

COMMENTARY ON A COURAGEOUS AND FAIR-MINDED JURIST

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As a former Editor-In-Chief of the North Dakota Law Review, 1966–1967, I was flattered to receive an invitation to revise a CLE presentation of August 19, 2011 into a law review article. The presentation for the CLE was to discuss my experience as a trial lawyer practicing before Federal District Judge Ronald N. Davies. There are not too many of us left around who had the opportunity to actually try cases in Judge Davies' court. I had that opportunity on several occasions.

My personal experience as a lawyer with Judge Davies goes back to June 1 of 1967 when I started as a law clerk for Judge Charles J. Vogel. Judge Vogel, at that time, was Chief Judge of the United States Court of Appeals for the Eighth Circuit. He held his primary chambers in Fargo, North Dakota at the federal courthouse. On the same floor of the courthouse were the chambers of Federal District Judge Ronald Davies. In between the two chambers was the federal law library where I had a desk and did most of my work for Judge Vogel during my fifteen-month appointment with him. All of this was housed in the old federal courthouse building, which still stands on First Avenue North in Fargo.

This was an interesting time to be associated with Judge Vogel. At that time, also sitting on the United States Court of Appeals for the Eighth Circuit was Judge Harry A. Blackmun, who was a close friend of Judge Vogel before Judge Blackmun was appointed to the United States Supreme Court. Judge Blackmun was an outstanding legal writer, but on occasion, Judge Vogel would assign me to redraft some of Judge Blackmun's proposed opinions as they were circulated between the three judges on the panel. This was sometimes a daunting task because of Judge Blackmun's elegant writing style and detailed analysis. He was usually the last one of a three-judge panel to finalize his draft opinion.

During my time as a law clerk, I had an opportunity to become well acquainted with Judge Davies. He often spent time in the law library. He

*1967 graduate of University of North Dakota School of Law. After completing fifteen months as law clerk for Charles J. Vogel, Chief Judge of the United States Eighth Circuit Court of Appeals, Mr. Hunke became a partner in Vogel Law firm and practiced litigation in all state and federal courts in Minnesota and North Dakota until December 31, 2011. More than twenty of his cases are published in the Northwest Reporter and the United States Federal Supplement.

invited me to attend various criminal trial hearings. He also provided an opportunity to sit in on several civil jury cases. I was always impressed with Judge Davies' efficient handling of the cases that came before him. He was a very busy judge handling a large volume of cases in the broad jurisdictional area for which he was responsible. Judge Davies tried cases regularly in Grand Forks, as well as Fargo and, on occasion, Minot and Bismarck.

In fact, my first exposure to Judge Davies was in my senior year at the University of North Dakota (UND) School of Law. Judge Davies, at that time, was trying a court case in Grand Forks.¹ It was a very significant case with two outstanding lawyers for the plaintiff: Melvin Belli, a flamboyant lawyer from San Francisco, California, renowned as the King of Torts, and Mart Vogel of Vogel Law Firm in Fargo.² The defense team was headed up by a long-time Grand Forks trial attorney, Harold D. Shaft, of Shaft, Benson, Shaft & McConn Law Firm.³

I will never forget Judge Davies made a special point of inviting law students and potential trial lawyers at UND to attend this famous and important case. Because it was a bench trial, the jury box was empty and Judge Davies encouraged UND law students to sit in the jury box to watch the proceedings in this case, which became one of the leading product liability cases involving prescription drugs. During the trial, Judge Davies let students sit in on, not only the evidentiary portion of the trial, but also on the legal arguments involving the issues of negligence, breach of warranty, and the relatively new concept of strict liability and product liability. Judge Davies' decision also was careful to avoid any risk of reversal on appeal by pointing out his decision was based on breach of implied warranty and negligence.⁴ He carefully noted adopting the new doctrine of "strict liability" in a products liability case was a matter for the North Dakota Supreme Court.⁵ His duty as a district judge was to apply the law as it currently existed in North Dakota. He rightfully refused to assume the role of the North Dakota Supreme Court and adopt the concept of "strict liability," but was successful in arriving at the same result using the concepts of negligence and breach of warranty.⁶

Judge Davies was also a strong believer in the wisdom of the common man. He was a staunch supporter of jury verdicts in cases he tried. An

1. *Stromsodt v. Parke-Davis & Co.*, 257 F. Supp. 991 (1966).

2. *Id.* at 992.

3. *Id.*

4. *Id.* at 994.

5. *Id.* at 997.

