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District Court Digests

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BENCH AND BAR

DISTRICT COURT DIGESTS

CIVIL PROCEDURE — CLAIMS AGAINST GENERAL ADMINISTRATOR IN ANOTHER STATE DOES NOT BAR HIS JOINDER IN ACTION IN NORTH DAKOTA. — *Gifford v. Moe*, District Court of the First Judicial District, Cass County, North Dakota, John C. Pollock, District Judge.

Churchill, a resident of Nebraska, was involved in an automobile collision in this state which resulted in his own death as well as the death of plaintiff's wife. A portion of his estate consisted of the remains of his automobile. The County Court of Cass County appointed the defendant Moe as special administrator of Churchill's estate with directions that Moe accept service of plaintiff's summons and complaint.

General administration of Churchill's estate was thereafter commenced in Nebraska and a general administrator appointed there. Plaintiff moved to add the general administrator as a party defendant.

Defendant's counsel objected on the ground a claim had been filed by plaintiff against Churchill's estate in Nebraska, and the pendency of this claim was a bar to joinder of the general administrator as a party defendant.

Judge Pollock ruled that the joinder was permissible under N.D. R.Civ.P. 20 and 21.

"From the pleadings in the action it appears that the interest of the present and proposed defendants as special and general administrators respectively is identical. Each is a personal representative of decedent. One judgment will satisfy any claim against both. Upon qualification of said general administrator in our county court, defendant Moe would be subject to discharge by said county court.

"Under the provisions of Chapter 204 NDSL 1955, in event of a nonresident automobile driver's death in the accident which is the subject of this action, the general administrator may be served in the same manner and with the same effect as the decedent himself might have been had he survived. In one of the citations of plaintiff in support of the motion the New York Court holds that such service made under a similar or identical statute is effective. *Leighton v. Roper*, 300 N.Y. 434; 18 A.L.R.2d 537.

"Objection of defendant's counsel to joinder of the general administrator on the ground that a claim has been filed by plaintiff against decedent's estate in Lancaster County Court, Nebraska, is not a bar to making the general administrator a party to this action. The amount of said claim is not liquidated. It is notice to the general administrator and the probate court that plaintiff claims a right to recover from the estate of the decedent. Only a judgment such as may be given in an action on tort in this court or one of similar jurisdiction can make it a liquidated claim. The only manner in which such a claim may be satisfied in the probate court where it is filed is by compromise between plaintiff and the general administrator with the approval of the court. In event of a failure to so compromise plaintiff would be compelled to resort to the courts of that state. The action is commenced here and the matter of liquidation of the claim can be determined in the instant action."

CIVIL PROCEDURE—JOINDER OF PARTIES UNDER RULE 19(b) OF THE NORTH DAKOTA RULES OF CIVIL PROCEDURE. — *Lobdell v. Lenertz,* District Court of the First Judicial District, Grand Forks County, North Dakota, O. B. Burtness, District Judge.

This was an action by three minor children to recover damages for personal injuries on the ground of the defendant's alleged negligence in operating her car and colliding with them at a grocery store parking lot at Grand Forks. The grocery store — Miller's Super Fair — was situated at the rear of the premises. The front portion was used as a parking lot and was also used by patrons, who had to cross the parking lot in going to and leaving the store on foot.

Defendant moved to add Donald and Roy Miller, proprietors of the store, as additional parties on the ground they were "solely or jointly liable for the damages complained of, that their inclusion in this action is necessary for a complete determination of all of the issues involved and it is necessary to avoid a multiplication of lawsuits and that it is further necessary to best serve the ends of justice." The motion was made under N.D.R.Civ.P. 19(b), which provides:

"When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the juris-

diction of the court as to service of process, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them can be acquired only by their consent or voluntary appearance; but the judgment rendered therein does not affect the rights or liabilities of absent persons."

Defendants contended that the Millers might have been joint or concurrent tort feasors.

Judge Burtness denied the motion.

1. "It seems admitted that the parking lot was level, that it had no obstacles or pitfalls therein, that no employee of Millers had anything to do directly with the accident and that about the only contention which could be made tending to show any possible negligence on the part of the Millers was the absence of some attendant to guide traffic in and out of the parking lot which was relatively small and somewhat congested." An examination of authorities cited to the court failed to reveal any case where liability had been predicated upon failure to keep an attendant on a lot to direct traffic.

