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STATE OF NORTH DAKOTA

**IN THE SUPREME COURT**

**STATE OF NORTH DAKOTA**

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| Jason Haider,<br><br>Plaintiff-Appellee,<br><br>vs.<br><br>Jeff Moen,<br><br>Defendant-Appellant. | File No. 51-2014-CV-890<br>Supreme Court No. 20170348 |

# BRIEF OF APPELLANT JEFF MOEN

Appeal from Jury Verdict
Dated August 2, 2017
Appeal from Order for Judgment on Jury Verdict
Dated September 6, 2017
Appeal from Judgment
Dated September 8, 2017
In the District Court of Ward County
The Honorable Todd L. Cresap, Presiding

Supreme Court No. 20170348
Ward County No. 2014-CV-00890

Daniel M. Traynor (N.D. ID#05395)
David A. Owens (N.D. ID#08531)
TRAYNOR LAW FIRM, PC
509 5th St NE, Ste. 1 - P.O. Box 838
Devils Lake, ND 58301-0838
Telephone: (701) 662-4077
Email: dantraynor@traynorlaw.com
davidowens@traynorlaw.com
*Attorneys for Defendant-Appellant Jeff Moen.*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases** **Paragraph**

**Statutes** **Paragraph**



**Rules** **Paragraph**



**Secondary Authority** **Paragraph**

## STATEMENT OF THE ISSUES

I. Whether the trial court abused its discretion by failing to instruct the jury on the operation, application, and definition of "treble damages" under Section 32-03-30 of the North Dakota Century Code, and by preventing counsel for Moen from commenting upon the same.

   A. The jury entered its verdict ignorant of applicable North Dakota Law.

   B. The trial court erred by forbidding counsel to inform the jury of the legal consequences of their findings.

   C. The jury's verdict was based upon speculation, conjecture, and insufficient evidentiary and/or factual basis.

II. Whether the trial court erred in allowing Paul Beck's testimony to be presented to the jury as expert testimony where Beck was unqualified to do so.

## STATEMENT OF THE CASE

[¶1] This is an appeal from the Jury Verdict issued on August 2, 2017; the Order for Judgment on Jury Verdict, dated September 6, 2017; and the accompanying Judgment entered in the above-entitled matter on September 8, 2017, as Docket No. 192 in the District Court of Ward County. The case centers on the removal of a row of volunteer Cottonwood trees located on Plaintiff-Appellee Jason Haider's residential property, which bordered farmland worked by Defendant-Appellant Jeff Moen. While initially litigated under several theories, ultimately Haider sued Moen seeking damages for Wrongful Injury to Timber. N.D.C.C. § 32-03-30.

[¶2] A Jury Trial was held on August 1-2, 2017. On August 2, 2017, a Verdict was entered awarding Haider $40,500.00 in damages. Pursuant to a question answered by the jury without explanation, the Order for Judgment on Jury Verdict entered on September 6, 2017, and the Judgment, dated September 8, 2017, tripled this amount to $121,500.00. On September 21, 2017, Moen issued his timely Notice of Appeal.

## STATEMENT OF THE FACTS

[¶3] The above-captioned matter is a civil action brought by Haider, against Moen to recover damages sustained following the destruction of Haider's trees by Moen.

[¶4] In July of 2010, Haider purchased and occupied a property in rural Foxholm, North Dakota. Transcript of Jury Trial, Vol. I, p. 69 (hereinafter "Trns."). Haider owns approximately seven (7) acres, which includes the homestead and the adjacent tillable farmland. See id. at pp. 69-70. Haider testified the property afforded a level of privacy, which influenced his decision in purchasing the property. See id. at pp. 72-73.

[¶5] Moen farmed the tillable portion of the property for many years prior to the removal of Haider's trees in 2010. See id. at 188. Moen had agreements with the previous owners allowing him to farm the land adjacent to the property. See id.

[¶6] After Haider purchased the land, Haider received a phone call from Moen asking about farming the land, which Haider allowed Moen to do. See id. at p. 74. Moen asked if Haider wanted payment in exchange, but Haider refused. See id. at 143-144.

[¶7] On or about September 2012, during the course of a farming operation, Jeff Moen removed a line of trees bordering and encroaching upon the rented farmland along the south side of Haider's homestead. See id. at 169. During the course of the trial, Jeff Moen maintained he believed he had authority to do so. See id. at 187. Moen also testified "it [went] with good farming practices" to remove trees in the way of the farming operation. Id. at 187.

**Explaining "treble damages" to the Jury**

[¶8] On the first day of trial, Haider elected to pursue remedies under section 32-03-30, N.D.C.C., for Wrongful Injury to Timber, and declined to proceed with his claim for Civil Trespass. See Trns. Vol. I, p. 33

[¶9] On the second day of trial, Moen requested an instruction be given to the jury explaining the statutory application of "treble damages." See Trns. Vol. II, pp. 228-229; see also Appendix to Brief of Appellant Jeff Moen, Bates No. 036 (hereinafter "Appendix"). After lengthy discussion, see Trns. Vol. II, at pp. 229-235, the Court declined Moen's request. See id. at 235.

[¶10] Moen's counsel subsequently informed the Court counsel would be addressing the language and definitions contained within the statute in its closing arguments. See id. at

235-236. The Court expressly prohibited Moen's counsel from doing so, and the jury was not informed of the trebling damages provision of Section 32-03-30, N.D.C.C. See id.

**The testimony of Paul Beck**

[¶11] Haider called Paul Beck ("Beck") as an expert Witness. See id. at 242. Beck based his valuation of tree loss on a study published by the University of Minnesota in 1980. See id. at pp. 262-263; see also Appendix, Bates No. 026. The University of Minnesota valued a tree $20.00 per square inch. See id. Beck amended this amount to $50.00 per square inch. See id.

