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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Nodak Mutual Insurance Company, Plaintiff-Appellee, vs. Kelly Steffes, Keith Steffes and Tasha Rohrbach, Defendants-Appellants.	Supreme Court No. 20140202 District Court Case No. 23-2016-CV-00050

BRIEF OF DEFENDANTS/APPELLANTS

APPEAL FROM THE ORDER DATED AUGUST 23, 2018, ISSUED BY THE
HONORABLE JAY A. SCHMITZ,
DISTRICT COURT JUDGE, LAMOURE COUNTY,
SOUTHEAST JUDICIAL DISTRICT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

RULES:

STATUTES:

OTHER AUTHORITIES:

STATEMENT OF THE ISSUES

I. The district court erred in granting Plaintiff's Motion for New Trial and vacating the judgment.

STATEMENT OF THE CASE

[¶1] This is an appeal from an Order of the LaMoure County District Court entered on August 23, 2018 (Appendix page 66-70; herein after "A.___") granting Plaintiff's motion for new trail and vacating the Judgment entered in this matter on April 15, 2018.

[¶2] This action was commenced by Plaintiff, Nodak Mutual Insurance Company [hereinafter "Nodak"], seeking a declaratory judgment as to the identity of the driver of a vehicle involved in an accident and whether coverage exits through policies with Nodak for the Defendants, Kelly Steffes, Keith Steffes and Tasha Rohrbach (now Steffes) (A. 8-14). The Defendants interposed answers denying the claims of Nodak, and specifically averred that Defendant Keith Steffes was operating the vehicle at the time of the subject accident (A. 16-19 & 20-23).

[¶3] On November 17, 2017, Nodak filed a notice and motion for summary judgment on its complaint for declaratory relief, predicated upon an assertion that certain alleged DNA evidence reflect that Kelly Steffes (not Keith Steffes) was operating the vehicle at the time of the accident; and that the statements of all three Defendants (Keith, Kelly and Tasha) identifying Keith as the driver are "material misrepresentations and fraudulent statements" relieving Nodak from its contracted duty to provide coverage for injuries and other damages suffered in the subject accident (A.3, Index #'s 44-66). The said motion was contested by the Defendants, and a counter-motion was interposed by Defendants Kelly Steffes and Tasha Steffes (A. 3, Index #'s 69-80).

[¶4] Notwithstanding a finding that the said motion was untimely under the scheduling order, the Court entered an Order Denying Motion for Summary Judgment on December 27, 2017, holding that "the credibility of the defendant's testimony is for the jury to decide" (A. 24-26). On January 10, 2018 the Court entered an Order Denying Cross-Motion for Summary Judgment for the reasons stated in the order denying the plaintiff's motion (A. 27).

[¶5] This matter was then tried to a 9 person jury on February 5-7, 2018 in the LaMoure County Courthouse (Appeal Transcript, page 1-5; hereinafter "T. ___ ").

[¶6] Following a very brief deliberation, the jury returned a special verdict on February 7th, 2018 finding that Nodak Mutual did not prove its case by the greater weight of the evidence that Keith Steffes was not the driver of the pickup at the time of the rollover accident in LaMoure County, North Dakota, on April 15, 2012 (T.541-542; A. 46-47).

[¶7] After resolving issues pertaining the final documents in this matter and in particular, awarding attorney's fees (A. 48-50), an Order for Judgment (A. 51-54), Declaratory Judgment (A. 55-57) and Notice of Entry of Declaratory Judgment (A. 58) were all entered in this matter on April 10, 2018.

[¶8] On May 8, 2018 Nodak filed and served a Motion for Post-Trial Relief, to which the Defendants timely responded (A. 5, Index 155 thru A. 6 Index # 178).

[¶9] On May 25, 2018 Nodak filed and served a Motion for New Trial and Relief from Judgment in this action, as well as a Motion To Stay Enforcement of Judgment in the Cass County District Court [Case No. 09-2018-CV-01645], both of which were also opposed (A.6, Index #'s 179 -197).

[¶10] An Order denying Plaintiff's Motion For Post-Trial Relief was entered on the 16th day of July, 2018 (A. 59-60), with a notice of entry served and filed on July 16, 2018 (A.61; A.

6, Index #'s 199-200). In response to a request for clarification of Defendant Keith Steffes (A. 62), an Amended Order denying Plaintiff's Motion For Post-Trial Relief was entered on the 25th day of July, 2018 (A. 63-64), with a notice of entry served and filed on July 26, 2018 (A.65; A. 6. Index #'s 205 & 206).

[¶11] On August 23, 2018, finding that "the jury's verdict is manifestly against the fair preponderance of the evidence, and that the interests of justice will be served if the question of who was driving Keith's pickup on April 15, 2012 is submitted to another jury", the Court entered an order granting Nodak's motion for a new trial and vacated the April 10, 2018 judgment and denied Nodak's Motion for New Trial and Relief from Judgment in all other respects (A. 66-70). No notice of entry of order was filed (See A. 1-7, Register of Actions). The Notice of Appeal of the Defendants was served and filed on September 25, 2018 (A.71; A. 7, Index #'s 210-213).