2. The real issue was the construction of N.D.R.Civ.P. 19(b). "In simple and unambiguous language it provides that the court shall order those to be summoned and appear in the action 'who ought to be parties if complete relief is to be accorded *between those already parties.*' " (Emphasis supplied by court.) "In this case it is clear that complete relief can be accorded between the plaintiff minors and the defendant.'

3. The Court's ruling did not affect the right of the defendant to seek contribution from the Millers if defendant wished, and was not an adjudication of the merits in any fashion.

CIVIL PROCEDURE—SERVICE OF GARNISHEE SUMMONS UPON OFFICER OF STATE INSTITUTION. — *Normand v. Mikkelson* (State of North Dakota, *garnishee*), District Court of the Second Judicial District, Walsh County, North Dakota, A. L. Lundberg, District Judge.

Plaintiff sued defendant, an employee of the Grafton State School, and attempted to garnish defendant's salary by serving a garnishee summons upon the Superintendent of the Grafton State School. On motion to dismiss the garnishment proceedings, Judge Lundberg held that the service of the summons upon the Superintendent was insufficient and that such service should have been

made upon the State Auditor under N.D. Rev. Code § 32-0905 (1943). The garnishment was therefore dismissed.

The plaintiff argued that the section of the Code involved provided that the State Auditor "may" be served but not that he "must" be served, and hence was permissive rather than mandatory. It was contended that plaintiff was entitled to proceed by an alternative method of making garnishment "and that since the Superintendent of the State School is the local head of the institution he can be served just as the manager of a branch office of a corporation can be served."

Judge Lundberg stated: "In weighing these arguments we have looked at the histories of the legislation in question which often throws light upon legislative intent and purpose. It appears that Chap. 188 Laws of 1929, first amended Sec. 7567 C.L. 1913, so as to permit garnishment of the State of North Dakota or its institutions. It is to be noted that this Chapter contains the provisions that service 'may' be made upon the State Auditor. It would, therefore, appear that the Legislature recognized that it was broadening the remedy, and it would seem that, even though they used language which appears permissive rather than mandatory, they intended that service upon the State Auditor should be *exclusive*. We have not been referred to any statute which indicates any legislative intent to include a State in the general category of corporations that can be served by service upon someone in charge of a 'branch office.' It appears to us that if the plaintiff had served the Board of Administration a closer analogy to the business service method would have been reached as such Board is really the 'manager' of the State School."

Nor did N.D.R.Civ.P. 4(d) (6) have a bearing on the situation. This rule, in referring to an "agency of the State" refers to such agencies as the Bank of North Dakota or the State Mill and Elevator Association, or any other agency that is recognized as a sort of legal entity and so declared to be subject to independent suit by the statute or statutes creating it. "While the garnishment statutes are not expressly excepted from the rules of civil procedure and are not listed in Table 'A' of the Rules, we think they would come within the provisions of Rule 64, which appears to apply to garnishment, attachment, and so forth."

CRIMINAL PROCEDURE — SUFFICIENCY OF NEWLY DISCOVERED EVIDENCE AS GROUNDS FOR A NEW TRIAL.— *State v. Jager*, District Court of the Second Judicial District, Ramsey County, North Dakota, Albert Lundberg, District Judge.

Jager and Stewart were convicted of grand larceny in 1954. In 1957 the conviction was affirmed by the North Dakota Supreme Court, *State v. Jager*, 85 N.W.2d 240 (N.D. 1957), and on December 14, 1957, the Supreme Court denied a further petition to amend the statement of the case. *State v. Jager*, 87 N.W.2d 58 (N.D. 1957).

The certificate of remittitur was, however, not immediately transmitted to the District Court. On January 15, 1958, the defendants moved for a new trial on the ground of newly-discovered evidence, submitting to the District Court a six-page pencil statement and a 70-page statement both made by one Wheeler in the state of California. In these documents, the last of which was made to a lawyer who interrogated Wheeler, Wheeler stated that he and a companion named "Sonny" committed the crime for which defendants had been convicted.

The State resisted the motion for new trial on the grounds that the District Court was without jurisdiction to entertain it since the Supreme Court had affirmed the conviction and the case was no longer "pending." The State also contended that the alleged confessions were fraudulent, that Wheeler was in the employ of the defendants, and that the statements had been made without notice to the State or an opportunity to cross-examine Wheeler.

A hearing on the motion for new trial was held on January 20, 1958. Defense counsel advised the District Court steps would be taken to "have Wheeler brought to North Dakota, or at least examined, after notice to the State, so that an opportunity for cross examination would be presented."

