2014 WL 2573536 (N.D.) (Appellate Brief)
Supreme Court of North Dakota.

Faith KRUEGER, Plaintiff, Appellant and Cross-Appellee,
v.
GRAND FORKS COUNTY, Defendant, Appellee and Cross-Appellant.

No. 20130372.
April 4, 2014.

Dist. Court No.: 18-2012-CV-01070
The Appellant, Faith Krueger Appeals from the Judgment and Orders in the County of Grand Forks
State of North Dakota By the Honorable M. Richard Geiger

Appellant's Brief

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

11 Following a jury trial in which the decision favored the Defendant and Appellee, Grand Forks County (“County”), the Plaintiff and Appellant, Faith Krueger (“Faith”), filed this appeal with several issues for this Court's review. The Appellant presents the following issues:

1. Whether the trial court erred in denying her motion to compel discovery of evidence relevant to the case.

2. Whether the trial court **abused** its discretion by denying her a continuance due to the strong influence of publicity from a jury trial from a previous companion case with similar allegations against the County just days before her trial.

3. Whether the lower court **abused** its discretion in excluding material evidence and witnesses in the trial.

4. Whether the trial court **abused** its discretion by denying damages for mental anguish, and the exclusion of any related evidence.

5. Whether the trial court incorrectly gave jury instructions, causing a new trial.

6. Whether opposing counsel's closing remarks to the jury included inflammatory words that prejudiced the jury, resulting in setting aside the judgment.

7. Whether Faith's right to a fair trial was violated under the due process clause of the U.S. Constitution, triggering a new trial.

STATEMENT OF THE CASE

12 This case comes to the Supreme Court from the Northeast Central Judicial District in Grand Forks, ND, from a Judgment by the Honorable M. Richard Geiger, dismissing the Plaintiffs case due to a jury decision. The Plaintiff, Faith Krueger, filed a Complaint, alleging breach of fiduciary duty, negligence, trespass to chattel, conversion, intentional infliction of emotional distress, and negligent supervision against the County, because Barbara Zavala, an employee with the duties of Public Administrator, was responsible as Faith's appointed guardian and conservator for her lost or misappropriated property. Faith's claimed lost property amounted to about $300,000.00. Litigation of her claims began with a Complaint on July 25, 2012. After a 3-day trial, the jury's decision was reached on September 12, 2013, finding against the Plaintiff. The trial court issued its Judgment of Dismissal on September 17, 2013. Plaintiff appealed on November 14, 2013. Defendant cross-appealed on November 27, 2013.

13 Throughout this Brief, reference is made to the trial court 258 item docket (“Doc”), 200 page Appendix (“App”) and 609 page Trial Transcript (“Trans”).

STATEMENT OF THE FACTS

¶4 Faith Krueger was born in 1926 as an only child. Trans- 100-09, App- 132. She is a college graduate and was employed by the University of North Dakota for twenty years. *Id.* She met Jack Krueger in 1950, and they married in 1951. *Id.* Jack was an only child, as well, and they had no children. *Id.* He was an engineer and taught civil engineering at UND for over 30 years. *Id.* He retired in 1990, and died in 2007. *Id.* Faith resided at Parkwood Place, a retirement facility in Grand Forks, from 2007 to 2011. *Id.* Jack owned a farmstead in East Grand Forks, MN, and was a savvy investor in gold and silver, as well as stocks and bonds. *Id.* While Jack and Faith were married, they travelled the world, owned timeshares in Florida, acquired nice things for their home, and lived fairly well. *Id.* Shortly after Jack died, Faith was admitted to the **Elder** Care Unit of Altru Hospital in May 2011, because she was extremely depressed and she needed her treatment medications adjusted. *Id.* That was accomplished through in-patient care. *Id.*

¶5 On June 17, 2011, Barbara Zavala, the Grand Forks County Public Administrator, was appointed as Faith's temporary guardian and conservator because Faith had no one else to care for her in her state of incapacity. *Id.*, App- 120. Later, in June, Faith was moved to the Aneta Nursing Home in Aneta, ND, where she complained about the facility to her guardian. Id. In August 2011, Zavala was appointed as Faith's permanent guardian and conservator. *Id.*, App- 126. In November 2011, Faith was moved to Tufte Manor, in Grand Forks, and she again complained. *Id.* Finally, in January 2012, Faith was moved to Valley 4000 Memorial Home in Grand Forks, where she resides today. *Id.*

¶6 After Zavala's appointment as Faith' guardian and conservator, Faith's life changed dramatically. Not only was she moved from abode to abode against her will, her apartment at Parkwood Place was completely cleaned out by Zavala and her assistant, Kathy Westensee, on July 15, 2011. Trans- 434. Of particular note, as required under NDCC § 30.1-28-12, there was not a proper accounting of her belongings in her apartment, including approximately 22 silver bars with a value of about $4,000 each, missing gold coins valued at over $100,000, and other valuable jewelry, porcelain pieces and paintings. *Id.* at 434-36, 298-300. Faith also owned a house in Grand Forks, and it was sold for $24,397.47, by Zavala on July 25, 2011, without an appraisal to a person who buys homes, fixes them up and sells them. App- 22, Trans- 355-58. On July 15, 2011, Westensee sold five of Faith's 8.5 lb. silver bars for $19,285.00, which were purchased by her late husband Jack as an investment. Trans-

434, App- 22. On November 15, 2011, Zavala submitted a Conservator's Report to the Court. App-22. All of these sales of Faith's assets were done without her knowledge and consent. Trans- 146. When she was informed of the sales, she expressed her dismay to Zavala in several letters, especially of the low price for her home, which she grew up in and inherited from her parents. Trans- 143, Doc- 213.