STATEMENT OF THE FACTS

[¶12] On the evening April 14-15, 2012, Defendants Kelly Steffes [hereinafter "Kelly"] and Tasha (Rohrbach) Steffes [hereinafter "Tasha"], drove Tasha's silver Plymouth Breeze from Edgeley, North Dakota, to Nogo's Bar in LaMoure, North Dakota, where they consumed alcoholic beverages in celebration of Kelly's birthday (T. 432-433; T. 443-444). Because they both felt they were unable to drive, Kelly contacted his brother, Defendant Keith Steffes [hereinafter "Keith"], who resided near LaMoure, and asked him to give them a ride home (T. 434; T. 444).

[¶13] Keith, Kelly and Tasha all testified that when the parties left Nogo's Bar early in the morning of April 15, 2012, Tasha was in the middle of the seat with Kelly on the passenger side and Keith was driving his pickup (T. 365-366; T. 435; T. 445).

[¶14] On the way to his home, Keith's vehicle hydroplaned in a heavy rain and lost control of his vehicle, violently rolling about one and a half times into the ditch about a mile from Keith's residence and came to a rest on its driver's side (T. 366-368). While Keith was able to brace himself by hanging onto the steering wheel, Kelly and Tasha did not have ahold of anything (T. 406). After the vehicle came to rest, Kelly and Tasha were piled on top of Keith (T. 369, T. 403) with Tasha pretty much on top of Keith and Kelly's body was in the front with his head down behind the headrest of the driver's seat (T. 404-405). Keith believed that Kelly and Tasha were both injured in the crash and while he observed a lot of bleeding, he was not initially able to discern who was bleeding (T. 404). Keith was able to extract himself from the vehicle by going through the driver's left window which was already broke out (T. 371; T. 406). Keith was then able to tunnel through the "farming ridge" the pickup was resting on and after he kicked in the vehicle's windshield, he was able to extradite Tasha and Kelly from the wreck (T. 371-373; T. 406-407). After Keith helped Kelly out of the vehicle he observed that Kelly was bleeding "very bad" from a gash on his left part of his forehead (T. 410-411). While Tasha was unable to recall anything about the accident (T. 435-436), Kelly was able to recollect the traumatic accident (T. 446-447).

[¶15] Rather than calling 911, Keith called his friend Ethan Lux (T. 374), who then came to the accident scene, helped load Kelly and Tasha into the back seat of Ethan's pickup and transported the injured Kelly and Tasha to the Oakes Hospital (T. 385-386; T. 449).

[¶16] After Lux left the scene with Kelly and Tasha, Keith went home, got a tractor with a loader, and returned to the accident scene, where he used the loader to put the pickup back on its wheels (T. 385). After determining that the vehicle was not driveable Keith hauled it to his farm in the loader's grapple fork bucket (T.386-388).

[¶17] As a result of the accident, both Kelly and Tasha suffered severe and permanent injuries, including both had broken necks and Kelly had a severe gash on his head [a large laceration that was approximately 8 centimeters in length by 4 centimeters at cross, in a "T" shape] which was bleeding profusely (T. 272-273; T. 277-280). At the Oakes Hospital, both Kelly and Tasha were both quite shook up, inebriated and in pain, and not surprisingly couldn't recall much that went on (T. 436; T. 449).

[¶18] Sheriff Fernandez received a phone call around 3:30 a.m. on April 15, 2012, of a vehicle roll over accident involving three occupants (T. 160-161). In the Sheriff's initial discussions with Keith on April 15, 2012, Keith acknowledged that he was the driver of the vehicle involved in that accident and stated that the accident occurred on Highway 13 east of Edgeley (T. 164). A few days later, Keith admitted that the crash site was actually on County Road 61 north of LaMoure (T. 164, ln. 3-7; T. 173-174). However, Keith never changed his story that he was the driver (T. 184, ln. 11-17). Sheriff Fernandez was the only law enforcement officer who personally viewed/inspected the alleged accident scene; and he did not note anything from his observations of the accident scene nor viewing of the vehicle involved in the accident possibly revealed the identity of the driver at the time of the subject accident.

[¶19] Keith testified that he spoke to Sheriff Fernandez about injuries he suffered in the accident and that he showed such to the Sheriff (T. 350, ln. 11-13; T. 380-383) and to Deputy Fleck (T. 417, ln. 1-3). When asked if Keith was injured in this accident, Sheriff Fernandez stated "I didn't see any noticeable injuries. I do believe he was complaining about rib pain" (T. 174, ln. 20-23). Sheriff Fernandez couldn't recall Keith mentioning cuts on his back (T. 185, ln. 16-25).

