

ORIGINAL

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

20030284

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

Lisa Haley,

Plaintiff/Appellant,

vs.

Martin Dennis, M.D., and Trinity
Hospital,

Defendants/Appellees.

DEC - 5 2003

STATE OF NORTH DAKOTA

Supreme Court No.

20030284

REPLY BRIEF OF APPELLANT LISA HALEY

Appeal from: Order for Judgment on Jury Verdict dated August 19, 2003; Order dated August 13, 2003 denying Plaintiff's Motion for New Trial; Judgment dated August 20, 2003, dismissing Plaintiff's Complaint against Defendants with prejudice; and Order dated October 10, 2003 denying Motion for Review of costs, and Amended Judgment.

The Honorable Gerald H. Rustad
Ward County District Court
Northwest Judicial District
Ward County Civil No. 02-C-0424

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INTRODUCTORY COMMENT

The brief of Appellees Dennis/Trinity will be referred to as “DTB - followed by page reference.” Haley's opening brief will be referred to herein as “HB - followed by page reference.”

OBJECTIONS, AND EXCEPTIONS TO DENNIS/TRINITY STATEMENT OF THE FACTS.

Dennis/Trinity's Statement of the Facts is (1) argumentative, (2) largely unsupported by any reference whatsoever to the appeal record in this case, (3) a summary of its closing argument to the jury, and (4) unrelated to the issues on appeal in this case. DTB 3-8. Had Dennis/Trinity desired to properly present this type of information it could, and should have ordered a transcript. Haley's appeal is from the face of the special verdict form, affidavits and other documents of record as thoroughly referenced in her brief. The Dennis/Trinity Statement of the Facts offends the rules of this Court requiring that alleged facts set forth in the brief be documented in, and referenced to the record.

Substantially all of the representations contained on p. 3, and all of the representations contained on pp. 4-6 are without reference to the record. While it is recognized some lenience is given to provide background to the court, such representation should be fair, accurate and non-argumentative. Moreover, they should be relevant to the issues in appeal.

Appellees state that Dr. Dennis did not know anything about Haley's patient history. DTB 3. However, Haley was a patient of Dennis' co-employee and office-mate at Trinity, Margaret Nordell, M.D., and her patient history records were at Trinity with Dr. Dennis, who had a couple of hours or so to review them prior to Haley's arrival at the Trinity emergency room in Minot. (Appendix "1"- May 14, 2002 Affidavit of Lisa Haley, Docket No. 88) Dr. Nordell was available and Dr. Dennis could simply have called her to get the history. Dr. Dennis held Haley in the emergency room for over two hours prior to this "emergency" surgery. This was strongly criticized by Haley's expert.

Dennis/Trinity state that fluids resuscitation was initiated immediately in order to restore Haley's circulatory system. DTB 3. Haley's expert, Michael Brown, M.D., testified the fluids were negligently administered.

Dennis/Trinity state that an ultrasound and a pregnancy test were performed for diagnostic purposes. DTB 3. Dr. Brown questioned the timeliness of these tests.

Dennis/Trinity state that informed consent cases require proof only that the matter was non-emergent, that the appropriate risks and benefits were discussed, and proof that the patient would have chosen a different course of treatment if so advised. This is argumentative and a conclusion of law contained in the Statement of the Facts.

Dennis/Trinity discussed issues related to the reanastomosis of the tube, fertility, treatment after discharge, ostensible agency, etc., having absolutely nothing to do with any issue in this appeal. DTB 4-6.

OBJECTIONS, AND EXCEPTIONS TO DENNIS/TRINITY SUMMARY OF ARGUMENT.

Haley respectfully disagrees with the conclusions in Dennis/Trinity's Summary of Argument for all of the reasons set forth in her opening brief.

OBJECTIONS, AND EXCEPTIONS TO THE DENNIS/TRINITY LAW AND ARGUMENT

Haley objects, and takes exception to the Dennis/Trinity Law and Argument section of its brief. TDB 9-24. Haley reaffirms her reliance on the argument and authority contained in her opening brief.

I. The Trial Court Abused Its Discretion In Denying Haley's N.D.R. Civ. Pro. 59(b)1 And/Or 6 And 59(g) Motion For A New Trial Based On The Jury's Special Verdict Form

A. Haley Did Not Waive Any Objection To The Verdict.

Dennis/Trinity argue that Haley somehow waived objection to the special verdict by not having objected at the time the verdict was read. DTB 10. Dennis/Trinity's reliance on State v. Jahner, 2003 N.D. 36, 657 N.W.2d 266 at ¶ 9, and Anderson v. Otis Elevator Co., 453 N.W.2d 798, 801 (N.D. 1990) is misplaced. In State v. Jahner, the appellant failed to raise any appropriate objection at the trial court level and was held unable to raise the issue “for the first time on appeal.” This totally overlooks Haley having timely made the motion for

new trial before the trial court. Haley properly raised the issues on the special verdict form and gave the trial court every opportunity to correct the error. This issue is not being raised for the first time on appeal.

