IN THE SUPREME COURT
STATE OF NORTH DAKOTA

SUPREME COURT NO. 20100295

Calvin Wahl and Laurie Wahl, Plaintiffs-Appellants

vs.

Northern Improvement Company a/k/a McCormick Incorporated and United Rentals Highway Technologies, Inc. Defendants-Appellees

---

APPEAL FROM THE AMENDED ORDER FOR JUDGMENT DATED JULY 20, 2010, THE AMENDED JUDGMENT ON JURY VERDICT DATED JULY 22, 2010, AND MEMORANDUM OPINION AND ORDER GRANTING TAXATION OF COSTS AND DISBURSEMENT DATED OCTOBER 5, 2010
DISTRICT COURT OF STARK COUNTY
CIVIL NO. 45-08-C-176
THE HONORABLE ZANE ANDERSON, PRESIDING

APPELLANTS' BRIEF

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STATEMENT OF ISSUES FOR REVIEW

A. The Trial Court's refusal to grant a five day jury trial and the twelve day separation of the jury was prejudicial to the Plaintiffs.

B. The Trial Court erred in granting the Defendants all of their costs and disbursements.

II. STATEMENT OF THE CASE

A. Course of Proceedings

This matter was initiated by the service of a Summons and Complaint dated July 30, 2007. (Register of Actions 1, 2, and 3 and Appellants' Appendix: 1 hereinafter Appellants' A:1). The Defendants answered the Complaint and denied liability. (Register of Actions 9 and 11 and Appellants' A:1). A scheduling order was issued on or about October 2, 2008 which estimated the trial to last four to five days. (Appellants' A:7-8). Notice of trial was sent therein setting trial on October 27, 2009, for four days. (Appellants' A:70-72). The trial was continued to April 13, 2010, for four days. (Appellants' A:10). The trial began on April 13, 2010, but was not completed on April 16, 2010, the fourth day. The trial was not resumed until April 28, 2010. (Appellants' A:11).

Upon resuming trial, no additional evidence was presented as the parties had rested their cases. Closing arguments were presented to the jury and after a noon break, the jury was given their instructions. (Partial Transcript - Jury Instructions and Date and Time Adjourned page 1, Line 19). After two hours of deliberation, the jury came back with a verdict for the Defendants. (Partial Transcript - Jury Instructions and Date and Time Adjourned page 20, Line 23 and Partial Transcript - Verdict Reading page 3, Line 21). The trial court entered a Judgment on Jury Verdict and Order for Judgment on Jury Verdict. (Appellants' A:12-15).

Upon entry of Judgment, the Defendants filed their Statements of Costs and Disbursements. (Appellants' A:16-22) The Plaintiffs filed an Objection to Statement of

Costs and Disbursements (Appellants' A: 23-26). Each Defendant filed a Reply. (Appellants' A:27-53). After oral argument, the trial court issued a Memorandum Opinion and Order Granting Taxation of Costs and Disbursements. (Appellants' A:54-59). Both Defendants were awarded full costs and disbursements. An Amended Judgment on Jury Verdict and Order for Jury Verdict was entered by the trial court. (Appellants' A: 60-63).

The Plaintiffs filed Notice of Appeal on September 14, 2010 (Appellants' A:66) and a second Notice of Appeal on October 19, 2010. (Appellants' A:68).

B. Statement of the Facts

The trial in this matter commenced on Tuesday, April 13, 2010 and was scheduled to be concluded by Friday, April 16, 2010. However, the trial was not going to be concluded by the end of the day so the trial court met with the parties in chambers. The trial court informed the parties that it would not keep the jury past business hours. The trial court also made the parties aware that it was not available the following week, due to master calendar duties. (Appellants' A:64).

The first day the trial court had available was April 28, 2010, twelve days later. The jury was allowed to separate until that date. On April 28, 2010, the parties delivered their closing arguments, which concluded by noon, recessed for lunch, and returned for final jury instructions.

From April 13 until April 16, the jury had received all of the evidence and testimony. There was testimony by four experts, Richard Arazi, M.D., Steven Kenner (Appellants' A:9), Sheldon Swenson, MD and Thomas Alcorn, M.S., P.E., PTOE

(Appellants' A:19). There were approximately twenty lay witnesses that also testified. (Appellants A: 70-72). In addition, the jury received forty-five exhibits, (Register of Actions: 78-123 and Appellants' A: 3-4) many of which consisted of numerous pages. Finally, the jury received eighteen pages of jury instructions. (Partial Transcript - Jury Instructions and Date and Time Adjourned, p. 1-18).