[¶20] Sheriff Fernandez, Deputy Fleck nor Deputy Henry interviewed or otherwise spoke with Kelly and Tasha (T. 178, ln. 11-18; (T. 228, ln. 1-9; T. 248, ln. 25 thru T. 249, ln. 6). Rather, Sheriff Fernandez and Deputy Fleck both only spoke with Keith after the accident. Sheriff Fernandez opined that he didn't think that Keith was truthful as to who was driving and where the accident happened and that Keith's statements were inconsistent (T. 176). Deputy Fleck likewise testified that Keith was not being honest where the accident occurred and that Keith's time lines did not line up (T. 245-246). Sheriff Fernandez, Deputy Henry nor Deputy Fleck is an accident reconstructionist (T. 177, ln. 15-22; T. 222, ln. 9-11; T. 246, ln. 8-10).

[¶21] Sheriff Fernandez observed Tasha's Plymouth Breeze parked near Nogos Bar in LaMoure the ensuing few days after the accident, however, no surveillance cameras where sought which could have reflected if and when Kelly, Tasha and Keith were at the bar (T. 178, ln 19 thru T. 179, ln. 6; T. 249), nor were any witnesses identified who may have seen them in the bar (T. 187). [¶22] Deputy Henry and Deputy Fleck processed samples of blood from the Keith's subject pickup (T. 202; 242). Deputy Henry indicated that they collected "quite a lot" of blood samples (T. 228, ln. 14-20) from all over in the pickup (T. 226, ln. 8-25). However, Richard Schmidt, an investigator for the Nilles Law Firm which was then representing Nodak, requested only 6 specific samples from the driver's side area of the vehicle for DNA testing (T. 209; T. 228 ln. 21 thru T. 230, ln. 4; T. 301-303; T. 307, ln. 6 thru T. 308, ln. 9).

[¶23] The DNA evidence offered at trial was simply a "Forensic DNA analysis" - not a "Forensic pathology analysis" (T. 340, ln. 14-19; T. 429, ln. 12-14) - and in particular, did not provide:

(a) Any explanation as to how and when the blood ended up in the location(s) (T. 340, ln. 23 thru T. 341, ln. 1);

(b) A bloodstain pattern analysis, including the shape, size, distribution, texture other characteristics of each sample (T. 340, ln. 20-22; T. 429, ln. 15-18); nor

(c) Whether each of the blood samples was from dripping, a blood splatter, in a handprint, smear, or other possible source (T. 429, ln. 19-25).

The purpose of the DNA analysis was to attempt to identify whose blood it was (T. 341, ln. 11-14; T. 428, ln. 24 thru T. 429, ln. 11).

LAW AND ARGUMENT

Standard of Review.

[¶24] A motion for a new trial under N.D.R.Civ.P. 59(b)(6) based on a claim of insufficient evidence is addressed to the sound discretion of the district court. **Brandt v. Milbrath**, 2002 ND 117, ¶ 24, 647 N.W.2d 674; **Okken v. Okken**, 325 N.W.2d 264, 269 (N.D. 1982). A district court's discretionary authority to decide a motion for a new trial is different from this Court's authority on review, which is limited to whether the district court abused its discretion. **Brandt**, at ¶ 23; **Okken**, at 269. An order ruling on a motion to vacate / vacating judgment is also reviewed under an abuse of discretion standard**. See, i.e., White v. Altru Health System**, 2008 ND 48, ¶ 7, 746 N.W.2d 173. A district court abuses its discretion when it acts in an arbitrary, unconscionable, or unreasonable manner, when its decision is not the product of a rational mental process by which the facts of record and law relied upon are stated and considered together for the purpose of achieving a reasonable determination, or when it misinterprets or misapplies the law. **Usry v. Theusch**, 521 N.W.2d 918, 919 (N.D. 1994); **Gisvold v. Windbreak, Inc.**, 2007 ND 54, ¶5, 730 N.W.2d 597.

I. The district court erred in granting Plaintiff's Motion for New Trial and vacating the judgment.

[¶25] The right of appeal is governed solely by statute in this state**.** **Mann v. North Dakota Tax Comm'r**, 2005 ND 36, ¶7, 692 NW2d 490. More particularly, the order appealed from must meet one of the statutory criteria of appealability set forth in N.D.C.C. § 28-27-02, which provides:

> "The following orders when made by the court may be carried to the supreme court:
> 1. An order affecting a substantial right made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken;
> 2. A final order affecting a substantial right made in special proceedings or upon a summary application in an action after judgment;
> 3. An order which grants, refuses, continues, or modifies a provisional remedy, or grants, refuses, modifies, or dissolves an injunction or refuses to modify or dissolve an injunction, whether such injunction was issued in an action or special proceeding or pursuant to the provisions of section 35-22-04, or which sets aside or dismisses a writ of attachment for irregularity;
> 4. An order which grants or refuses a new trial or which sustains a demurrer;
> 5. An order which involves the merits of an action or some part thereof;
> 6. An order for judgment on application therefor on account of the frivolousness of a demurrer, answer, or reply; or
> 7. An order made by the district court or judge thereof without notice is not appealable, but an order made by the district court after a hearing is had upon notice which vacates or refuses to set aside an order previously made without notice may be appealed to the supreme court when by the provisions of this chapter an appeal might have been taken from such order so made without notice, had the same been made upon notice."

