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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

20030284

Lisa Haley, Plaintiff/Appellant, vs. Martin Dennis, M.D., and Trinity Hospital, Defendants/Appellees.	Supreme Court No. **20030284**

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
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STATE OF NORTH DAKOTA

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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STATEMENT OF THE ISSUES

I. Whether the trial court's refusal to vacate the inconsistent and irreconcilable verdict and grant a new trial under N.D.R. Civ. P. 59(b) 1 and/or 6 and 59(g) was manifest abuse of discretion?

II. Whether the trial court's refusal to vacate the verdict and grant a new trial under N.D.R. Civ. P. 59(b) 1 and/or 6, 51(c), and Section 28-14-19 N.D.C.C., because of the irregularity of the proceedings due to the court's communications with the jury during deliberations outside the presence of and without notice to the parties or counsel was manifest abuse of discretion?

III. Whether the trial court's granting of Defendant's motion for partial summary judgment on the deceit count prior to trial was manifest abuse of discretion?

IV. Whether the trial court abused its discretion by denying Haley's Section 28-26-16 N.D.C.C. Motion for Review of the Clerk's Taxation of Costs and Disbursements.

STATEMENT OF THE CASE

Plaintiff and Appellant Lisa Haley (Haley) on April 2, 2002, initiated this action against Martin Dennis, M.D., and Trinity Hospital by Summons and Complaint. Clerk's Register of Actions - Items 1 and 2, (Appendix) App. A. The Court granted Haley's Motion to Amend the Complaint. Id. Item 54. The Amended Complaint, App. B., set forth claims for medical negligence, lack of informed consent, deceit and/or negligent misrepresentation, bad faith, and battery. Id. 62. Defendant/Appellees (Dennis/Trinity) filed its Answer to Amended Complaint Id. 57. App. C. Both parties demanded jury trial.

Dennis/Trinity filed a Motion for Partial Summary Judgment in advance of trial. Id. 82 and 85. On May 20, 2003 the court, over Haley's objection granted the partial summary judgment motion. Id. 121.

Dennis/Trinity requested a Special Verdict Form. Id. 99 and 111. The court's final instructions to the jury included the Special Verdict Form requested by Dennis/Trinity. Id. 179.[1] Jury Instructions, App. D.

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[1] Relevant instructions and the Special Verdict Form are included in Appendix D, to-wit: (1) Ordinary Negligence as D-1; (2) Proximate Cause as D-2; (3) Medical Negligence as D-3; (4) Comparative Fault as D-4; (5) Damages (In General) as D-5; (6) Damages Defined as D-6; (7) Duty to Accept Law from the Court as D-7; (8) Deliberations and Conduct of Jury in Retirement as D-8; and (9) Form of Verdict and Submission of Case as D-9.

On Wednesday, May 28, 2003, the parties rested upon conclusion of the evidence and the court instructed the jury as to the law and provided the Special Verdict Form. After argument the jury was sent to deliberate.

During deliberations the jury sent written questions to the court. Id. 180-182. App. E and F. The court, without notice to the parties or counsel wrote responsive instructions and returned the notes to the jury. Id.

On May 28, 2003, the jury returned the completed Special Verdict Form. Id. 183. App. G.

On June 2, 2003, Haley made a Rule 59 Motion for New Trial. Id. 184. On July 8, 2003, Haley filed her Amended Rule 59 Motion for New Trial. Id. 189. App. H. Supporting Affidavits of counsel and Bailiff Bud Johnson were filed. Id. 191 and 192. App. I and J. The court entered its Order Denying Motion for New Trial. Id. 199. App. K. The court entered its Order for Judgment on Jury Verdict. Id. 204. App. L. On August 20, 2003 Judgment was entered. Id. 205. App. M. Notice of Entry of Judgment was given on August 28, 2003. Id. 209. App. N.

Dennis/Trinity filed their proposed Statement of Costs and Disbursements with the Clerk for the amount of $48,794.56. Id. Item 202. Haley filed Objections to Proposed Statement of Costs and Disbursements together with Notice of Review to the District Court. Id. 208. App. O. The Clerk entered the costs on the judgment, and Haley filed a motion under Section 28-26-16,

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N.D.C.C., for the District Court's review of the Clerk's taxation of costs and disbursements. Id. 212

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On September 29, 2003, Haley Notice of Appeal was filed. Id. 218 (Exhibit T) The Bond for Costs on Appeal was filed. Id. 219.

