FEDERAL CIVIL PROCEDURE AND FEDERAL COURTS—WITNESSES, EVIDENCE, AND CONDUCT OF COUNSEL: ASSESSING THE ADMISSIBILITY OF INSURANCE EVIDENCE TO PROVE WITNESS BIAS

Ventura v. Kyle, 825 F.3d 876 (8th Cir. 2016)

ABSTRACT

In *Ventura v. Kyle*, the Eight Circuit Court of Appeals formed two major holdings that differed with the holdings from the United States District Court for the District of Minnesota. This case involved former Minnesota Governor Jesse Ventura, Navy SEAL and author Chris Kyle, and his book "American Sniper." Specifically, the court reversed the unjust-enrichment judgment and vacated and remanded the defamation judgment for a new trial. However, the most significant holding for North Dakota legal practitioners was that the Eighth Circuit vacated the district court's defamation judgment and damages that were awarded in favor of Ventura, because the district court clearly abused its discretion in denying Kyle a new trial. The court reasoned that both the closing remarks made by Ventura's counsel and the improper cross-examination of witnesses from the publisher of Kyle's book regarding insurance coverage prevented Kyle from receiving a fair trial. One specific aspect of this holding involved the Eighth Circuit applying two standards to complement Rules 403 and 411 of the Federal Rules of Evidence and assessing the admissibility of insurance evidence to prove witness bias: the "economic ties" standard and the more popular "substantial connection analysis" common law standard that has been applied in a majority of jurisdictions. Because Rules 403 and 411 of the North Dakota Rules of Evidence contain essentially the same language as their federal counterparts, *Ventura* and its application of standards for admitting insurance evidence to prove witness bias can be applied in future North Dakota cases involving similar evidentiary matters. This application will provide North Dakota common law with a more unified and objective standard for determining the admissibility of insurance evidence.

I. FACTS

Before his death, Chris Kyle,[1] a former sniper for a United States Navy Sea, Air and Land ("SEAL") team, authored the book "American Sniper: The Autobiography of the Most Lethal Sniper in U.S. Military History"

1. After Chris Kyle was killed in 2013, Taya Kyle, his wife and the executor of his estate, was substituted as the defendant in the case. Ventura v. Kyle, 825 F.3d 876, 878 n.1 (8th Cir. 2016). For simplicity, the defendant will be referred to as "Kyle."

("American Sniper").[2] "In this book, Kyle described punching a 'celebrity' referred to as 'Scruff Face,'" later revealed to be political commentator, former Navy special forces member, and Minnesota Governor James Janos, more widely known as Jesse Ventura.[3] The alleged altercation relating to this legal action took place at a California bar in October 2006, where Kyle and some friends were gathered after a funeral for a fellow Navy SEAL.[4]

According to Kyle, Ventura made offensive remarks about both America and the Navy SEALs.[5] After Kyle confirmed the fight with Ventura had occurred during both a radio interview and a television interview on Bill O'Reilly's "'The O'Reilly Factor,'" Kyle's editor described the publicity from the radio interview as "'priceless,'" while Kyle's publicist "agreed the publicity response was 'HOT, hot, hot!'"[6] In 2014, Kyle's editor testified that 1.5 million copies of the "American Sniper" book had been sold.[7]

After the radio and television interviews, "Ventura sued Kyle for defamation, misappropriation, and unjust enrichment on the grounds that Kyle fabricated the entire interaction with Ventura."[8] After the district court denied Kyle's motion for summary judgment on Ventura's claims of misappropriation and unjust enrichment, Kyle moved for summary judgment on all claims at the close of discovery.[9] Kyle's motion was again rejected.[10]

Among witnesses' testimonies for the defamation claim, two witnesses from the publisher of Kyle's "American Sniper" book, HarperCollins, testified at trial.[11] First, HarperCollins's publicist, Sharyn Rosenblum, testified that the story regarding Ventura "was 'a very insignificant part'" of the book and did not impact the success of the book.[12] In fact, in regard to the general process of preparing the book for publication, Rosenblum testified that:

> [S]he did not know who "Scruff Face" was when she read the manuscript of the book, and did not ask. She testified she did not

2. *Id*. at 878.
3. *Id*.
4. *Id*. at 878-79.
5. *Id*.
6. *Id*. at 879.
7. *Ventura*, 825 F.3d 876 at 879.
8. *Id*.
9. *Id*.
10. *Id*.
11. *Id*. at 880.
12. *Id*.