On January 27, 1958, defense counsel advised the District Court he had been informed Wheeler was being "held by police in Ensenada, Mexico, but that the prosecution had announced they would do nothing about attempting any extradition but would expect Mr. Wheeler to appear voluntarily."

On January 30, 1958, the Supreme Court of North Dakota ordered the remittiturs in the action transmitted to the District Court, the order being entered without opinion.

It appeared to the District Court there was "no immediate prospect of Wheeler either being brought to North Dakota or being

examined." Defense counsel advised the District Court "that the procuring of a more adequate set of proofs seemed impossible in view of Mr. Wheeler's being held in a Mexican jail and the State taking the position that it was up to the defendants and not the State to do anything about it."

On this set of facts, Judge Lundberg ruled as follows:

1. The District Court had jurisdiction to entertain the motion for new trial. The matter of new trial is controlled by statute. "There is not at the present time and has not been since Chap. 207, 1951 Laws, took effect, any time limit by statute within which applications for a new trial may be made except insofar as Sec. 29-2404 makes a provision and seems to set up a thirty-day limit after discovery of the facts cited as a ground." The Court rejected the contention that it was prohibited by *State v. Prince,* 66 N.W.2d 796 (N.D.), from entertaining a motion for new trial unless the case was "pending" on appeal. "It seems to us that the 1951 repeal of Section 29-2406 could only have one purpose, viz: to remove all time limits within which a motion for a new trial can be made except insofar as these time limits are restricted in Section 29-2404."

2. On the merits, the motion for a new trial could not be granted. "One of the most fundamental rules of the law seems to be that a new trial should not be granted on the grounds of newly discovered evidence unless such evidence is such as to probably change the result of the trial." The Court also held that it is the duty of the trial court to determine the credibility of the newly discovered evidence and if the Court "is satisfied that such testimony would not be worthy of belief by a jury, the motion should be denied." However, in considering these matters the court may in its discretion relax the technical rules of evidence, especially where the newly discovered evidence is positive as to the innocence of the accused and where the conviction rests on circumstantial evidence.

However, the new evidence must be admissible under the established rules of evidence. "If we now proceed to examine the six-page 'confession' and the 'statement' of some 70 pages, which were submitted to the court with the Motion, we are at once struck with the fact that this material is *obviously not admissible* as evidence in its present form under any rules of evidence." (Emphasis supplied by court). "If a new trial should, therefore, be granted and no more than this material be available it could clearly not change the result because it could not be introduced."

The District Court further found that the documents tendered contained many elements of improbability, and that there was not a reasonable prospect that the improbabilities could be or will be removed. Accordingly the motion was denied.

JUDICIAL REMEDIES — CONTRIBUTION AMONG TORT FEASORS ACT IS SUBSTANTIVE IN NATURE.—*Juhl v. Wilkes* (Lester Juhl, Third-Party Defendant), District Court of the Second Judicial District, Cavalier County, North Dakota, Obert C. Tiegen, District Judge.

On August 13, 1956, the plaintiff was riding as a guest in a motor vehicle driven by Lester Juhl which collided with a tractor operated by the defendant Wilkes. Some time after July 1, 1957, plaintiff brought an action for damages against the defendant as a result. Defendant Wilkes thereupon impleaded Lester Juhl, the host driver, as a third-party defendant under N.D.R.Civ.P. 14(a), alleging a right to contribution from Juhl on the ground he was a joint tortfeasor.

The third party defendant moved to dismiss the third-party complaint for failure to state a claim upon which relief could be granted, on the ground that at the time of the collision there was no right to contribution among joint tortfeasors in the state of North Dakota.

The third-party plaintiff argued that the Contribution Among Tortfeasors Act, N. D. Laws 1957, c. 223, was in effect at the time the action was instituted and hence was applicable.

Judge Teigen granted the motion to dismiss the third-party complaint. As a basis for his decision, he ruled:

1. N.D.R.Civ.P. 14(a) permits impleader of a third-party defendant against whom a substantive right of contribution as a joint tortfeasor exists. However, before impleader under Rule 14(a) is proper a substantive right to the relief demanded in the third-party complaint must be shown to exist. *Wilson Storage and Transfer Co. v. Geurkink*, 242 Minn. 60, 64 N.W.2d 9; *Gustafson v. Johnson*, 235 Minn. 358, 51 N.W.2d 108.

2. At the time the accident occurred, no statute conferred a right of contribution among joint tortfeasors in this state. N.D. Rev. Code § 1-0103 (1943) provides that in the absence of constitutional or statutory enactments applicable to civil rights and remedies the common law shall govern. At common law contribution among joint tortfeasors was not permitted in the absence of statute.