[¶12] Beck could not explain his methodology behind the $50.00 modification, stating only "prices have went [sic] up in 38 years . . . $20.00 was the 1980 price," and he did not know the rate of inflation. See id. at 263; see also id. at 285-286.

[¶13] Beck testified as to the steps he followed when calculating the trees' value, stating:

> BECK: So first you have the tree value – the cross section of the tree, which would be in square inches. That's diameter. And we want to know what the square inches of this tree cross section is. And there's a formula for that and there is also a table on the shade tree valuation that shows that.
>
> * * *
>
> BECK: So you take [the square inches of the cross section] times the value. Well the value we have set it up at $50. So you take your square inches times the value, $50, and you come up with a number. So that equals the total value of that tree.

Id. at 260-261.

## STANDARD OF REVIEW

[¶14] A trial court's findings of fact are reviewed under the clearly erroneous standard. See Oien v. Oien, 2005 ND 205, ¶8, 706 N.W.2d 81. This Court applies a *de novo* standard of review for questions of law, and an abuse of discretion standard of review for discretionary matters. See id. A trial court abuses its discretion if it acts in an arbitrary,

unreasonable, or unconscionable matter, its decision is not the product of a rational mental process leading to a reasoned determination, or it misinterprets or misapplies the law. See Schnieder v. Schaaf, 1999 ND 235, ¶12, 603 N.W.2d 869; see also Hamilton v. Oppen, 2002 ND 185, 653 N.W.2d 678.

[¶15] Jury instructions should fairly inform the jury of the law applicable to the case, and the claims made by both sides of the case. Instructions on issues or matters not warranted by the evidence are erroneous, but constitute reversible error only when calculated to mislead the jury or . . . when they are prejudicial. Tasarek v. Lakeview Excavating, Inc., 2016 ND 172, ¶25, 883 N.W.2d 880. "If the district court commits error in its instructions, this Court decides whether the error was harmless." Id.

[¶16] Whether a witness is qualified as an expert, and whether the expert's testimony will assist the trier of fact, are decisions within the sound discretion of the trial court, and the court's ruling will not be overturned on appeal absent an abuse of discretion. See Horstmeyer v. Golden Eagle Fireworks, 534 N.W.2d 835 (N.D. 1995).

## ARGUMENT

[¶17] The trial court erred by not instructing the jury of "treble damages." "The determination of the amount of damages . . . rests largely in [the jury's] discretion." Dahlen v. Landis, 314 N.W.2d 63, 67-68 (N.D. 1981).

[¶18] The trial court also erred by allowing Paul Beck to testify as an expert, though Beck was unqualified to do so. Beck relayed erroneous information to the jury. Therefore, his testimony was not able to assist "the trier of fact to understand the evidence or to determine a fact in issue." N.D. R. Evid. 702.

## I. Whether the trial court abused its discretion by failing to instruct the jury on the operation, application, and definition of "treble damages" under Section 32-03-30 of the North Dakota Century Code, and by preventing counsel for Moen from commenting upon the same.

[¶19] On the second day of trial, Moen requested an instruction indicating the statutory application of "treble damages," or otherwise allowing the unadulterated language of the statute to be read or otherwise explained to the jury. See Trans. Vol. II, pp. 228-229; See also Appendix, Bates No. 036. The court refused to give such an instruction and prohibited Moen's counsel from informing the jury of the same. See id. at 235. The jury ultimately awarded what it presumably believed to be a fair sum to the Plaintiff, ignorant of North Dakota law and its "treble damages" provision. See Sollin v. Wangler, 2001 ND 96, 627 N.W.2d 159 (concluding not informing the jury of the finding may produce a judgment which does not reflect the wisdom of the jury or their view of the facts, but only their ignorance of the law).

[¶20] Therefore, Moen respectfully submits the trial court erred by declining to instruct or otherwise inform the Jury of the aforementioned statutory operation, which resulted in undue prejudice to Moen.

### A. The Jury entered its verdict ignorant of applicable North Dakota Law.

[¶21] The jury should have been made aware of the legal consequences of their answers. In a comparative negligence case, a jury is informed of the consequence of finding a plaintiff 50% at fault. See Sollin, 2001 ND 96; see also McGarry v. Skogley, 275 N.W.2d 321 (N.D. 1979) (holding instructions on negligence fairly informed the jury of the law of comparative negligence); Travelers Cas. Ins. Co. of America v. Williams Co. Const., Inc., 2014 ND 160, ¶9, 851 N.W.2d 164 (instructing jury on comparative fault, and the instruction became the law of the case). When a jury is informed such a finding would bar

the plaintiff from recovery, the jury is shielded from making a finding ignorant of the law. Thus, the judicial process functions fairly, without subversion and speculation. See Sollin, 2001 ND 96; see also Seppi v. Betty, 579 P.2d 683 (Idaho 1978). Here, the trial court erred by refusing to instruct the jury as to the applicable law, and subverted the judicial process. See Sollin, 2001 ND 96.

[¶22] The North Dakota legislature prescribed the following damages and compensatory relief with respect to the damages alleged in the case at bar:

> **§ 32-03-30. Damages for wrongful injuries to timber.**
>
> For wrongful injuries to timber, trees, or underwood upon the land of another . . . the measure of damages is three times such a sum as would compensate for the actual detriment, except when the trespass was casual and involuntary or committed under the belief that the land belonged to the trespasser . . . In such a case the damages are a sum equal to the actual detriment.

N.D.C.C. § 32-03-30.

[¶23] In Sollin v. Wangler, Plaintiffs Richard and Linda Sollin (the "Sollins") sued Defendants Dale and Pius Wangler (the "Wanglers") for negligence. See 2001 ND 96. The Sollins sought compensation for personal injuries suffered when a large hay bale the Wanglers attempted to place in the grinder fell and struck Richard Sollin as he attempted to grease a grinder, which was still in operation at the time. See id. The Sollin jury returned a verdict finding both parties 50% at fault, and the action was dismissed. See id.

