ORIGINAL

20000011

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
DISTRICT COURT NO. 98-C-568
SUPREME COURT NO. 20000011

Joseph F. Schaefer and
LaVonne J. Schaefer,

Plaintiffs/Appellants,

vs.

Souris River Telecommunications Cooperative and
Gerald Pettys,

Defendants/Appellees.

APPEAL FROM THE DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
WARD COUNTY, NORTH DAKOTA
THE HONORABLE GARY A. HOLUM

BRIEF OF PLAINTIFFS/APPELLANTS JOSEPH F. SCHAEFER AND LAVONNE J. SCHAEFER

ROBERT V. BOLINSKE (I.D. No. 03266)
ATTORNEY AT LAW
Attorney for Plaintiffs/Appellants
515 North Fourth Street
Bismarck ND 58501
(701) 222-2035

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

ISSUES PRESENTED FOR REVIEW

20000011

I. Are plaintiffs Joe and LaVonne Schaefer entitled to a new trial because of errors of law and other irregularities which occurred at trial?

II. Did the trial court erroneously exclude plaintiffs' documentation evidencing some $2,200 in medication expense, thereby misleading the jury to conclude that plaintiff had not exceeded the $2,500 medical expense threshold necessary to establish a "serious injury"?

III. Did the trial court erroneously exclude plaintiffs' medical and drug expense documentation on foundational grounds when the foundation thereto had actually already been stipulated to by counsel for the parties?

IV. Are plaintiffs entitled to a new trial because defendants abused the discovery process by failing to turn over relevant documents which were specifically requested in discovery?

V. Are plaintiffs entitled to a new trial because the trial court erroneously refused to allow plaintiffs' counsel to read into evidence the depositions of plaintiffs' expert witness doctors and instead allowed defendants' counsel to do so?

VI. Did the trial court's conduct surrounding the exclusion of the medical and drug expense summaries constitute an irregularity which prevented plaintiffs from receiving a fair trial?

VII. Did the cumulative effect of the trial court's errors of law and the other irregularities which occurred during the trial deprive plaintiffs of a fair trial, thereby entitling them to a new trial?

I. BRIEF FACTUAL AND PROCEDURAL BACKGROUND

On June 1, 1993, on a highway just outside Harvey, North Dakota, plaintiff Joseph F. Schaefer was seriously injured when defendant Gerald Pettys negligently failed to observe the Schaefer pickup, which was stopped with its left turn blinker on, and crashed into it from behind. (T. 50-56) Defendant Pettys was operating a pickup which was owned by his employer, defendant Souris River Telecommunications Cooperative. At trial, defendants admitted liability for the collision. (T. 21; 200-202)

As a result of the collision, plaintiff Joseph Schaefer sustained serious and permanent injuries, including injuries to his neck, arms, right hand and legs. Plaintiff LaVonne Schaefer, Joseph's wife sustained a loss of her husband's consortium, including his aid, comfort, companionship and his emotional and financial support. (T. 73-90; 229-233)

Joseph and LaVonne Schaefer farmed near Fessenden, North Dakota. They had worked their entire lives looking forward to retirement. When the Schaefers left their farm and moved into Fessenden, Joseph Schaefer, who loved to work with tools, had actually built a new and well equipped shop next to his home for use in his retirement. (T. 48-50; 96-98)

Instead of being able to enjoy his retirement, however, the 1993 collision caused Joe to suffer serious, painful and debilitating neck pain, frequent and painful headaches, pain and numbness in his arms and numbness in his legs. Further because of his pain, Joe was and is unable to sleep through the night and must nightly get up in an attempt to alleviate his pain. As a result, he suffers from constant sleep deprivation. (T. 73-90)

As a further result of Joe's injuries, he has also suffered serious limitations in his daily activities. Included in the activities he either can't do, can't do as well or can't do without pain are the following activities which he could do before the 1993 collision: (1) work in his shop, which now sits closed up and virtually idle, (2) travel with his wife (3) garden, (4) hunt and fish, (5) play with his grandchildren, (6) dance or socialize with friends, (7) sit or stand without pain as he could previously, (8) help his son on the farm by, for example, driving a tractor or

operating a combine, and (9) help his wife around the house. (T. 84-115)

But, most important to Joe he cannot care for and ride his beloved horses as he had been able to do before the 1993 collision. The transcript of the trial reflects that Joe Schaefer is truly a "Horse Whisperer". You can see it when he talks about his horses. You can hear it in his stories about them. Beginning when he was only 2½ years old, he somehow managed to get a bridle on a horse, "rustled" it out of the barn, promptly fell off while riding under a clothesline, and broke his arm. (T. 100-115) (App. p. 14) (To know the kindness, gentleness and decency of this man, and what he has lost, all one need do is read these fifteen pages.)

Now, Joe can't put up hay for his horses. He can't shoe them. He can't train them as he would like to do. But, most important of all to Joe, he can't ride them. Whereas prior to the 1993 collision Joe was constantly riding, nearly every night, even after a long day's work, he has not been able to ride since the 1993 collision - except once, when, as he explained, he just couldn't help himself and had to try. (T. 100-114) The Court need also only look at the photographs in evidence to see what Joe's horses mean to him. (Plaintiffs' Exhibit 11)

As a reading of Joe's testimony makes clear, if Joe Schaefer were not seriously injured from the 1993 collision he would be out riding his horses, helping his son on the farm and working in his shop like he did before. But he can not.

Instead, the 1993 collision sentenced Joe Schaefer to a lifetime of chronic pain, disability and anguish. He often has to actually hold his head up with his hands to try to minimize his neck pain. Because he wanted so badly to help his son on the farm, he has gone so far as to try putting his head in a "bungee cord contraption" (which Joe built himself and attached to the "ceiling" of the cab) in order to hold his head up so he could attempt to operate the combine. (T. 87-88)

Unfortunately, there is nothing Joe's physicians can do for his condition. Surgery is not recommended. As a result, Joe basically has to live with his pain. (T. 124) As a further

consequence, because nothing can be done for him, he has not incurred a lot of medical expense, only slightly in excess of $5000. (T. 235)

Consequently, when the trial court, we submit erroneously, excluded documentation evidencing some $2200 in medication expense, that error led directly to the jury's conclusion that Joe had not exceeded the $2500 medical expense threshold and consequently was not entitled to recover for his non-economic losses. (T. 244-256)

This case was tried in Minot, North Dakota, before the Honorable Gary A. Holum and a jury. The trial began on March 8, 1999. The jury returned a verdict in favor of defendants, finding no "serious injury", on the evening of March 10, 1999.

The Schaefers thereafter brought a motion for a new trial but that motion was denied by Judge Holum in his letter opinion dated November 5, 1999. (App. p. 11)

This appeal followed.