17 On January 19, 2012, Zavala received a notice from the County, asking her to resign due to apparent financial discrepancies in the accounts of wards, who were entrusted to her fiduciary duty as the Public Administrator ("PA"). App-144. After receiving the notice or letter, Zavala visited Faith's safety deposit box at US Bank. Trans- 314. Since the bank was unaware of her resignation, Zavala was permitted to access the bank's vault and open Faith's safety deposit box, and the bank had no camera in the vault to record Zavala's activity. *Id.* On January 20, 2012, Zavala resigned as the PA. Trans- 380. On January 24, 2012, Wayne Westlund, as the stand-in PA, was appointed as Faith's guardian and conservator. Trans- 210. On June 19, 2012, Faith's guardianship was terminated by the district court based upon re-evaluations by a psychiatrist and social worker, who found her capable of handling her own affairs due to her medication stabilization for depression. App-19, Trans-105. On July 3, 2012, Faith coordinated to have her safety deposit box drilled since the keys were apparently lost or ceased by the N.D. Bureau of Criminal Investigation (BCI) during its investigation of Zavala and Westensee. Trans-117-18, 230, 311. It was then that Faith discovered the missing gold coins that her husband had purchased as an investment. Trans-118-19. After an inventory of the safety deposit box contents, no gold coins were found, only 17 silver bars and other jewelry and keepsakes remained. Id., App-27. She was given a new safety deposit box by US Bank, where she stored the remaining valuables, which would be valued at over $75,000. Trans- 312. Zavala's Conservator Income and Expense Report ("Conservator's Report") filed with the court on November 15, 2011, stated that the unaccounted number of "gold and silver valuables" was only identified as "market value" for an asset. App- 22. Faith was not given notice of the Conservator's Report, so she could not dispute its contents. Trans- 135, 146.

18 Because of the numerous missing or unaccounted for assets in her estate, Faith Krueger filed a lawsuit against Grand Forks County on July 25, 2012, alleging breach of fiduciary duty, negligence, negligent supervision, trespass to chattel, conversion, and intentional infliction of emotional distress. Doc-2. Her claimed property losses amounted to over $300,000.00, and she also claimed non-economic losses for mental anguish. App-27, Trans- 10. An amended complaint was filed on October 8, 2012. App- 13. As a result of a partial granting of the Defendant's motion for summary judgment, the Plaintiffs claims were reduced to breach of fiduciary duty, negligence, trespass to chattel and conversion. App- 40. The mental anguish part of the damages for these claims was denied by the trial court, as well as any evidence relating to mental anguish was excluded from the trial. Trans- 21-22.

19 Zavala was employed by the County on September 18, 2008, following Wayne Westlund's tenure as the PA from 2004-2008. Trans- 210. The Grand Forks County Commission approved her appointment and employment as the PA, and paid her a monthly salary of $1,250 per month, according to her contract, which also included insurance benefits, bonding, travel costs and office expenses. App-20, 138. On July 14, 2011, Zavala requested a pay raise from the County Commission on "Grand Forks County" letterhead stationary, which was approved as noted in the Commission's meeting minutes. App- 21, Doc- 212. She was paid by the County and received an annual W-2 tax statement from the County. Trans-367-68. She maintained her office in the County building on the sixth floor. App- 21. She had a County e-mail address, and the wards financial accounts were tracked on the County's computer system, so the County Auditor had access to Zavala's accounts. Trans- 388. Zavala was the guardian and conservator for about 30 wards at any one time during her tenure as the PA. Trans- 385-87. Kathy Westensee was her assistant. Trans- 431. The Grand Forks County employee manual clearly shows that the Public Administrator is a recognized department under the Grand Forks County Government. App- 136.

110 A letter dated September 19, 2011, from Debbie Nelson, County Auditor, to Mike Flannery, a former Grand Forks Police Department officer, cited numerous allegations of misappropriated funds discovered through the County's computer system of Zavala's wards' financial accounts. App-111. BCI was requested to investigate the matter, which led to the resignations of Zavala and Westensee on January 20, 2012. App- 115, 144.

111 The known evidence of the County employees' wrongdoing is overwhelming. In addition to the trial testimony, a 9/19/2011 letter stated that there were irregularities with 17 of Zavala's wards. App- 111. Therein, Auditor Nelson stated: “I have reviewed a few of the [Conservator's] Reports filed with District Court and each one of the four I reviewed had social security income and medical expenses greater than the check register. I do not know why they would do that. [] I am making this report because of the possibility vulnerable adults are being defrauded.” Id. On January 19, 2012, Zavala acknowledged receipt of a notice to appear before the County Commission to discuss the topic of “termination of employment for the following reasons: 1. Falsified information presented to a law enforcement investigation [and] 2. Misappropriation of funds.” App-144. Coincidently, on that same date, 1/19/12, a letter from the N.D. Insurance Department (“NDID”) acknowledged a claim on the County's fidelity bond. App- 145. On August 8, 2012, NDID sent a letter to the Grand Forks County State's Attorney's office stating, “Debbie Nelson's letter resulted in an investigation that uncovered additional facts as shown by the BCI initial report by Special Agent Cal Dupree showing date of offense ‘10/10/2011 thru 10/31/2011.”’ App- 115. NDID denied the County's claim because it was not submitted within the 60-day legal requirement. Id. In a September 21, 2012 letter from NDID, signed by its legal counsel, Mary N. Hoberg, it stated, “The four-page September 19 letter cites multiple instances of moneys handled by the bonded employees that are not accounted for.” App- 117. It further states, “The gravamen of the September 19 letter is knowledge of a default or wrongful act.” Id. Thus, upon reconsideration, the County's claim was denied by the NDID. Id.