6. *Id.*

excellent example was the careful review and upholding of the factual decisions made by the jury in the relatively little known case of *Dick v. New York Life Insurance Co.*⁷ This case, which involved an unusual accidental shooting death, was tried before a jury in North Dakota early on in Judge Davies' career as a district judge.⁸ The jury returned a verdict against the insurance company, which had denied its obligation to pay an additional \$7500 double indemnity portion of a life insurance policy for an accidental death resulting from the discharge of a double barrel shotgun.⁹ Judge Davies denied the post-trial motions of the insurance company for judgment notwithstanding the jury verdict.¹⁰ The insurance company claimed there was insufficient evidence that the shooting was accidental and argued the decedent committed suicide by shooting himself twice with the double barrel shotgun.¹¹

On appeal, however, the United States Court of Appeals for the Eighth Circuit three-judge panel reviewed the case and agreed with the insurance company that the evidence did not justify submitting the case to the jury.¹² The court then reversed both the jury's decision and Judge Davies' post-trial rulings supporting the jury verdict.¹³ Who would anticipate that the United States Supreme Court would ever review a case which involved not only the nominal amount of \$7500, but also involved an interpretation of North Dakota law concerning the sufficiency of evidence? Nonetheless, the Supreme Court granted review.¹⁴ Chief Justice Warren delivered the opinion of the Court reinstating the jury's verdict and Judge Davies' opinion supporting that verdict.¹⁵ Justice Warren strongly endorsed Judge Davies' opinion stating:

After all the evidence was in, the district judge, who was intimately concerned with the trial and who has a first-hand knowledge of the applicable state principles, believed that the case should go to the jury. Under all the circumstances, we believe that he was correct and that reasonable men could conclude that the

7. 359 U.S. 437 (1959).

8. *Dick*, 359 U.S. at 438.

9. *Id.*

10. *Id.* at 442.

11. *See id.*

12. *Id.* at 444.

13. *Id.*

14. *Id.*

15. *Id.* at 447.

respondent failed to satisfy its burden of showing that death resulted from suicide.¹⁶

Judge Davies, in addition to holding his “formal court” in the federal courtrooms in Grand Forks and Fargo, also regularly held “informal court.” This informal court was held just about every noon when Judge Davies was in Fargo at the largest table in the Fargo Elks Club, which was then located just across the street west of the old federal courthouse. Judge Davies loved to have lawyers and lay people join him for lunch to discuss politics and current events, tell jokes and, of course, engage in lots of joshing and gossip. This was an example not only of Judge Davies’ love of the law, but also his interest in the lawyers who practiced before him. It also exemplified his desire not to become isolated from the personal lives of the people he served, regardless of who they were or their status in life. When he sat at the informal court, he wanted to hear from everyone at the table. He could certainly have a sharp tongue at times during these discussions, but it was also served with wit and good humor.

My experience as an attorney litigating cases in front of Judge Davies began after I joined Vogel Law Firm in September of 1968. I recall one case in particular. Judge Davies appointed me to represent a defendant accused of murder allegedly occurring on an Indian Reservation in North Dakota. The defendant was a Native American woman. The federal district court has jurisdiction over crimes on the reservation, so the venue for the case was in the federal district court in Fargo. Because of the circumstances of the case which involved a crime of passion and disputed facts, I believed my client deserved a jury trial. My reasoning was that my client, while certainly the person who shot the male decedent, was involved in a matter that had mitigating circumstances, including what appeared to be either an accidental shooting or a situation involving self-defense. There were sufficient facts that a jury could find she should not have to face the certainty of spending some years in jail if she pled guilty to a murder charge.

The trial of this case was rather typical for a Judge Davies’ trial and, to some extent, trials generally in both state and federal court back in the 1960’s and early 70’s. Trials moved along very quickly, which was particularly true with this litigation. The whole matter was basically completed approximately eight weeks after my assignment to serve as defense counsel. The trial itself was completed over the course of two days, including picking the jury, making the opening statements, presenting all

16. *Id.*

the evidence, preparing jury instructions relating to the evidence, closing arguments, jury deliberation, and ultimately, a verdict by jury.

Judge Davies, while a very fair judge, was not prone to tolerate lengthy questioning of the jurors as to their qualifications. He felt, for good reason, the citizens were there to serve and not to become witnesses or, in a sense, placed on trial by any type of lengthy examination into their personal lives or beliefs. Similarly, Judge Davies wanted precise opening and closing arguments and did not tolerate questioning of witnesses that went beyond what they knew about the facts and how they acquired that knowledge and other foundation with regard to any prejudices they had as to their view of the facts. Ultimately, at the close of the second day of trial, the jury returned a verdict. Fortunately, they did not find my client guilty of murder, but she was found guilty of a reduced charge of manslaughter.