> see the "Scruff Face" subchapter as relevant to her publicity campaign for the book but she wanted to focus on "the themes of the war, military service, love of country, [and] the patriotism to serve one's country." She was "surprise[d]" when Ventura's name came up in Kyle's interview.[13]

Similarly, Peter Hubbard, Kyle's editor, testified that "the 'Scruff Face' story was not relevant to his decision to enter into a book contract with Kyle."[14] Plus, Hubbard also indicated that he never suggested incorporating the subchapter containing "the 'Scruff Face' story" into the book's marketing campaign conducted by HarperCollins.[15] Hubbard "characterized the 'mention of Jesse Ventura' as having a 'negligible' effect on the success of the book."[16]

When Ventura's counsel tried to impeach Rosenblum and Hubbard by asking questions regarding both Kyle's and HarperCollins' insurance coverage to show that the book's publisher "had 'a direct financial interest in the outcome of th[e] litigation' and the witnesses were biased in favor of Kyle," Rosenblum denied knowledge of HarperCollins' insurance policy[17] and Hubbard said that he did not know about any insurance provisions within the Kyle-HarperCollins contract.[18]

However, during closing arguments, Ventura's counsel stated that, "Sharyn Rosenblum testified that she did not know her company's *insurer is on the hook if you find that Jesse Ventura was defamed*," and despite both witnesses' testimony, "[i]t's hard to believe that they didn't know about the insurance policy because it's right in Kyle's publishing contract. Paragraph 6.B.3. of Exhibit 82, *Chris Kyle is an additional insured for defamation* under the publisher's insurance policy."[19]

After the district court denied both of Kyle's motions for a mistrial, due to Ventura's counsel's questioning of the HarperCollins witnesses, and denied Kyle's motion for a mistrial, "due to the insurance references once the jury was excused" during Ventura's counsel's closing argument, the jury reached an 8-2 verdict on the fifth day of deliberation.[20] The jury

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13. *Ventura*, 825 F.3d 876 at 880.
14. *Id*.
15. *Id*.
16. *Id*.
17. *Id*. Ventura's counsel specifically asked Rosenblum two questions: "'[A]re you aware that the legal fees for the estate's attorneys . . . are being paid by the insurance company for HarperCollins?' and 'Are you aware that HarperCollins has a direct financial interest in the outcome of this litigation because they are providing the insurance?'" *Id*.
18. *Ventura*, 825 F.3d 876 at 880.
19. *Id*. at 880-81.
20. *Id*.

found in favor of Ventura regarding the defamation claim and awarded him $500,000 in damages.[21] The jury made an advisory recommendation in Ventura's favor regarding the unjust enrichment for approximately $1.35 million in damages.[22] However, the jury did find for Kyle regarding the misappropriation claim.[23] Ultimately, the district court adopted the jury's recommendations regarding both the unjust enrichment claim and its damages amount.[24]

On appeal, Kyle argued the district court's denial of his motion for a new trial "on the grounds that the jury's 'awards were tainted by the admission of prejudicial testimony and argument regarding [Kyle's] insurance.'"[25] Kyle also argued that the unjust enrichment judgment violated both Minnesota law and the First Amendment and that Ventura did not prove the amount that he was enriched.[26]

II. LEGAL BACKGROUND

When determining the admissibility of insurance evidence to prove witness bias or prejudice, Rules 403 and 411 of both the Federal and North Dakota Rules of Evidence contain virtually identical language.[27] However, while the Eighth Circuit adopted the majority substantial connection standard at the federal level, North Dakota strictly adheres to interpreting its evidentiary rules with no clear standard.[28] This lack of uniformity within the Eighth Circuit common law may be due to the fact that no clear set of criteria exists for the substantial connection analysis.

A. INTRODUCTION: GRANTING A NEW TRIAL

Rule 59 of the Federal Rules of Civil Procedure states that upon a proper motion, a federal district court may grant a new trial on either all or only some of the issues,[29] and to any party, in the following manners:

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21. *Id.* at 881.
22. *Id.*
23. *Id.* at 878.
24. *Ventura*, 825 F.3d at 878.
25. *Id.* at 881.
26. *Id.*
27. *Compare* FED. R. EVID. 403, 411, *with* N.D. R. EVID. 403, 411.
28. *See infra* Part IV.
29. Courts must use discretion when determining whether one issue can be separately retried apart from the other issues in a respective case "without injustice." 58 AM. JUR. 2D *New Trial* § 35 (2016). Furthermore, it is appropriate to limit a new trial to only certain issues "when it appears to the court that justice can be done by limiting the retrial to the area in which error occurred." *Id.* In addition, the propriety of granting a new trial on only certain issues "hinges on whether the issues to be retried are sufficiently distinct and separable from the others that the trial of those issues alone may be had without injustice." *Id.*

> [A]fter a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or . . . after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.[30]

