

## IN THE SUPREME COURT

## STATE OF NORTH DAKOTA

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|                                   |   |                                      |
|-----------------------------------|---|--------------------------------------|
| Nodak Mutual Insurance Company,   | ) |                                      |
|                                   | ) | <b>Supreme Court No.: 20180359</b>   |
| Plaintiff-Appellee,               | ) | District Court No.: 23-2016-CV-00050 |
|                                   | ) |                                      |
| vs.                               | ) |                                      |
|                                   | ) |                                      |
| Kelly Steffes, Keith Steffes, and | ) |                                      |
| Tasha Rohrbach,                   | ) |                                      |
|                                   | ) |                                      |
| Defendants-Appellants.            | ) |                                      |

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**BRIEF OF APPELLEE**


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APPEAL FROM THE ORDER DATED AUGUST 23, 2018, ISSUED BY  
 THE HONORABLE JAY A. SCHMITZ, DISTRICT COURT JUDGE,  
 LAMOURE COUNTY, SOUTHEAST JUDICIAL DISTRICT

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## STATEMENT OF THE ISSUES

### **I. Whether the District Court's grant of Nodak's Motion for New Trial was an abuse of discretion?**

## STATEMENT OF THE CASE

[1] Appellee/Plaintiff Nodak Insurance Company (hereinafter "Nodak") initiated a declaratory judgment action seeking a determination of coverage rights and obligations arising from a single vehicle automobile accident and subsequent fraudulent statements and material misrepresentations made by Appellants/Defendants Keith Steffes, Kelly Steffes, and Tasha Rohrbach in the course of Nodak's coverage investigation.

[2] On April 15, 2012, a vehicle owned by Appellant/Defendant Keith Steffes (hereinafter "Keith") and insured by Nodak was involved in a single vehicle rollover accident in Lamoure County, North Dakota. Keith alleged he was driving but was not injured in the accident, but his brother, Appellant/Defendant Kelly Steffes (hereinafter "Kelly"), and Kelly's girlfriend, Appellant/Defendant Tasha Rohrbach (hereinafter "Tasha"), were seriously injured in the accident.

[3] An initial investigation by law enforcement and a claims investigation by Nodak found numerous inconsistencies, misrepresentations, and misstatements from the Appellants about the circumstances of the accident, and more specifically about who was operating the vehicle at the time of the crash. Random blood and DNA analysis of the driver's side portion of the vehicle further contradicted the



statements of Keith, Kelly, and Tasha that Keith was driving the vehicle at the time of the accident and instead implicated Kelly as the operator.

[4] After finalizing its investigation, Nodak sought declaratory relief and a determination of coverage that no coverage was available based on fraudulent actions and material misrepresentations made by Keith, Kelly, and Tasha concerning the accident.

[5] Specifically, Nodak sought relief on the following questions related to the accident: (1) whether Keith was the driver involved in the single vehicle automobile accident on April 15, 2012; (2) whether Nodak was obligated law to defend Keith against any claims or lawsuits brought against him by Kelly or Tasha; (3) whether Keith had made fraudulent statements and material misrepresentations to Nodak that would void coverage; (4) whether Nodak would be obligated to defend Kelly against claims or lawsuits brought against him by Tasha; (5) whether coverage would be voided or impacted based on Kelly's fraudulent statements or material misrepresentations and/or committed concealment or collusion with Keith and Tasha related to the accident; (6) whether Nodak would be obligated to provide coverage to Tasha for any uninsured or underinsured motorist claims brought by her against Keith or Kelly; (7) whether Tasha made fraudulent statements or materials misrepresentations that void coverage; and (8) whether Tasha would be concerned an innocent third-party under North Dakota law.

[6] A jury found in favor of Keith, Kelly, and Tasha. Nodak moved for a new trial, which the District Court granted, based on the overwhelming testimonial

and physical evidence that could not support the verdict that Keith (not Kelly) was operating the vehicle at the time of the accident. This appeal follows.

### **STATEMENT OF THE FACTS**

#### **I. Accident Investigation**

[7] On April 15, 2012 at approximately 3:30 a.m., Lamoure County Sheriff's Department Sheriff Robert Fernandes was notified by dispatch of a single vehicle crash approximately six (6) miles east of Edgeley on Highway 13 in Lamoure County, North Dakota. Trial Transcript (hereafter "Tr. at p. \_\_\_\_.") at p. 160, ll. 7-14. The accident victims (later determined only to be Kelly and Tasha) had been transported to the Oakes Hospital after being picked up by a passerby – later determined to be Ethan Lux ("Lux"). Tr. at p. 160-161.