II. PLAINTIFFS ARE ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL COURT ERRONEOUSLY EXCLUDED VITAL EVIDENCE

At trial plaintiffs attempted to introduce into evidence documentation to establish the dollar amount of their drug and medication expenses in order to establish that plaintiff Joseph Schaefer had exceeded the $2500 threshold and, consequently, had sustained a "serious injury".

The specific documentary evidence offered, but excluded by the court, was (1) Plaintiffs' Exhibit 16 (App. p. 30) which is a complete drug store printout of all medications taken by Mr. Schaefer identifying the name, date of purchase and purchase price of each medication and (2) Plaintiffs' Exhibit 14 (App. p. 39) which is a typewritten summary of the specific drugs taken for the injuries sustained in the subject accident together with the date of purchase, the prices for each, and the total amount of drug expense. (The Court will also note that, on Exhibit 16, the drug store printout, the specific medications taken for the injuries

sustained in the subject collision are highlighted, just as they were when the document was offered into evidence at trial.) Such summaries are admissible pursuant to Rule 1006 of the North Dakota Rules of Evidence.

We respectfully submit that the trial court erred in excluding the above-described evidence, that that error was critical to the outcome of the trial, and that that error entitles plaintiffs to a new trial.

Rule 59(b)(7) specifically provides that a new trial may be granted for "Errors in law occurring at the trial, and, when required, excepted to by the party making the application;".

Inasmuch as other portions of Rule 59 are relevant to this case, and will be later discussed, they are quoted below. Rule 59 thus provides in relevant part as follows regarding the grounds upon which a new trial may be granted:

> **Rule 59. New trials -- Amendment of judgments.**
> (a) **New Trial -- Defined**. A new trial is a reexamination of an issue of fact in the same court, after a trial and decision by a jury or court or by a referee.
> (b) **Causes for new trial**. The former verdict or other decision may be vacated and a new trial granted on the application of a party aggrieved for any of the following causes materially affecting the substantial rights of the party:
>
> 1. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;
>
> . . . .
>
> 6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law;
>
> 7. Errors in law occurring at the trial and, when required, excepted to by the party making the application; or
>
> . . . .
>
> (d) **Upon what motion for new trial made.** A motion for a new trial may be made upon the files, exhibits, and minutes of the court. Pertinent facts not a part of the minutes may be shown by affidavit. Either party may procure a complete or partial transcript of the proceedings for use upon the hearing of the motion. (Emphasis added.)

In Erdmann v. Thomas, 446 N.W.2d 245 (N.D. 1989) the North Dakota Supreme Court made clear that expert medical testimony is not required to lay the foundation for the admission of medical bills and/or expenses to establish that claimant sustained a "serious injury" and therefore met the $2500 "no-fault threshold." The court concluded that a sufficient foundation could be established by claimant's testimony that the medical bills were incurred as a result of the collision.

And, in a more recent case, the North Dakota Supreme Court held that a passenger in an automobile collision, by affidavit, adequately evidenced her past medical expenses so as to create a fact issue for the jury as to whether her past medical expenses exceeded the $2500 threshold to establish a "serious injury", thereby precluding summary judgment. See Tuhy v. Schlabsz, 1998 ND 31, 574 N.W.2d 823.

In Tuhy, the Supreme Court went even further, in reversing the trial court's granting of defendant's motion for summary judgment, and held that the trial court had impermissibly actually weighed the credibility of plaintiff's documentary evidence.

The trial court in Tuhy, (exactly like the court in the instant case) conducted its own examination of the documents offered to establish medical expenses. The trial court then concluded that plaintiff's medical expense summaries were confusing and unreliable.

In the instant case, the trial court conducted a lengthy examination and analysis of the medical records, compared them to the medications claimed as expenses, and, virtually exactly like in Tuhy, concluded that the medication expense documentation was not reliable. (T. 221-226; 244-256) (App. p. 41) That function, though, according to the North Dakota Supreme Court, is for the jury, not the court.

Thus, in Erdmann, supra, the Court said:

> Erdmann sought to meet the threshold requirement by offering medical bills

totaling $3,642.57 he incurred after the February 1987 accident. Thomas' major assertion on appeal is that the trial court committed reversible error by admitting the medical bills into evidence without proper foundation. Thomas contends that foundation was lacking because no expert medical testimony was offered to show that the bills were necessary for medical treatment required as a result of the accident.

Foundation testimony is that testimony which identifies the evidence and connect it with the issue in question. Taylor v. State, 642 P.2d 1294, 1295 (Wyo. 1982). It is axiomatic that a foundation must be laid establishing the competency, materiality, and relevance of all evidence. Cansler v. Harrington, 231 Kan. 66, 643 P.2d 100, 113 (1982). See also Rule 104, N.D.R.Evid.; R & D Amusement Corp. v. Christianson, 392 N.W.2d 385, 386-387 (N.D. 1986). Whether "an exhibit should have been excluded on the basis that it lacked adequate foundation is primarily within the sound discretion of the trial court, the exercise of which will not be disturbed on appeal in the absence of a showing that it affected the substantial rights of the parties." Ned Nastrom Motors, Inc. v. Nastrom-Peterson-Neubauer, 338 N.W.2d 64, 66 (N.D. 1983). (446 N.W.2d at 248)

. . . .

Thomas asserts that our statement in Calavera v. Vix leads to the conclusion that a plaintiff must prove not only that future medical expenses, but also that past medical expenses, were necessarily incurred as a result of the accident "to a reasonable degree of medical certainty." We disagree. (446 N.W.2d at 247)

. . . .

[2] The bills having been properly admitted in evidence, the question whether the medical expenses were necessitated by the accident became one for the jury. See Calavera v. Vix, supra; Cansler v. Harrington, supra. (Emphasis added) (446 N.W.2d at 248)

In Schutt v. Schumacher, 548 N.W.2d 381 (N.D. 1996), the North Dakota Supreme Court reaffirmed Erdmann as follows:

Evidence of medical expenses can be admitted without expert medical opinion that the expenses were necessitated by the defendant's conduct, and, once admitted upon a foundational showing the evidence is relevant, the question whether the medical expenses were incurred as a result of the defendant's wrongdoing is for the jury to decide. Erdmann v. Thomas, 446 N.W.2d 245, 248 (N.D. 1989). (Emphasis added) (548 N.W.2d at 382-3).

Finally, in Tuhy, supra, the Court said:

In Erdmann v. Thomas, 446 N.W.2d 245, 247 (N.D. 1989), we explained "in this jurisdiction, expert medical testimony is not required to lay the foundation

for the admission of medical bills or expenses into evidence." A sufficient foundation can be established by a claimant's testimony that the medical bills were incurred as a result of the collision. Id.