New trial motions must satisfy a "particularity requirement," meaning that the motion must particularly state the grounds for the motion, otherwise the motion must generally be denied.[31] Thus, if the assignment of error is a very general basis such as "'the verdict is against the law' or 'against the evidence,'" a new trial ordinarily may not be granted.[32] Essentially, then, an order for a new trial can only be granted on the specified ground(s) within the motion itself.[33]

Furthermore, even though motions for a new trial are generally at the discretion of the district court, those types of motions are reviewed by a court of appeals for abuse of discretion.[34] If a motion for a new trial is denied, reversing that denial "is proper if the district court made a legal error in applying the standard for a new trial or if the record contains no evidence in support of the verdict."[35] Regardless of whether a trial court grants or denies new trial motions, the rule stating that the review of either of those actions is only permissible in reviewing abuse of discretion where the motion is based on jury bias as well as misconduct of counsel or jurors.[36]

Also, if a district court denies a new trial motion, an appellate court must affirm that decision "if a reasonable person could have reached a similar decision, given the evidence before him, not that a reasonable person would have reached that decision."[37] Likewise, a new trial will not be granted simply because the court would have reached a different conclusion than the jury reached.[38] Rather, neither a reversal nor a new trial is required in the absence of "error affecting the substantial rights of the parties."[39]

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30. FED. R. CIV. P. 59(a)(1)(A)-(B) (2016).
31. 58 AM. JUR. 2D *New Trial* § 345 (2016).
32. *Id.*
33. *Id.*
34. 36 C.J.S. *Federal Courts* § 636 (2016).
35. *Id.*
36. *Id.*
37. *Id.* (citing FED. R. CIV. P. 59 (2016); Hiser v. XTO Energy, Inc., 768 F.3d 773, 776 (8th Cir. 2014)).
38. 58 AM. JUR. 2D *New Trial* § 42 (2016).
39. *Id.*

Many aspects within the rationale of granting a new trial are predicated around the notion of fairness and justice.[40] This includes claims of excessive damages, evidentiary matters,[41] or other claims stating that the moving party did not receive a fair trial.[42] In relevant part, new trial motions can also raise questions of law that arise out of "alleged substantial errors in the admission or rejection of evidence or in instructions to the jury."[43] In *Ventura*, the Eighth Circuit Court of Appeals cited language from its own common law precedent to establish that in order for Kyle to be granted a new trial on the defamation claim, the district court's denial of granting a new trial must be "a 'clear abuse of discretion.'"[44]

B. ADMISSIBILITY OF INSURANCE EVIDENCE UNDER FED. R. EVID. 411 TO PROVE WITNESS BIAS OR PREJUDICE: THE SUBSTANTIAL CONNECTION MAJORITY STANDARD VERSUS MINORITY STANDARDS

One of the oldest American legal doctrines still in use today is the "insurance exclusionary rule" and is currently codified within Rule 411 of the Federal Rules of Evidence.[45] This rule basically states that "evidence that a party is or is not insured may not be admitted to prove that party's negligence . . . it precludes any reference to the topic of 'insurance' that is intended solely to divulge the existence of a party's insurance coverage."[46]

Similar to the rationale behind judicial discretion in granting a new trial, the rationale underlying the admissibility of insurance evidence involves notions of fairness and justice. Specifically, unless a court approves of a legitimate and admissible purpose for insurance evidence under the confines of Rules 403 and 411 of the Federal Rules of Evidence, evidence of liability insurance has generally been forbidden because it carries "a substantial risk of unfair prejudice, inviting the jury to find against a blameless defendant because the insurance company, not the defendant, will have to pay the judgment."[47] This rationale even applies in

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40. *Id*.

41. *Id*. (Evidentiary matters include claims stating that the verdict was against the weight of the evidence).

42. *Id*.

43. *Id*.

44. *Ventura*, 825 F.3d at 882 (citing Behlmann v. Century Sur. Co., 794 F.3d 960, 963 (8th Cir. 2015).

45. Alan Calnan, *The Insurance Exclusionary Rule Revisited: Are Reports of Its Demise Exaggerated?* 52 OHIO ST. L.J. 1177, 1177 (1991).

46. *Id*.