Furthermore, although Haley's counsel had to leave town on another pressing matter he was available on his cell phone at all relevant times to the trial court's knowledge, and the trial court did not contact him knowing of the obvious inconsistent and irreconcilable fact findings on the face of the special jury verdict form. This is not cured by the trial judge allegedly asking 29 year old Lisa Haley supposedly "in open court whether she wished to proceed or whether she desired to contact her attorney before proceeding with the verdict." DTB 11. Again, this statement by Dennis/Trinity as to what the trial court may have done in open court is unsupported by any record before this Court on appeal. It is self-serving and argumentative. If Dennis/Trinity intended to allege these purported facts they should have ordered a transcript. Having failed to do so this Court should disregard any and all such allegations.

Federal appellate decisions interpreting, and applying F.R.C.P. 49(a), identical to this state's rule, hold that the failure to object to inconsistencies of a special verdict prior to the jury's discharge does not preclude appellate review of the inconsistencies. Malley-Duff & Ass'n, Inc. v. Crown Life Ins. Co., (1984, CA.3 Pa) 734 F.2d 133. The failure to object prior to the discharge of the jury does not preclude appellate review of inconsistencies in a special verdict returned

under F.R.C.P. 49(a). Simmons v. Philadelphia, (1991, CA.3 Pa.) 947 F.2d 1042, cert. den. (U.S.) 118 L. Ed. 2d 391, 112 S. Ct. 1671.

The failure to request the re-submission of questions to the jury prior to its discharge does not result in waiver of a party's subsequent right to complain of inconsistent special verdict on appeal. Alvarez v. J. Ray McDermott & Co., (1982, CA. 5 La.) 674 F.2d 1037. Again, FRCP 49(a) does not require objections to inconsistent special verdict answers before the discharge of the jury. Pierce v. Southern Pacific Trans. Co., (1987, CA. 9 Cal.) 823 F.2d 1366. F.R.C.P. 49(a) does not require a party to object to inconsistencies in the answers to special verdicts before the jury is discharged in order to preserve the right to challenge inconsistencies in subsequent motions or on appeal. Bonin v. Tourwest, Inc., (1990 CA. 10 Utah) 896 F.2d 1260. See, also, Whitlock v. Jackson, (1991, SD Ind.) 754 F. Supp. 1394. Presently, Dennis/Trinity made no objection whatsoever concerning waiver in relationship to Haley's motion for new trial. Not having raised the waiver issue at the trial court level, Dennis/Trinity must be deemed to have waived any such argument and cannot be allowed to raise it for the first time on appeal.

B. The Special Verdict Is Legally Inconsistent Under North Dakota Law.

Haley reiterates her reliance upon Moszer v. Witt, 2001 N.D. 30, 622 N.W.2d 223, 228-230 on this issue.

As stated in Moszer v. Witt,

A jury verdict which assigns fault to a person after finding the person's negligence was not a proximate cause is a 'clearly inconsistent and perverse' verdict.

Since the special verdict returned by the jury in this case clearly assigns fault to Dennis/Trinity after finding their negligence was not a proximate cause is a “clearly inconsistent and perverse verdict” as a matter of law. The present facts fall four-square within the holding of Moszer v. Witt on this point.

Dennis/Trinity attempt to argue that Haley tries to “manipulate” the holding of Moszer, and that Haley's reliance on Moszer is misplaced, because in Moszer, “the trial court had multiple protracted conversations with the jury in which the judge suggested what their verdict should be. etc.”. DTB 13. This argument mixes apples and oranges. This argument is inappropriately made in that specific subsection of appellee's brief pertaining to the facial legality of the inconsistent verdict under North Dakota law. The trial court's conversations with the jury are irrelevant to this issue. Appellees subsequently argue in a separate section of their brief about the court's communications with the jury. DTB 15-17. That is a totally separate and distinguishable issue. In other words, the court's contact with the jury has nothing to do with the facial inconsistency and irreconcilability of the special verdict form.

Next, Dennis/Trinity attempt to argue that, “the alleged inconsistency in the verdict, if made consistent, does not alter the outcome of this case.” DTB 13-14.

The Appellees' cite N.D.C.C. Section 32-03.2-02, relative to comparative fault, and the jury's attribution of ten percent fault to Dennis/Trinity. DBT 14. As is clear from Moszer v. Witt, this argument is irrelevant. In Moszer v. Witt the jury only attributed 25 percent fault to the defendant. That was substantially less than the 50 percent fault contained in the comparative negligence statute. Nevertheless, this court held that "any" attribution of fault where the jury has found that party not guilty of any negligence or proximate causation is a "perverse" verdict. In other words, it would be pure speculation to guess what the verdict might have been had the jury properly understood the law. Whether the attribution is 10 percent, 25 percent, 50 percent, or 75 percent is irrelevant. It is the inconsistency and irreconcilability of the verdict which causes it to fail.