[5] [¶11] Here, Sandra's affidavit adequately evidenced her past medical expenses. They exceeded $2,500 and, under Erdmann, met the "serious injury" threshold. Once the threshold has been met by sworn testimony of the claimant, we explained in Erdmann at 248, "the question whether the medical expenses were necessitated by the accident [becomes] one for the jury."

[¶ 12] However, the trial court concluded Sandra had not "by affidavit or testimony" established "with admissible evidence, in excess of $2,500 of past medical bills for injuries sustained in the accident on November 26, 1986." The court said, "[Sandra's] submission of past medical expenses is confusing to the extent that [Sandra's] estimated figures are not reliable evidence and do not indicate medical bills in excess of $2,500." The court reasoned Sandra had, at various times, given the amount of past medical expenses at $3,774.58, $3,508.86, and $2,300.00, and that the exhibits she prepared for trial showed a total of $2,588.68. Additionally, the trial court relied on the depositions of four orthopedic surgeons who treated her and were unable to say with a reasonable medical certainty that certain ailments, injuries, and medical expenses claimed by Sandra were caused by the collision. (574 N.W.2d at 825-6)

. . . .

[7] [¶ 14] While the necessity of future medical expenses for a knee replacement may not have been adequately shown to avoid summary judgment for lack of a "serious injury," see Calavera v. Vix, 356 N.W.2d 901, 902 (N.D. 1984) (future expense countable only if they, "with reasonable medical certainty, will be incurred in the future"), the trial court did not accept Sandra's evidence of past medical expenses. Instead, the court considered her summaries "confusing" and characterized them as "not reliable evidence." These assessments show the court impermissibly weighed the credibility of Sandra's evidence. (Emphasis added.) (574 N.W.2d at 826)

. . . .

[¶ 17] We reverse the summary judgment and remand for trial. The jury must decide whether Sandra's medical expenses from the collision exceeded $2,500. If they did, of course, Sandra will be entitled to seek an award of damages from the jury for all of her injuries from the collision, even a slight disfigurement, minor disabilities, and potential future medical expenses although, categorically, those lesser injuries did not assist her in the threshold inquiry to get past an adverse summary judgment. (Emphasis added). (574 N.W.2d at 827)

In the instant case, plaintiff offered into evidence Plaintiffs' Exhibit 16 (the drug store printout - App. p. 30) and Plaintiffs' Exhibit 14 (the typewritten summary of specific

medications - App. p. 39). Defendant objected to both exhibits and the trial court, we contend erroneously, sustained those objections. Neither Plaintiffs' Exhibit 16 no 14 was, therefore, submitted to the jury.

Joe Schaefer, a 67 year old man at the time of the collision, was a seat-belted passenger in a smaller sized Dodge Dakota pickup, which was stopped on the highway to make a left turn when it was violently struck from behind by a large Dodge Ram pickup traveling approximately 40 mph. (T. 52-56; 113-114). Defendant Pettys, age 23, the driver of the other vehicle, had been distracted and was looking at a body of water to his left, did not see the Schaefer vehicle, made no effort to stop whatsoever, did not at all slow down and instead crashed into the rear of the Schaefer vehicle. (T. 52-57; 206) The collision between the front of the larger Dodge Ram pickup and the rear of the smaller Schaefer pickup was "square on". (T. 59) Demonstrating that the collision was substantial is the fact that the rear bumper of the Schaefer vehicle was bent and distorted, the frame was bent and the box of the vehicle was forced into its cab. Both side panels or box sides were damaged on the rear end, both tail lights were destroyed, and the end gate was smashed and damaged quite severely. (T. 59-61) The frame was so badly bent that both sides of it had to be straightened. (T. 61-62) The bumper, which was received in evidence as Exhibit 2, was also straightened, but it still, in its present condition, reflects the damage it sustained. The bumper was originally forced into a "V" configuration by the collision and "if you look at it yet, (even though it has been straightened) it is still 'V'd quite bad." (T. 62-65) If the collision could do that type of damage to a steel bumper and a steel frame, it is not hard to imagine what it would do to the neck of a 67 year old man subjected to the resulting "whiplash" motion, causing damage to his muscles, ligaments, nerves, discs and other soft tissue. (T. 192-194; Dr. Geier Depo. pp. 21-23; 29-30; 37-57)

Joe's pain began that same night and has persisted to the present time. (T. 74-125) Joe testified that his pain starts in the back of his neck and goes down into the center of his shoulders and that that problem has existed from the time of the 1993 collision to the present. (T. 76) The pain, which started shortly after the accident, is "getting progressively worse." (T. 76) Joe describes the pain in his neck as:

> "[I]t's like a, I would say a bad charley horse in your leg or muscles tightening up. And just like it would be electric shock if you touched something like electric fence, if you have ever been associated with a cattle fence or something like that, tremendous volts but not a lot of current, and it gives you a real blast of shock and it's like needles." (T. 76).

When asked how frequently he has that type of pain, Joe answered:

> "It varies. Probably one movement or this or that can cause it to be real severe but many nights I wake up. I get very little sleep most of the time. I'm lucky if I get three to four hours of sleep and then I have to go sit, I roll around in bed and finally I get up and sit in a recliner and see if I can get a different position. Sometimes I can get sleep and sometimes I can't. Sometimes I have to get up and just plain move around and just try to get movement. Many times I get up and do chores probably at four o'clock in the morning." (T. 77)

When asked how many nights in an average week he would have those kinds of problems Joe answered "it's more like how many don't I. I have it every night. I get up just about every night and have to do that." Joe further testified with respect to whether any time of the day is any better or worse with respect to his pain that "well, the mornings are always worse. That's when I have my headaches in the morning when I get up. And change of weather is bad." (T. 77)

When asked about the spasms in his neck, and their frequency, Joe stated "that varies. Some days I get them quite frequently which would be probably, I don't know if it's an hour, sometimes it seems like it's every fifteen minutes but I just never timed them. And sometimes you get them just, I still think it's from movement, certain movement of my body or weight of my head on my neck." (T. 78) As time has gone on "it's gotten worse. At first I didn't get the spasms quite as bad as I am now, but it's getting worse. As time goes on it's definitely getting

worse." (T. 78) Joe testified that, prior to the subject June 1, 1993 collision, he "absolutely" did not have this pain in his head and neck area and the spasms that he now has. On a scale of one to ten Joe describes his pain in his neck area as "right close to the top." (T. 79)

Joe has also suffered from headaches since the 1993 collision. He told the jury that his headaches start "in the back of my neck and goes up to the back of my head. It's mostly in the back of my head. I don't know why but it's on the right side more than it is on the left....[I]t's a pretty good sized headache. It's a sharp pain....They've gotten much worse as the years went by." (T. 79-81)