[¶26] In the instant case the order granting a new trial is clearly appealable under subsection 4 of NDCC § 28-27-02. It is also asserted that the August 23, 2018 order of the district court is also appealable under subsections 1, 2 and/or 5 of NDCC § 28-27-02. More particularly:

a. Subsection 1 is applicable in this case as the order affected a substantial right is this action and in effect determined the only issue presented to the jury - who was driving the vehicle - and prevents a judgment from being entered now has been vacated.

b. Subsection 2 is applicable in this case. A declaratory judgment action under Chapter 32-23, N.D.C.C., is a special proceeding as that term is used in N.D.C.C. § 28-27-02(2). **Kee v. Redlin**, 203 N.W.2d 423, 429 (N.D. 1972) ("[U]nder the terms of our statutes an ordinary proceeding is one known to the common law, . . . while a special proceeding is a remedy of statutory origin."). The language of N.D.C.C. § 32-23-06 demonstrates that decisions on the duty to defend are decisions which affect a substantial right. **Ziegler v. Meadowbrook Insurance Group**, 2009 ND 192, 774 N.W.2d 782.

c. Subsection 5 is also applicable as the court's order involved the merits of this action - namely a declaratory action to determine the driver of the vehicle at the time of the subject accident.

[¶27] When analyzing the jurisdiction of the Supreme Court to consider appeals from orders in cases where there are unadjudicated claims remaining to be resolved by the trial court, Rule 54(b), NDRCivP, must be complied with. **See, ie.**, **Ziegler v. Meadowbrook Insurance**, 2009 ND 192, ¶11, 774 N.W.2d 782. In the instant matter, the Court effectively re-determined the only issue presented to the jury, leaving no unadjudicated claims. Consequently, Rule 54(b) is not applicable.

[¶28] Retrying this case before a different jury, but before the same judge - who has already made his position on the ultimate issue known - would be effectively ending this matter. Until a jury returns a verdict acceptable to the Judge, the court could continue to grant a new trial.

[¶29] In **Gisvold v. Windbreak, Inc.**, 2007 ND 54, ¶¶6-11, 730 N.W.2d 597, the North Dakota Supreme Court summarized the common threads for the standard for a district court's consideration of a motion for a new trial based on a claim of insufficient evidence:

> [¶6] Over the years, this Court has variously described the legal tests that have evolved for a district court's consideration of a motion for a new trial based on insufficiency of the evidence. We have often said a district court may set aside a jury verdict and order a new trial when the district court decides the verdict is "manifestly against the weight of the evidence." **Brandt**, 2002 ND 117, ¶ 25, 647 N.W.2d 674; **Larson v. Kubisiak**, 1997 ND 22, ¶ 6, 558 N.W.2d 852; **Schutt v. Schumacher**, 548 N.W.2d 381, 384 (N.D. 1996); **Marohl v. Osmundson**, 462 N.W.2d 145, 146 (N.D. 1990); **Mauch v. Manufacturers Sales & Serv., Inc.**, 345 N.W.2d 338, 344 (N.D. 1984); **Scientific Application, Inc. v. Delkamp**, 303 N.W.2d 71, 74 (N.D. 1981); **Wall v. Pennsylvania Life Ins. Co.**, 274 N.W.2d 208, 218-19 (N.D. 1979); **Cook v. Stenslie**, 251 N.W.2d 393, 395-96 (N.D. 1977); **Maier v. Holzer**, 123 N.W.2d 29, 32 (N.D. 1963). This Court has also said a district court's discretion to grant a new trial based on insufficiency of the evidence is a legal discretion to be exercised "in the interests of justice." **E.g., Munro v. Privratsky**, 209 N.W.2d 745, 757 (N.D. 1973); **Trautman v. New Rockford-Fessenden Co-op. Transp. Ass'n**, 181 N.W.2d 754, 763 (N.D. 1970);

Ferguson v. Hjelle, 180 N.W.2d 408, 413 (N.D. 1970); **Leake v. Hagert**, 175 N.W.2d 675, 689 (N.D. 1970); **Muhlhauser v. Archie Campbell Constr. Co.**, 160 N.W.2d 524, 528 (N.D. 1968); **Pocta v. Kleppe Corp.**, 154 N.W.2d 177, 183 (N.D. 1967); **Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Johnston's Fuel Liners, Inc.**, 130 N.W.2d 154, 157 (N.D. 1964); Maier, 123 N.W.2d at 32; **Kohlman v. Hyland**, 56 N.D. 772, 779, 219 N.W. 228, 230 (1928). On other occasions, this Court has said a new trial is warranted when the jury verdict is "against the clear weight of the evidence." **Okken**, 325 N.W.2d at 271; **Nokota Feeds, Inc. v. State Bank of Lakota**, 210 N.W.2d 182, 187 (N.D. 1973); **Weber**, 49 N.D. at 330, 191 N.W. at 612. We have sometimes said a motion for a new trial asks the district court to decide whether the verdict is against the weight of the evidence. **Forster v. West Dakota Veterinary Clinic, Inc.**, 2004 ND 207, ¶ 26, 689 N.W.2d 366; **Rittenour v. Gibson**, 2003 ND 14, ¶ 12, 656 N.W.2d 691; **Comstock Constr., Inc. v. Sheyenne Disposal, Inc.**, 2002 ND 141, ¶ 7, 651 N.W.2d 656; **Perry v. Reinke**, 1997 ND 213, ¶¶ 21-22, 570 N.W.2d 224; **Okken,** 325 N.W.2d at 269; **Wrangham v. Tebelius**, 231 N.W.2d 753, 756 (N.D. 1975); **Kohlman,** 56 N.D. at 779, 219 N.W. at 230. So too this Court has stated a district court abused its discretion in granting a new trial when the jury verdict was supported "by the great preponderance of the evidence," **Benzmiller v. Swanson**, 117 N.W.2d 281, 286 (N.D. 1962), and was "amply supported by the evidence." **Hamre v. Senger**, 79 N.W.2d 41, 47 (N.D. 1956).