II. The Trial Court Abused Its Discretion in Denying Plaintiff's N.D. R. Civ. P. 59(b) 1 And/Or 6 and 51(c) Motion For A New Trial Based On The Court's Communications With The Jury

As mentioned in Haley's opening brief, this Court in Moszer v. Witt reversed the trial court for both (1) the special verdict's facial inconsistency and irreconcilability as a matter of law, and (2) the trial court's communications with the jury outside of the presence of, and without notice to counsel or the party.

Most importantly, Dennis/Trinity completely fail to mention N.D.C.C. Section 28-14-19, and Rule 51(c) governing a court's communications with the jury. Both this statute and rule were set forth and argued with supporting authority in Haley's opening brief. HB 15-18. Moreover, this Court in Moszer v. Witt at p.

230 cites, and relies upon N.D.R. Civ. P. 51(c) and N.D.C.C. Section 28-14-19, as the underpinning of its reversal of the trial court and sets forth this statute and rule as governing contacts between the court and jury. HB 16.

Rule 51(c) mandates the trial court, before instructing jurors, to submit the proposed written instructions to counsel to provide an opportunity for exceptions to be noted. Presently, Haley's counsel at the request of the trial court left his cell phone number with the bailiff to be contacted in case of any jury questions. The trial court, having requested counsel to leave his cell phone number for that purpose, failed to contact either counsel prior to answering the two jury questions in this case and clearly did not allow any opportunity for exceptions to be noted. This contravenes Rule 51(c) and the governing statute N.D.C.C. Section 28-14-19, and is reversible error as a matter of law.

The balance of the Dennis/Trinity argument on this point is simply irrelevant.

III. The Trial Court Improperly Granted Partial Summary Judgment Prior To Trial

The point of Haley's argument on this issue is that the trial court, in advance of trial and before hearing any of the evidence totally disregarded Lisa Haley's Affidavit and erroneously granted the motion for partial summary judgment. While Lisa Haley's Affidavit is not in the Appendix, it is in the record forwarded to this Court for purposes of these proceedings. Docket No. 88.

In case of reversal, Haley believes that the issues precluded by the partial summary judgment should not be the law of the case but rather should be tried subject to new trial.

Lisa Haley's May 14, 2002 Affidavit is appended hereto as Appendix "1" and incorporated herein. See, ¶¶ 3,5,7,10, 12-16 and 18-21. On the basis of this Affidavit the preliminary granting of the partial motion for summary judgment was clearly erroneous as a matter of law.

Dennis/Trinity state at p. 2 of their brief as follows:

Prior to trial, Defendants moved for partial summary judgment of Plaintiff's contention that verbiage in a pathology report constituted fraud and deceit, on allegations of negligence on the part of pathologist Dr. Wayne Jansen as actual or ostensible agent of Trinity Hospital, and on allegations of informed consent, fraud, or deceit against Defendant Dr. Dennis. The trial court granted summary judgment on these issues. (Emphasis added)

As noted above, it is clear from the verified facts set forth in Lisa Haley's Affidavit the trial court erroneously granted partial summary judgment on the referenced issues as a matter of law.

IV. The Trial Court Abused Its Discretion In Its Award Of Costs And Disbursement To Dennis/Trinity

Haley incorporates her argument and authority in the opening brief on this issue. HB 19-22. Dennis/Trinity readily admit that the only support for the costs and disbursements was the Affidavit of its counsel. Counsel's Affidavit contained only a bare-bones general statement of costs and disbursements in conclusory

form. No supporting documentation in the form of bills or evidence of payment was provided. Haley questions whether the Affidavit of counsel is valid. Counsel's Affidavit as to the costs and disbursements incurred by witnesses is hearsay. Although counsel may well be aware of outlays for deposition transcripts and photocopying in his office and the like, the parties and/or witnesses should affirm their outlays.

Haley asserts that the trial court abused its discretion and acted arbitrary, unreasonably and unconscionably in the award of costs and disbursements in this case contrary to the requirements of Braunberg v. Interstate Engineering, Inc., 2000 N.D. 45, ¶ 14, 607 N.W.2d 904. When requested by Haley, the clerk and/or trial court should have required Dennis/Trinity to provide the supporting documentation for review. In any event, a reversal of the judgment would carry with it the reversal of the costs and disbursements.

CONCLUSION

For all the foregoing reasons and authority, as well as that contained in Haley's opening brief, this Court is respectfully requested to reverse the trial court's judgment, costs and disbursements and partial summary judgment.

Respectfully submitted this 5 day of December, 2003.

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