[8] Authorities were dispatched to the Oakes Hospital while Sheriff Fernandes attempted to locate the vehicle crash scene as initially reported, but he was not able to locate it. Tr. at p. 163, ll. 7-21. Sheriff Fernandes was not able to locate the accident scene at any time during the morning of April 15, 2012. Tr. at p. 164, ll. 1-2. Lamoure County Sheriff's Deputy Jeff Fleck also attempted to locate a possible accident scene around the date of the accident based on reports but was also not able to do so after looking for approximately 2-3 hours. Tr. at p. 238, ll. 19-24. The actual accident site was not located until several days later. Tr. at p. 164, ll. 6-7.

[9] None of the Appellants (Keith, Kelly or Tasha) reported the incident to law enforcement shortly after the accident and the first time Sheriff Fernandes



was contacted was on the night of April 15, 2018 by Keith. Tr. at p. 164, ll. 14-15. Approximately 12-15 hours after the accident, Keith identified himself as the alleged driver of the vehicle. Tr. at p. 164. Sheriff Fernandes first had communication with Keith approximately 12-14 hours after the accident on the evening of April 15, 2012. Tr. at p. 164, ll. 14-15. At that time, and in his early communications with law enforcement, Keith stated that the accident had taken place on Highway 13 east of Edgeley, which was later determined to untrue. Tr. at p. 173, ll. 22-25; p. 174, ll. 1-4. After giving repeated statements to the contrary, Keith later admitted lying to law enforcement about the accident location. Tr. at p. 174, ll. 5-14. In actuality, the accident occurred approximately 14 miles from the location initially reported by Keith, Lux and the other Appellants. Tr. at p. 166. The vehicle was ultimately found on Calvin Steffes' farm, the father of Keith and Kelly Steffes, following Keith's removal of the vehicle from the actual accident scene. Tr. at p. 171, ll. 1-2.

[10] Based on the conflicting information reported, law enforcement continued its investigation. Deputy Fleck had at least two (2) conversations with Keith on or near the date of the accident, one over the phone and one in person. Tr. at p. 239, ll. 2-7. Keith initially told Deputy Fleck that he had not notified 911 because he had lost his phone, and Deputy Fleck advised Keith that his statements regarding the events and timeline were inconsistent based on statements received from other individuals interviewed. Tr. at p. 239, ll. 16-25 and Tr. at p. 241, ll. 14-25. Keith eventually admitted he had removed the vehicle from the actual accident

scene without contacting law enforcement and that he had attempted to allegedly drive the vehicle, was unable to do so and then retrieved a payload to remove the vehicle from the crash site and transport it back to his father's farm, approximately a mile away. Tr. at p. 243, ll. 1-20. At no time in the hours immediately following the accident did Keith ever notify law enforcement. Tr. at p. 243, ll. 21-23.

[11] Law enforcement did eventually locate the accident vehicle and inspect it at Calvin Steffes' farm. Tr. at p. 171, ll. 1-2. Blood was observable in the vehicle and law enforcement collected samples for potential testing as part of its ongoing investigation. Tr. at p. 244, ll. 1-15. No criminal charges were brought against Keith or Kelly but law enforcement concluded numerous inconsistent statements had been provided in the course of covering up the incident and failing to report the accident. Tr. at p. 176.

## **II. DNA Testing and Nodak's Claims Investigation**

[12] Following the incident as part of its claims investigation, Nodak performed DNA testing in 2015 on blood found on the driver's side of the vehicle owned by Keith and involved in the accident on April 15, 2012 in three randomly tested locations. Doc. Id. No 1. at ¶ 10. The results from the DNA testing confirmed that the blood found on the driver's side of the vehicle was not from Keith, but the blood was from another unknown male. Id. Sorenson Forensic Analyst Kristen Lundgren concluded that "A complete DNA profile that is contributable to unknown male # 1 and suitable for comparison was obtained from this item [B Pillar Driver Side]. Keith is excluded as the source of this DNA profile." Doc. Id. No. 63.



Lundgren's report and testimony at trial further concluded that the DNA profile on the driver's side was attributable to an unknown male, excluding Keith and Tasha as matches for the blood on the driver's side of the vehicle in three separate locations. Id.