[¶24] The Sollins moved for a new trial, arguing, *inter alia,* the trial court erred by failing to explain to the jury how the attribution of fault would affect the award of damages. See id. at ¶6. The trial court determined the instructions given were adequate and counsel could have explained to the jury, but did not, the relationship between comparative fault findings and damages. See id. Sollin appealed. See id.

[¶25] On appeal, the North Dakota Supreme Court discussed North Dakota's former comparative negligence statute, N.D.C.C. § 9-10-07, which allowed a jury to be informed of how comparative fault answers would affect an award of damages by providing, upon the request of any party, section 9-10-07 shall be read by the court to the jury, and the parties may subsequently comment to the jury regarding the section. See id. at ¶10.

[¶26] The Sollin court noted "the overwhelming modern trend is away from the 'blindfold rule' in comparative negligence jurisdictions and toward permitting the jury to be informed of the legal consequences of its special verdict answers through an 'ultimate outcome' instruction because the jury's lack of knowledge does not eliminate sympathy and bias, but merely insures the jury makes its decision in greater ignorance." Id. at ¶13 (quotation in original).

[¶27] The Sollin court relied upon an often-cited opinion of the Idaho Supreme Court for its reasoning:

> It would be incredibly naïve to believe that jurors, after having listened attentively to [witness testimony and the arguments of counsel], will answer questions . . . without giving any thought to the effect those answers . . . and to whether their answers will effectuate a result in accord with their own lay sense of justice. [T]he jury would have to be extremely dull-witted not to be able to guess which answers favor which parties. In those instances where the legal effect of their answers is not so obvious, the jurors will nonetheless speculate, often incorrectly, and thus subvert the whole judicial process.
>
> * * *
>
> A reminder in the deliberations by one of the jurors that a finding of 50% negligence will result in no recovery by the plaintiff is likely to cause the jurors to examine the facts more closely before quickly coming to the appealing 50-50 allocation of negligence. Thus, it is not unlikely . . . whether the plaintiff recovers may depend as much upon how "courtwise" the members of the jury are as upon how the jurors view the facts. [N]ot informing the jury of the effect of a [50% finding is] likely to cause an unjust result and produce a judgment which does not reflect the wisdom of the jury or their view of the facts, but only their ignorance of [the] law.

Id. at ¶13 (quoting Seppi, 579 P.2d 683, 690-91). The Sollin court found the logic of the modern trend followed by many other jurisdictions to be compelling. which allows for juries to be informed of the legal consequences their special verdict answers would have on damages. See Sollin, 2001 ND 96, ¶¶13-15. The Sollin Court decided to adopt this trend. See id. at ¶15.

[¶28] As noted by the Seppi decision, upon which the Sollin relied, where the legal effect of their answers is non-obvious, "jurors will nonetheless speculate, often incorrectly, and thus subvert the whole judicial process." Id. at ¶13. Therefore, it is in the best interests of the "judicial process" for the jury to know the consequences of their special verdict answers. See id.

[¶29] The trial court's refusal to inform the jury as to the consequences of their special verdict answers directly opposes the line of reasoning the Court adopted in Sollin. See generally id. Presumably, the jury contemplated and awarded a sum they believed "in accord with their own lay sense of justice." Id. at ¶13. Here, the trial court actively prevented the jury from learning their answers' legal effects, which subverted both the jury's intent and the judicial process. See id.

[¶30] In the case at bar, as in other civil cases, the jury should have been made aware of the consequences of their answers. In a comparative negligence case, a jury is informed finding a plaintiff 50% at fault would bar the plaintiff from recovery, shielding it from legal ignorance. See id. at ¶13; see also McGarry, 275 N.W.2d 321; Travelers, 2014 ND 160, ¶9. Thus, the judicial process functions fairly, without subversion and speculation. See Sollin, 2001 ND 96, ¶13; see also Seppi, 579 P.2d at 691.

[¶31] Because the trial court forbade and a prevented presentation of this information to the jury, it had no choice but to speculate or had no awareness as to the consequences of their special verdict answers. As a result, "the judicial process" was subverted. See id.; see also Dahlen, 314 N.W.2d at 67-68 (finding the determination of the amount of damages is especially within the province of the jury, and such determination rests largely in its discretion).

[¶32] Considering the foregoing, failing to inform the jury of the effect of a finding is "likely to cause an unjust result and produce a judgment which does not reflect the wisdom of the jury or their view of the facts, but only their ignorance of [the] law." Id. at ¶13; Seppi, 579 P.2d at 691. Similarly, such an omission amounts to the court substituting its judgment for the jurors', thereby robbing the jury of its discretion to determine the amount of damages. See Dahlen, 314 N.W.2d at 67-68.

[¶33] Accordingly, Appellant Jeff Moen respectfully submits the trial court erred and abused its discretion in preventing this information from being presented to the jury.

**B. The trial court erred by forbidding counsel to inform the jury of the legal consequences of their findings.**

[¶34] After the Court refused to allow an instruction regarding "treble damages," Moen's counsel informed the Court it would be addressing the language and definitions contained within the statute in its closing arguments. See Trns., Vol. II, p. 235-236. The Court expressly prohibited Moen's counsel from doing so. See id.

[¶35] As discussed above, the Sollin trial court denied the Sollins' motion, noting Sollins' counsel *could* have explained to the jury, but did not, the relationship between comparative fault findings and damages. See Sollin, 2001 ND 96, ¶6. This course of action, allowed in Sollin, but denied here, would have allowed counsel to inform the jury, and thereby avoid

a verdict entered in legal ignorance. See Trns. Vol. II, pp. 228-229; see also Sollin, 2001 ND 96, ¶13. Instead, by prohibiting counsel to instruct the Jury during closing arguments, the trial court in effect did not inform the jury of the impact of their findings, causing an unjust result and producing a judgment which does not reflect the wisdom of the jury or their view of the facts, but only their ignorance of the operation of Section 32-03-30, N.D.C.C. See Sollin, 2001 ND 96, ¶6.