Despite the vast amount of evidence for the jury to consider, the jury only deliberated for approximately two hours. (Appellant's Partial Transcript - Jury Instructions: Page 20, Line 23 and Appellants' Partial Transcript - Verdict Reading, page 3, Line 21).

III. Law and Arguments

A. Issues on Appeal.

This appeal involves issues of matters of discretion. For questions of law, a de novo standard is applied, a clearly erroneous standard for questions of fact, and an abuse discretion for discretionary matters. Bertsch. v. Bertsch, 2006 ND 31, 710 NW2d 113, Keyes v. Amundson, 343 N.W. 2d 78 (N.D. 1983), and Patterson v. Hutchens, 529 N.W. 2d 561 (N.D. 1995).

1. The Trial Court's refusal to grant a five day jury trial and the twelve day separation of the jury was prejudicial to the Plaintiffs.

The Court was aware from the onset that the Plaintiffs believed that this trial would require more then four trial days. (Appellants' A: 7-8). At the October 20, 2009 pretrial hearing, the following conversation occurred:

The Court: – we have to – I said, is that prudent that we have four days set aside?

We plan on that –

Ms. Neubauer: Yeah.

The Court: We may not –

Ms. Neubauer: We were –

The Court: - - need all of it.

Ms. Neubauer: - - actually talking and we thought four days may not be enough, but –

The Court: Really?

Ms. Neubauer: Yeah.

The Court: Well, we have four days. Are there scheduling problems? Have you tried to work out that? Do we need to talk about setting a time limit as far as how much time you have to present your case so it is fair to the other side?

Ms. Neubauer: No, I don't - - I don't think so. I just that there's just so many witnesses and issues. A lot of our witnesses are going to be the same. It's just there's a lot of people that –

The Court: Anyway, we have four days and I guess - -

Ms. Neubauer: Right. We'll just have to - -

The Court: - - if we have a problem - -

Ms. Neubauer: - - get it done.

The Court: - - then we will have to figure it out.

(Pretrial Conference, page 49, Line 25 - Page 50, Line 22).

When the October 27, 2009, trial date was continued, the trial court again allowed four days of trial despite being informed the parties were concerned with the length. (Appellants' A:10).

The trial commenced on April 13, 2010, but was not completed on April 16, 2010, the fourth day, and the trial court refused to keep the jury. Prior to adjourning for the day, counsel for the parties met with the trial court in chambers. (Appellants' A: 64). It was apparent that it would be impossible to complete the trial by 5:00 p.m. (Appellants' A: 64). The trial court informed the parties it would not keep the jury past business hours and also that it was not available the following week due to master calendar duties. (Appellants' A:64). Plaintiffs and the jurors left without a return date. The proceedings were adjourned and the jury excused prior to 5:00 p.m. Friday afternoon.

The trial did not resume until April 28, 2010, twelve days later. (Appellants' A:11). The jury was allowed to separate until that date. After four and a half days of trial: numerous witnesses, including four expert witnesses (Appellants' A:9, 19, 70-72); and forty-five exhibits (Register of Actions: 78-123 and Appellants' A: 3-4), the parties were summoned back to the courtroom approximately two hours later for reading of the jury verdict. (Appellant's Partial Transcript - Jury Instructions: Page 20, Line 23 and Appellants' Partial Transcript - Verdict Reading, page 3, Line 21).

N.D.C.C. § 28-14-18 provides in pertinent part:

> ...that when the case is finally submitted to jurors, they may decide in court or retire for deliberation. If they retire, they must be kept together in some convenient place under charge of an officer, until they agree upon a verdict, are temporarily dismissed by the Court, or are premanently discharged by the Court....If the jurors have not agreed upon a verdict during normal working hours of any day of deliberations, the trial judge may temporarily dismiss the jurors and direct them when to resume deliberations.

Although N.D.C.C. § 28-14-18, specifically addresses situations when the case has been submitted to the jury, it is logical that this statute should also apply when the

evidence has all been presented, with only closing arguments remaining.

> The rule prohibiting jury separation is one of the most fundamental and ancient in the English-speaking world. It is strictly enforced in order to prevent jury tampering. It is even more stringently applied after the jury begins deliberations, because the chance of outside influence is the greatest when the evidence is all in, and any outside information coming to the jury at that time would likely have a greater effect on the verdict. With respect to the extremely sensitive matter of jury separations after deliberations have begun, the prohibition against such separations must be strictly observed. If an emergency prevents a continuation of the deliberations, a mistrial must be declared unless the parties consent to a separation or it is shown that no harm has occurred.