112 All four of these documents, further establishing that Zavala and Westensee were County employees and that there was a scheme involved in defrauding wards of their estates, were offered as evidence in this case, and they were all excluded by the trial court. App- 54, Trans- 23. The alleged scheme was further evidenced by the testimony of Rita Hjelseth, of Michigan, ND, who was acquainted with Westensee through her job there. Trans- 331. Hjelseth testified that Westensee admitted to her that Kathy and Barb Zavala were involved in a scheme or scam to rip off the wards they were in charge of. Id. at 332-35. She said, “To me it sounded like a scheme. Or a scam. I don't know what anybody else would think.” Id. at 335.

113 In the course of the litigation, Faith made a motion to compel discovery of information, which was not produced by the County, including the papers cited above. Doc- 31. The motion was based on several attempts to obtain the documents in the possession of the County, starting with a Rule 34 Request for Production of Documents and including a Subpoena Duces Tecum, requesting all the documents relating to the employment and termination of Zavala and Westensee, for the deposition of Auditor Nelson. Id., App. 104, 107, 109. The court denied the motion to compel, and awarded the County $3,382.50 in attorney fees and costs. App-35.

114 Documents still not produced are the letters written by the County to NDID regarding the claim on their employees' bond, any e-mails, and the BCI initial report of the investigation of Zavala and Westensee, as well as their personnel files with the County Auditor. These were all relevant documents.

115 In addition, the trial court denied testimony from retired Judge Joel Medd, who was the presiding judge when Zavala's contract was signed in 2008 and could have testified regarding the role of the judicial branch in the appointment and its oversight of the duties of the PA or the self-evident assumption that the County had supervision of the position of PA. Trans- 69. In closing remarks to the jury, the County's attorney referred to Judge Medd several times and to the district court's role in the matter no less than 10 times. App- 146-77. The trial court also denied testimony from Assistant State's Attorney Haley Wamstad, who would have been able to testify regarding the efforts to obtain bond coverage for the County employees, Zavala and Westensee, as well as her role in the apparent fraud scheme investigation being conducted. Trans- 25. Of note, as of the writing of this brief, there have been no criminal charges brought against Zavala or Westensee, since their resignations on January 20, 2012 over two years ago. Could it be there is a deliberate delay in the criminal charges in order to exclude evidence until this civil action has ended?

116 During the trial, when the former PA Westlund testified, he was asked to lay the foundation for offering of a piece of evidence marked as Exhibit 25, Guardian Ad Litem Report, dated September 9, 2011 (App-132), regarding the permanent guardianship and conservatorship of Faith Krueger. Trans- 241. The report was part of Zavala's permanent petition. App- 126. Westlund had nothing personally to do with it, and he had no personal knowledge of it. There was no objection made to the court, since it was not realized until a review of the trial transcript and the exhibits that the error occurred. What is most

important and disturbing about this trial irregularity is the County attorney's closing remarks to the jury, stating that Faith's testimony was not reliable because her guardian ad litem, an attorney, reported that she was mentally unstable in 2011, stating: "He [the guardian ad litem] goes on to say, It is almost as though she' meaning Faith Krueger 'exists mentally back several years back before her faculties deteriorated."' Trans- 557. In further closing remarks, he states: "That's an independent third person, a lawyer, with a fiduciary responsibility to Faith Krueger. A guardian ad litem telling you that she is not reliable." Id. The County's attorney continued to attacked Faith's credibility with outdated reports from physicians, citing from the petition for the temporary guardianship in 2011 of the petitioner Zavala (Exh. 21, App-121), stating, Faith "will need long-term care given her memory problems and psychiatric problems, which includes hallucinations and delusions." Trans- 553, App- 150. Also, in closing, he cites from Zavala's permanent petition for guardianship in 2011, stating, "She [Faith] was reduced on this dosage [depression medication] early in her stay and became blatantly psychotic." Trans- 557, App- 154.

117 Finally, the facts of this case show that the jury's Special Verdict Form indicates that the jury decided in favor of the Plaintiff, Faith Krueger, on all counts (breach of fiduciary duty, negligence, trespass to chattels, and conversion), however, on each count it decided that the apparent violation of law was not the proximate cause of her damages. App- 57.

118 The court's Judgment was made on September 17, 2013. App- 34. A Notice of Appeal was made on November 14, 2013 (App- 103), and is based on several grounds for a new trial.