[¶7] Other authorities have recognized that a district court's standard in ruling on a motion for a new trial is not clear and somewhat confused. See 11 Charles

Wright, Arthur Miller & Mary Kay Kane, **Federal Practice and Procedure: Civil 2d** § 2806 (1995) (stating standard is not clear and it is doubtful whether any verbal formula will be useful to trial courts because all formulations are couched in broad and general terms that furnish no unerring litmus test for a particular case); 12 James Wm. Moore, **Moore's Federal Practice** § 59.13 [2][f][iii][B] (3rd ed. 2006) (stating standard is unclear and "somewhat confused"). **See also Lind v. Schenley Indus., Inc.**, 278 F.2d 79, 88-91 (3rd Cir. 1960) (stating no consensus as to exact standards to be used by trial court and discussing several tests, including (1) no interference with verdict unless miscarriage of justice and quite clear jury has reached seriously erroneous result, (2) no interference with verdict unless verdict manifestly and palpably against evidence so as to compel conclusion the verdict is contrary to right and justice, or the evidence as a whole, after according it the highest probative force to which it is lawfully entitled, is insufficient to support the verdict, and (3) giving trial court almost unlimited discretion in granting or denying motion for new trial).

[¶8] Notwithstanding the various descriptions of the legal test that have evolved in this state, the underlying meaning has remained essentially the same and can be found by looking at our cases. In **Weber**, 49 N.D. at 326, 191 N.W. at 610, a case decided before the adoption of the rules of civil procedure, this Court reversed a district court's denial of a defendant's motion for a new trial in a bastardy proceeding. In denying the defendant's motion for a new trial on the basis of insufficient evidence, the district court said, "The evidence is of so unsatisfactory a character and the results of the trial as a whole leaves my mind in

such a state that if I had been a juror I could not have returned a verdict of guilty against the defendant." **Id.** at 326, 191 N.W. at 610. However, the district court denied the defendant's motion for a new trial, concluding there were no errors of law warranting the vacating of the jury verdict and "one man ought not to intervene to overthrow" the verdict**.** **Id.** at 326, 191 N.W. at 610. In reversing the district court's decision, this Court cited with approval numerous authorities to the effect that a district court must uphold a jury verdict against mere doubts as to the verdict's correctness, but a district court may set aside the verdict when the court's judgment tells it the verdict is wrong and clearly against the fair preponderance or weight of the evidence. **Id.** at 329-36, 191 N.W. at 612-14. In **Weber,** this Court decided the district court's statement about the character of the evidence manifested a "disapproval of the verdict in no uncertain terms" and remanded for a new trial. **Id.** at 335-36, 191 N.W. at 614.

[¶9] Under N.D.R.Civ.P. 59(b)(6), the district court's role in considering a motion for a new trial based on a claim of insufficient evidence is similar to the standard from **Weber**. **See, e.g., Brandt**, 2002 ND 117, ¶ 25, 647 N.W.2d 674; **Cook**, 251 N.W.2d at 395-96; **Wrangham**, 231 N.W.2d at 756. In **Wrangham**, this Court said a district court's discretion in considering a motion for a new trial based on a claim of insufficient evidence is not confined to whether the verdict is supported by substantial evidence; rather, the court is vested with a margin of discretion to weigh the evidence and, within limitations, act upon its own judgment with a view to promote the ends of justice. 231 N.W.2d at 756. In **Cook,** this Court explained a district court may not set aside a jury verdict merely

because the court disagrees with the verdict; rather, the district court must find the verdict was manifestly against the weight of the evidence. 251 N.W.2d at 395-96. This Court cited **Weber** with approval for the proposition that a district court may not substitute its judgment for the jury when the evidence is nearly balanced, but a district court may set aside a verdict when the court's judgment tells it the verdict is wrong and against the fair preponderance of the evidence. **Cook**, at 396 (citing **Kohlman**, 56 N.D. at 779, 219 N.W. at 238). In **Cook**, at 396 n.1, this Court recognized **Kohlman** had been "cited and relied upon by this court in numerous later decisions with some language modification leaving an ambiguous impression as to the applicable standards for granting new trials on the insufficiency of the evidence."