> Question: (by attorney Bolinske) Joe, I noticed, first of all, that you're leaning against your left, you're leaning your head against your left arm or hand. Why are you doing that?
>
> Answer: My neck is very weak and if I don't support that I'll get just like seizures in my back. I'm not a doctor but I've been told that it's a pinched nerve and if I don't help support that head which they say is considerable weight in a human being that it causes those seizures and like a charley horse in your leg only with electric shock." (T. 75)

Joe also has suffered from pain and numbness in his arms and right hand since the June, 1993 collision. "[I]t's numbness at times and it feels like needles in it." (T. 74-75) He also has problems with his right shoulder. Joe didn't notice the problems with his right shoulder and right hand right after the accident "but within months after, several months I started noticing more pain in my arm, less grip and just needles like." (T. 82) "This problem has also gotten worse." (T. 82) Joe's problems with his hands and shoulder "seem to be closely related to... my neck pain and hand pain". (T. 83)

Joe's just described problems cause him to have difficulty lifting and using his arms. "Well, when I go to lift something I always have pain in the top and that's by my neck and down between my shoulders. Many times I do lift things but I pay for them later if I do lift them." (T. 84)

Joe then testified as follows with respect to whether he had similar problems prior to the June, 1993 collision:

> Answer: No, I was always considered to be a very strong man.
>
> Question: How about moving your head and neck around, do you have any problems with that since the 1993 collision?
>
> Answer: Definitely.
>
> Question: Tell the jury about that, please.
>
> Answer: It just seems like it's sore and when I do move it I have to be very careful. If I move too fast it seems like it sends a shock down my spine.
>
> Question: Joe, do you have any, did you -- well, let me ask you, did you have any problems moving your head and neck before the 1993 accident?
>
> Answer: No, I did not. I did not. (T. 85)

Prior to the 1993 collision Joe worked extremely hard, helped his son on the farm for many hours a day, driving, for example, a tractor or a combine. Now, his ability to do that is "very limited" "because it caused me so much pain." (T. 87)

With respect to his injuries, and the resulting pain from the 1993 collision, Joe stated:

> Answer: I kept thinking -- I was aching and I kept thinking that it would go away, it would just go away because, you know, as a farmer you get bruised and you think it's going to go away and many times it does but this never went away. And I don't think I've ever been a baby that every time I get a scratch I run to mama, and being one of twelve kids you didn't do that, you survived. And I don't remember exactly when it was that I thought there's got to be something else wrong, this isn't going to go away. (T. 115)

Joe then went to see Dr. Geier, his longtime family doctor, at the Carrington Health Center. (T. 115) Dr. Geier first sent Joe to a chiropractor. That treatment made Joe's condition worse. He then tried traction, which also aggravated Joe's condition. Dr. Geier next recommended a neck brace device but that also only made Joe's neck more sore. (T. 116-118)

> Question: And you went in to see Dr. Geier then from the time of the collision in 1993, he's been your doctor right to the present day, is that right?
>
> Answer: Well, when it got real bad I would go in and see him otherwise I

didn't because it just seemed like there wasn't going to be any help. I would rub it. My stepdaughter brought me a, seen a, I don't know what you call it, it's kind of a collar and it's filled with wheat and I can heat that in the microwave four minutes. Not four minutes, it's so many seconds, I don't know, anyway you heat it to a warm degree and then I would lay in that and it fits up around, it's like about that big around (indicating) or about four inches in diameter and it tapers off and comes around and basically that gives me as much comfort as anything. And I do that at home and I have done that almost since day one with this and I still do it and that's done me more good than all the doctors I've seen. (T. 116-118)

Joe was then asked:

Question: (Mr. Bolinske continuing) Has Dr. Geier's treatment been effective, Joe?

Answer: On my neck?

Question: Yes.

Answer: No, no one else's has either.

. . . .

Answer: Oh, wait a minute. I, I should say the medication, as far as making it -- may I ask -- rephrase that question. And may I ask a question?

Question: Well, I don't know if that's allowed.

THE COURT: You may.

Answer: Okay. What I'd like to know is how you meant that has his treatment been effective? The medication that I take will cease the pain to some degree. As far as any of the people that he has recommended I go see, that haven't helped me one bit. In fact at the moment or at the time, as I previously stated, he makes it worse.

Question: All right. You've mentioned just a moment ago various medications. Do you, has Dr. Geier prescribed various drugs or medications to you?

Answer: Yes, he has over the years and some of them would irritate my stomach and I couldn't take them, and he has shifted medications from time to time to try to get one that I can live with.

Question: Joe, has Dr. Geier been the doctor that has prescribed all of your medication or have some other doctors prescribed any, do you know?

Answer: Thinking back I think he's the only one that prescribed any

medication that I can remember.

Question: Where do you buy your medication, Joe?

Answer: Oh, some of it's bought, most of it's bought in Nilles Drug in Fessenden....

Question: Do you know the types of medications that Dr. Geier has prescribed for your injuries from this 1993 collision?

Answer: I don't know all of them. LaVonne knows them all but I don't remember them all.

Question: So we'd be better off asking her about the medications and so forth?

Answer: I think so. There's been considerable amount that we've experimented with and I can't begin to remember or even pronounce half of them.

Question: Do those medications help you, Joe?

Answer: Yes they do. Oddly enough without that I wouldn't be functioning. I'd probably be functioning but I wouldn't be functioning very well.

Question: Do you still have all the problems and the pains and physical impairments even though you're taking the medications to soothe the pain some?

Answer: It does soothe the pain down some.

Question: And have you had some X-rays?

Answer: Many.

Question: And MRI, have you had that?

Answer: Yes, I have.

Question: Have you considered surgery?

Answer: I have. I would like to but right now I don't think, I have never been recommended surgery at this time. They said in time I will have to have surgery. I don't know when. (T. 120-122)

Dr. Geier related Joe's problems to the 1993 collision. (Dr. Geier Depo. pp. 49-58; T. 192-194) Dr. Geier also referred Joe to a specialist, Dr. Monasky, a neurosurgeon in Bismarck. But Dr. Monasky did not recommend surgery and advised Joe that there was

nothing further Dr. Monasky could do for him. (T. 122-124)

When Joe was asked:

> Question: (by attorney Bolinske) Do you know what you're going to do about your neck pain and these other problems, Joe?
>
> Answer: Going to live with it as long as I can and when I can't live with it, I'll go see someone like Dr. Monasky to do surgery. That is probably the only hope because it doesn't pay to go to physical therapists, chiropractors or anyone else because I'm afraid they will move that, that portion that is damaged and probably pinch my spinal cord and make me paralyzed.
>
> Question: Have you just endured this pain because you don't know what else to do?
>
> Answer: That's right.
>
> Question: Ever since 1993?
>
> Answer: Yes.
>
> Question: Did you have anything, Joe, like this pain that you've been describing before 1993?
>
> Answer: I sure did not. (T. 124)

Inasmuch as LaVonne Schaefer, Joe's wife, was more familiar with Joe's medication than Joe was, she testified as to the types of medication Joe took for his 1993 problems.