American Jurisprudence 2d, Trial § 1486

> As a general rule, the members of the jury in a civil case may separate, after proper admonition, during the recesses and adjournments of the court, before the cause is finally submitted. The decision whether or not to sequester the jury prior to the time the cause is submitted is within the discretion of the trial court.

American Jurisprudence 2d, Trial § 1258

Here the trial court should have either required the jurors to remain that Friday to complete the case, or to at least receive closing arguments and the jury instructions to allow jury deliberations that Monday. Certainly, the trial court could have found a few minutes for reading of the verdict Monday. Other viable options were to return the following morning, the trial court to clear its' calendar to allow this matter to proceed and be completed the following Monday, or even sometime that week, or to declare a mistrial. N.D.C.C. § 28-14-18. provides only for "temporary separation" of jurors. Twelve days, as what happened in this case, is certainly not a "temporary separation" and was an abuse of the trial court's discretion.

In Keyes supra, at 81, this Court stated: "The law of jury conduct must be strictly followed in order to keep the conduct of jurors and jury verdicts above suspicion." In

State of Vermount v. Eddie White, 129 Vt. 220, 274 A.2d 690, 693-694 (Vt. 1971) the Vermount Supreme Court stated:

> Separation of the jury is neither althogether prohibited nor absolutely permissible but rather it is a difference in degree. In misdemeanor cases, like civil cases, the trial court's discretion in the matter becomes operative. In exercising this discretion, it is for the trial court to weigh concern for the prompt orderly administration of criminal law against the possibility of jury prejudice in a given case. State v. Brisson, supra, pp. 213, 214, 201 A.2d 881. Respondent's claim of error is only that a separation of sixty-two days is prejudicial to him as a matter of law. The respondent had the burden to demonstrate an abuse of discretion. State v. Hedding, 122 Vt. 379, 384, 172 A. 2d 599. But when dealing with the integrity of the jury the party claiming abuse has only to show the existence of circumstances capable of prejudicing the deliberate function of the jury. He is not required to prove that they actually did so. State v. Brisson, supra, 124 Vt. pp.215, 201 A.2d 881. Justice Barney speaking for the Court in the Brisson case said at page 215, 201 A.2d at page 883
>
> > Events or circumstances which might not be of concern where a jury is under control and scrutiny of the court itself during trial, might be factors of greater weight when their effect on a jury at large in the community is considered. The mere passage of time between empanelling and service may itself operate to magnify the effect of otherwise minor incidents. Moreover, it is conceivable that a case could arise where the separation was so long, the control of the court over the jury so dissipated by the elapsed time, that this Court might be bound to find prejudice from that fact alone.

North Dakota Supreme Court ruled on a somewhat similar case in State v. Bonner, 361 N.W. 2d 605 at 611 (N.D. 1985). "Bonner asserted that the delay itself prejudiced him because the jurors where allowed to roam at large for 55 days with the State's side of the story in their minds, citing People v. Dinsmore, 102 Cal. 381, 36 P. 661 (1894), and People v. Logan, 1.23 Cal. 4.11, 56 P.56 (1899)."

However, the significant difference between Bonner, supra, and this case is that substantially more then a mere opening statement and one witness was presented to the

jury prior to the separation and the complaining party was the cause of the separation. Here all of the evidence had been presented and only closing arguments remained.

This case is similar to Keyes, supra in that the prejudice can be assumed based upon solely on the fact the jury was separated for a lengthy period of time. See:Dinsmore, supra, Logan, supra, and White, supra.

As stated in Keyes, supra at 86: "It is foreseeable that jurors may be called upon to sit on cases where the accident occurred at the major intersection in town, or even in front of the courthouse. A casual view by jurors in such cases is inevitable; however, without more, it is not likely to affect the verdict."

Here, allowing the jury twelve days substantially increased the likelihood that some members of the juror investigated the scene. The appropriate standard is for the court to determine whether or not there is a reasonable possibility that extrinsic evidence could have affected the verdict....and in doing so, the court is to consider the possible prejudicial effect on a hypothetical average jury. Keyes, supra at 85-86.

