficult choice. On the one hand the Court could bar the use of the documents because they were produced late. However, this runs counter to the Third Circuit’s *preference* for *cases* to be *decided* on their *merits*. *See* ABB Air Preheater, Inc. v. Regenerative Environmental Equipment Co., Inc. 167 F.R.D. 668, 671 (D. N. J. 1996)(“The Third Circuit has, on several occasions manifested a distinct aversion to the *exclusion* of important testimony absent *evidence* of extreme negligence or bad faith on the part of the proponent of the testimony.”). *See also*, Secure Controls, Inc v. Vanguard Prods. Group, Inc., 2007 U.S. Dist. LEXIS 17228, 2007 WL. 781253 [“The net effect of these Rules is that non-disclosure generally will result in *exclusion* of undisclosed *evidence* unless the information was made known to the other side in the context of the case itself. *Id.* P. 6[*21]

8. The record, Clerks # 65-67, proves that the discovery was timely disclosed and produced by Appellee counsel, yet the district court refused to allow Appellant to present it to the jury to hear or any testimony contained therein. The exclusion of this important testimony severely affected Appellants substantial rights, contrary to N.D.R.Ev. 103(a).

9. Under the Rules, this was admissible, critical evidence that was improperly excluded

by the District Court, which undermines the reliability of the jury verdict. The filing of three motions for mistrial, [denied take it up on appeal] and motion for directed verdict, undermines the need to motion for new trial, thus Russell v. Olson is distinguishable and inapplicable hereto.

The lack of transcripts of jury trial.

10. The lack of transcripts severely affects Appellants substantial right to be heard and receive a meaningful appeal of the jury trial proceedings.

11. Appellee cites Grager v. Schudar, 2009 N.D. 140, 770 N. W. 2d 692, 693 and Lithun v. DuPaul, 447 N. W. 2d 297, 300 (N.D. 1989) for the proposition that an appellant assumes the consequences and the risks of failing to provide a complete transcript. *Id*, P.5, Par. 13.

12. Grager and Lithun are distinguishable, and are contrary to U.S. Supreme Court precedent.

13. Neither Grager nor Lithun, addressed the issue that Appellant was an indigent person, had petitioned for a waiver of the transcription fees, and was denied *not* based upon their indigency status, as required by Statute, but for other irrelevant and immaterial reasons. *Cf. Patten v. Green*, 369 N.W. 2d 105, N.D. LEXIS 335 (N.D. 1969)[“a trial courts discretion consists only of a determination of whether or not the petitioner is unable to pay”]. *See also* Justice Meschke, concurring opinion: “Rather, the exercise of discretion when considering waiver of filing fees under the statute should focus on the circumstances of indigency. That is what the statute refers us to...” *Id*.

14. Both Federal and State statutes, regarding the waiver of filing fees, limit’s the trial

courts decisions in making a determination whether the petitioner is indigent. Neither Statute requires the indigent person to set forth what specific statute or case law supports their entitlement to waiver of the fees, nor do they allow the court to make that determination arbitrarily based upon what type of civil or criminal action is before the court. *Cf. Cook v. District Court in & for Weld County*, 670 P. 2d 758, 760-761 (Colo. 1983) [“a trial court’s discretion consists *only* of a determination of whether or not the petitioner is unable to pay.”]

15. There is a right for an indigent civil litigant to sue in forma pauperis, grounded in the right of access to the courts and constitutional principles of due process. *Earls v Superior Court*, 6 Cal. 3d 109, 113-114, 98 Cal. Rptr. 398, 484 P. 2d 814. There is a constitutional and statutory right for an indigent to receive a free transcript to assist in perfecting an statutorily authorized appeal in a civil matter.

The constitutional right to appeal.

16. While there may be no federal or state constitutional right to appeal, when the State’s grant a statutory appeal as a matter of right, that appeal has to meet federal and state constitutional requirements. The denial of a transcript of the proceedings to an indigent appellant, thereby violates the federal and State Constitutional right to an effective and meaningful appeal contrary to well established U.S. Supreme Court precedent. Cf. *Griffin v. Illinois*, 351 U. S. 12 (1956)(“holding that it was a violation of the Fourteenth Amendment to deprive a person because of his indigency of any rights of appeal afforded all other convicted defendants.”); *Eskridge v. Washington*, 357 U. S. 214. See also, cases cited in support of Motion for transcripts.