[¶36] In Dahlen v. Landis, a farm laborer, Dahlen, brought action against a farmer, Landis, seeking compensatory and punitive damages for personal injuries received during an alleged roadside altercation with Landis. See generally 314 N.W.2d 63 (N.D. 1981). The district court entered judgment in Dahlen's favor and Landis appealed See generally id.

[¶37] In affirming the trial court's decision, the North Dakota Supreme Court noted "[t]he determination of the amount of damages is peculiarly within the province of the jury. Such determination rests largely in its discretion." Id. at 67-68, (quoting Johnson v. Monsanto Co., 303 N.W.2d 86, 92 (N.D. 1981)). The Court also defined "detriment" as "a loss or harm suffered in person or property." Id. at 67. "The jury may properly consider wounded feelings, mental suffering, humiliation, degradation, and disgrace in fixing compensatory damages." Id. at 68. "The determination of damages for pain and suffering and comparable losses is not susceptible of an arithmetical calculation. Its ascertainment must . . . depend upon . . . the practical judgment of the jury." Id.

[¶38] In the instant case, proceedings were commenced on the second day of trial, August 2, 2017, the trial court and parties were to discuss Closing Instructions and Verdict Form. Haider had requested an instruction labeled "Tree Trespass," which was ultimately included in the Closing Jury Instructions. See Appendix, Bates No. 046.

[¶39] Counsel for Moen correctly pointed out Haider's instruction is a pattern instruction drafted by Alaska courts for use in similar actions. See Trns. Vol. II, p. 214; see also Alaska Civil Pattern Jury Instructions Committee, 13-01, 2 (1996). The Alaska statute to which Plaintiff's instruction refers states:

> **§ 09.45.730. Trespass by cutting or injuring trees or shrubs**
>
> A person *who without lawful authority* cuts down, girdles, or otherwise injures or removes a tree . . . on the land of another . . . is liable to the owner of that land . . . for treble the amount of damages that may be assessed in a civil action. However, *if the trespass was unintentional or involuntary, or the defendant had probable cause to believe that the land on which the trespass was committed was the defendant's own or that of the person in whose service or by whose direction the act was done* . . . only actual damages may be recovered.

AK ST. § 09.45.730 (emphasis added). Those items emphasized above differ from North Dakota's corresponding statute, which states the measure of damages is trebled "except when the trespass was casual and involuntary *or committed under the belief that the land belonged to the trespasser*." N.D.C.C. § 32-03-30 (emphasis added).

[¶40] There exists a widespread presumption a jury has followed the instructions provided by the court. Hildenbrand v. Capital RV Center, Inc., 2011 ND 37, ¶22, 794 N.W.2d 733. Juries have also been provided instructions as to the trebling of damages in other jurisdictions. See Marsella v. Shaffer, 754 N.E.2d 411 (Ill. App. 2001); Freeze v. Hinkle, 317 S.W.2d 817 (Ark. 1958) (finding in action to recover treble damages for the cutting and removing of timber from land, instruction stating before plaintiff could recover treble damages, jury must find timber was willfully and intentionally cut and removed and it was not a mistake on the part of the defendant was not erroneous because of specific phrasing used); Banks v. Watrous, 59 A.2d 723 (Conn. 1948) (holding an instruction directing the jury if it found defendant liable it was for them to treble value of trees was

proper); Floyd v. Richmond, 199 S.W.2d 754 (Ark. 1947) (holding the evidence tended to show willfulness and warranted an instruction on punitive damages, and the giving of an instruction on punitive damages was not prejudicial where jury determined the issue in favor of appellant). In Marsella, the trial court had provided the following instruction to the jury:

> There was [a statute] in force in the State of Illinois, The Wrongful Tree Cutting Act, which provides that any party found to have cut any timber or trees which he or she did not have the full legal right to cut or caused to be cut shall pay the owner of the timber or trees three times its 'stumpage' value as determined by the jury. 'Stumpage' value means standing trees.
>
> The defendants, [sic] have admitted a violation of this statute. It is [sic] thus, up to the jury to determine the amount of the damages. You are to determine the stumpage value of the trees based upon all the evidence you heard.

Id. at 416 (referencing 740 ILCS 185/2). The trial court had also provided the following verdict form:

> Three times the standing value of the trees cut down on plaintiffs' property.
> $_____

Id.

[¶41] Significantly, the Marsella court stated "there is nothing in the language of the statute indicating the jury cannot be told the stumpage value must be tripled." Marsella, 754 N.E.2d at 416; see also 740 ILCS 185/2. The instruction as to the trebling of damages alone did not confuse or mislead the jury. See Marsella, 754 N.E.2d at 416. "Jury instructions should, taken as a whole, fairly and correctly state the law and [not mislead the jury]. . . [and] the jury is entitled to and should know the law," which expressly provides the measure of damages is to be tripled, and there is "no reason to keep this from the jury." Id. This opinion is shared by the North Dakota Supreme Court: "[j]ury instructions must

correctly and adequately inform the jury of the applicable law and must not mislead or confuse the jury." Travelers, 2014 ND 160, ¶11.

[¶42] The Marsella appellant also asserted numerous instances of improper argument. See Marsella, 754 N.E.2d at 417. Defense counsel informed the jury during closing argument the jury needed "to factor in that you're going to triple [the damages] . . . they don't want [$15,000] . . . [t]hey want $45,000 . . . and for $10,000 they could probably buy [fifty trees] . . . and they're more than compensated . . . they want this punishment thing. They want to stick it to him." Id. The Marsella court ruled allowing these arguments an abuse of discretion because it *misstated* the law – not because the jury was to be *kept ignorant* of the law. See id.; see also Sollin, 2001 ND 96, ¶13.