The court subsequently, on October 15, 2003, filed its Order denying, with one exception, Haley's appeal from the Clerk's taxation of costs and disbursements. App. P. Haley filed an Amended Notice of Appeal to include that Order. App. Q. The Court entered an Amended Judgment to reflect the cost Order on October 21, 2003. App. R. On October 30, 2003, Haley filed a Second Amended Notice of Appeal to include the Amended Judgment of October 21, 2003. App. S.

STATEMENT OF FACTS

On Wednesday, May 28, 2003, the parties rested, the court instructed the jury, and after argument the jury was sent to deliberate. The jury was instructed, in part as follows:

> * * * If it becomes necessary during your deliberations to communicate with the court, the jury leader will send a note by the bailiffs * * * App. D-8.

During its deliberations the jury submitted two separate written questions. The first question reads as follows:

> Is answering no to No. 1 releasing him from all negligence? How do we answer if we feel part was negligent (surgery/discharge) the other not. The jury. App. E.

Judge Rustad, without any prior notice to the parties or counsel, wrote his instruction and returned it to the jury as follows:

> Read carefully the verdict forms and related instructions. Id.

The second written question submitted by the jury to the judge reads as follows:

> Is there an exhibit - what book? Is there any reference to the perscription (sic) being called into Kenmare Carlson Drug Store? By who - when. App. F.

Again, Judge Rustad without notice to the parties or counsel wrote his instruction and returned it to the jury as follows:

> You must rely on your recollection. Id.

The jury subsequently returned its "Special Verdict" App. G. The six separate questions, and the jury's answers as they appear on the Special Verdict Form are as follows:

(1) As to Question No. 1 concerning negligence, the jury marked "No" finding no negligence. Having answered "no" to Question No. 1, the jury was told to go to question No. 3 and to ignore Question No. 2;

(2) Question No. 2 was thus left blank as to negligence proximately causing any damage or injury to Plaintiff;

(3) Rather than placing zeros in Question No. 3 consistent with its answer to Question No. 1, the jury attributed 10% fault to Dr. Dennis and 90% fault to Plaintiff Lisa Haley;

(4) Even though the jury found no negligence and no proximately caused damages, the jury answered

Question No. 4 by finding $12,000 of damage owed Plaintiff Lisa Haley;

(5) The jury answered Question No. 5 by awarding interest on the damage; and

(6) The jury answered Question No. 6 by determining interest on such damages at 3%.

The jury's answers to the separate Interrogatories on the <u>Special Verdict Form</u> are contrary to, and inconsistent with the court's instructions on the law. Negligence, and medical negligence were specifically covered in the instructions. Exhibits D-1 and D-3. The jury was instructed that "proximate cause" is, in part a cause without which injury could not have occurred. App. D- 2. The jury found, as fact, that there was no proximate cause, and that Dennis/Trinity were <u>not</u> negligent.

Most importantly, the jury was instructed as to "comparative fault" in relevant part as follows:

<u>COMPARATIVE FAULT</u>

> You will return a special verdict <u>in which you will make special findings of fact</u> determining:
>
> (1) <u>Who was at fault</u>, if anyone;
> (2) Whether <u>such fault was a proximate cause of damages</u>;
> (3) The respective percentages <u>of fault</u> allocated to the Defendant, the Plaintiff, or anyone else who contributed to <u>proximately cause</u> any damages;
> (4) The amount of Plaintiff's damages without reduction <u>for fault</u>.
>
> The court will determine from your special verdict form the amount of damages, if any, which are recoverable. App. D-4 (Emphasis added)

As to damages, the jury was instructed in relevant part as follows:

> DAMAGES (In General)
>
> Before you can consider the question of damages, you must first find a party is entitled to damages. If you find a party is entitled to damages, you should award such damages as are proportionate to the harm or law suffered. * * * App. D-5. (Emphasis added)

The jury instructions further defined damages as follows:

> DAMAGES DEFINED
>
> A person who is injured or has property damaged because of another's fault may recover money damages for past and future loss * * *. App. D-6. (Emphasis added)

The jury was instructed that while it was the sole judges of the facts of the case, it was their duty to accept the law as contained in the instructions from the court, and that it had no right to disregard the law. App. D-7. As mentioned, the jury was instructed it could send questions by note to the court if it became "necessary" during deliberations. App. D-8.