STANDARD OF REVIEW

119 Generally, the issues presented for review in this case have a standard of review by this Court of an **abuse** of discretion by the lower court. The standard of review may be also noted in conjunction with the discussion of the issues below. A trial court **abuses** its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of a rational mental process leading to a reasoned determination, or it misinterprets or misapplies the law. *Schneider v. Schaaf, 1999 ND 235, ¶ 12, 603 N.W.2d 869.*

ARGUMENT

I. The trial court's decision to deny the Plaintiffs motion to compel discovery was an abuse of discretion.

120 This case involved a number of claims that depended on evidence in possession of the Defendant, County, a governmental entity, and it became abundantly clear, as the facts reveal, that the County was stonewalling the Plaintiffs demand for production of documents.

121 Because of the County's steadfast resistance to producing requested documents, Faith filed a Motion to Compel pursuant to Rule 37, N.D.R.Civ.P., on May 6, 2013. Doc- 31. The motion was accompanied by two affidavits by her attorney, certifying that several attempts were made to obtain documents from the County, including an exhibit of the Subpoena Duces Tecum of Auditor Nelson for her deposition on April 30, 2013. Docs-34, 35, 48, App- 104, 107, 109. Following the filing of the Motion to Compel, the County produced three of the documents requested by the Rule 34 request for production of documents, which included a letter written by Auditor Nelson to Detective Flannery, GFPD, dated 9/1/11 (App- 111); a letter from Jeff Bitz, NDID, to Asst. State's Attorney Wamstad, dated 8/8/12 (App- 115); and a letter from Mary Hoberg, Legal Counsel for NDID, to Wamstad, dated 9/21/12 (App- 117). See Affidavit of Attorney Lamb Regarding Discovery Documents. Doc- 48, App- 109. The affidavit stated that there were still several documents that were requested and not produced, including letters from Wamstad to the NDID, Zavala's and Westensee's personnel files (which would include their notices of termination), the Grand Forks County employee handbook, and any e-mails relating to the resignations of Zavala and Westensee. *Id.* The only document produced was the employee handbook. There is also a noted BCI initial report of the investigation of Zavala and Westensee, which has still not been produced. These were all relevant to Faith's case, and she was prejudiced by the trial court's denial of the Motion to Compel.

122 The trial court ruled on June 25, 2013, in an Order Denying Motion to Compel Discovery, and the Defendant was awarded $3,382.50 in attorney fees and costs. App-35. The lower court's decision was based, in part, on the lack of certification pursuant to Rule 37(a)(1), N.D.R.Civ.P. *Id.*

123 Rule 37(a)(1), N.D.R.Civ.P., states: "On notice to other parties and all affected persons, a party may move for an order compelling discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make discovery in an effort to obtain it without court action." Id. There is no specific format noted for the certification.

124 In effect, the Subpoena Duces Tecum for Auditor Nelson's deposition on April 30, 2013 was a formal good faith attempt following Defendant's response to Plaintiffs request for production of documents, which was not fully complied with. Again, there are still documents and e-mails that have not been produced, as noted previously. Therefore, the trial court **abused** its discretion in denying the Plaintiffs Motion to Compel, and awarding Defendant costs.

125 The standard of review for this issue as set forth in *Investors Title Insurance Co. v. Herzig, 2010 ND 169, ¶ 38, 788 N.W.2d 312*, is **abuse** of discretion. *Id.*

126 Clearly, the trial court **abused** its discretion in denying the Motion to Compel. The Subpoena Duces Tecum requested all documents relating to the employment of Zavala and Westensee, which were kept by the County in the ordinary course of business, including "files, notes, letters, e-mails" and "termination information". App- 107. It should be emphasized that Zavala's termination notice (App- 144) was not produced until the trial, which was excluded by the court as evidence (Trans- 376). The Subpoena Duces Tecum should have satisfied the requirement in Rule 37(a)(1), and the trial court **abused** its discretion by ruling that the Plaintiffs Motion to Compel lacked certification and awarding Defendant attorney fees. Plaintiffs affidavits (App. 104, 109) served as certification of the noncompliance. The court's order is cause for reversible error.

II. The trial court erred by denying the Plaintiffs motion for continuance due to the proximity to a companion case and the influence of publicity and the ability of the Plaintiff to receive a fair and impartial trial.

127 Court records show there was a 3-day companion case involving an **elderly** incapacitated man, who alleged similar claims against the County for the breach of fiduciary duty of another one of Zavala's wards named Paul Veum (see *Paul Veum, Ward, by and through Jane Marcotte as Legal Guardian, and Rodney Folkers, Conservator v. Grand Forks County,* 18-2012-CV-1071), and the jury trial occurred from August 28-30, 2013 (wherein there were front page newspaper articles in the Grand Forks Herald, which the Court can take judicial notice of and which was discussed during the pretrial conference on September 3, 2013, see transcript at Doc- 256). On September 1, 2013, the Plaintiff moved for a continuance of her jury trial scheduled for September 10, 2013. Doc- 131. Of note in this discussion is that in the Veum trial the jury found in favor of the *County. Veum v. Grand Forks County, supra.* Faith Krueger requested a continuance because of the obvious prejudice due to the well publicized outcome of the Veum trial just days before her trial to her case and her ability to receive a fair trial. Docs- 131,256.