[13] Kelly's blood and DNA sample were collected in 2017 and additional DNA analysis was conducted on the original samples from the vehicle in the same three locations: the drivers' side pillar, driver's side fabric foam piece and driver's side door. Doc. Id. Nos. 64-65; Doc. Id. No. 119. The results concluded that "[t]his DNA profile [of Kelly] matches the DNA profile obtained from items 1.0 (B Pillar Driver side, 3.0 (Fabric Foam Piece Driver Side), and 6.0 (Part from Driver Side Door)." Doc. Id. No 64 at p. 1; Doc. Id. No. 119 at p. 1. Kelly's profile was a statistical match to the blood/DNA stained items from all three tested items in the accident vehicle. Tr. at p. 426, ll. 6-22.

[14] Following the incident as part of its claims investigation, Nodak took statements from all three Appellants and also had the Appellants sit for examinations under oath. Keith admitted that he had lied to both law enforcement and Nodak about where the accident had occurred. Tr. at p. 348, ll. 21-25. Keith admitted to providing Nodak and law enforcement with inconsistent and untruthful statements about whether Ethan Lux was called to the scene or arrived, whether he was wearing a seatbelt, and that he had told Ethan Lux to also lie to law enforcement about where the accident occurred. Tr. at p. 351; 350, ll. 1-3. Keith conceded previously lying under oath (Tr. at p. 355) and lying about whether or not he had his

cell phone on him at the time of the accident – stating initially that he could not find it but later admitting he had called Ethan Lux, did not call 911 and left the scene of the accident. Tr. at p. 356, ll. 4-19.

[15] Kelly and Tasha also gave two statements to Nodak during its investigation, one in the form of an examination under oath approximately 13 months after the accident. Tr. at p. 456. Tasha had no memory of the accident circumstances and indicated she was sleeping. Tr. at p. 435. Her first recollection of anything was waking up in the hospital. Tr. at pp. 435-436. Kelly told Nodak during his statement and examination under oath that he had no idea what happened with the accident itself. Tr. at p. 457, ll. 4-10. Kelly stated he did not remember anything because he was sleeping (Tr. at p. 5-12) and that his first memory was waking up in the Oakes Hospital. Tr. at p. 459, ll. 8-25. Kelly told Nodak initially that he did not remember anything after allegedly getting into a vehicle operated by Keith. Tr. at p. 441. Kelly maintained in all of statements to Nodak that he did not have any first-hand recollections of the accident circumstances. Tr. at p. 459.

#### **STANDARD OF REVIEW**

[16] The District Court has discretion in determining a motion for new trial and that decision will not be overturned unless it is a manifest abuse of discretion. Continental Resources, Inc. v. P&P Industries, LLC, 2018 ND 11, ¶ 11, 906 N.W.2d 105. “In an appeal from an order granting a new trial, the appellant has the burden of showing that the trial court erred and that the granting of the new trial was a

manifest abuse of the trial court's discretion." Wrangham v. Tebelius, 231 N.W.2d 753, 756 (N.D. 1975).

## **LAW AND ARGUMENT**

### **I. Whether the District Court's grant of Nodak's Motion for New Trial was an abuse of discretion?**

[17] "The district court has discretion in deciding a motion for a new trial, and the court's decision will not be overturned unless it manifestly abused its discretion." Continental Resources, Inc. v. P&P Industries, LLC I, 2018 ND 11, ¶ 11, 906 N.W.2d 105 (citing Mozer v. Witt, 2001 ND 30, ¶ 10, 622 N.W.2d 233). "A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination." Id. (citing Johnson v. Buskohl Constr. Inc., 2015 ND 268, ¶ 12, 871 N.W.2d 459).

[18] This Court has previously held that "[t]he trial court [is] in a much better position than [the North Dakota Supreme Court] to determine if there was a fair trial." Cearin v. Ochs, 516 N.W.2d 651, 655 (N.D. 1994). "Trial judges are much closer to the pulse of a trial than we can ever be' and 'are better able to sense the dynamics of a trial than we can ever be.'" Cearin v. Ochs, 516 N.W.2d 651, 655-56 (N.D. 1994) (citing Fisher v. Johnson, 508 N.W.2d 352, 356 (N.D. 1993)). This Court additionally added that "[O]rders granting new trials stand on a firmer foundation in an appellate court than orders denying them." Kohlman v. Hyland,



219 N.W.2d 228, 230 (N.D. 1928). Furthermore, simply because an appellate court “might have viewed the facts differently, if [the appellate court] had been the initial trier of the case, does not entitle [an appellate court] to reverse the lower court.” In re Elmer’s Estate, 210 N.W.2d at 820 (citing Nee v. Linwood Securities Co., 174 F.2d 434 (8th Cir. 1949)).