[¶43] The refused instruction requested by Moen provided the basis required for the Plaintiff to recover treble damages once actual detriment had been proven. See Appendix, Bates No. 036. This instruction fairly stated the law. Accordingly, there was no danger the jury would be misled or confused by the instruction. See Travelers, 2014 ND 160, ¶11.

[¶44] Here, trial court also claimed a distinction between an action involving comparative negligence and an action for timber trespass. Instead of comparing the case at bar to another civil action, the trial court instead compared the instant case "to a criminal case where . . . it is against the rules to tell [the jury] what the penalties are." Trns. Vol. II, pp. 232. This sentiment was shared by Haider's counsel during the trial court proceedings, who characterized the difference between a comparative negligence instruction and Moen's instruction as "apples and oranges." Id. at p. 234 "It is not the same . . . and the jury [does not] need to know." Id. Haider's counsel also argued such an instruction would be prejudicial, "inflame the jury," and be "totally unfair." See id. at 231, 234.

[¶45] However, other jurisdictions hold instructions as to punitive damages cannot be considered prejudicial to the prevailing party. See Floyd, 199 S.W.2d at 758. More to the point, an instruction on treble damages is proper if the jury finds the defendant liable. Banks, 59 A.2d at 726. An instruction on treble damages is not improper if the proper language is read. See Freeze, 317 S.W.2d at 818.

[¶46] Moen's counsel wished to inform the jury of the law. Allowing Moen's counsel to quote and provide statutory commentary, satisfies the "proper language" requirement in Arkansas. See id. Due to Moen's testimony and the Closing Jury Instructions, there was no material issue of fact with respect to the allocation of fault – Moen was to be found liable in any event. See Banks, 59 A.2d at 726. Therefore, as the prevailing party, an instruction as to the statutorily allowed treble damages could not have prejudiced Haider. See Floyd, 199 S.W.2d at 758.

[¶47] Additionally, the jury was instructed to determine only "adequate compensation," irrespective of subsequently assessed penalties or punitive damages. See Appendix, Bates No. 052. Because juries are presumed to have followed all instructions, an instruction regarding damages would only serve to inform the jury of the law upon which its decision was to be based; thereby preventing speculation and conjecture as to their answers on the special verdict form. See Hildenbrand, 2011 ND 37, ¶22; see also Sollin, 2001 ND 96, ¶13. Accordingly, it is presumed such information would *not* have impeded juror compliance with the "Adequate Compensation" instruction, and therefore *not* resulted in prejudice to Haider as the prevailing party. See Hildenbrand, 2011 ND 37, ¶22; see also Floyd, 199 S.W.2d at 758; Appendix, Bates No. 052.

[¶48] Comparing instructions and their prohibitions in criminal cases to civil cases, like the court held below, is indeed attempting to compare "apples and oranges." Though a jury

in a criminal case is neither informed nor involved in the sentencing process, oftentimes in civil cases the jury's primary purpose is not only to *consider* penalties which the defendant is to be assessed, but to *decide* those penalties. In this case, analogous to a criminal sentence is the jury's determination of actual detriment, an amount with which the jury was instructed to assess. See Appendix, Bates No. 052 and Hildenbrand, 2011 ND 37, ¶22.

[¶49] Furthermore, juries in civil trials are commonly called upon to award punitive damages to a prevailing party. "Unlike compensatory damages . . . punitive damages are awarded when the wrongdoer's conduct has been oppressive, fraudulent, or malicious." Dahlen, 314 N.W.2d at 68 (citing N.D.C.C. § 32-03-07). Punitive damages' purpose is to punish the wrongdoer and to deter him, as well as others, from the repetition of the wrongful conduct. See id. Accordingly, it is common for a jury to decide the "civil sentence" or "civil penalty." While information regarding penalties may necessarily be withheld during a criminal trial, such information should not be withheld in a civil trial.

### C. The jury's verdict was based upon speculation, conjecture, and insufficient evidentiary and/or factual basis.

[¶50] The ruling against informing the jury of the effect of a particular finding places counsel in a position to exploit the sense of equity implicit in such a finding without opposing counsel's opportunity to argue the determination's critical legal import. See Sollin, 2001 ND 96 at ¶13. Consequently, an uninformed jury could easily deceive itself, believing it has decided a defendant should fairly compensate a plaintiff one total sum, but due to statutory prohibitions or allowances, plaintiff is either precluded from recovery or awarded an amount grossly in excess of the intended sum. See id. at ¶13.

[¶51] Haider's claimed detriment also involves a loss of privacy as a result of the removal of the subject trees. Haider did not provide evidence tending to show the value of the loss.

Haider's "mere mention" of this loss is insufficient to establish the existence of those claimed damages with any "reasonable degree of certainty." See Johnson v. Monsanto Co., 303 N.W.2d 86, 92 (N.D. 1981). Accordingly, Haider could not prove the value of those damages, and the jury did not have a sufficient factual basis upon which to base its verdict.

[¶52] Given the jury's legal ignorance, the fact Haider failed to carry his burden regarding special damages, and because the ultimate award for "actual detriment" is lacking factual basis and is unsupported by any evidence, Moen respectfully submits the trial court abused its discretion when it declined to instruct the jury as to the law.

[¶53] In Maragos v. Union Oil. Co. of California, Alex Maragos appealed from a judgment dismissing his action against Union Oil Company of California ("Unocal") for slander of title. See 1998 ND 180, 584 N.W.2d 850. Maragos appealed, and the North Dakota Supreme Court affirmed the trial court's ruling, stating "[w]e conclude Maragos failed to prove special damages, a requisite element of slander of title, and we affirm the judgment." Id. at ¶1.