The evidence had been submitted to the jury. Twelve days elapsed and the parties came back to finish their closing arguments. The mere passage of time between the submission of the evidence to the jury and completing the trial potentially magnified the effects of even minor incidents. This is unlike the facts in Keyes, supra, where jury separation lasted only a weekend. While in Keyes, supra, several of the jurors submitted affidavits that they had been to the accident scene, there are no such affidavits in this case. This accident location was on a well traveled route in a proximity to the courthouse and the fact that the jurors had twelve days of separation, greatly increases the likelihood

that the jurors viewed the accident scene or committed other juror misconduct.

This Court has stated that: "Mere reliance upon technical violation of the statute without a showing of prejudice is insufficient." See State v. Bergeron, 340 N.W. 2d 51, 59 (N.D. 1983). Plaintiffs should "only [have] to show the existence of circumstances capable of prejudicing the deliberate function of the jury. They [are] not required to prove that they actually did so." See: White, supra, at 694.

In making that determination, this Court should determine whether the twelve days of jury separation created circumstances capable of prejudicing the function of a hypothetical jury. See: (Keyes, supra, at 86, which provided: "we conclude that there is reasonable possibility that the extrinsic information could have affected the verdict of a hypothetical average jury.")

B. The Trial Court erred in granting the Defendants all of their costs and disbursements.

N.D.C.C. § 28-26-06 provides, in pertinent part that:

> In all actions and special proceedings, the clerk of district court shall tax as a part of the judgment in favor of the prevailing party the following necessary disbursements:
>
> > 1. The legal fees of witnesses; sheriffs, clerks of district court, the clerk of the supreme court, if ordered by the supreme court, process servers; and of referrees and other officers;
> >
> > 2. The necessary expenses of taking depositions and of procuring evidence necessarily used or obtained for use on the trial;
> >
> > 5. The fees of expert witnesses. The fees must be reasonable fees as determined by the court, plus actual expenses. The following are nevertheless in the sole discretion of the trial court:

a. The number of expert witnesses who ar allowed fees or expenses:

b. The amount of fees to be paid such allowed expert witnesses, including an amount for time expended in preparation for trial; and

c. The amount of costs for actual expenses to be paid and allowed expert witnesses.

In Patterson v. Hutchens, 529 N.W. 2d 561 at 568, N.D.1995), this Court stated: "A trial court's decision on fees and costs will not be overturned on appeal unless an abuse of discretion is shown."

In this case, the Plaintiffs are not contesting the costs and disbursements of the Defendant United Rentals Highway Technologies, Inc, but assert they should not have to pay all of the costs and disbursements requested by Defendant Northern Improvement Company, a/k/a McCormick Incorporated. In particular, the Plaintiffs should not be liable to pay a portion of Dr. Sheldon Swenson's (hereinafter Dr. Swenson) expert fees as much of his time was spent educating himself to be able to testify as an expert on helmet use, despite denying at trial he was an expert on anything.

Dr. Swenson stated, under voir dire examination:

Q: Would you agree that you're not an expert on motorcycle helmet use?

A: I am not an expert on anything. I'm an emergency physician who's been practicing medicine for 27 years. Over that 27 years, I've seen a lot of people with head injury. We take head injury - - very, very experienced. We take helmet use seriously. We try to educate the public on the need to wear helmets. The - - it is very well known that helmets save lives, just like seat belts save lives. Am I an expert on seat belts? No, but we all know that is very important....

Partial Transcript - Dr. Swenson's Testimony Page 10, Lines 14 - 23.

Q: But, you're here today - - it's your understanding you're hear today as an

expert, correct?

A: You know, expert witness is your terms, okay.

Partial Transcript - Dr. Swenson's Testimony page 11, Lines 5-7.

It was also readily apparent that Dr. Swenson was not an expert on helmet usage at the time of his deposition. In support of the same, the following conversation took place during voir dire:

> Q: Now, on - - you - - at your deposition you were asked what your experience was and whether you had involved anything regarding motorcycle helmets, do you remember that?
>
> A: I would have to review the record to be certain, but at that point in time, I had - - I did - - had not - -
>
> Q: You had not?
>
> A: I had not reviewed the literature.

Partial Transcript - Dr. Swenson's Testimony page 9, Line 22 - Page 10, Line 3.

At trial, and under direct examination from the Defendant's attorney, Dr. Swenson thereafter testified:

> Q: Can you tell me how you were able to assess or make an evaluation of whether a helmet would have made a difference?
>
> A: Well, there was some articles that were provided to me by your associate, Sharon Knutson, and I also did some further research, and --

Partial Transcript - Dr. Swenson's Testimony page 38, Line 18-22.