Most importantly, the jury was instructed as to the form of verdict and submission of the case (Special Verdict) in relevant part as follows:

> FORM OF VERDICT AND SUBMISSION OF CASE
> (Special Verdict)
>
> A form of special verdict will be submitted in which you will be required to make a special written finding upon each issue of fact. You will note that the questions are to be answered with "yes" or "no" or other brief answer. * * * You will refrain from answering any question which has become moot by your answer to a previous question * * *. App. D-9. (Emphasis added)

The court , in advance of trial, and prior to taking any testimony granted Dennis/Trinity's Motion for Partial Summary Judgment on the deceit count. App. A - Item 121.

Dennis/Trinity filed their Statement of Costs and Disbursements in the amount of S48,794.56 with the Clerk. Id.- Item 202. No supporting documentation whatsoever was filed in support of the claimed costs. Haley objected, but the Clerk entered the costs in their entirety. Haley, pursuant to Section 28-26-16, N.D.C.C. appealed to the District Court for review of the Clerk's Taxation of Costs. Id. - Item 212. With one exception, the Court on October 10, 2003 entered it Order affirming the Clerk's taxation. App. P.

LEGAL ARGUMENT

I. Whether the trial court's refusal to vacate the inconsistent and irreconcilable verdict and grant a new trial under N.D.R. Civ. P. 59(b) 1 and/or 6 and 59(g) was manifest abuse of discretion?

Haley relies upon Moszer v. Witt, 2001 ND 30, 622 N.W.2d 223,228-230 (N.D. 2001) recently decided by this Court under nearly identical facts on this issue. In Moszer v. Witt the jury was given a special verdict form similar to that used in this case. In that case, special verdict question No. 3 asked the jury whether it found that Defendant Mike Witt was negligent. The jury answered "no" finding Defendant Witt was not negligent. The jury further found that Defendant Witt's actions were not a proximate cause of the accident, but the jury apportioned 25 percent of the fault to Witt on the question concerning comparative fault.

This Court states at p. 226 of its Opinion in Moszer v. Witt in relevant part as follows:

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> * * * The jury found (Defendant) Witt was neither negligent nor a proximate cause of the accident, but the jury apportioned fault for the accident 75 percent to Moszer and 25 percent to Witt. (Parenthetical and emphasis added)

Presently, the jury identically answered the negligence question on the Special Verdict Form that Defendant Dennis was not negligent by marking "no" as instructed; found that Dennis was not a proximate cause of Plaintiffs injury by leaving question No. 2 on the Special Verdict Form related to proximate cause blank; but, nevertheless, apportioned 10 percent of the fault or negligence to Dennis; answered question No. 4 awarding Plaintiff Haley $12,000 for past economic damages; answered question No. 5 awarding interest on such damages; and answered question No. 6 assigning a 3 percent rate to the amount of interest to be granted.

The verdict on its face is patently, exactly like that in Moszer v. Witt, obviously and evidently inconsistent and irreconcilable and irrational on its face. The verdict is in plain disregard of the instructions of the court, and rendered under a misapprehension of the instructions.

The jury's confusion is readily evident from the question delivered to the court concerning negligence. The jury note, (App. E) reads as follows:

> Is answering no to No.1 releasing him from all negligence? How do we answer if we feel part was negligent (surgery/discharge), the other not. The jury.

The trial judge answered, stating "Read carefully the verdict forms and related instructions." Thus, the court did not either (1) reiterate any proper instruction or (2) give any instruction administrative in nature. Rather, the court directed the jury to read the verdict forms and "related instructions" without advising the jury which instructions were "related". The ultimate verdict discloses that the jury's confusion was not helped and that it misapprehended the instructions.