> Question: (to Joe Schaefer) So we'd be better off asking her about the medications and so forth?
>
> Answer: I think so. There's been considerable amount that we've experimented with and I can't begin to remember or even pronounce half of them. (T. 121)

LaVonne Schaefer graduated from high school and then worked for two years for the Wells County State's Attorney in Fessenden. She also worked at the Fessenden Clinic for Dr. Towarnicky for two years as the office manager and as a nurse helper. (T. 223-224)

Joe and LaVonne Schaefer married after their first spouses passed away and at the time of trial had been married 25 years. (T. 47-49; 219)

LaVonne stated that she usually accompanied Joe when he saw the doctor. (T. 221)

With respect to the medications Joe took for his injuries from the 1993 collision, she testified:

> Answer: He took Voltaren, anti-inflammatory medication; Toradol for pain; a Propoxy N for pain; Norflex for muscle spasms. And he also took Diclofenac and that's just another generic name for Voltaren that was prescribed....
>
> Question: What is the Voltaren for?
>
> Answer: That's an anti-inflammatory medication. (T. 223)

Plaintiffs Exhibit 14 (the medication summary) was then offered into evidence through LaVonne Schaefer as follows:

> Question: (by attorney Bolinske) LaVonne, showing you what has been marked for identification as Plaintiffs' Exhibit 14, can you tell the court what that is, please?
>
> Answer: These are prescription records from Nilles Drug in Fessenden, North Dakota.
>
> Question: Are these the drugs that Joe took following his 1993 collision as a result of the injuries that he sustained in that collision? (T. 224)

LaVonne Schaefer answered that question "Yes", but defendants' attorney Nostdahl interposed an objection and the following ensued:

> MR. NOSTDAHL: I'm going to object, lack of foundation.
>
> THE COURT: Response?
>
> MR. NOSTDAHL: She's not a doctor.
>
> MR. BOLINSKE: Your Honor, again --
>
> THE WITNESS: Yes.
>
> MR. BOLINSKE: ...she went to the clinic with him, she observed the pain that he was having and purchased the medicine for him. And we also have medical records that have already been introduced that show that very same thing. This is simply a summary of those records, really.
>
> MR. NOSTDAHL: Then I would suggest, Your Honor, the medical records speak for themselves. And for this as well.
>
> MR. BOLINSKE: Your Honor, we're entitled to offer a summary of medical

records to assist the jury sort some of these things out.

THE COURT: Oh, I'm going to over -- sustain that objection, I'm not sure you're entitled to do that.

[This is error. Rule 1006 of the North Dakota Rules of Evidence provides that such summaries are admissible. And, of course, Exhibit 16, the drug store printout is in itself a "medical record." The specific medications taken by Joe were highlighted thereon.]

MR. BOLINSKE: To do which, Your Honor?

THE COURT: To give them a summary. We give them the medical records and they are free to look at them if they choose and hopefully they will.

MR. BOLINSKE: All right.

(Mr. Bolinske continuing) LaVonne, what is the total of those medications that Joe took?

MR. NOSTDAHL: Your Honor, same objection. He's just short circuiting my objection I just made. He wants the total now instead of the whole list. What's the total mean if we don't know what it's for? (Emphasis added)

[This is precisely the point. Without the specific listing of medications, the $2,200 total is virtually meaningless because the jury has no way to substantiate it and consider it "proven."]

MR. BOLINSKE: The total is indicated on the exhibit, Your Honor.

THE COURT: I realize that. Give me your objection again.

MR. NOSTDAHL: Lack of foundation. She's not a doctor.

THE COURT: Overruled, you can go ahead.

THE WITNESS: The total of these medications is $2,229.65.

Question: All right. Thank you.

MR. BOLINSKE: And, Your Honor, we would make an offer of proof of Plaintiff's 14 by entering the document itself into the record.

THE COURT: Okay, we'll determine that a little later. (T. 224-226)

Thereafter an offer of proof was made with respect to Plaintiffs' Exhibits 14 (the medication summary) and 16 (the drug store printout), in part as follows:

THE COURT: ...Now your offer of proof and I left Mrs. Schaefer on the stand in case I have any questions of her or you have any. Give me your offer of proof on Exhibits 14 and 16, please?

MR. BOLINSKE: All right, Your Honor. And may I simply ask her some questions about them, Your Honor, for the offer of proof?

THE COURT: Yes.

OFFER OF PROOF DIRECT EXAMINATION BY MR. BOLINSKE:

Question: LaVonne, showing you again what has been marked as Plaintiff's Exhibit 16, will you tell the Court how that came into your possession?

Answer: This? I went to Nilles Drug in Fessenden and asked him for a printout of all the prescription drugs that we had bought there for Joe.

Question: All right. And that's what that document represents?

Answer: Correct.

Question: And then the drugs that you have indicated that Joe was taking for the conditions from the 1993 accident are listed in here by date of purchase, by name, by price and the number of tablets, is that right?

Answer: Correct.

Question: Now I know that some of them, LaVonne, are marked in pink ink. Who did that?

Answer: I did that. (T. 244-245)

At this point in the trial there was an extended discussion between the trial court and counsel as to the admissibility of Plaintiffs' Exhibits 14 and 16. That discussion, covering pages 244 through and including page 256 is included in the Appendix beginning at page 47.

As the Court will note from reading that portion of the Trial Transcript, it was at this point in the trial that the trial court recessed the trial to itself examine the evidence by comparing the medications listed in Exhibits 14 and 16 to Joe Schaefer's medical records. That the court performed this function, and itself attempted to evaluate the evidence, is made clear by the Court's discussion on this subject. (T. 244-256) The recess lasted from 2:27 p.m. to 3:15 p.m., a period of approximately forty-five minutes. (T. 248)

At the end of the Court's own evaluation of the evidence, and after further discussion with counsel, the trial court again sustained attorney Nostdahl's objections to Plaintiffs' Exhibits 14 and 16. (T. 256) Once again those exhibits, Plaintiffs' Exhibits 14 and 16, were offered as the offer of proof of their contents as follows:

> MR. BOLINSKE: Your Honor, may we then have those exhibits as a part of the record as our offer of proof instead of going through all of them.
>
> THE COURT: Yes, certainly, they'll be in the record and we will note they are sustained and for purposes of appeal they are there. (T. 256)

During defense attorney Nostdahl's closing argument, he devoted a great deal of his argument to a blackboard demonstration and mathematical formula attempting to show that Mr. Schaefer had not met the $2500 serious injury threshold.