[19] If a “motion is for a new trial, the trial judge has a certain amount of discretion in viewing the evidence. Here, the trial court may, within limits, weigh the evidence and judge the credibility of witnesses.” Okken v. Okken, 325 N.W.2d 264, 269 (N.D. 1982) (citing Cook v. Stenslie, 251 N.W.2d 393, 395 (N.D. 1977)). In short, when ruling on a motion for a new trial, the trial judge may consider all the evidence. Okken, 325 N.W.2d at 269 (citing Wrangham v. Tebelius, 231 N.W.2d 753, 756 (N.D. 1975)).

[20] On appeal, Appellants appear to argue that the District Court has committed a grave injustice and wholly abused its discretion in concluding that the overwhelming evidence does not align with the verdict - - that reasonable minds could differ on the outcome of this case. Appellants take issue with the District Court’s decision to grant Nodak appropriate post-trial relief despite the fact that the Appellants (1) called no non-party witnesses and (2) submitted no evidence at trial. Moreover, Appellants’ position stands in stark contrast to Nodak’s case and balance of evidence presented at trial and fails to consider the complete and demonstrated unreliability of Appellants as witnesses at trial. The District Court has not abused

its discretion, but done precisely what the law requires when the evidence does not support the jury's verdict.

[21] At trial, Nodak presented overwhelming evidence that the narrative of the Appellants did not align with the facts, including testimonial observations by those involved and physical evidence surrounding the accident. This included, among several items, DNA evidence of three randomly tested blood-stained portions of the driver's side vehicle matching Kelly and excluding Keith; mechanism of injury testimony and observations from the attending paramedic about Kelly's injuries and statements (Tr. at pp. 268-298); testimony from law enforcement about their observations of the situation and investigation, including the Appellants' unusual behavior in the wake of the accident and outright lies the accident location, failing to notify law enforcement, and lying or omitting key facts and information despite repeated opportunities to be truthful.

[22] The trial court conducted a "thorough consideration of the testimony and evidence" in concluding that the jury verdict was manifestly against the weight of the evidence. Appendix (hereinafter "App.") at 67. The District Court's Order granting Nodak's Motion for a New Trial was made thoroughly and after a full consideration of all the evidence presented at trial. Id. And as the District Court pointed out in its analysis, one significant problem with the verdict (among many) was that it consisted almost exclusively of the Appellants' contradictory and distrustful testimony:



In contrast to the other [Nodak] witnesses, Keith and Kelly testified in detail about an accident which had occurred six years before, details which included some rather amazing events and feats and which **neither of them had mentioned or even hinted at in their previous statements to law enforcement and Nodak.**”

Id. at ¶ 7 (Emphasis added).

[23] The trial court focused in detail on the testimony of Keith and Kelly at trial for its total unbelievability and complete novelty. In addition to the several misstatements made to law enforcement, Keith and Kelly twice had the opportunity to be truthful before trial, once under oath, and yet failed to do so. Instead, both of them sat on the witness stand at trial, admitted to previously lying under oath, and then testified to new details and narrative for the very first time.

[24] During Keith’s trial testimony, he admitted that he had lied to both law enforcement and Nodak about where the accident had occurred. Tr. at p. 348, ll. 21-25. Keith also testified at trial, for the first time, that he was allegedly injured in the accident and had “back pain, neck pain.” Tr. at p. 350, 13. When asked about his injuries previously by Nodak, Keith stated under oath “No, I was not.” Tr. at 350, ll. 4-9. But at trial, Keith suddenly began to state (again, for the first time) that he was injured in the accident. Tr. at p. 350, ll. 14-18. In addition to misrepresenting the timeline and accident location, Keith initially indicated to law enforcement that all of the passengers in the vehicle purportedly had their seatbelts on and were in the front seat of his truck. Tr. at p. 242, ll. 20-25.