As stated by the Florida Appellate Court, a jury's understanding of the applicable law is integral to trial by jury. Sears Robuck & Co. v. Polchinski, 636 So. 2d 1369 (Fla. App. 1994), wherein it is stated at p. 1371 as follows:

> A jury has a right to ask questions calculated to shed light on the controversy or which will assist that jury in arriving at a just result. (Citation omitted) A jury's understanding of the applicable law is integral to trial by jury.
>
> * * *
>
> While a trial judge may have discretion in not sending written instructions to a jury, we cannot overlook the possibility that the jury's verdict was a product of confusion or misunderstanding of the law as evidenced by the nature of the communication. When a question from a deliberating jury indicates its confusion about the law, a trial court abuses its discretion when its response fails to ameliorate the confusion. (Citations omitted) We are forced to speculate about what would have occurred if the jury's question was answered by the trial court after receiving input from both parties. Based on the nature of the communication, we cannot say the action was harmless. (Emphasis added)

Presently, the trial court's responsive instruction concerning the negligence question obviously did not ameliorate the confusion as evidenced by the verdict. It

would be pure speculation to guess what might have occurred if the jury's questions had been answered.

Furthermore, concerning the application of Section 28-14-19, N.D.C.C., this court states in Kronberger v. Zins, 463 N.W.2d 656, (N.D. 1990) at p. 658 as follows:

> We said, 'the failure to comply with the provisions of a mandatory statute in a matter of such importance as instructions to the jury and communications between the trial court and the jury constitutes error per se and must be deemed to be prejudicial either as a matter of law, or unless and until it is shown that no prejudice resulted or could have resulted from the noncompliance'. (Citation omitted)

In concluding that the trial court's refusal to vacate the verdict and grant a new trial under N.D.R. Civ. P. 59(g) was manifest abuse of discretion, under facts relatively identical, this Court states at pp. 229-230 of Moszer v. Witt as follows:

> * * * The trial court, in its written instructions advised the jury on the definitions of negligence and proximate cause: (Recitation of jury instructions in that case on 'ordinary negligence' and 'proximate cause' are omitted but are pattern and identical to those given by the court in this case)
>
> * * *
> Proximate cause denotes cause to which liability may be attached. (Citation omitted) Proximate cause is a separate element from a determination of negligence and is a question of fact for the jury to determine. (Citations omitted) Both negligence and proximate cause must be found to impose liability. (Citation omitted)
>
> Although the jury returned with a verdict, members of the jury quickly informed the court they were confused about the concepts of negligence and proximate cause. (This is similar to the confusion shown by the present jury in its note to the court showing confusion about negligence) While the jury never waivered from assessing on

> the special verdict form 75 percent of the fault to Moszer and 25 percent of the fault to Witt the jury never simultaneously found Witt's conduct to constitute both negligence and a proximate cause of the accident.
>
> * * *
>
> Each time the jury assessed 25 percent of the fault to Witt. The jury's answers to the special verdict clearly demonstrate they did not understand or correctly apply the law as given to them in the case, and their confusion was not resolved during the jury's communications with the court.
>
> 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. (Citation omitted) The jury clearly never understood in this case that to assess fault against a person who has been charged with negligent operation of a motor vehicle, the jury must find both that the person's conduct was negligent and that it was a proximate cause of the accident. We conclude the trial court's refusal to vacate the verdict and grant a new trial under N.D.R. Civ. P. 59(g) was manifest abuse of discretion. (Parenthetical and emphasis added)

As in Moszer v. Witt it is clear that the present verdict was given in "plain disregard by the jury of the instructions" and "the verdict was rendered under a misapprehension of the instructions", and the verdict must be vacated and a new trial granted under N.D.R. Civ. P. 59(b)(l) or (g). As the court states in Moszer v. Witt, a jury verdict which assesses fault to a person after finding the person was neither negligent nor was its negligence a proximate cause is a "clearly inconsistent and perverse" verdict.

The degree or percentage of fault apportioned under comparative negligence is irrelevant. Presently it was 10 percent. In Moszer v. Witt, it was 25

percent. In either case it was below 50 percent. In order to assess any fault against a person under negligence, the jury must find both that the person's conduct was negligent. and that such negligence was a proximate cause of the accident. Id. The present jury found that Dennis was neither negligent, nor a proximate cause of the injury and yet apportioned fault and awarded damages and interest. This is inconsistent and irrational and irregular.