My experience with Judge Davies, not only in that trial, but in experiences others have shared, was that he did not suffer fools well whatsoever. You had better show up in his court well prepared in the facts and the law. He insisted on brevity in opening statements and closing remarks. He wanted the facts and nothing but the facts, and there had better not be any stretching of the facts. He particularly disliked lengthy argument and repetitious questioning of either jurors or witnesses. In one instance, an attorney, while making his opening to the jury, included statements that amounted to argument rather than fact. Judge Davies promptly chastised him in front of the jury and the hapless fellow just quit his opening statement and sat down.

At the same time, you always had the sense that Judge Davies had a very big heart. My client in the murder case I tried in his court had a young child and was also pregnant with child at the time of trial. After receipt of the verdict, Judge Davies ordered her to spend a short period of time in prison, but then immediately suspended the sentence on condition of good behavior. As a result, she was released from prison after the trial and prior to the birth of her second child. The compassion Judge Davies showed certainly helped the young woman put her family back together again after this tragic period in her life.

Furthermore, Judge Davies was a very effective legal writer. He actually authored what I think to be an unusually large number of published opinions for a federal district judge at that time. Included within that volume of litigation are a number of cases still well-renowned for their significance. Foremost of these, of course, would be his opinion in *Aaron v. Cooper*.¹⁷ This was the famous case he tried sitting by assignment for the

17. 156 F. Supp. 220 (1957).

United States Court of Appeals for the Eighth Circuit.¹⁸ Judge Davies' opinion directly confronted Arkansas Governor Orval E. Faubus's refusal to allow integration stating:

The acts of defendants Governor Orval E. Faubus, Governor of the State of Arkansas, General Sherman T. Clinger, Adjutant General of Arkansas, and Lt. Col. Marion E. Johnson, Unit Commander of the Arkansas National Guard, in forcibly preventing colored students, who are eligible under the School Board's plan to attend Central High School, from doing so are beyond their lawful authority. Said acts unlawfully obstruct and interfere with the carrying out and effectuation of the Court's orders of August 28, 1956, and September 3, 1957, contrary to the due and proper administration of justice; and they violate the constitutional rights of said colored children.¹⁹

This renowned decision demonstrates quite well Judge Davies' basic character and approach to the law. He understood his duty as a judge was to follow the law. He also had the courage to render a decision he certainly knew would be extremely unpopular in Arkansas. Here was this newly appointed district judge of fifteen months, in a jurisdiction far from his home in North Dakota, having the courage to actually implement the mandate of the United States Supreme Court in *Brown v. Board of Education*.²⁰ Judge Davies enforced racial integration for the Little Rock, Arkansas School District. Ultimately, Judge Davies also had to issue an order requiring President Eisenhower to call in the U.S. Army 101st Airborne Division to protect the safe entry into Little Rock High School of the nine brave students of color who finally had the right to attend an integrated school near their home. What an example of a man and judge of tremendous character and courage.

Judge Davies also tried to accomplish as practical and fair a result as he could within the law. A prime example of his philosophy is demonstrated in Judge Davies' decision in the case of *Merchants National Bank & Trust Co. of Fargo v. United States*.²¹ This case involved medical malpractice by a doctor at the Veteran's Hospital in South Dakota, who released a seriously disturbed and violent man threatening to kill his wife who lived in North Dakota.²² The doctor failed to provide any warning to the veteran's wife of

18. *Aaron*, 156 F. Supp. at 220.

19. *Id.* at 226-27.

20. 347 U.S. 483 (1954).

21. 272 F. Supp. 409 (1967).

22. *Merchants Nat'l Bank & Trust Co.*, 272 F. Supp. at 413.

the release, which ultimately led to the deranged man shooting his wife to death in Detroit Lakes, Minnesota.²³

This lengthy decision involves a number of legal issues. Foremost is the question of which state's law should apply as to the issue of damages.²⁴ The United States Veterans Administration argued that either the law of South Dakota or Minnesota should apply.²⁵ South Dakota, where the negligence occurred, limited wrongful death awards to \$30,000.²⁶ Minnesota, where the shooting occurred, provided a maximum recovery of \$35,000.²⁷ North Dakota, meanwhile, had no statutory limit on the amount of damages for wrongful death.²⁸ Judge Davies noted that Ms. Newgard was supporting three minor children at the time of her death.²⁹ Clearly, the damage amounts allowed under Minnesota and South Dakota law would be insufficient. Judge Davies chose to apply the damages law of North Dakota, which would provide a fair amount of damages to the children and awarded \$200,000.³⁰ He also refused to discount the damage award by the amounts the children would receive under Social Security.³¹