¶28 The trial court denied the motion for continuance. Doc- 176, App- 56. At the pretrial conference on September 3, 2013, the motion was discussed, and in its Order, the court stated, "Having considered the defendant's oral response to the motion and also considering the plaintiffs oral reply to it, I concluded that the motion for continuance should be denied." *Id.* During the pretrial conference, Plaintiffs counsel argued, "I think the Court can appreciate the media coverage [] the *Veum* case obtained[.] [] And I think the jury pool may have been tainted by that press, and I think that should be considered by the Court." App- 186.

129 The trial court ruled: "The motion for your continuance is denied. This is the reason for that ruling. First, not mentioned by either of you, one of the things I have to consider is if this is continued, how long into the future is it continued? I can tell you from my own experience, trying to schedule a case in Grand Forks County about a week or so ago, a jury trial of about this length, we are looking into May of 2014. So that is how far into the future we would be looking to reschedule this case."

Id. at 187. In effect, the trial court weighed the risk of adverse publicity and an unfair trial against a seven month continuance, and decided against the strong influence of the publicity and a fair trial.

¶30 The trial court has broad discretion in deciding a motion for continuance and the standard of review is **abuse** of discretion. *See Lund v. Lund, 2011 ND 53, ¶ 7-8, 795 N.W.2d 318.*

¶31 In Sheppard v. Maxwell, 384 U.S. 333 (1966), F. Lee Bailey argued that undue prejudice from publicity in the case caused an unfair trial. The U.S. Supreme Court stated in pertinent part:
[T]he Court has also pointed out that "[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper." *Bridges v.California*, [314 U.S. 252 (1941)] supra, at 271.

[] "Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." *Pennekamp v. Florida*, 328 U. S. 331, 347 (1946). But it must not be allowed to divert the trial from the "very purpose of a court system... to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures. *Cox v. Louisiana*, 379 U.S. 559, 583 (1965) []. Among these "legal procedures" is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources. Thus, in *Marshall v. United States*, 360 U. S. 310 (1959), we set aside a federal conviction where the jurors were exposed "through news accounts" to information that was not admitted at trial. We held that the prejudice from such material "may indeed be greater" than when it is part of the prosecution's evidence "for it is then not tempered by protective procedures." At 313. At the same time, *we did not consider dispositive the statement of each juror "that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles."* At 312.

[As] expressed by Mr. Justice Holmes over half a century ago in Patterson v. Colorado, 205 U. S. 454, 462 (1907) :

"The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

Sheppard v. Maxwell, supra, at 350-51, emphasis added.

132 The U.S. Supreme Court found: "We have concluded that Sheppard did not receive a fair trial consistent with the Due Process Clause of the Fourteenth Amendment and, therefore, reverse the judgment." *Id.* at 335.

133 Likewise, in Faith's case, she was not afforded a fair trial, since the trial court **abused** its discretion in denying her a continuance, which allowed the publicity from a similar previous case to prejudice the jurors.

III. The trial court's decision to exclude certain material evidence and key witnesses caused prejudice to the Plaintiff.

134 The facts in this case show that there were key pieces of evidence excluded by the court, as well as key witnesses whose subpoenas were quashed. The excluded evidence is provided in the Appendix. App- 111, 115, 117, 144. The excluded evidence included several letters regarding the allegations of a scheme of defrauding vulnerable adults under the fiduciary care of the PA Zavala, as well as the notice of termination from the County to Zavala. *Id.* The excluded witnesses were retired Judge Joel Medd and Asst. State's Attorney Wamstad. Trans- 25, 69. The standard of review for evidentiary issues is well established. *See, e.g., Lawrence v. Delkamp, 2008 ND 111, 17, 750 N.W.2d 452; State v. Friedt, 2007 ND 108, ¶ 8, 735 N.W.2d 848* (holding that the standard of review of a district court's admission or exclusion of evidence is whether it **abused** its discretion.)

135 Further, in reviewing evidentiary rulings, this Court in *Williston Farm Equip, v. Steiger Tractor, 504 N.W.2d 545* (1993), stated, in pertinent part:

> We review this issue within the context of the evidentiary rules for relevancy[.] Relevant evidence means evidence that would reasonably and actually tend to prove or disprove any fact that is of consequence to the determination of an action. *Shark v. Thompson, 373 N.W.2d 859 (N.D.1985);* Rule 401, N.D.R.Ev. Relevant evidence is generally admissible. Rule 402, N.D.R.Ev. A trial court has discretion to determine whether evidence is relevant[.] *State v. Biby, 366 N.W.2d 460 (N.D.1985).*

Id. at 548-49.

136 In this case, the trial court **abused** its discretion by excluding the letters and notice of termination, since the evidence was relevant. The court made its decision based on a misapplication of the law. Regarding the letters from NDID, with respect to the County's claim on the fidelity bond covering employees, who handle public funds, the court stated: "[I] have already ruled that evidence regarding the bond, because it's akin to insurance, is is not admissible into trial." Trans- 23, App- 54.

137 During the pretrial conference, the court said, "My ruling on this is that [] the bond, be it a fidelity bond or any other kind of bond, is akin to an insurance policy, and except for reasons that might be for some other purpose, it is not appropriate to allow it into evidence[.]" App -195.