Attorney Nostdahl argued in part as follows:

> So that's the very first question on the verdict form that you need to answer, that you'll need to consider. Did they meet the threshold? Did they have $2,500 in medical expenses? Mr. Bolinske threw out a number of $5,000. It's a nice round number and I don't know where it comes from exactly but it's not accurate. He's using, of course, part of that is this $2,200 in prescriptions that he's claiming. <u>But as I pointed out, those aren't in evidence. And those aren't related to the accident and that's why they're not in evidence because you don't have the proof</u>. (T. 397) (Emphasis added.)

As will be noted, attorney Nostdahl zeroed in on precisely the point we are trying to make. First, the trial court <u>excluded</u> documentary evidence of the Schaefer's medication expense. Then, attorney Nostdahl told the jury that, <u>because the trial court had kept out the documentary evidence,</u> the medication expense <u>itself</u> was not in evidence. "And those aren't related to the accident and that's why they're not in evidence...." (T. 397)

Keep in mind that the jury had sat in the jury box and observed Plaintiffs' Exhibits 14 and 16 being offered and LaVonne Schaefer questioned about them. Then, after an objection when they were offered into evidence, the trial court took an <u>extended break</u> to itself study the records while the jury no doubt wondered whether the trial court would admit the evidence,

only to have the trial court come back, sustain the objection, and prevent the jury from seeing those documents.

From the jury's point of view, the documents containing the medication expense were excluded by the trial judge, unmistakably indicating to the jury that the medication expense should therefore not be considered. Then, attorney Nostdahl told the jury that "this $2,200 in prescriptions that he's claiming -- those aren't in evidence". (T. 397) What is the jury supposed to think? The trial court excluded the evidence establishing the $2,200 in medication expense and then attorney Nostdahl told the jury that, as a result, $2,200 expense wasn't even in evidence.

Of course, the reality is that the $2,200 figure for medication expense was allowed to be testified to, but the documentation establishing that that medication expense was in fact related to Joe's injuries from the 1993 collision was kept out.

That being the case, the jury had absolutely no way to examine each of the itemized medications, and then go to the medical records themselves, which were in evidence, and determine whether the medication expense was or was not related to the 1993 collision injuries. Without the itemized documentation of each medication expense, the name of the medication, and the date it was purchased, the jury had no way whatsoever to determine whether any specific medication expense should have been included as counting toward the $2,500 threshold or not. As a result, we submit that the jury simply concluded that the entire $2,200 in medication expense should be disallowed when answering the special verdict question relating to whether the $2,500 threshold ("serious injury") had been met.

When the $2,229.65 in medication expense is subtracted from the $5,184.65 in total medical expenses, it is easy to see that the jury had little left to work with ($5,184.65 minus $2,229.65 equals $2,955.00) and by questioning and discounting just $455.00 could, and did, conclude that $2,500 threshold was not reached. If only $455.00 of the $2,229.65 of

medication expense was found to be related to Joe's 1993 collision injuries, the $2500 threshold would have been met (assuming, of course, that the jury accepted the other medical expenses Joe submitted at trial. That total is itemized in Plaintiffs' Exhibit 15). (App. p. 60)

There is no good reason why Plaintiffs' Exhibits 14 and 16 should not have been received in evidence. A proper foundation for them had been laid. They were clearly relevant. And, very importantly, they would have enabled the jury to go through the medical records and determine just what each prescribed medication, and refills thereof, were prescribed and/or used for.

Instead, here, we had the trial court do that analysis. Under the law, however, that is clearly a function for the jury. That is, after all, what a jury trial is all about.

We submit that it is here clear (1) that the jury in this case concluded that plaintiff Joseph Schaefer had not exceeded the $2500 serious injury threshold and (2) that that conclusion was reached because they were not allowed to consider (1) the drug store printout of drugs taken by Mr. Schaefer and (2) the specific drug summary of drugs taken by Mr. Schaefer. (Plaintiffs' Exhibits 16 and 14).

Not only does this conclusion follow logically, but it is also clear because, immediately after the trial, the undersigned spoke to one of the jurors by telephone and was advised that, because the subject evidence had been excluded, the jury did not believe that it could consider and include the drug expenses in deciding whether Mr. Schaefer had met the $2500 threshold. (See the Affidavit of Robert V. Bolinske, attached hereto.) (App. p. 73)

Therefore, the exclusion of admissible evidence led directly to the jury's finding that Mr. Schaefer did not sustain a "serious injury" because he did not meet the $2500 threshold.

We respectfully submit that the just and proper method of correcting this error of law is to grant the Schaefer's a new trial.

III. THE OFFERED MEDICAL AND DRUG EXPENSE DOCUMENTATION WAS ALSO ERRONEOUSLY EXCLUDED BECAUSE THE PARTIES HAD ALREADY STIPULATED TO THE FOUNDATION FOR ITS ADMISSIBILITY

It is respectfully submitted that the trial court erred further in refusing to admit the documentary medical and drug expense summaries and drug printout because the parties had actually already stipulated to the foundation for that evidence. Both at the Pretrial Conference (transcript of Pretrial Conference, pp. 6-7. App. p. 61) and again at the beginning of the trial, (Trial Transcript p. 29, App. p. 63) the parties stipulated to the foundation for their respective medical records. However, despite that very specific stipulation, defendant objected to plaintiffs' exhibits in that regard and the trial court excluded the evidence.

A stipulation is an agreement, admission, or concession made in a judicial proceeding by the parties or their attorneys, respecting some matter incident hereto. Its purpose is generally stated to be the avoidance of delay, trouble, and expense. 73 Am. Jur. 2d, Stipulations, § 1 (1974). Oral stipulations of the parties in the presence of the court are generally held to be binding, especially when acted upon or entered on the court records, and need not be signed by the parties or their attorneys. 73 Am. Jur. 2d, Stipulations, § 2 (1974). Citing Prestwood v. Watson, 20 So. 600 (Ala. 1896).

As a general rule, stipulations should receive fair and liberal construction, consistent with the apparent intention of the parties, the spirit of justice, and the furtherance of fair trials upon the merits, rather than a narrow and technical one calculated to defeat the purposes of their making. 73 Am. Jur. 2d, Stipulations, § 7 (1974). Citing Theatrical Enterprises v. Ferron, 7 P.2d 351 (Cal. 1932); Still v. Equitable Life Assur. Soc., 54 S.W.2d 947 (Tenn. 1932).

Stipulations made by the parties to a judicial proceeding or by their attorneys within the scope of their authority, are binding upon those who make them and those who they lawfully represent. 73 Am. Jur. 2d, Stipulations, § 8 (1974). Citing Morse v. Boulger Destructor Co.

v. Cambden Fibre Mills, Inc., 239 F.2d 382 (3d Cir. 1956). Stipulations are also generally binding upon the trial and appellate courts. Id. Citing Pasco Holding Co. v. Wells, 171 So. 674 (Fla. 1937).