[25] Keith also admitted at trial to providing Nodak and law enforcement with inconsistent and untruthful statements about whether Lux was called to the



scene or arrived and whether he had told Ethan Lux to also lie to law enforcement about where the accident occurred. Tr. at p. 351; 350, ll. 1-3. Keith could not “recall” on the witness stand at trial if he was wearing a seatbelt or not but previously told Nodak under oath that he was wearing his seatbelt at the time of the accident. Tr. at p. 350, ll. 1-3. Keith conceded previously lying under oath. Tr. at p. 355. Keith conceded lying about whether or not he had his cell phone on him at the time of the accident – stating initially that he could not find it but later admitting he had purportedly used it to call Lux, did not call 911 and left the scene of the accident. Tr. at p. 356, ll. 4-19.

[26] Having not given law enforcement or Nodak the full story after repeated opportunities to do so, at trial Keith proceeded to tell a detailed and descriptive account of the accident circumstances, including descriptions of how many times the vehicle rolled, the direction of the roll over, directions he was traveling, how the tires were oriented during the initial alleged crash, the weather, and visibility. Tr. 366-67; p. 367, ll. 8-16; p. 369, ll. 18-19. He told the jury at trial (for the very first time) how he was positioned in the vehicle, where bodies were scattered after the crash, and how he freed himself and the others from the vehicle. Tr. at p. 371, ll. 12-25; p. 372, ll. 1-5. As the District Court noted in its Order (App. at 67) this was all information that Keith never provided to Nodak or law enforcement, but revealed in highly descriptive detail, years later for the very first time at trial:

Well, the first thing I had to do was get Kelly and Tasha awake. And I asked them to try and get in the back seat so I could get out because the front window was still intact in the pickup. All the windows were intact except the left driver's window by my door. And the pickup was laying up against the farming ridge. Thank God it was raining. The sod was soft. I had to tunnel out way out underneath that sod ridge. I climbed out through the left front window, had to dig my way out a tunnel to get out. And then after that I went around the front of the pickup, and of course the left side is lower, and I told Kelly and Tasha to cover their eyes. I kicked a hole in the front window. Of course, I don't know if any of you have ever seen a window break, but they just don't shatter. I got it to spiderweb and I got a small hole in it, and I took my hand and I tore the window open big enough to get them out.

Tr. at p. 371, ll. 12-25; p. 372, ll. 1-5.

[27] At trial, Keith provided a detailed narrative of how the wheels broke during the skid and how all the people were piled after the roll on the driver's side of the vehicle. Tr. at pp. 405-06. Keith stated for the first time that he had a glass tunnel scar injury which had never been mentioned to Nodak or law enforcement prior to trial. Tr. at p. 410, ll. 11-12. In addition to these "amazing events and feats" that the District Court noted in its Order, three randomly tested portions of the driver's side of the truck completely excluded Keith's DNA. If he maintains as he alleges that he was driving, injured, and possibly cut, his wildly unbelievable testimony does not reconcile the fact that none of his blood or DNA in his own truck was found.

[28] Keith testified in vivid detail at trial about the purported circumstances during the accident, most of which was never communicated to law enforcement, Nodak, or anyone else for that matter until trial. And Keith's partial rationale for previously lying under oath repeatedly to law enforcement and Nodak



about significant details that he suddenly remembered at trial was that all of those people “Never asked for the details.” Tr. at p. 413, ll. 4-15. In actuality, the whole purpose of taking an initial statement from the Appellants and conducting examinations under oath was to do just that - - which Nodak did, providing ample opportunity for the Appellants to be forthcoming and truthful. Appropriately, the District Court found his testimony to be suspect and not credible, especially in contrast to the overwhelming other and more reliable evidence presented at trial. App. at 68.

[29] Like his brother, Kelly’s testimony at trial was information be provided for the first time in six years and completely contradictory to his prior statements including under oath testimony. At trial, Kelly recalled vivid details about how the vehicle allegedly rolled and twisted into the air, how his head hit the mirror, “ripped me open,” and how he couldn’t move while stacked up in the vehicle with his brother and Tasha. Tr. at p. 446, ll. 8-19. Kelly recalled how he struggled to wake his girlfriend up after the accident, how he couldn’t move, and how he tried desperately to push himself up. Tr. at p. 446, ll. 8-19. He provided details never given to Nodak in the course of its investigation, and never provided to law enforcement. Id. This included conversations with Keith after the accident, actions he took to freeing himself and Tasha, and witnessing his brother exit the vehicle. Tr. at p. 447, ll. 1-5. He recalled at trial for the first time details about helping Keith exit the vehicle. Tr. at p. 452, ll. 1-6.