[¶10] In **Brandt**, 2002 ND 117, ¶ 25, 647 N.W.2d 674, we recently summarized common threads for the standard for a district court's consideration of a motion for a new trial based on a claim of insufficient evidence:

> When considering a motion for a new trial, under N.D.R.Civ.P. 59, the "district court may, 'within limits, weigh the evidence and judge the credibility of witnesses.'" **Perry**, 1997 ND 213, ¶ 21, 570 N.W.2d 224 (quoting **Okken v. Okken**, 325 N.W.2d 264, 269 (N.D. 1982)).
>
> In particular, when a motion for a new trial is made and the reason given in support of the motion is that there was insufficient evidence to justify the verdict, the moving party is asking the trial court to decide whether or not the verdict is against the weight of the evidence. And in making this decision, the trial judge must

weigh the evidence; he must consider that evidence which supports the verdict equally with that evidence which challenges the verdict. In short, when ruling on a motion for a new trial, the trial judge may consider all the evidence.

Okken, at 269 (citations omitted). While a district court is given great latitude to decide whether a motion for a new trial should be granted, its discretion is not without limits.

We do not mean . . . that [the trial judge] is to substitute his own judgment in all cases for the judgment of the jury, for it is their province to settle questions of fact; and, when the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions thereon, he has no right to disturb the findings of the jury, although his own judgment might incline him the other way. In other words, the finding of the jury is to be upheld by him as against any mere doubts of its correctness. But when his judgment tells him that it is wrong, that, whether from mistake, or prejudice, or other cause, the jury have erred, and found against the fair preponderance of the evidence, then no duty is more imperative than that of setting aside the verdict, and remanding the question to another jury.

Cook v. Stenslie, 251 N.W.2d 393, 396 (N.D. 1977) (citations omitted).

"To set aside a jury verdict and grant a new trial, the trial court must find

the verdict to be manifestly against the weight of the evidence." **Larson v. Kubisiak**, 1997 ND 22, ¶ 6, 558 N.W.2d 852 (citations omitted).

[¶11] Because our standard for a district court's consideration of a motion for a new trial has sometimes lacked precision, we now articulate and clarify that a district court considering a motion for a new trial based on insufficiency of the evidence may not substitute its own judgment for that of the jury, or act as a thirteenth juror when the evidence is such that different persons would naturally and fairly come to different conclusions, but may set aside a jury verdict when, in considering and weighing all the evidence, the court's judgment tells it the verdict is wrong because it is manifestly against the weight of the evidence. **See Brandt**, 2002 ND 117, ¶ 25, 647 N.W.2d 674; **Perry,** 1997 ND 213, ¶¶ 21-22, 570 N.W.2d 224; **Larson**, 1997 ND 22, ¶ 6, 558 N.W.2d 852; **Schutt**, 548 N.W.2d at 384; **Marohl**, 462 N.W.2d at 146; **Mauch**, 345 N.W.2d at 344; **Okken**, 325 N.W.2d at 269; **Wall**, 274 N.W.2d at 218-19; **Cook**, 251 N.W.2d at 395-96; **Wrangham**, 231 N.W.2d at 756; **Maier**, 123 N.W.2d at 32; **Weber**, 49 N.D. at 329-36, 191 N.W. at 612-14.

[¶30] Following a very brief deliberation, the jury in this case returned a special verdict on February 7th, 2018 finding that Nodak Mutual did not prove its case by the greater weight of the evidence that Keith Steffes was not the driver of the pickup at the time of the rollover accident in LaMoure County, North Dakota, on April 15, 2012 (T.541-542; A. 46-47). The issues before the court were factual issues. The jury had the chance to hear the witnesses and rate the credibility of each witness as to each witness's veracity. As was stated by the Court in denying Nodak's motion for summary judgment, it is for a jury to decide the credibility of the

witnesses (A. 26, ¶5). The jury heard the evidence concerning the inconsistent statements, heard the explanations for those inconsistent statements and then judged the credibility and veracity of that evidence in reaching its verdict. It is clear that the jury unanimously determined that the bare DNA evidence and/or alleged inconsistent statements of the Defendants did not outweigh the otherwise uncontroverted testimony of Keith, Kelly and Tasha as to who was driving the vehicle at the time of the subject accident together with corroborating evidence.

[¶31] The district court when considering Nodak's motion for a new trial based on insufficiency of evidence impermissibly substituted its own judgment for that of the jury and acted as a thirteenth juror as evidenced at the beginning of the court's discussion (A. 68, ¶5):

> "I will state candidly that I would have found in favor of Nodak if I had been on the jury. The question I have wrestled with is whether that statement reflects "mere doubts" about the correctness of the verdict, or a conviction that it was "manifestly against the weight of the evidence. After thorough consideration of the testimony and evidence, my notes, and the contentions of the parties, I have concluded it is the latter."

[¶32] In granting the motion for a new trial and vacating the declaratory judgment the district court clearly abused its discretion by acting in an arbitrary, unconscionable, or unreasonable manner.