This case also presents an example of Judge Davies' sharp tongue when he felt the U.S. Attorney stepped over the line of fair witness rehabilitation on re-direct examination of the government's expert witness:

There follows a series of questions by Mr. Stansbury and answers by Dr. Craft which clearly show that Mr. Stansbury sought to rehabilitate Dr. Craft's testimony, which was patently damaging to the Government's position. In the posture of this lawsuit that course of conduct with Dr. Craft, the Government's own witness, falls just short of being reprehensible.³²

Judge Davies was a great patriot and he loved the United States Government, but in this case, he had no hesitancy to reach the fair and just result by his decisions regarding which state's law should apply.

Judge Davies was a fair-minded jurist. He was courteous to witnesses, to court personnel, and to lawyers, unless they stepped over the rules and deserved otherwise. He was especially considerate of the lay people who

23. *Id.* at 414.

24. *Id.* at 419.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 420.

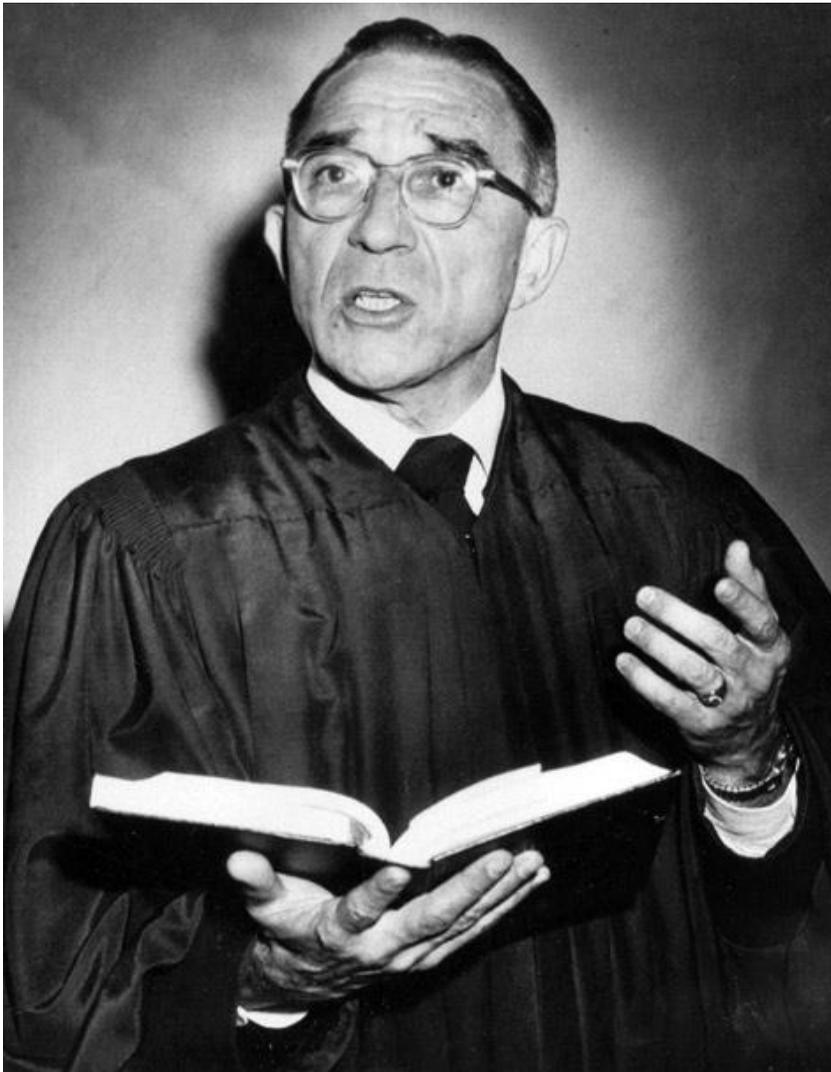
29. *Id.*

30. *Id.* at 421.

31. *Id.* at 420.

32. *Id.* at 417.

served on the juries. He made sure their time was not wasted during the trial of the case. He was devoted to his job and worked hard and long to serve the court system and the people who appeared before him. Most importantly, he made an effort to understand and treat equally and fairly every person, regardless of status. I feel privileged to have had the opportunity to practice in Judge Davies' court, as well as to enjoy the experience of joining him at his informal court. He was unique and an outstanding servant of the law and the people within his jurisdiction.



Honorable
RONALD N. DAVIES
United States District Court Judge, 1955-1996
Fargo, North Dakota