Dr. Swenson costs included the following: three hours to review literature on helmets regarding facial injury and two hours to review literature regarding evidence of head dizziness. (See Appellants' A: 35). Dr. Swenson was not an expert in this field and

relied upon Defendants' legal counsel to supply him with some of the literature he reviewed. The Plaintiff's should not be assessed costs for Dr. Swenson to educate himself to become an expert.

In addition, Dr. Swenson's costs included three hours of time to review - for a second time - the Plaintiffs' medical records, even though that took place after his deposition and his written expert opinion. (See Appellant's A:35) Finally, Dr. Swenson costs include two hours to prepare for a deposition and two hours to review a deposition that only lasted an hour and fifteen minutes. (See Appellant's A: 37). Dr. Swenson made three clerical changes to his deposition and was not prepared for his deposition. (Register of Actions 162. Appellants' A: 5, and Oral Arguments on Costs and Disbursements page 5, lines 23-24).

That as to Thomas Alcorn, M.S.P.E. PTOE (hereinafter Mr. Alcorn) at no point in time has anyone received a breakdown or itemized stated of the time Mr. Alcorn spent as an expert. The Defendant Northern Improvement did not even know how much their own expert Mr. Alcorn charged per hour. (Oral Arguments on Costs and Disbursement, page 18, lines 11-15). Thereafter, the Defendant submitted a statement as to Mr. Alcorn's hourly rate. (Appellants' A:52). However, the Defendant only submitted a summary of Mr. Alcorn's bill and did not provide an hourly or minute breakdown of that time which would support Mr. Alcorn's $26,010.45 in fees. (Appellants' A:19). The trial court acknowledged that Mr. Alcorn was expensive (Appellants' A:58). The trial court also stated that an hourly itemization and breakdown would have been helpful, but then simply accepted the Defendant's fees. (Appellants' A:58).

It is the Plaintiffs' position that a breakdown of Mr. Alcorn's costs would have shown that the Plaintiffs were billed for costs that Mr. Alcorn expended prior to the legal proceedings being initiated. In addition, the Plaintiffs do not believe that Mr. Alcorn spent the amount of time that he claims, after the legal proceedings were initiated, as Mr. Alcorn did not investigate the accident scene and was not deposed by the Plaintiffs. However, without a breakdown of Mr. Alcorn's billing statement, it is impossible for the Plaintiffs to discern the time that Mr. Alcorn actually spent on this case.

IV. CONCLUSION

WHEREFORE, the Plaintiffs respectfully request that the jury verdict in this matter be vacated, that this matter be remanded to the district court for retrial, and alternatively that the Defendant's costs and disbursements be reduced as requested herein.

Dated this 11th day of March, 2011.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellants Calvin Wahl and Laurie Wahl, in the above matter, and as the author of the Appellants brief, hereby certifies, in compliance with Rule 28 of the North Dakota Rules of Appellate Procedure, and the Appellants brief, excluding words in the table of contents, table of authorities, addendum and certificate of compliance totals 3607.

Dated this 11th day of March, 2011.

Brenda A. Neubauer, ID #05210
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AFFIDAVIT OF DELIVERY

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Tiffani Milligan, being first duly sworn, on oath, does depose and say: That this affiant is of legal age and not a party to this action.

That on the 11th day of March, 2011, affiant served as indicated below, a true and correct copy of the following documents: **APPELLANTS' BRIEF; and APPELLANTS' APPENDIX** addressed and delivered as follows:

Brenda L. Blazer - *Hand delivery*
Attorney at Law
P.O. Box 2097
Bismarck, ND 58502-2097

North Dakota Supreme Court
Original + 7 copies
- *Hand delivery*

Douglas W. Gigler - *First Class Mail*
Attorney at Law
P.O. Box 2626
Fargo, ND 58108-2626

To affiant's knowledge. information and belief, such address was the last known post office address of the party intended to be so served.

Tiffani Milligan

Subscribed and sworn to before me at Burleigh County, North Dakota, on this 11th day of March, 2011.

DANIEL H. OSTER (SEAL)
Notary Public
State of North Dakota
My Commission Expires Aug. 12, 2011

Daniel H. Oster, Notary Public
Burleigh, County, State of North Dakota
My Commission Expires: August 12, 2011