[30] At trial, Kelly was asked directly about portions of his prior statement and examination under oath. Tr. at p. 457. While under oath prior to trial, Kelly stated that he had no idea what happened with the accident itself. Tr. at p. 457, ll. 4-10. He admitted at trial to providing untrue testimony during his examination under oath, which was in stark contrast to the elaborate details relayed during his testimony at trial. Tr. at p. 458, ll. 1-5. During his examination under oath, Kelly stated he did not remember anything because he was sleeping. Tr. at p. 5-12. To rationalize his prior untrue statements, Kelly indicated at trial that Attorney Harrie never asked asked about the accident. Tr. at p. 458, ll. 23-25. In actuality, Attorney Harrie asked several questions during the examination under oath in 2013 about the accident and Kelly's firsthand knowledge. Kelly's prior testimony in 2013 was that his first memory was of waking up in the Oakes Hospital. Tr. at p. 459, ll. 8-25.

[31] Keith allegedly walked away from the accident unharmed, sustained no injuries, which required treatment, or which he even sought treatment. He did not meaningfully mention his injuries until six years after the accident. He initially told Nodak under oath that he was allegedly not injured at all which is inconsistent with the testimony he provided at trial regarding back and neck pain. Moreover, these statements are also inconsistent with testimony Keith provided at trial that he cut and scarred his hand from glass and not corroborated by DNA evidence which completely excluded him. During trial, he provided vivid details never previously provided approximately six years after the accident. Keith allegedly walked away from the accident unscathed, did not accompany his brother and now sister-in-law

to the hospital after extremely serious injuries, and then repeatedly lied about the incident to law enforcement and Nodak. No reasonable explanation was ever provided by Appellants as to why they would lie about the accident location or other details concerning the accident. Furthermore, no evidence or explanation was ever provided as to how Keith's DNA is completely excluded from blood stains collected solely on the driver's side of the truck in three random locations. These are just a sample of the issues the Court considered in its analysis and evaluation of the evidence to arrive at the proper decision.

[32] The District Court correctly concluded the combined testimony of Keith and Kelly was so replete with contradictory information, new details, and completely contradicted by their prior under oath testimony and statements provided to Nodak and law enforcement that no rational person could come to reasonable or different conclusions about the circumstances in this case. App. at pp. 67-68.

[33] The District Court's Order also focused on the testimony from law enforcement and emergency responders regarding the dishonest and unusual behavior of the Appellants during its criminal investigation. Tr. at p. 245, ll. 18-25; App. at 66-68. Sheriff Fernandes did not believe, based on his experience and rational observations of his interactions with Keith, that Keith was being honest about where the accident actually occurred or being truthful about who was operating the vehicle. Tr. at p. 176, ll. 3-9. He also concluded that statements from Keith were inconsistent with statements given by Kelly and Tasha in the course of his investigation. Tr. at p. 176, ll. 16-25. All members of law enforcement that had



conducted interviews of the defendants disbelieved the account of the accident from Keith based on his provided inconsistencies about location of the accident along with general evasive and dishonest behavior.

[34] Michael Sandy (“Sandy”) was the paramedic manager of the ambulance that responded to the accident scene involving the defendants. Tr. at p. 269, ll. 11-25. Sandy was one of the responding EMTs in this accident and encountered Tasha and Kelly in the hospital garage at the Oakes Hospital. Tr. at p. 270, ll. 19-25; p. 271, ll. 1-4. Sandy had conversations with Kelly and Tasha in the wake of the accident for the purpose of determining the mechanism of injury, including where the individuals were and what they were doing as to help assist and identify injuries which could not been seen visibly. Tr. at p. 271, ll. 12-18.

[35] Sandy, a paramedic nationally registered, state licensed and certified by the National Registry of EMTs in the state of North Dakota paramedic with over 20 years of experience, testified that in the course his of career he has responded to approximately 300 emergency calls a year for 20 plus years, of which 15-20% would be automobile related. Tr. at p. 269, ll. 16-25; p. 270, ll. 1-15. Sandy questioned Tasha and Kelly because of conflicting reports that emergency responders had already received regarding operation of the vehicle and the mechanism of the injury. Tr. at p. 272, ll. 2-9. Kelly told him he was riding in the front seat and that his girlfriend stated that she was riding in the backseat. Tr. at p. 272, ll. 2-9. When Sandy pressed Tasha for information on who was driving, she replied stating “well, what did Kelly say?” See Tr. at p. 272, ll. 2-9.