Further, the jury was specifically instructed to refrain from answering any question that became moot by its answer to a previous question. Even though the jury was instructed to go to question 3 if it answered question 1 "no", question 3 was "moot" due to the jury's finding that Dennis was neither negligent nor a proximate cause of any injury. This establishes the jury's misapprehension of the court's instructions on the law. The trial court manifestly abused its discretion by not vacating the verdict and granting Haley's Motion for a New Trial.

II. Whether the trial court's refusal to vacate the verdict and grant a new trial under N.D.R. Civ. P. 59(b)(1) and/or 6, 51(c), and Section 28-14-19 N.D.C.C., because of the irregularity of the proceedings due to the court's communications with the jury during deliberations outside the presence of and without notice to the parties or counsel was manifest abuse of discretion?

The trial court further manifestly abused its discretion by having failed to vacate the verdict and grant Haley's Motion for a New Trial under N.D.R. Civ. P. 59(b) (1), 6, 51 (c) and Section 28-14-19 N.D.C.C. due to irregularities in its communications with the jury. This is a separate and distinct grounds for reversal.

This Court separately dealt with this identical issue in Moszer v. Witt, at pp. 230-231.

The Affidavit of Haley's counsel and Bailiff Bud Johnson were filed in support of the Rule 59 Motion for New Trial. App. I & J. The undersigned counsel's Affidavit states in relevant part as follows:

(1) After the parties had rested and the jury was sent to deliberate, Affiant advised the court and Defendant's counsel that he had to leave town due to other pressing matters;

(2) Affiant asked Judge Rustad to call him on his cell phone if there were any jury questions, and the Judge instructed Affiant to give his cell phone number to bailiff Bud Johnson;

(3) Affiant advised bailiff Bud Johnson that the judge had asked him to give him his cell phone number in case there were any jury questions, and further gave bailiff Bud Johnson a handwritten note containing his cell phone number and requesting that he be called if there were any jury questions;

(4) There were two jury questions submitted to the court but Affiant was never called at any time;

(5) Affiant had further advised bailiff Bud Johnson of his absence, and that Plaintiff Lisa Haley and her husband were remaining in Minot and gave him a written note containing their cell phone number and asking that they be called when the jury returned the verdict;

(6) Affiant was not called after the verdict was returned and before the jury was discharged and Affiant's cell phone was on and functioning at all relevant times.

Bailiff Bud Johnson in his Affidavit states as follows:

(1) After the jury was sent to deliberate, Ron Schmidt, known to be the attorney for Lisa Haley, told Affiant Bud Johnson that he was asked by Judge Rustad to give me his cell phone number in case there were any jury questions;

(2) Attorney Schmidt also gave Affiant Bud Johnson a handwritten note giving Affiant his cell phone number and asking that he be called on his phone if there were any jury questions;

(3) Affiant Johnson states that the jury had two questions which he delivered to Judge Rustad, and in both instances the judge did not ask for Attorney Schmidt's cell phone number nor did he contact attorneys in Affiant's presence, and that the judge answered the questions and had Affiant take them back to the jury;

(4) After the questions were answered the jury returned its verdict, and Judge Rustad asked that Affiant Bud Johnson call and advise the parties or their attorneys that the jury had returned its verdict;

(5) That Plaintiff Lisa Haley and her husband, and attorneys for the Defendants were present when the jury verdict was read; and

(6) Affiant Bud Johnson recalls the judge polling the jury but did not recall any discussions between the judge and those present about the jury questions or verdict before the jury was discharged.

Presently, the Court received two separate questions from the jury during its deliberations. In neither instance did the Court advise the parties or counsel that the jury had submitted the questions nor of his answering instructions. Dennis/Trinity's counsel, Randall S. Hanson, filed an Affidavit dated July 14, 2003, wherein he states as follows:

> I was not informed of any questions that the jury had and believe that no party was informed of the questions or responses made by the court . . . App. A - Item 194.

The trial court in its Order Denying Motion for New Trial acknowledges neither counsel was contacted concerning the jury questions. App. A- Item 199 at p. 3.