[¶54] According to the North Dakota Supreme Court, "[t]he chief characteristic of special damages is a realized loss. Thus, the trier of fact must be furnished data sufficient to determine damages without resort to mere speculation or conjecture." Id. at ¶6 (citing Johnson, 303 N.W.2d at 95) (other citations omitted).

[¶55] In Johnson v. Monsanto Co., an herbicide manufacturer, Monsanto, appealed from order denying its motion for judgment notwithstanding the verdict, for a new trial or remittitur in action brought by farmer for damages allegedly caused by defective herbicide. See generally Johnson, 303 N.W.2d 86. Monsanto appealed, arguing Johnson was awarded an amount which was "greatly in excess of the proper measure of damages." Id. at 92. The Supreme Court reversed and remanded. See generally id.

[¶56] In its decision, the Johnson court stated review of the facts is limited to consideration of whether there is substantial evidence to sustain the verdict and, if substantial evidence exists, or where there is conflicting evidence and reasonable men might draw different conclusions of the evidence, [the Court] is bound by the verdict. See id. at 91; see also Dahlen, 314 N.W.2d at 67. "Before the Supreme Court will interfere with an award of damages, the award must be so excessive or so inadequate as to be without support in evidence," Johnson, 303 N.W.2d at 91, or the verdict is "so excessive as to appear clearly arbitrary, unjust, or such as to shock the judicial conscience." Dahlen, 314 N.W.2d at 67.

[¶57] The Johnson court determined the jury's award was "greatly in excess of the proper measure of damages." Johnson, 303 N.W.2d at 92. While Monsanto had raised no objection to Johnson's testimony on these items of damage, the Court ruled he could not recover for those damages because they were "special damages." See id. at 93. The Court defined special damages as "items of loss which are peculiar to the plaintiffs and . . . are subject to two limitations: (1) special damages must be proved to a reasonable degree of certainty; and (2) special damages are not recoverable if deemed to be too remote." Id. (citing N.D.C.C. § 32-03-20; emphasis added; other citations omitted). The "mere mention that such damages existed" did not provide the factual basis necessary for a jury to fix damages. Id.

[¶58] Haider argues his entitlement to special damages for the loss of the subject trees, which adversely impacted his sense of privacy while on his remote property. Trns. Vol. I, p. 117; see Johnson, 303 N.W.2d at 92. The value of such damages must be proved to a reasonable degree of certainty and, because the chief characteristic of special damages is a realized loss, the trier of fact must be furnished data sufficient to determine damages

without resort to mere speculation or conjecture. See Johnson, 303 N.W.2d at 92; see also Maragos, 1998 ND 180, ¶6.

[¶59] Section 32-03-30, N.D.C.C. provides Haider must prove "actual detriment." Haider's counsel conceded Haider carried the burden of proof regarding actual detriment. See Trns. Vol. II, p. 232. However, there were only mere mentions of his perceived loss of privacy, which is insufficient to establish the existence of special damages with a "reasonable degree of certainty." Trns. Vol. I, p. 117; see also Johnson, 303 N.W.2d at 92. Therefore, Haider did not provide evidence tending to show the value of such a loss. Accordingly, Haider has failed to meet his burden of proof with respect to his claim to lost privacy, and the "detriment" incurred as a result of the alleged loss.

[¶60] Not only was the factual basis insufficient for a jury to determine the amount of Haider's alleged special damages, there was no evidentiary basis for the jury's $40,500.00 award, the amount before the "treble damages" provision was applied. See N.D.C.C. § 32-03-30. No expert offered this sum as an amount which would "compensate for the actual detriment" Haider allegedly suffered. Id. The trial court's refusal to inform, or otherwise allow counsel to inform, the jury of the legal consequences of its answers on the special verdict form compromised the jury's sense of equity, resulting in an unintended misapplication of what was considered an equitable result. See Sollin, 2001 ND 96, ¶13. This resulted in an award without evidentiary foundation. Accordingly, Haider did not meet his burden in proving his "actual detriment" with a "reasonable degree of certainty." See Johnson, 303 N.W.2d at 92.

[¶61] For the foregoing reasons, Moen respectfully submits the trial court abused its discretion by intentionally withholding the statute's operative language from the jury, and

by prohibiting Moen from instructing jury of the same, resulting in a verdict without any evidentiary or factual basis, and was instead the result of speculation and conjecture.

## II. Whether the trial court erred in allowing Paul Beck's testimony to be presented to the jury as expert testimony where Beck was unqualified to do so.

[¶62] Beck lacks the qualifications to testify as an expert under N.D.R. Evid. 702 because his explanation of the mathematics used in his evaluation was grounded in misunderstanding of basic mathematical principles. See N.D.R. Evid. 702. Beck had no knowledge of the rate of inflation, and could not provide foundation for his modification of the University of Minnesota's formula. See Trns. Vol. II p. 263; see also Appendix, Bates No. 026. Therefore, his "scientific, technical, or other specialized knowledge" was not able to aid the trier of fact in either understanding or determining a fact in issue, and his testimony is inadmissible. See N.D.R. Evid. 702. Additionally, North Dakota's refusal to apply Fed. R. Evid. 702 as amended to its own rules, effectively allows purported experts, such as Paul Beck, to permissibly testify to matters found well without their sphere of expertise. See Fed. R. Evid. 702.

[¶63] In Hamilton v. Oppen, Plaintiff Charles Hamilton, an employee, brought a personal injury action against his employer, Defendant Robert Oppen, after Hamilton was injured cleaning his employer's combine at Oppen's farm. See 2002 ND 185. The trial court dismissed the suit and denied Hamilton's motion for new trial. See id. On appeal, Hamilton argued the trial court erred in refusing to allow his expert witness to testify. See id. at ¶14. The Hamilton court upheld the decision to exclude Hamilton's "expert" witness, because "[Hamilton's expert] had no expertise with which to assist the trier of fact in understanding the evidence or determining the facts in issue." Id. at ¶19.