[36] Sandy observed injuries to Kelly and Tasha during transport to Fargo, North Dakota for additional intensive care and testified that Kelly sustained fairly significant injuries to his head, mainly on the left side of the back of his head, and there was significant pain in his shoulders and neck. Tr. at p. 273, ll. 1-5. Kelly did not describe the rollover accident at all but said to Sandy that he thought he hit his head on the windshield. Id. Sandy testified at trial that this was not consistent with the injuries that he observed on Kelly. Tr. at p. 273, ll. 6-11. Sandy gave descriptive detail about the mechanism of the injury and observations that he perceived of Kelly's head and external injuries in relation to what was reported about the accident. Tr. at p. 274, ll. 17-24.

[37] Sandy also had conversations with Kelly about who was driving, who was restrained, and he was trying to solicit such information to assist with emergency treatment. Tr. at p. 275, ll. 20-25. Kelly's injuries were "inconsistent in that when you strike the windshield, typically the impact will be involving the facial, forehead, and sometimes the crown of the head. Very seldom when you strike the windshield do you strike the lateral side, one side or the other." Tr. at p. 277, ll. 1-6. Sandy personally observed Kelly's injuries to be on the left side of his head and rear. Tr. at p. 277, ll. 7-12. Sandy testified about the nature of the injuries consistent with an accident rollover and how the direction of a rollover would be a less determinative factor because if a vehicle rolls all the way over, the individual would likely hit both sides of the vehicle, not the windshield. Tr. at p. 288, ll. 17-21.

[38] In addition to the witness testimony, random blood samples from the driver's side of the vehicle were a statistical match of Kelly's blood DNA and expressly excluded Keith from any DNA contamination or sample whatsoever. Two separate forensic DNA experts testified at trial, explaining the science, and the results that none of the purported driver's DNA was found in any of the three samples that were tested.

[39] In addition to the above, Nodak presented evidence to the jury that at least two of the Appellants (Kelly and Keith) had expressly lied in statements and examinations under oath provided to Nodak in the course of the investigation. And while previously under oath, neither Keith or Kelly provided the rich, detailed accounts of the accident that were summoned at trial. Instead, Keith and Kelly waited until 6 years after the accident at trial to relay this new information and accident details. For their part, the Appellants presented no evidence, save their own contradictory and unreliable self-interested testimony. Throughout their brief, Appellants appear to argue that their testimony, and their testimony alone, should be given heightened deference and credibility. However, the Appellants all admitted to lying multiple times under oath. By their own numerous admissions, Appellants should not be given any benefit of the doubt when it comes to credibility. Any attempt by Appellants to put their judgment and credibility above the balance of other physical and testimonial evidence and the judgment of the District Court is laughable. The District Court correctly examined all evidence and testimony presented at trial and properly made the determination that the greater weight of the



evidence did not support the verdict. Quite frankly, it is absurd for the Appellants to ask this Court to believe their own self-contradicted testimony over that of the physical and other testimonial evidence in this case. Appellants, through their own admissions, have already made it abundantly clear that their testimony cannot be trusted or relied on by this Court.

[40] In granting Nodak's Motion for a New Trial, the District Court exercised its discretion appropriately and accordingly concluded based on the balance of evidence presented at trial that the verdict was manifestly against the weight of the evidence. The District Court assessed the credibility of the witnesses (or lack thereof) within appropriate limits in specific detail. Based on that analysis, the District Court concluded that the overwhelming testimony of Nodak's witnesses, which included three separate members of the Lamoure County Sheriff's Department, a long-standing and experienced county paramedic, an independent investigator, one chain of custody blood witness, and two forensic DNA experts, all aligned with Nodak's theory of the case. App. at 68.

[41] As such, the trial court did not abuse its discretion in granting Nodak's motion for a new trial. The trial court did what justice, this Court's precedent set forth above and the applicable rules expressly provide for in granting Nodak's motion for a new trial. The District Court correctly applied this Court's standard and engaged in proper and meaningful analysis of the evidence, which overwhelmingly and unequivocally establishes that the jury verdict was against the



weight of the evidence. As such, the trial court did not abuse its discretion in granting Nodak's motion for a new trial.

### **CONCLUSION**

[42] Based on the above, Nodak respectfully requests this Court affirm the District Court's Order granting Nodak's Motion for New Trial.

Respectfully submitted this 13 day of December, 2018.



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