Section 28-14-19, N.D.C.C. reads as follows:

> 28-14-19. After the jurors have retired for deliberation, if there is a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the case, they may require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of or after notice to the parties or counsel. (Emphasis added)

This statute is mandatory, and failure to comply with it is error per se, and deemed prejudicial. Ferderer v. Northern Pac. Ry. Co., 26 N.W.2d 236 (N.D. 1947) Presently the jury was instructed that if it became necessary during deliberations to communicate with the court, the jury leader will send a note by the bailiff. The jury was confused as to the instructions on negligence. The court never brought the jury into court, nor informed the parties or counsel of the jury's confusion concerning negligence. Counsel never had the opportunity of conferring with the court or excepting to the responsive instruction. As in Moszer v. Witt, the jury's confusion and question concerning negligence went directly to the jury's consideration of the merits.

Additionally, Rule 51(c) reads in relevant part as follows:

> (c) Exceptions to instructions. The giving of instructions and the failure to instruct the jurors are deemed excepted to unless the court, before instructing the jurors, submits to counsel the written instructions it

> proposes to give to the jurors and asks for exceptions to be noted.
>
> ***
>
> All proceedings connected with the taking of exceptions must be in the absence of the jurors and a reasonably sufficient time must be allowed counsel to take exceptions and to note them in the record of the proceedings. (Emphasis added)

This Court concluded in Moszer v. Witt that the trial court's actions constituted irregularity in the proceedings which denied a fair trial, and ordered a new trial and states at p. 230 in relevant part as follows:

> If there is a need to further instruct the jurors on a point of law, after the jurors have retired for deliberation, the jury must be brought into court and information requested by the jury must be given in the presence of or after notice to the parties' counsel. N.D.C.C. Section 28-14-19. The parties have a right to have the exceptions noted to the jury instructions to which they did not agree. In the absence of an opportunity to object, all instructions are deemed excepted to. N.D.R. Civ. P. 51 (c) See Kronberger v. Zins, 463 N.W.2d 656, 659 (N.D. 1999) In Kronberger, at 659-60 we found the trial court's ex parte communication with the jury after it had retired for deliberations was not harmless error. When the trial court merely reiterates a proper instruction, or gives an instruction administrative in nature, the prevailing party may overcome the presumption of harm that attaches to ex parte communications. An administrative instruction is one that goes to the mechanics or process of jury deliberations, as for example, the jury's inability to use a dictionary or whether the jury's verdict must be rendered in writing. In this case the question and answer concern neither a reiteration of a previously given instruction nor an instruction which is merely administrative. Instead the question and answer go directly to the jury's consideration of the merits. Under the circumstances, Zins did not overcome the presumption of harm and the trial court abused its discretion in denying a new trial. (Emphasis added)

Presently, the jury's question, as mentioned, disclosed confusion as to "negligence" going directly to the heart of the jury's consideration of the merits.

Moreover, the court instructed the jury in response to the questions in disregard of the requirements of Section 28-14-19 N.D.C.C. and Rule 51(c). Haley's counsel specifically requested the right and opportunity to participate in answering any questions of the jury. The court disregarded the request of Haley's counsel and instructed the jury in response to the questions without notice to the parties or counsel. Since counsel was not given notice or opportunity to participate in answering the jury's questions, such instructions were excepted to as a matter of law pursuant to Rule 51(c). Since the questions went to the merits on the negligence issue, they are per se prejudicial and not subject to being overcome as a matter of law. Moszer v. Witt, 230-231.

As stated in Moszer v. Witt at 230-231:

> Unless the judge can instantly conclude that the verdict is proper, it is appropriate for the judge, upon receipt of the verdict, to retire to chambers to consider whether the verdict is consistent and correct as to form before accepting the verdict. In the event re-instruction of the jury is necessary, counsel should, of course, be consulted and be given an opportunity to make suggestions. or objections.
>
> In this case, without giving the parties an opportunity to review the inconsistent verdict out of the presence of the jury or to suggest how to further instruct the jury, the trial court engulfed itself in the deliberation process.
>
> * * *
>
> We conclude the trial court's actions constituted irregularity in the proceedings which denied the parties a fair trial and entitles them to a new trial under N.D.R. Civ. P. 59(b)(1). (Emphasis added)

Currently, the trial court did not "give counsel notice or opportunity to consider, or except to either the jury questions or the ultimate inconsistent verdict outside of the presence of the jury. As Haley's counsel states in his Affidavit he

was never contacted on either the jury questions or the verdict until after the jury had been discharged.