Blashfield's Cyclopedia of Automobile Law, Vol. 5A, § 1356 (Perm. Ed.); 13 Am. Jur., Contribution § 37. Prior to the enactment of the Contribution Among Tortfeasors Act, it had been held by the Federal District Court that under the common law of the state of North Dakota there could be no contribution among joint tortfeasors. *State ex rel. Workmen's Compensation Bureau v. Przybylski,* 98 F.Supp. 21 (N.D. 1951). South Dakota, possessing identical statutes, has ruled to the same effect. *Wallace v. Brende,* 66 S.D. 582, 287 N.W. 328 (1939); *Tufte v. Sioux Transit Co.,* 7 N.W.2d 619 (S.D. 1943). On these authorities, the Court was of opinion that the right of contribution did not exist in North Dakota prior to the enactment of the Contribution Among Tortfeasors Act.

3. "The third-party plaintiff in his brief argued that the third-party defendant could not complain had the plaintiff brought him in as a joint defendant. That the tort-feasor's contribution act only provides a means of impleading a third party defendant under our new rules governing third-party practice, but it does not give rise to another cause of action but merely a right to implead another where there is failure on the part of the plaintiff to do so. That there is no new cause of action. No new liabilities are created, and that it is of essence in this case that the action was brought by the plaintiff after July 1, 1957, and after the joint tort feasor contribution act and the new rules of civil procedure came into effect." The third-party plaintiff thus argued that the act was procedural. The third-party defendant contended the act was substantive.

The court ruled that in the absence of language in the act providing that it was retroactive or retrospective in effect, the Contribution Among Tortfeasors Act could not be applied to actions arising before its effective date. The Court was of opinion that the act is substantive in nature. "The statute first creates the right to contribution, which is substantive, and then provides the procedure." The court cited *Distefano v. Lamborn,* 81 Atl.2d 675 (Del. 1951) as being of comparable nature. It also cited in support of its view *Klaas v. Continental Southern Lines,* 82 So. 2d 705 (1955); *Commercial Casualty Ins. Co. v. Leonard,* 196 S.W.2d 919 (Ark. 1936); *Bargeon v. Seashorne Transportation Co.,* 147 S.E. 299 (N.C. 1929); *Norfolk Southern Ry. v. Beskin,* 125 S.E. 678 (Va. 1924).

RES JUDICATA — EFFECT OF DENIAL OF INSTRUCTION ON LAST CLEAR CHANCE DOCTRINE IN FORMER SUIT BETWEEN PARTIES. — *Pederson v. Bogart*, District Court of the First Judicial District, Grand Forks County, North Dakota, O. B. Burtness, District Judge.

On August 13, 1955, an automobile driven by Margaret Pederson collided with an automobile driven by Alfred D. Bogart. On February 21, 1956, Bogart commenced an action for bodily injuries and property damage against Mrs. Pederson, alleging negligence. Mrs. Pederson filed an answer denying that she had been negligent and asserting that Bogart had been guilty of contributory negligence, but this answer contained no counterclaim.

On May 11, 1956, Mrs. Pederson commenced an independent action against Bogart for property damage and bodily injuries arising from the accident, the action being based on the theory that Bogart had the last clear chance to avoid the accident.

In March, 1957, Bogart's action against Mrs. Pederson came to trial. Mrs. Pederson asked for an instruction to the jury to the effect that if Bogart had the last clear chance to avoid the accident and failed to do so, she was not liable. This instruction was refused and the jury rendered a verdict in favor of Bogart for $1300 damages. Mrs. Pederson paid this judgment.

Bogart then amended his answer to Mrs. Pederson's action of May 11, 1956, to allege that all issues tendered by Mrs. Pederson's complaint had been adjudicated and that the action was barred by defense of res judicata. Bogart then moved for summary judgment. In response, counsel for Mrs. Pederson contended that since the trial judge in the action by Bogart against Mrs. Pederson had denied an instruction dealing with the issue of last clear chance, the matter had never been passed upon or determined.

Judge Burtness ruled that the defense of res judicata was well taken and granted the motion for summary judgment. In his opinion he examined the ruling of the trial court in denying the instruction on last clear chance in the earlier case. He quoted the earlier ruling, which contained the following statement: "Under the instructions of the court given to the jury in the . . . action, the jury weighed the evidence and determined that it was the negligence of the defendant, Mrs. Pederson, which was the proximate cause of the accident."