[¶64] Hamilton's "expert" possessed an engineering degree and worked on construction projects throughout the United States, but his background in farming was sparse. See id. at ¶17. The North Dakota Supreme Court found the Hamilton trial court's did not abuse its discretion in disallowing Hamilton's expert to testify. See id. at ¶20.

[¶65] Also in Hamilton, the Supreme Court deemed it unnecessary to decide whether it should adopt the standards articulated by the United States Supreme Court in Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), because the result was the same under both state and federal standards. See Hamilton, 2002 ND 165, n.2; see N.D.R. Evid. 702; Fed. R. Evid. 702.

[¶66] "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of any opinion or otherwise if the expert's . . . specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." N.D. R. Evid. 702. The North Dakota rule mirrors the original rule found in the Federal Rules prior to the amendments made subsequent Daubert and Kumho. See Daubert, 509 U.S. 579; see also Kumho, 526 U.S. 137. The current Federal Rule is similar, but distinguishable:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> **(b)** the testimony is based on sufficient facts or data;
>
> **(c)** the testimony is the product of reliable principles and methods; and
>
> **(d)** the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702

[¶67] In Daubert, the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in Kumho clarified this gatekeeping function applies to all expert testimony. See Daubert, 509 U.S. 579; see also Kumho, 526 U.S. at 156-57.

[¶68] Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony, and this checklist was not intended to be definitive. See Daubert, 509 U.S. at 592-94. These factors include, "[w]hether a theory or technique . . . can be (and has been) tested"; [w]hether it 'has been subjected to peer review and publication'; [w]hether, in respect to a particular technique, there is a high 'known or potential rate of error' and whether there are 'standards controlling the technique's operation'; and [w]hether the theory or technique enjoys 'general acceptance' within a 'relevant scientific community.'" Kumho, 526 U.S. at 149-150. The Court in Kumho held these factors potentially applicable to assess the reliability of non-scientific expert testimony, depending upon "the particular circumstances of the particular case at issue." See id. at 150.

[¶69] Other cases have recognized not all of Daubert's factors can apply neatly to every type of expert testimony. See Kumho, 562 U.S. 137. However, "[t]he standards set forth in the amendment are broad enough to require consideration of any or all of the specific Daubert factors where appropriate." Advisory Committee's Notes to Fed. R. Evid. 702 (2000).

[¶70] The Advisory Committee's Notes to Fed. R. Evid. 702 (2000) list other factors considered by courts both before and after Daubert. See id. One consideration relevant to the instant case involves whether the field of expertise claimed by the expert is known to

reach reliable results for the type of opinion the expert would give. See Kumho, 526 U.S. 137 (1999); Moore v. Ashland Chemical, Inc., 151 F.3d 269 (5th Cir. 1998) (finding a clinical doctor was precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology). Another consideration is whether the expert has used an accepted premise as a basis for an unfounded conclusion. See General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997).

[¶71] The Court in Daubert declared the focus "must be solely on principles and methodology, not on the conclusions they generate." Daubert, 509 U.S. at 595. But the Court later recognized, "conclusions and methodology are not entirely distinct from one another." Joiner, 522 U.S. at 146 (1997). Currently under Fed. R. Evid. 702, when an expert purports to apply principles and methods in accordance with professional standards, but reaches a conclusion other experts in the field would not reach, the trial court may fairly suspect the principles and methods have not been faithfully applied. See Lust v. Merrell Dow Pharmaceuticals, Inc., 89 F.3d 594, 598 (9th Cir. 1996); see also Fed. R. Evid. 702. As the Third Circuit Court of Appeals noted, "any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. *This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.*" See In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 745 (3rd Cir. 1994) (emphasis added).

[¶72] Similar to Hamilton, should the Court examine Beck's testimony in the framework proposed by both N.D.R. Evid. 702 and Fed. R. Evid. 702, Beck's testimony as to both the mathematical process used, as well as to the arbitrary $50.00 value Beck assigned to the formula, is inadmissible because his qualifications are suspect. See Hamilton 2002 ND 185. Beck could not explain the origins of the $50.00 figure, and his explanation of the

mathematics used in his evaluation was grounded in misunderstanding of basic mathematical principles. See id. Therefore, his "specialized knowledge" was not able to aid the trier of fact in either understanding or to determine a fact in issue. See N.D.R. Evid. 702; Fed. R. Evid. 702.

[¶73] The formula Beck attempted to explain is grounded in one of the most reliable methodologies in existence: mathematics. See Appendix, Bates No. 029. The area of mathematics relevant here is Euclidean geometry, which is commonly taught to schoolchildren as early as the fifth grade, and often by the seventh.

[¶74] The "diameter" is "the length of a straight line through the center of an object or space." Diameter, Merriam-Websters Collegiate Dictionary (11th ed. 2003) "Radius" is "a line segment extending from the center of a circle . . . to the circumference." Radius, id. "Circumference" is "the perimeter of a circle." Circumference, id. Finally, the "square inches" to which Mr. Beck refers in his testimony presumably refers to the surface area of the "circle" derived from what measurements are on record. Mathematically, this is called the "area" or "the surface included within a set of lines; *specifically*: the number of unit squares equal in the measure to the surface." Area, id. If Beck conflates these terms when calculating this value, it would render Beck's analysis unreliable.

[¶75] Additionally, the North Dakota Rule requires an expert to be qualified by "knowledge, skill, experience, training, or education." N.D.R.Evid. 702. When questioned, Beck could not explain the methodology behind his modification to the University of Minnesota's formula, stating only "prices have went [sic] up in 38 years." See Trns. Vol. II p. 263; pp. 285-286. When asked how he arrived at the $50.00 calculation, Beck could provide no foundation stating "$20.00 was the 1980 price," and he had "no idea what the rate of inflation is." See id. at 285; 262.