138 The letters showed that there was an alleged scheme to defraud wards under the fiduciary care of the public employees, Zavala and Westensee, who were acting as agents of the County in the roles. Further, the documents were evidence that the County was taking responsibility for their actions by making a claim on the bond. Notwithstanding that, in the absence of any evidence of what kind of bond was at stake and what its purpose was intended for and whether it actually covered liability for Zavala and Westensee, a bond is not insurance as defined by NDCC § 26.1-02-01.1, and should not be treated as such, especially in this situation involving county employees, where their scope of employment was at issue. The court made an erroneous application of the law regarding these critical elements in determining whether the bond in question was "akin to insurance," and could not be offered for another purpose.

¶39 Rule 411, N.D.R.Ev., Liability Insurance, states, "Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. *But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control." Id.*, emphasis added.

140 The excluded letters were evidence of the County's control over their employees, and certainly proved there was agency and scope of employment in this situation. The exclusion was prejudicial to Faith's opportunity for a fair trial. The court **abused** its discretion and that is grounds for a new trial.

141 Likewise, the exclusion of testimony from Wamstad, who was served with a Subpoena Duces Tecum as a witness, the trial court concluded: "[I] am of the conclusion that any knowledge that she has in regards to this action and facts relating to it are based upon her participation as an attorney for the County. That would come under attorney-client privilege and communications between attorney and client. [] So with that, the motion to quash the subpoena duces tecum of Wamstad is in all things granted." Trans-25. An objection by Plaintiffs attorney was made. Id. at 25-26.

142 The most compelling argument that begs this Court's review for reversible error is the fact that Wamstad has never been listed as an attorney for the County in this case. Howard Swanson is the only attorney listed as the attorney of record on the court's docket. App- 4. There is nothing on the record that indicates that Wamstad gave a notice of appearance or shows anything remotely that she has an attorney-client relationship with the Defendant. Therefore, the court **abused** its discretion in quashing her Subpoena Duces Tecum. The exclusion of this witness prejudiced Faith's opportunity for a fair trial, and that is grounds for a new trial.

143 Finally, with respect to the exclusion of testimony at trial from former Judge Medd, who was served with a subpoena as a witness for the Plaintiff to explain the court's role in the oversight process and review of the Conservator's Report (App- 22) which are relevant facts in this case the trial court quashed the subpoena. Trans- 69. Plaintiffs attorney objected. Id. at 70.

144 Further illustrating the prejudicial impact to Faith, it should be underscored that Judge Medd was mentioned several times in the County's closing remarks, regarding Zavala's "authority" to act for Faith, stating at one point, "Judge Medd gave specific authority to sell the house." Trans- 552-53, 574, App- 149-50, 171. In fact, in its closing remarks, reference to the court's role in this case was made no less than 10 times. App-146-77. Indeed, Judge Medd's testimony during the trial was critical to explain the role of the district court in matters concerning Faith's estate, especially since Judge Medd did not give specific authority to Zavala to sell Faith's house. There is no evidence of that. The power of the court was misused by the County in diverting attention for its responsibility of its employees in this matter.

145 Again, the trial court **abused** its discretion, and excluded relevant testimony in Faith's trial led to the denial of her opportunity for a fair trial.

IV. The trial court abused its discretion by denying Plaintiffs claim for mental anguish.

¶46 The next issue brought before this Court for review is that of damages for mental anguish suffered by the Plaintiff, Faith, a vulnerable **elderly** adult, as a result of the breach of trust by her fiduciary through the negligent misconduct of her guardian and conservator, Zavala, the PA. As explained under the law cited below, damages for mental anguish resulting from a tort "need not be alleged in order to be proved." *Ingalls v. Paul Revere Ins. Group, infra.* As a sanction against the Plaintiff for apparently failing to provide supplemental discovery giving the Defendant adequate "notice" of non-economic damages, the trial court ruled on a motion to exclude non-economic damages made by the Defendant, since it was "prejudiced." Trans- 10-21. The ruling was made despite the fact that there was no motion to compel under Rule 37(d), N.D.R.Civ.P., and the prerequisites for sanctions were not met. *Id.* at 11.

147 The trial judge stated: "Consequently, it will be the order of this Court that the non-economic damages claimed by the plaintiff will not be allowed. The jury will not be allowed to hear evidence regarding it. They will not be allowed to hear argument about it. Motion of the defendant in this regard is in all things granted." Trans- 21-22. Plaintiff made an objection on the record to the ruling. Id. at 22.

148 The law regarding damages for mental anguish can be found in *Ingalls v. Paul Revere Ins. Group, 1997 ND 43, ¶ 38-9, 561 N.W.2d 273*, where the Court explained:
Thus, in a case of this kind, damages for mental anguish may be "general' damages--damages for a harm so frequently resulting from the tort that is the basis of the action that the existence of the damages is normally to be anticipated and hence need not be alleged in order to be proved."' [citation omitted], Damages in Tort Actions §1.01[3] (1996) (quoting Restatement (Second) of Torts §904 []). [It] also explains [], a claim for mental anguish is a classic example of a noneconomic, intangible loss.

"Traditionally, the jury had wide discretion in evaluating and awarding these damages." Id. The only standard for evaluation of mental anguish damages "is the amount a reasonable person would estimate to be fair compensation." Id., § 3.01[1]. "The determination of damages for pain, discomfort, and mental anguish largely is dependent upon the jury's common knowledge, good sense, and practical judgment and mainly rests within its sound discretion." *Reisenauer v. Schaefer, 515* N.W.2d 152, 157 (N.D. 1994).

Id., emphasis added.