Judge Burtness stated: "As I see it the issue involved was completely adjudicated in the former case and is therefore res judicata

and binding upon this Court." He cited as authorities in point *Mabardy v. Railway Express Agency, Inc.*, 26 F.Supp. 24 (D.Mass. 1939); 3 Barron & Holtzoff, Federal Practice and Procedure 128 (1950).

DIGEST OF ATTORNEY GENERAL OPINIONS

JUDICIAL BRANCH — JURORS FEES AND MILEAGE
February 4, 1958

Section 27-0905 of the 1957 Supplement to the North Dakota Revised Code of 1943 provides for traveling expense of jurors for each mile actually and necessarily traveled each way to the place of trial. While generally jurors are paid mileage for one trip each way, and are not compensated if they return home while they are excused, if the entire panel of jurors is excused for a period of days, the county may pay the extra mileage incurred.

PUBLIC BUILDINGS — AWARDING CONTRACT TO DOMESTIC CORPORATION OWNED BY NON-RESIDENTS
January 27, 1958

Section 48-0206 of the 1957 Supplement to the North Dakota Revised Code of 1943 provides that in awarding a public building contract preference is to be given to ". . . the lowest qualified bidder who has been a resident of the state for at least one year . . ."

A domestic corporation is a resident of the state under whose laws it was incorporated. No one may look beyond its charter and consider other facts in determining its residence. Therefore, the fact that a domestic corporation is owned by a foreign corporation or by foreign stock holders and a majority of its directors are residents of a foreign state is not to be considered when applying section 48-0206 of the Code.

OPINION OF THE ABA PROFESSIONAL ETHICS COMMITTEE

OPINION 293
(Adopted: November 13, 1957)

ADVERTISING — Publication in a local newspaper of New Year's greetings by a lawyer, improper under Canon 27, although without designation as a lawyer, although party holds public office and although supported by local custom.

Canon 27,
Opinions 4, 59, and 109

The chairman of the local ethics committee of a state bar association has asked our formal opinion as to whether it is contrary to the Canons for practicing lawyers to publish in a local newspaper the following advertisements:

1. Councilman and Mrs. John Jones extend sincere wishes to all for a Happy New Year.
2. Happy New Year to all, John Smith.

Both John Jones and John Smith hold public office.

We are advised that the publication of such greetings is not uncommon in the locality.

In the opinion of the Committee the publication of these advertisements is in each case contrary to both the letter and spirit of Canon 27, the careful reading of which the Committee commends to the attention of all lawyers.

In Opinion 107 we disapproved the publication in the form of a joint Christmas greeting of an advertisement signed by twenty-two persons, including ten lawyers.

In Opinion 59 we condemned the distribution by a law firm in the form of a Christmas greeting of a "year book" convenient as a diary or appointment book. In this opinion the Committee said:

> The purchase and distribution of the "year book" described in the question is obviously a form of advertising. Its purpose is to remind the client at the Christmas season of the fact that the donor is still practicing law and the clear expectation of the attorney is that, through the use of the book, the client will be so reminded day by day during the ensuing year. It is a subtle commercialism of the spirit of good-will which prevails at the holiday season, and its impropriety is not lessened because it bears the guise of that spirit. The distribution of such book, being a form of advertising, must be condemned as a violation of Canon 27.

In one of its earliest opinions the Committee held that a violation of Canon 27 was not justified by local custom: Opinion 4.

In the Committee's opinion the advertisements are not justified by the omission to state that the advertisers hold public office or that they are lawyers.

Lawyers continuing to practice as such cannot insulate themselves from the Canons by acting in other capacities.

LETTERS TO THE EDITOR

Dear Sirs:

I have read with interest your Recent Case commentary on *Nelson v. Miller*, 143 N.E.2d 673 in the January, 1958, issue of the North Dakota Law Review.

I though it may be of interest for you to know that the Committee on the Draft of N.D.R.Civ.P. had in mind Section 17 of the Illinois Civil Practice Act in preparing our own Rule 4(e)(3). We limited service, however, to situations where the party to be served shall "engage in business in this State". Service in nonresident motor vehicle cases provided for by statute is preserved by Rule 4(f). The Committee felt it unwise to extend the rule to all tortious acts or transactions, as was done in Illinois.

Actually, we adopted our Rules from Section 229(b) N.Y.C.P.A. The Supreme Court decision justifying the constitutionality of this type of service is found in *Henry L. Doherty & Co. v. Goodman*, 55 S.Ct. 553.

Very truly yours,

EUGENE A. BURDICK,
District Judge.