[¶76] Beck admits is not an economist, mathematician, or knowledgeable in any field which may have informed or supported the decision to alter the value originally espoused by the University of Minnesota. See Appendix, Bates No. 026. Therefore, under both the Fed. R. Evid. 702 and N.D.R. Evid. 702, Beck is unqualified to make such a change.

[¶77] The chosen mathematical principles themselves did not fail to inform the jury, but rather Beck's misapplication and misunderstanding thereof. Again, these principles are elementary, and are often taught to school children as early as the fifth grade. However, if one follows the formula as Beck *explains* it, and after applying the adjustments for species, health, and location of the hypothetical trees, the solution is a value four times greater than what he ultimately determines on-record. See Trns. Vol. II, p. 269. Though *his* ultimate result was the correct approximate value mathematically, it proceeded from misapplication and conflation of terms inherent to the formula as explained in his testimony.

[¶78] The correct formula for calculating the area of a two-dimensional circle is: $A = \pi r^2$, where "*r"* is the radius. This value is then multiplied by the unsupported $50.00 figure, and subsequently adjusted based on previously mentioned factors. Following the formula mentioned in *this paragraph* results in the figure on-record: approximately $53,300.

[¶79] However, Beck conflates "radius" with "diameter." See Appendix, Bates No. 029. To obtain the diameter, *"d"*, from the Circumference, e.g. the measurements provided to Beck by Haider, the formula is $C/\pi$, with "*C*" as the circumference. The radius, not the diameter, is required to determine the area. To correctly derive the radius from the diameter, one simply divides the diameter by two, e.g. $d/2 = r$. However, Beck incorrectly squares the *diameter*, which, correctly calculated, is far greater than the mathematical area of the "cross section."

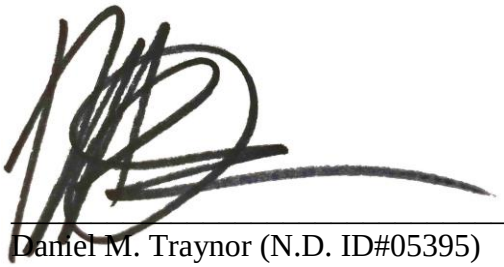
[¶80] Therefore, Beck's "specialized knowledge" was not able to aid the trier of fact in either understanding or to determine a fact in issue. See N.D.R. Evid. 702. His knowledge lacked *any* foundation because his methods and beliefs were fundamentally incorrect, and under both evidentiary rules, his testimony is inadmissible. See id.; See Fed. R. Evid. 702; see also In re Paoli, 35 F.3d at 745 (holding if an expert misapplies a methodology, the expert's testimony is inadmissible). Indeed, if Beck rendered any "aid" to the trier of fact at all, it was merely a fortuitous mistake.

[¶81] For the foregoing reasons, Moen respectfully submits Beck lacks the qualifications to testify as an expert under N.D. R. Evid. 702 because his explanation of the mathematical process used in his evaluation was grounded in misunderstanding and misapplication of basic mathematical principles. See id. Beck had no knowledge of the rate of inflation, which is strongly implied to be the basis for modification. See Trns. Vol. II p. 263; see also Appendix, Bates No. 026. Therefore, his "specialized knowledge" was unable to aid the trier of fact in either understanding or determining a fact in issue, and his testimony is inadmissible. See N.D.R. Evid. 702. Moen further submits the Court should adopt the factors in the current federal rule to prevent parties' experts from being presumptively qualified to testify as to secondary matters found well without their sphere of expertise.

## CONCLUSION

[¶82] For the reasons set forth herein, Defendant/Appellant Jeff Moen respectfully requests this Court REVERSE the trial court's Order and Judgment in its entirety and REMAND with direction to both instruct the jury on the law as it pertains to the applicable statutory penalty of treble damages, and with instruction to disqualify Paul Beck as an expert.

[¶83] DATED January 25, 2018.



Daniel M. Traynor (N.D. ID#05395)
David A. Owens (N.D. ID#08531)
TRAYNOR LAW FIRM, PC
509 5th St NE, Ste. 1 - P.O. Box 838
Devils Lake, ND 58301-0838
Telephone: (701) 662-4077
Email: dantraynor@traynorlaw.com
davidowens@traynorlaw.com
*Attorneys for Defendant-Appellant Jeff Moen*

STATE OF NORTH DAKOTA

COUNTY OF RAMSEY

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**AFFIDAVIT OF SERVICE BY ELECTRONIC MEANS**

**Re: Jason Haider v. Jeff Moen**
Supreme Court No._20170348
Ward County No. 51-2014-CV-00890

[¶1] Andrea Johnson being first duly sworn on oath, does depose and say: She is a citizen of the United States, of legal age, and not a party to the above-entitled matter.

[¶2] That on January 25, 2018, affiant electronically served via electronic mail, a true and correct copy of the following document(s):

1. Brief of Appellant Jeff Moen; and
2. Appendix to Brief of Appellant Jeff Moen

[¶3] The copies of the foregoing were securely served to the following electronic mail address:

Seth A. Thompson sathompson@vogellaw.com
US Bank Building
PO Box 2097
Bismarck, ND 58502-2097

[¶4] To the best of affiant's knowledge, the electronic address above given was the actual electronic address of the party intended to be served. The above documents were duly served in accordance with the provisions of the Rules of Civil Procedure.

Andrea Johnson

[¶5] Subscribed and sworn to before me on January 25, 2018.

JODI L. FAABORG
Notary Public
State of North Dakota
My Commission Expires Jan. 19, 2022

Notary Public
Ramsey County, North Dakota