North Dakota Law Review

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District Court Digest

North Dakota Law Review

BENCH AND BAR

DISTRICT COURT DIGEST

CIVIL PROCEDURE — MOTION FOR MORE DEFINITE STATEMENT UNDER RULE 12 (e).— *Devlin v. Muus*, District Court of the First Judicial District. Grand Forks County, North Dakota, O. B. Burtness, District Judge.

Plaintiff in his complaint alleged that the defendant, a doctor, was negligent in performing an operation upon him, and lacked care and skill both in the diagnosis and performance of surgery—malpractice. In a subsequent paragraph it was alleged that the defendant performed a major operation upon the plaintiff without permission or consent, permission having been given for minor surgery only—"assault and battery and a trespass upon the body of the plaintiff". Further on the complaint stated: " . . . that as a proximate result of defendant's negligence, his breach of his professional duty to the plaintiff, his . . . battery and trespass upon the body of the plaintiff . . . the plaintiff has been damaged as follows . . ."

The defendant made a motion for a more definite statement under Rule 12 (e) "or in the alternative to separately state several causes of action that the plaintiff had co-mingled in one count in his complaint". The court denied the motion.

Judge Burtness stated that although it was true that two causes of action were really involved—one based on malpractice and the other on assault and battery—the Rules of Civil Procedure did not require any more technical pleadings than those contained in the complaint. Rule 10 (b) states that each paragraph "shall be limited as far as practicable to a statement of a single set of circumstances . . .", and the plaintiff's averments with respect to each of the two causes of action refered to were in separate paragraphs. Further, the Judge stated, "Under the provisions of Rule 8 (e) (2) the plaintiff has a right to set forth 'as many separate claims or defenses as he has'. Counsel [for the defense] has failed to point out where or how under Rule 12 (e) it can be claimed that the complaint 'is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading'. . . . [I]t is my conclusion that the counts in this case are pleaded separately although they are not technically set out and pleaded as a first cause of action and a second cause of action. While I feel that it would be preferable to do so I can find nothing in the rules which requires that technical distinction in the form of the complaint."

[2 Moore's Federal Practice § 10.03, p. 2005 (2d ed. 1958)]. "The new rules have not only eliminated technical forms but as I have sometimes said permit even sloppy pleadings."

DIGEST OF ATTORNEY GENERAL OPINIONS

COUNTIES — MEMORIAL FUNDS

January 5, 1959

Section 11-3201 of the 1957 Supplement to the North Dakota Revised Code provides, in the words of the title, "County Commissioners Authorized To Erect A Memorial Or Memorials Or Other Suitable Recognition; To Make Levy." Under the wording of the statute, funds accumulated ". . . may not be used for scholarships as a proper memorial under the provisions of chapter 11-32." This reasoning was inferred from the use of the following words in the statute: "Such memorial, or memorials, or other suitable recognition shall be *erected* . . . and when *erected* shall be properly maintained." (Emphasis added). The word "erect" implies something physical, such as a building or monument, and a scholarship would not fit within this classification.

MOTOR VEHICLES — LOCATION OF USED CAR LOTS

January 20, 1959

Section 39-04595 of the 1957 Supplement to the North Dakota Revised Code states that "[a] registered dealer . . . may establish open used car lots as may be necessary in the conduct of his business in an area not further removed than three miles from the city limits of the town in which he operates a licensed place of business."

"A used car lot is a lot where second hand automobiles are purchased, displayed, exchanged and sold." (124 A.2d 48). Under this reasoning a salesman having several used cars for sale in his yard 60 miles from the place of his employer's business, the salesman not falling within the definition of a "dealer" as stated in Section 39-0459, is in violation of the statute. The dealer must, in the words of the opinion, "confine its used car lots within three miles of the city limits in which it operates."

PUBLIC BUILDINGS — USE OF INMATE LABOR IN REPAIRING

January 19, 1959

Section 48-0202 of the 1957 Supplement to the North Dakota Revised Code provides that alterations, repairs and construction