Where a stipulation has been entered into and filed, one of the parties will not be allowed to withdraw from the agreement thus made without the consent of the other, except by leave of court upon cause shown. 73 Am. Jur. 2d, Stipulations, § 12 (1974). This is especially true after he has received the benefits contemplated by the stipulation, or where it has been so acted upon that the parties cannot be placed in status quo. Id.

A stipulation which is frequently entered into, and which is generally recognized as being within the power of attorneys to make, is one relating to matters of evidence. 73 Am. Jur. 2d, Stipulations, § 17 (1974). Stipulations concerning the admissibility of documentary evidence are generally upheld. Id. Ordinarily courts have no power to make findings contrary to the terms of the stipulation. Id. Citing Burnstin v. United States, 232 F.2d 19 (8th Cir. 1956).

For a more detailed discussion of the stipulation, and defendants' subsequent denial that it took place, the Court is directed to the Appendix which contains: (1) Plaintiffs' Reply Brief on Motion for New Trial dated August 13, 1999 (App. p. 64); (2) Plaintiffs' Combined Supplemental Brief and Affidavit of Robert V. Bolinske dated August 17, 1999 (App. p. 69); (3) Defendants' Brief in Response to Plaintiffs' Reply Brief and Supplemental Reply Brief (App. p. 76); (4) Affidavit of Jim Nostdahl (App. p. 81); and (5) Plaintiffs' Pretrial Statement dated August 28, 1998 (App. p. 86).

As the Court will note Plaintiffs' Pretrial Statement very clearly and specifically lists as Trial Exhibits (1) All medical records relating to Joseph Schaefer (2) Medical prescriptions and containers and (3) Records showing amounts paid for medications. The Pretrial Statement then, in addition, lists all medical records from each and every medical care facility at which

Joseph Schaefer received treatment. There can be then absolutely no doubt but that defendants and their attorney were very well aware of precisely what medical records documentation plaintiffs intended to offer as exhibits at trial.

Moreover, at the trial itself, as established at page 29 of the Trial Transcript (App. p. 63) attorney Nostdahl very clearly and unequivocally stipulated to the foundation of plaintiffs' medical records. How defendants could thereafter deny that they entered into the subject stipulation, after having done so at both the Pretrial Conference and at the trial itself, is perplexing.

Plaintiffs didn't need a doctor to establish the foundation for the medical records. Erdmann, supra. Plaintiffs didn't need a druggist or medical records clerk or librarian to establish the subject foundation, because that foundation had been stipulated. Indeed, attorney Nostdahl himself at the time of trial stated that the basis for his objection to the medication summaries was not that the druggist wasn't available to testify as to their foundation. (T. 253-4). A proper foundation was laid for the medication summaries, as previously established. They were clearly relevant to proving that plaintiffs had met the $2,500 "serious injury threshold." And, finally, the trial court impermissibly weighed, evaluated and analyzed the credibility of the Schaefer's evidence, contrary to Tuhy, supra. That function, instead, was for the jury, and, we submit, requires that this case be remanded for a new trial.

Not only was the court's exclusion of the subject evidence an "error in law occurring at the trial" entitling plaintiffs to a new trial pursuant to the grounds set forth in Rule 59(b)(7) but also it is grounds for the granting of a new trial pursuant to Rule 59(b)(1) in that the entire episode constitutes an "[i]rregularity in the proceedings of the court, jury, or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial."

Again, it was critical to plaintiffs' case that the (1) drug expense summary and (2) drug expense printout be received into evidence so that the jury could make its own determination as to whether plaintiff Joe Schaefer had met the $2500 threshold. Without, especially, the drug expense printout and drug expense summary, the jury had no way whatsoever to determine which specific drugs (and the amounts thereof, the date purchased and the price of the drugs claimed by Joe Schaefer as a medical expense) took him over the $2500 threshold. It is not surprising, then, that, when the undersigned was advised by a member of the jury that, because of the lack of documentary evidence, the jury felt that it couldn't consider the drug expense, that the jury reached the decision it in fact reached on the $2500 serious injury threshold issue.

The exclusion of the subject evidence thus led directly to the finding by the jury that plaintiff Joe Schaefer did not prove that he had met the $2500 serious injury threshold. Had the subject documentary evidence been admitted, however, we submit, there is little question but that the jury would have in fact decided that Mr. Schaefer did meet the threshold. In fact, his medical expenses, with the medication expense included, doubled the $2500 threshold.

However, the point is that the court erroneously excluded the subject documentary evidence and that that erroneous exclusion caused the jury to conclude that the threshold had not been met. The exclusion of the subject medical and drug expense evidence, therefore, materially affected the substantial rights of the Schaefers and led inexorably to a verdict against them. That error should now be corrected by ordering a new trial of the case.

IV. DEFENDANT ABUSED THE DISCOVERY PROCESS BY FAILING TO TURN OVER TO PLAINTIFFS DOCUMENTS WHICH WERE SPECIFICALLY REQUESTED IN DISCOVERY

In Plaintiffs' First Set of Continuing Interrogatories to Defendants, Interrogatory No. 23 provides as follows:

> "Please identify, according to the above instructions, any documents relating to any of the issues involved in this action."

During the course of trial, and prior to defendant Pettys' testifying, the undersigned observed defendant Pettys reading a document. After the trial it occurred to the undersigned that the document may have been an internal accident report and/or diagram or in some other way related to the case. It was further speculated that that document could have been prepared after some type of accident investigation by defendant SRT. That document was never received by the plaintiffs, even though documents of that type were specifically requested. Nor were plaintiffs ever even made aware that such a document existed. These "speculations" were first addressed in plaintiffs' Motion for a New Trial, and proved to be accurate. In their Brief in Response to Plaintiffs' Motion for New Trial, at pp. 7-8, defendants for the first time admit that through "oversight," this document was never produced. While liability was admitted, defendant Pettys' credibility was an issue in the trial because he claimed he was traveling only 10 miles per hour at the time of impact. (T. 216) His speed would obviously affect the nature and extent of damages to be expected. The document has still not been produced.

It is submitted that the failure of defendants to comply with the rules of discovery constitutes yet another ground for the granting of plaintiffs' a new trial pursuant to (1) Rule 59(b)(1) "irregularity in the proceedings" and 59(b)(4) "newly discovered evidence material to the party making the application, which he could not with reasonable diligence have discovered and produced at the trial".

Because what is now believed to have been an internal accident report prepared by defendant Pettys employer, SRT, (and perhaps other documents) were wrongfully concealed by defendants, it is submitted that plaintiffs are entitled to a new trial in this case.