149 Of course, the jury did not get to the question of damages in this case, since it stopped answering questions in the jury form after it decided that proximate cause was not satisfied for any of the four counts. App- 141. However, the impact of the court's

decision had a negative influence on Faith's ability to present evidence regarding her mental anguish and the emotional scar that the breach of trust has left with her in this ordeal concerning not only misconduct under a fiduciary duty but also as a public servant. As the law in *Ingalls v. Paul Revere Ins. Group, supra*, plainly states, mental anguish need not be alleged, since it is an element of damages, and the jury has "wide discretion in evaluating and awarding these damages." *Id.* Excluding evidence regarding mental anguish effectively eliminated any of Faith's feelings with respect to mental pain, distress, disappointment, anger, worry, resentment, embarrassment, indignation, shame, wounded pride, despair, and public humiliation. The trial court banned those expressions of feelings in Faith's trial, which was prejudicial to her right to a fair trial.

150 For example, during the examination at trial of Kelly Gatlin, Faith's personal assistant, the following transpired:
Q: Was there any accountability that you saw of the property that is described as missing? Lost or stolen or whatever? Is there any accountability that you have seen?

A: The contents that I remember in her house and in her apartment, I saw very little of it. In fact, I was outraged.

MR. SWANSON: Well, Your Honor, I will object. Her opinion and description editorializing is irrelevant.

THE COURT: Sustained. Jury will disregard that comment. Next question.

Trans- 298.

151 Consequently, the trial court **abused** its discretion by excluding the element of damages regarding mental anguish and any evidence relating to it, particularly in this case involving a breach of fiduciary duty and the fleecing of a vulnerable **elderly** person's estate by a county official. Therefore, this case should be remanded for a new trial.

V. The trial court incorrectly gave jury instructions, which is grounds for a new trial.

152 As described in the Statement of the Facts, the jury decided in favor of Faith on all four counts (breach of fiduciary duty, negligence, trespass to chattels, and conversion), however it had trouble with the pattern jury instruction of "proximate cause", since it decided on all four counts that there was no proximate cause between the injury and the damages. App- 141. Plaintiffs attorney objected to the jury instruction. Trans- 508. The pattern jury instruction for proximate cause reads as follows:

> A proximate cause is a cause which, in natural and continuous sequence, produces the injury, and without which, the injury would not have occurred. It is a cause which had a substantial part in bringing about the injury either immediately or through events which follow on another.

App- 79.

153 The obvious problem with this pattern jury instruction is that it relates to personal injury claims, and the claims in this particular case regard breach of fiduciary duty, negligent duty, and conversion. The words, "natural and continuous sequence", are misleading in this case. Faith's estate was allegedly misappropriated during the guardianship and conservatorship of Zavala, the PA. In this instance, the "but for" test would have been more appropriate, which provides a tort liability causation criterion as to "whether the plaintiff would not have suffered the wrong 'but for' the action of the defendant." *Black's Law Dictionary*, at 200, West Publ. Co. (6th Ed., 1990). Plaintiffs attorney requested the "but for" test be added to the pattern jury instruction, but that was denied. Tr. Trans, at 507.

¶54 This Court's Standard of review of jury instructions as cited in *Kaufman v. Meditee, Inc.*, 353 N.W.2d 297, 301 (N.D. 1984), wherein the Court ordered a new trial on the account of faulty jury instructions, is as follows:

> The [jury] instructions must fairly inform the jury of the law that must be applied. On appeal, however, jury instructions must be reviewed as a whole and, if they correctly advise the jury as to the law, they are sufficient although parts of them standing alone may be erroneous and insufficient. *Besette v. Enderlin School Dist. No. 22, 310 N.W.2d 759* (N.D.1981).

Id.

155 The issue with the jury instructions is further illustrated by the special verdict form, where the questions regarding "proximate cause" were, for example, cited as follows: "Was Barbara Zavala's breach of fiduciary duty a proximate cause of Faith Krueger's damages?" and "Was Barbara Zavala's conversion a proximate cause of Faith Krueger's damages?". App- 141.

156 The problem with applying the jury instruction of "proximate cause" to the special verdict form is that the verdict form implies that Zavala was the sole cause of Faith's damages, when, in fact, Zavala's assistant, Kathy Westensee, also allegedly contributed to the misappropriation of her estate.

157 Also noted was the voluminous and overall confusing nature of the instructions. See App- 57-102. Therefore, the jury instructions were confusing and misleading, and under Kaufman, this Court should remand this case for a new trial.

VI. Opposing counsel's closing prejudicial remarks to the jury, which included inflammatory references to Appellant's depressed state of mind in 2011, are grounds for a new trial.

158 As the facts in this case indicate, the closing remarks (App-146) made to the jury by the County's attorney were inflammatory and based upon references to documents by Faith's psychiatrists and guardian ad litem, without their consent, and without proper foundation and the ability to cross examine the evidence. Statement of the Facts, supra.