17. Appellee reliance on Ross v. Moffitt, 417 U. S. 600, 606 94 S. Ct. 2437 (1974) for their belief that there is no federal constitutional due process right to appeal, even in a criminal case. Ross v. Moffitt has long been overruled by the Supreme Court, thus its holding has no application.

Denial of fair trial.

18. Appellee makes the bold unfounded and unsupported assertion that the voir dire process was not tainted. *Id*, Appellee Brief, Par. 22, P. 8-9.

The record does not support Appellee's representations. The trial transcripts would not contain the non verbal actions of the impatience of the judge. The time allotted was clearly inadequate, appellant did go over that time allotment, was denied a fair and impartial jury due to members of the panel being relatives of defendants. The exclusion of relevant, material evidence deprived appellant of a fair trial. Without a trial transcript this Court can not make a meaningful determination of the issues.

19. The notice of appeal gives the S. Court jurisdiction and information about what is being appealed. An appellant is not confined to the issues raised in their notice of appeal, nor the format that they were worded therein. The Rules only require a preliminary statement of the issues being appealed. N.D.R. APP. P. 12.

20. North Dakota's Constitution and Statutes provides for a Supreme Court of five Justices. A Chief Justice and four Associates. The Chief Justice does not sit as the Court. Appellant is entitled to raise the issue of his denial of the Motion for a Free Copy of the Trial Transcripts, for a determination by the full Court, without filing a new notice of appeal, since the issue raised is part of the judgment being appealed, and Appellant is

Pro Se, held to less stringent standards than those pleadings drafted by legal counsel.

Haines v. Kerner, 404 U. S. 519 (1972).

21. Appellee's reliance upon **Schaefer v. Souris River Telecommunications Co.**, 2000 ND 187, 618 N.W. 2d 175, is misplaced. Its facts and situation are distinguishable.

Herein, the trial court never gave reasons for the denial/exclusion of evidence.

The proper standard of review is de novo.

22. This Court has the jurisdiction to remand the record to the district court with instructions to address Appellant's indigency status, as required by Statute, irregardless of the district courts view point that Appellant had cited the wrong case law; State Statute; or the type of action before the court.

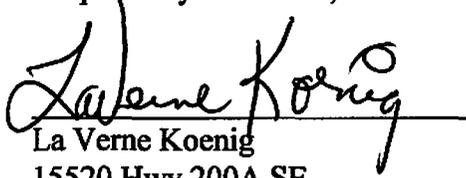
23. The denial of a continuance was unjustified. Two/three months is inadequate time to find a new attorney; allow a new attorney to review the record; to conduct an investigation or do discovery; and most attorneys were unwilling to represent a case that some other attorney had started. The courts refusal to allow a continuance deprived Appellant of a fair trial.

Conclusion

24. This Court has jurisdiction to remand this case back to the District Court with instructions to address Appellant's Motion for Free Transcripts with attached Affidavit of Indigency, based upon a proper interpretation of the Statute. North Dakota grants an appeal as a matter of Statutory right, the denial to an indigent person of a free transcript denies the Appellant of a meaningful, effective appeal, in violation of well established U. S. Supreme Court precedent. The trial court's exclusion of relevant material evidence

denied Appellant of a fair trial; the denial of an extension of time after legal counsel was allowed to withdraw denied appellant of a meaningful opportunity to retain new legal counsel; the grant of partial summary judgment was contrary to established precedent, warranting this Court to Reverse and Remand the judgment of the trial court for a new trial and a reassignment of judges.

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 a horizontal line.

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Blanchard, ND 58009

701-30-0096

NO. 20160060

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INCLUSIVE,

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AFFIDAVIT OF SERVICE

The undersigned hereby certifies, declares, under penalty of perjury that a true and correct copy of

1. Appellant's Reply Brief;

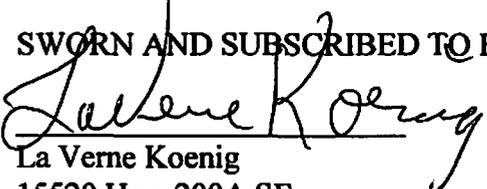
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55440-0991

On this 1st day of August, 2016.

SWORN AND SUBSCRIBED TO BEFORE ME THIS 1st DAY OF AUGUST, 2016.


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


NOTARY PUBLIC
STATE OF NORTH DAKOTA

BENJAMIN L. OLSON
Notary Public
State of North Dakota
My Commission Expires Sept. 15, 2017