This court in Cendak Agri-Service, Inc. v. Hausam, 275 N.W.2d 326, 330 (N.D. 1979) relies on, and quotes with favor from Fillippon v. Albion Vein Slate Co., 250 U.S.76, 39 S. Ct. 435, 64 L. Ed. 53 (1919) wherein, the jury sent the trial judge a written inquiry and the trial judge replied by sending a written instruction to the jury room in the absence of the parties and their counsel, without their consent, and without calling the jury into open court as follows:

> The Circuit Court of Appeals considered that the jury had asked a plain question in writing concerning a matter of law, and the judge had answered it in writing plainly and accurately, and were of the opinion that since nothing else had occurred - the question and answer having been preserved of record and counsel having been promptly notified of what had taken place and given the opportunity of excepting to the substance of the instruction and to the manner of giving it - no harm had been done, and none was probable to arise under like circumstances, and hence affirmed the judgment.
>
> It is not correct, however, to regard the opportunity of afterwards excepting to an instruction and to the manner of giving it as equivalent to an opportunity to be present during the proceedings. To so hold would be to overlook the primary and essential function of an exception, which is to direct the mind of the trial judge to the point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be obviated. 250 U.S. at 81-82, 39 S. Ct. at 436-437, 63 L. Ed. at 856. (Emphasis added)

Haley's counsel asked specifically that he be contacted in case of any jury questions. He was not. Haley was denied the opportunity to participate during the proceedings concerning the inconsistent verdict. This is a fundamental right, the denial of which constitutes harmful error and manifest abuse of discretion and requires a new trial under N.D.R. Civ. P. 59(b)(1) as an irregularity in the proceedings. Moszer v. Witt.

III. Whether the trial court's granting of Defendant's motion for partial summary judgment on the deceit count prior to trial was manifest abuse of discretion?

Dennis/Trinity filed their Motion for Partial Summary Judgment on negligence and deceit counts of Plaintiff's Amended Complaint. The motion was made in advance of trial and prior to the court's hearing any of the evidence. Lisa Haley filed her Affidavit in opposition to the motion. App. A- Item 88.

This Court has consistently held that negligence actions, and actions involving state of mind such as deceit are not suited for summary disposition. Pioneer Credit Co. v. Medalen. 326 N.W.2d 717 (N.D. 1982) On May 20, 2003 the Court entered it's order granting partial summary judgment to Defendants. Haley's Affidavit raised sufficient fact issues and the court abused its discretion granting such motion.

IV. Whether the trial court abused its discretion by denying Haley's Section 28-26-16 N.D.C.C. Motion for Review of the Clerk's Taxation of Costs and Disbursements.

Dennis/Trinity filed their Statement of Costs and Disbursements in the amount of $48,794.56 with the Clerk of Courts. The statement was filed by counsel without a single supporting document. Haley immediately filed objections with the Clerk. Haley argued Dennis/Trinity were not "prevailing parties" entitled to reimbursement of costs and disbursements pursuant to Section 28-26-06, N.D.C.C. Bitelr's Teleservice, Inc. v. Guderian, 466 N.W.2d 141 (N.D. 1991) In order to be a "prevailing party" in a tort action for purposes of allowing costs and disbursements, a party must prevail on the issues of negligence and proximate cause. Andrews v. Hearn, 387 N.W.2d 716 (N.D. 1986) That Dennis/Trinity did not prevail on the issues of negligence and proximate cause is evidenced by the verdict. A trial court was held not to have abused its discretion in denying costs holding that the Defendant was not a "prevailing party" where it claimed

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that the plaintiff was entitled to nothing, but the jury disagreed and awarded damages such as presently the case. Kusniryk v. Arrowhead Regional Corrections V.D., 413 N.W.2d 182 (Minn. App. 1987)

Additionally, Haley argued Items 3 to 10 of the proposed costs and disbursements were unjustified. Many of the medical records for which reimbursement was sought pursuant to Item 3 were stipulated as irrelevant and/or contrary to the ruling of the court and not used for trial purposes. All of the witnesses mentioned in Item 4 appeared as witnesses during trial and none of their deposition transcripts was read into the record. Furthermore, very little, if any, of such deposition transcripts were used for impeachment or otherwise during trial. The photos mentioned in Item 5 were produced by Haley and copies furnished Defendants.