¶59 In summary, the Appellee's counsel relied upon reports from the petitions for temporary and permanent guardianship and conservatorship of Faith, namely the psychiatrists and guardian ad litem. Trans- 553-57, App- 150-54. He referred to out-of-context and out-of-date medical doctors' assessments, including inflammatory words, such as "deteriorated faculties", "hallucinations and delusions", "memory problems", "psychiatric problems", "blatantly psychotic" all referring to Faith's mental state in 2011, over two years before the trial. Id. In characterizing her guardian ad litem's report, he told the jury, "That's an independent third person, a lawyer, with a fiduciary responsibility to Faith Krueger. A guardian ad litem telling you that she is not reliable." Trans- 557, App-154. Further, he says, "You [the jury] now have two physicians and a lawyer setting forth information for you." Id. These inflammatory remarks were highly prejudicial and caused reversible error.

¶60 It should be pointed out that the doctor's letters or notes attached to Exhibits 21 and 24 (App- 121, 126) are not part of the court's record in the proceedings of her temporary (court doc. #1) and permanent (court doc. #8) petitions in *In the Matter of the Conservatorship and Guardianship of Faith D. Krueger*, case no. 18-2011-PR-00091. Regarding the Guardian Ad Litem's report, the foundation for these highly inflammatory remarks aimed to prejudice the credibility of Faith is suspect. They were surreptitiously admitted as evidence in the trial and not used until closing remarks, which prejudiced the jury.

¶61 Regardless of the fact that there was no objection made at trial, the remarks made by the County's attorney were so severe that they affected Faith's "substantial rights" and constituted a denial of her right to a fair trial. *See Andrews v. O'Hearn, 387 N.W.2d 716, 731* (N.D. 1986) (wherein the Court found that if closing remarks are "so severe" that they affect the party's "substantial rights" and constitute "a denial of a fair trial[.]") *See also, Gulf, C. § S.F. Ry. Co. v. Greenlee, 70 Tex. 553, 8 S.W. 129 (1888),* (where the Court explained this in terms of whether the remarks to the jury were so plainly prejudicial to the other party as to demand that the verdict be set aside. Citing *Greenlee, it was said in Wade v. Texas Employers' Insurance Association, 150 Tex. 557, 244 S.W.2d 197 (1951),* that the Court judges by the degree of the vice, not merely the subject matter of the

argument, and that the distinction between arguments that are “curable” and those that are not has always been one of difficult application. The Court stated in *Texas Employers' Insurance Association v. Haywood, 153 Tex. 242, 266 S.W.2d 856 (1954)*, that the true test is the degree of prejudice flowing from the argument, i.e., whether the argument, considered in its proper setting, was reasonably calculated to cause such prejudice to the opposing litigant that a withdrawal by counsel or an instruction by the court, or both, could not eliminate the probability that it resulted in an improper verdict.) The Court continued.*(1)*

162 In this case, the remarks made by the County's attorney stepped way over the line of being curable by the trial court, and despite the fact that there was no objection made by Faith's attorney at the time of the occurrence in the closing remarks, the conclusion this Court should reach is that Faith did not receive a fair trial because the inflammatory statements were so severe that the jury was prejudiced and the remarks were not curable. Consequently the verdict should be set aside. Buttressing this argument is that contention that the Guardian Ad Litem's Report did not have proper foundation, as it was admitted through the former PA Westlun's testimony as Exhibit 25 (App- 132), and he had no personal knowledge of the exhibit. Trans- 241. In effect, the County's attorney relied on evidence not properly admitted in his closing remarks to the jury. *See, e.g., United States v. Swinehart,* 617 F.2d 336, 339 (3d Cir.1980) (where the Court ruled in a criminal case to expand the rule that gave a new trial in instances where closing remarks to the jury regarding a witness's credibility were based on evidence not on the record and prejudiced the witness.) Here, Faith was prejudiced by the remarks, and that's grounds for a new trial.

VII. Plaintiffs constitutional right to a fair trial under the Due Process Clause of the 14th Amendment was violated.

163 Appellant Faith Krueger is confident that she has made a compelling and convincing case for a new trial on several grounds, however should she not prevail for some reason, she wishes to preserve her right to appeal to the United States Supreme Court on the grounds that her right to a fair and impartial trial was violated under the Due Process Cause of the Fourteenth Amendment to the U.S. Constitution by contending she was denied a fair trial due to:
1) Denial of her motion for continuance and the publicity in the prior companion case caused the jury to be prejudiced;

2) Exclusion of key evidence and witnesses in the case; and

3) Inflammatory closing remarks by the County's attorney.

164 The U.S. Supreme Court explained in Brecht v. Abrahamson, 507, 640 U.S. 619 (1993), that “due process” is not an exact science, but it does trigger a Constitutional review. The Court stated, in pertinent part:
Every allegation of due process denied depends on the specific process provided, and it is familiar learning that all “claims of constitutional error are not fungible.” *Rose v. Lundy, 455 U. S. 509, 543 (1982)* []. [C]onstitutional due process violations vary dramatically in significance; harmless trial errors are at one end of a broad spectrum, and *what the Court has characterized as “structural” defects - those that make a trial fundamentally unfair even if they do not affect the outcome of the proceeding--are at “the other end of the spectrum,” ante, at 629.*

Id., emphasis added.

165 In this case, Faith's trial was fundamentally unfair and the trial errors would fall in the category of “structural” defects vice harmless trial errors which is an asserted Due Process violation under the Fourteenth Amendment. She would be remiss if she did not protect her right of appeal by ignoring presentation of this critical issue for review.

CONCLUSION

166 For the foregoing reasons, the Court should remand for a new trial and rule on the issues raised under this appeal in favor of the Appellant, Faith Krueger.

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