V. THE TRIAL COURT ERRONEOUSLY REFUSED TO ALLOW PLAINTIFFS' COUNSEL TO READ THE DEPOSITIONS OF DR. GEIER AND DR. MONASKY AND INSTEAD ALLOWED DEFENDANTS' COUNSEL TO DO SO

During the trial, and during plaintiffs' portion of the case, plaintiffs' counsel sought to read the depositions of plaintiff Joe Schaefer's doctors, Dr. Geier and Dr. Monasky. The trial court, however, refused, and instead, and we submit erroneously, allowed defendants' counsel to read the depositions, all this during plaintiffs' portion of the case. (T. 192-195)

In so ruling, it is respectfully submitted that the trial court acted contrary to the provisions of Rule 32(a)(3) of the North Dakota Rules of Civil Procedure which specifically provides in relevant part that:

> "the deposition of a witness, whether or not a party, may be used by any party for any purpose...." (Emphasis added.)

(It was necessary to read the doctor's depositions at trial because Dr. Geier was unexpectedly unavailable because of the impending death of his mother and Dr. Monasky was unavailable because he was more than 100 miles away, had no replacement, and was expecting to have to deal with a serious head injury case during the trial.)

The reason which party's attorney was allowed to read the depositions is significant in this case is that the court's ruling made it actually appear to the jury that the doctors were in fact attorney Nostdahl's witnesses, because he was reading the questions in the deposition, rather than, as was actually the case, witnesses being called by way of deposition by plaintiffs.

The court's ruling was further significant in that it allowed attorney Nostdahl to control the pace and emphasis of the questions and answers, thereby prejudicing plaintiff in that regard. While this issue may seem insignificant at first blush, much mischief, confusion and outright deception can take place in the manner, emphasis and speed with which a deposition is read. One very specific example of this type of abuse occurred when attorney Nostdahl, who himself admitted during the trial to speaking very quickly, somehow neglected at trial to read the year of the accident to which one of his questions related. In fact, it is submitted that attorney Nostdahl, when he discovered that he had apparently misspoken as to the year of a particular

accident at the time he took the deposition of Dr. Geier, at trial read only the month and day of the accident in question, leaving out the year, thereby conveying to the jury that he was actually referring to the 1993 accident, to gain the impression he sought to create. (See Dr. Geier's deposition at page 46). As it developed, the question involved was potentially critical to the outcome of the case. At Dr. Geier's deposition, attorney Nostdahl asked the following question:

> Question: (by attorney Nostdahl) Based -- knowing the history of Mr. Schaefer, the fact that he's had three other car accidents, the rollover in '81, horse trailer accident in '95, a car accident in '92, I think all three of which he complained of some kind of neck or thoracic pain afterwards, knowing that, knowing the fact that he's had osteoarthritic changes since at least as early as '81, as well as other degenerative back problems, can you say with a reasonable degree of medical certainty that any problem he has now with his thoracic spine problems are related to the accident on June 1, '91? (Emphasis added.)
>
> Answer: I guess I can say that he has developed headaches since that auto accident, but as far as saying that all of his discomforts are related to that accident, I cannot. (Dr. Geier Deposition Transcript at p. 46)

As the Court will note, attorney Nostdahl was attempting to, and partially succeeded, in getting Dr. Geier to testify, basically, that he could not relate all of Joe's discomforts to the "June 1, 1991" accident. Attorney Nostdahl's problem was that there actually was no June 1, 1991 accident. Thus, any benefit he gained from Dr. Geier's answer was lost by the fact that attorney Nostdahl was talking about a June 1, 1991 accident rather than the subject June 1, 1993 accident. To solve this problem, at trial, when attorney Nostdahl read the above-referenced question he simply left out that portion of the question relating to "1991". Thus, he ended his question by asking "Can you say with a reasonable degree of medical certainty that any problem he has now with his thoracic spine problems are related to the accident on June 1st...." Attorney Nostdahl then stopped and did not read the reference to 1991. That, of course, was intended to convey to the jury that attorney Nostdahl was in fact addressing his question to the accident on June 1, 1993. (Indeed, it is speculated that this was likely the

reason Attorney Nostdahl wanted to read the depositions in the first place.) This "sharp practice" also constitutes an irregularity in the proceedings which prevented plaintiff from receiving a fair trial.

By refusing to allow plaintiffs to read the depositions the court very clearly caused it to be conveyed to the jury that these doctors were defendants' witnesses, and that their testimony was actually contrary to plaintiffs' position, when in fact just the opposite was true. This irregularity, it is submitted, prevented plaintiffs from receiving a fair trial, and support the granting of a new trial.

VI. THE TRIAL COURT'S CONDUCT SURROUNDING THE EXCLUSION OF THE MEDICAL AND DRUG EXPENSE SUMMARIES AND DRUG EXPENSE PRINTOUT CONSTITUTES AN IRREGULARITY WHICH ALSO PREVENTED PLAINTIFFS FROM RECEIVING A FAIR TRIAL

The fact that the trial court (we submit erroneously) excluded plaintiffs' drug and medical expense summaries and the specific drug printout has already been discussed. However, the trial court's activities surrounding that exclusion also, we submit, constitute an irregularity which by itself, and combined with all other irregularities, prevented plaintiffs from receiving a fair trial.

Specifically, the trial court's conduct in repeatedly and erroneously sustaining objections to plaintiffs' efforts to have Mrs. Schaefer testify to the items of medical and drug expense, and then in keeping out the records themselves, unmistakably conveyed to the jury that the medical expenses, including the medication expenses, and claims regarding their dollar amounts, were suspect.

Further, the trial court adjourned the trial, and for a substantial period of time, some 45 minutes, studied and erroneously weighed the credibility of the medical and drug expense summaries and drug printout. Then, when the court finally excluded those documents, and

they were not allowed to go to the jury, it was a clear (even if not intended) message to the jury that it could and/or should not consider them or the medical and drug expenses they evidenced. In fact, as indicated above, one of the jurors contacted immediately after the trial by the undersigned stated exactly that.

VII. CONCLUSION

The trial court excluded vital and admissible documentary evidence consisting of a summary of plaintiff Joseph Schaefer's drug expense and a printout of his drug expenses. That exclusion was erroneous as a matter of law and led directly to the jury concluding that plaintiff Joseph Schaefer had not met the $2500 threshold.

For that, and all other reasons set forth above, (including the cumulative effect of the errors and irregularities), plaintiffs respectfully request that the court remand this case for a new trial.

Respectfully submitted this 2nd day of June, 2000.

ROBERT V. BOLINSKE (I.D. No. 03266)
ATTORNEY AT LAW
Attorney for Plaintiffs
515 North Fourth Street
Bismarck ND 58501
(701) 222-2035