[¶33] First, it is quite interesting that the only witness the court specifically identified by name was "EMT Michael Sandy." Sandy was a paramedic - not a physician or nurse (T. 277). Nor was Sandy an accident reconstructionist (T. 277-278) or otherwise proffered as an expert - yet the court attempted to gave credence to his averments as to the how Kelly suffered the gash on his head. The district court misstated the testimony in that Sandy did not testify that gash on

"Kelly Steffes's head was inconsistent with a rollover accident" as stated by the court; rather, Sandy testified that Kelly's averred injuries were not consistent with hitting his head on the windshield (T. 275-277). Moreover, in his zest to give such credence to Sandy's testimony, the district court totally ignored the fact that Sandy was mistaken as to the location of the gash on Kelly's head - which Kelly displayed to the court and jury was to his left forehead area (T. 447) - not on the back of his head as opined by Sandy (T. 274-275).

[¶33] Second, the district court's statement that "the DNA evidence indicated that Kelly had been on the driver's side of the pickup" is consistent with the testimony of Keith and Kelly, to-wit: that after the vehicle rolled, it came to rest on its driver's side, Kelly and Tasha were piled on top of Keith (T. 369, T. 403) with Tasha pretty much on top of Keith and Kelly's body was in the front with his head down behind the headrest of the driver's seat (T. 404-405) bleeding profusely from an injury to his head (T. 446, ln. 8 thru T. 447, ln. 20). This testimony clearly explained how Kelly's blood ended up on the driver's side of the vehicle.

[¶34] Deputy Henry and Deputy Fleck processed samples of blood from the Keith's subject pickup (T. 202; 242). Deputy Henry indicated that they collected "quite a lot" of blood samples (T. 228, ln. 14-20) from all over in the pickup (T. 226, ln. 8-25). However, Richard Schmidt, an investigator for the Nilles Law Firm which was then representing Nodak, requested only 6 specific samples from the driver's side area of the vehicle for DNA testing (T. 209; T. 228 ln. 21 thru T. 230, ln. 4; T. 301-303; T. 307, ln. 6 thru T. 308, ln. 9).

[¶35] The DNA evidence offered at trial was simply a "Forensic DNA analysis" - not a "Forensic pathology analysis" (T. 340, ln. 14-19; T. 429, ln. 12-14) - and in particular, did not provide:

(a) Any explanation as to how and when the blood ended up in the location(s) (T. 340, ln. 23 thru T. 341, ln. 1);

(b) A bloodstain pattern analysis, including the shape, size, distribution, texture other characteristics of each sample (T. 340, ln. 20-22; T. 429, ln. 15-18); nor

(c) Whether each of the blood samples was from dripping, a blood splatter, in a handprint, smear, or other possible source (T. 429, ln. 19-25).

The purpose of the DNA analysis was to attempt to identify whose blood it was (T. 341, ln. 11-14; T. 428, ln. 24 thru T. 429, ln. 11).

[¶36] Third, Sheriff Fernandez, Deputy Fleck nor Deputy Henry interviewed or otherwise spoke with Kelly and Tasha (T. 178, ln. 11-18; (T. 228, ln. 1-9; T. 248, ln. 25 thru T. 249, ln. 6). Rather, Sheriff Fernandez and Deputy Fleck both only spoke with Keith after the accident. Deputy Henry did not interview any of the parties. In the Sheriff's initial discussions with Keith on April 15, 2012, Keith acknowledged that he was the driver of the vehicle involved in that accident and stated that the accident occurred on Highway 13 east of Edgeley (T. 164). A few days later, Keith admitted that the crash site was actually on County Road 61 north of LaMoure (T. 164, ln. 3-7; T. 173-174). However, Keith never changed his story that he was the driver (T. 184, ln. 11-17). Sheriff Fernandez was the only law enforcement officer who personally viewed/inspected the alleged accident scene; and he did not note anything from his observations of the accident scene nor viewing of the vehicle involved in the accident possibly revealed the identity of the driver at the time of the subject accident. Sheriff Fernandez opined that he didn't think that Keith was truthful as to who was driving and where the accident happened and that Keith's statements were inconsistent (T. 176). While Deputy Fleck testified

that Keith was not being honest where the accident occurred and that Keith's time lines did not line up (T. 245-246), Fleck did not testify as to any disbelief of Keith's story that he was driving. Sheriff Fernandez, Deputy Henry nor Deputy Fleck is an accident reconstructionist (T. 177, ln. 15-22; T. 222, ln. 9-11; T. 246, ln. 8-10).