Attorney travel expenses for depositions are not allowable as a matter of law as requested in Item 6. Costs and disbursements are creatures of statute and cannot be allowed unless authorized by statute. Gunch v. Gunch, 67 N.W.2d 311 (N.D. 1955) Haley argued that the expert witness fees sought in Item 7 must be disallowed in their entirety. The expert witness testimony was cumulative and of no value since the jury found the Defendant at fault and awarded damages and interest. Dennis/Trinity did not prevail on any evidence presented by the experts, and all such costs and disbursements should be disallowed as a matter of law.

Item 8 seeks reimbursement of the travel and lodging expenses of Defendant/Appellee Dennis, and two of the experts whose testimony was disavowed by the jury. The trial court on appeal did disallow the costs and disbursements sought for Dennis. The experts' travel and lodging were unsupported by any records.

Haley argued it was unconscionable to seek reimbursement of travel expenses for attorneys and their paralegal for mileage, lodging and meals. Additionally, there is

absolutely no documentation or breakdown or itemization of any such attorney or paralegal claimed items. There is no way of knowing how extravagantly they ate or lodged or drank or traveled. Absolutely no documentation was provided in order for the court or Haley to review either the reasonableness or relevancy of the claimed attorney and paralegal expenses. As mentioned, the same is true of the claimed expenses for the expert witnesses. Whether they ate lobster or steak or claimed alcoholic beverages is simple unknown.

The UND sign and design claim for trial exhibits in Item 10 is again unsupported and not itemized and should have been disallowed as a matter of law. Dennis/Trinity did not utilize or even offer many of its pretrial proposed exhibits.

The Clerk, over Haley's objections granted the full $48,794.56 sought as costs and disbursements. Haley filed a motion pursuant to Section 28-26-16 N.D.C.C., for the District Court's review of the Clerk's Taxation of Costs and Disbursements. Except as to Dennis' personal costs and disbursements, the trial court denied Haley's appeal. The Court entered an Amended Judgment to reduce the costs to $46,542.98 to reflect the Order.

The trial court held it had no authority to reduce any of the costs and disbursements sought by Dennis/Trinity. Id. The court's statement that it had no authority to review or modify the claimed costs and disbursements flies in the face of the Section 28-26-16 N.D.C.C. specifically giving the court that authority

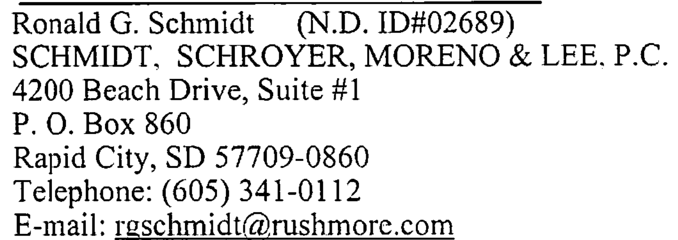
Dennis/Trinity's costs and disbursements much be reversed as a matter of law since they were not prevailing parties. Alternatively, such costs and disbursements should be reversed as undocumented and unsupported as a matter of law. Costs and disbursements are not justified unless supported by detailed itemization of costs and time records and invoices which are provided to the court and opposing counsel for

examination and verification prior to taxation pursuant to Section 28-26-06(5), N.D.C.C. and Taghon v. Kuhn, 497 N.W.2d 403 (N.D. 1993) for example. The costs as entered by the Clerk and affirmed by the trial court are unconscionable and unjust under the totality of the circumstances.

CONCLUSION

The court, for all of the foregoing reasons and authority is respectfully requested to vacate and reverse the amended judgment and the orders denying a new trial, awarding costs and disbursements and granting partial summary judgment, and to remand the case for a new trial on the merits.

Dated this 31st day of October, 2003.



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