[¶37] Nodak did not offer into evidence at the trial any alleged "individual statements from all three Defendants" nor any proffered "Examinations Under Oath." Rather, Nodak merely questioned the Defendants about such. When Nodak's attorney asked Keith about his inconsistent statements, Keith explained that no one had ever asked about the specific details of the accident (T. 412-414). Keith admitted at trial that he had not told the truth regarding the location of the accident. At the trial, Keith explained why he had done that. The evidence presented at trial was that it was dark, cold and raining and that Keith had called a friend, Ethan Lux to help get Kelly and Tasha to a hospital for they were badly hurt. Keith testified that he was scared, and afraid Ethan would get into trouble. Keith therefore told Sheriff Fernandes that the accident occurred on U.S. Highway 13 closer to where Ethan lived. Ethan Lux was not called as a witness to testify to contradict or verify what Keith had said. The evidence at trial showed that Kelly and Tasha were too drunk to know where they were at and never really knew the location. Kelly and Tasha only knew about the location based on statements made to them by Keith. Kelly and Tasha testified that they had broken necks and were dealing with pain, pain medications, and going in and out of consciousness when they were asked questions at the Oaks hospital about the accident.

[¶38] Keith, Kelly and Tasha also stated different stories as to whether they were wearing seatbelts. When Keith, Kelly and Tasha were interviewed by Nodak's representative and deposed by their attorney, they each gave different answers as to whether each were wearing

seatbelts. At trial, Keith, Kelly and Tasha all testified that they could not remember if they had seatbelts on or not. The evidence presented at trial showed Kelly and Tasha were too drunk to know whether or not they were wearing seatbelts. Tasha testified that she did not have any recollection of anything after leaving the bar, Nogo's, in LaMoure. The one thing Keith, Kelly and Tasha never changed their story on was who was driving. All three continually said that Keith was driving.

[¶39] Fourth, Keith was injured in the accident. While Keith was able to brace himself by hanging onto the steering wheel, Kelly and Tasha did not have ahold of anything (T. 406). Keith testified that he spoke to Sheriff Fernandez about injuries he suffered in the accident and that he showed such to the Sheriff (T. 350, ln. 11-13; T. 380-383) and to Deputy Fleck (T. 417, ln. 1-3). When asked if Keith was injured in this accident, Sheriff Fernandez stated "I didn't see any noticeable injuries. I do believe he was complaining about rib pain" (T. 174, ln. 20-23). Sheriff Fernandez couldn't recall Keith mentioning cuts on his back (T. 185, ln. 16-25). The officers' lack of recall doesn't trump the testimony of Keith, Kelly and Tasha.

[¶40] No testimony of any nature "supports a conclusion that he was not even in the vehicle." The district court made no attempt to reconcile the fact that, consistent with the testimony of Kelly and Tasha, Sheriff Fernandez observed Tasha's Plymouth Breeze parked near Nogos Bar in LaMoure the ensuing few days after the accident, and that no surveillance cameras where sought which could have reflected if and when Kelly, Tasha and Keith were at the bar (T. 178, ln 19 thru T. 179, ln. 6; T. 249), nor were any witnesses identified who may have seen them in the bar (T. 187). The undisputed evidence at trial was that Tasha along with Kelly drove her vehicle to Nogo's but left in Keith's pickup. Tasha testified that she had been drinking heavily and does not remember after getting into a vehicle. Kelly testified that he was drinking heavily

and has very limited memory once he left Nogo's bar. The testimony was that Kelly had called Keith to pick them up and take them home because he and Tasha were too drunk to drive. The question then brought before the jury was questions of common sense. If you were called to pick up your drunk brother and his girlfriend who had a car there, why would you let them drive your pickup home. That made no sense and common sense would tell you that you would not let extremely intoxicated people drive your vehicle and then get into that vehicle knowing they had drank excessively.

[¶41] Finally, the fact that they were involved in this traumatic accident alone can explain why Keith and Kelly would be able to recall the accident in more specific details than any of Nodak's witnesses - especially where no one else witnessed the accident. A district court may, within limits, weigh the testimony and other evidence; however, that does not encompass any consideration of a party's "theory of the case". Here, "Nodak's theory of the case" does not override the uncontroverted testimony of Keith, Kelly and Tasha.

[¶42] When rectifying the jury's verdict with the district court's decision, it is evident that the evidence presented at trial is such that different persons would naturally and fairly come to different conclusions. The jury's verdict was not "manifestly against the weight of the evidence." Rather, the jury verdict was supported "by the great preponderance of the evidence."

CONCLUSION

[¶43] When considering Nodak's motion for new trial based on insufficiency of the evidence the district court impermissibly substituted its own judgment for that of the jury and acted as a thirteenth juror when the evidence is such that different persons would naturally and fairly come to different conclusions. The jury's verdict was not "manifestly against the weight

of the evidence." The district court's Order granting a new trial and vacating the April 10, 2018 judgment should be reversed and the declaratory judgment reintstated.

Respectfully submitted this 13th day of November, 2018.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief of Appellants complies with the type-volume limitations imposed by the North Dakota Rules of Appellate Procedure. The Brief of Appellants contains 6961 words of proportionately spaced type as counted by WordPerfect the software used to prepare the Brief of Appellant.

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CERTIFICATE OF MAILING

Lawrence P. Kropp, a member of the bar of this Court, certifies that on the 13th day of November, 2018 he mailed a true and correct copy of the foregoing BRIEF OF DEFENDANTS/APPELLANTS together with a copy of the APPENDIX OF DEFENDANTS/APPELLANTS to:

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