47. 2 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, JONES ON EVIDENCE § 9:22 (7th ed. 2016).

cases dealing with the admissibility of evidence that a defendant did not have liability insurance because there is a "reverse risk" that a jury might base its decisions on sympathy for the defendant instead of the merits of the case.[48]

Despite its expressed purpose of ensuring that jury verdicts are based on legitimate grounds rather than "the improper notion that a judgment adverse to the defendant will be passed along to a 'deep pocket' insurance company," the insurance exclusionary rule has received much criticism, including the argument that today's jurors "supposedly are not influenced by insurance references because they are already aware of the prevalence of insurance in such litigation and may actually presume its existence."[49] Critics of the rule further argue that even if jurors are influenced by insurance references, "'extensive and unnecessary arguments, reversals, and retrials stemming from elusive questions of prejudice and good faith'" make the insurance exclusionary rule too costly to implement.[50] Nevertheless, the insurance exclusionary rule still exists within Rule 411 of the Federal Rules of Evidence.

Although Rule 411 does not allow the introduction of evidence to show whether a person was insured against liability in order to prove if that person "acted negligently or otherwise wrongfully," insurance evidence can be admitted to prove the bias or prejudice of a witness.[51] However, Rule 403 of the Federal Rules of Evidence allows a court to exclude relevant evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[52] In other words, as indicated by the 2011 amendments to Rule 411, even if evidence is offered for a purpose not explicitly barred by Rule 411, its admissibility is still subject to the court's discretion under Rule 403.[53]

While the Eighth Circuit's opinion is only broken down into one section regarding the defamation claim and another section committed to the unjust enrichment claim, the court's analysis within the defamation

48. *Id.*; *see also* 23 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 5367 (1st ed. 2016) (footnote omitted) ("And some courts have admitted evidence of insurance under the doctrine of 'curative admissibility' to impeach testimony by the defendant that insinuates that he is impecunious and will be harmed by a large judgment").

49. Calnan, *supra* note 45, at 1177-79.

50. *Id.* at 1179.

51. FED. R. EVID. 411 (2016).

52. FED. R. EVID. 403 (2016).

53. FED. R. EVID. 411 advisory committee's note to 2011 amendment.

portion of the opinion contains several important subparts that collectively assessed whether the district court clearly abused its discretion by denying Kyle a new trial. The first important subpart of this portion of the opinion analyzed the admissibility of the insurance testimony under Rule 411 of the Federal Rules of Evidence that was given by the witnesses from HarperCollins.[54] Specifically, the Eighth Circuit adopted the majority standard in this area of the law, the "'substantial connection' analysis" standard, which states:

> [I]n order to balance the probative value and potential prejudice . . . The substantial connection analysis looks to whether a witness has "a sufficient degree of connection with the liability insurance carrier to justify allowing proof of this relationship as a means of attacking the credibility of the witness."[55]

As early as 2001, the substantial connection standard was only adopted by "a handful of other jurisdictions," even though commentators recognized that insurance evidence can potentially have a "distorting effect" during trial because juries are more likely to hold defendants liable and impose higher damages when those defendants are perceived to have a healthy source of assets.[56] As late as 2003, only one jurisdiction adopted "a per se rule allowing the admission of commonality of insurance evidence."[57]

Currently, the substantial connection standard's status as the majority standard closely aligns with the underlying rationale behind the admissibility of insurance evidence. Specifically, the risk of unfair prejudice in relation to insurance evidence's probative value is generally viewed as too high when either a defense witness' affiliation with the defendant's insurance company is "purely coincidental" or when both the defendant and his expert are merely policyholders in the same insurance company.[58] In fact, it has even been encouraged to use other means besides introducing insurance evidence if those means can establish an equivalent bias.[59] But despite its popularity, the substantial connection standard that was provided in *Bonser v. Shainholtz* is generally quite vague.[60] However,

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54. Ventura v. Kyle, 825 F.3d 876, 883 (8th Cir. 2016).

55. *Id.* (quoting Bonser v. Shainholtz, 3 P.3d 422, 425 (Colo. 2000).

56. J. Christopher Clark, *South Carolina's "Substantial Connection" Test for Introducing Evidence of Insurance to Prove Witness Bias*, S. C. LAW. 15, 17 (2002).

57. Stacey D. Mullins, *Evidence for Trial Lawyers*, *in* ASSOC. TRIAL LAW. AM., ATLA WINTER 2003 CONVENTION REFERENCE MANUAL (2003).

58. FISHMAN & MCKENNA, *supra* note 47, § 9:27.

59. *Id.*

60. Andrew M. LaFontaine, *Rule 411: Excluding Evidence of Insurance Offered to Show Witness Bias*, 38 COLO. LAW. 17, 17 (2009).

common law from multiple jurisdictions attempted to clear up that ambiguity.[61]

After adopting the substantial connection standard in *Yoho v. Thompson*,[62] the South Carolina Supreme Court held that a substantial connection existed between the respondent's expert witness and the petitioner's underinsured motorist carrier that assumed the respondent's defense.[63] However, instead of establishing a generalizable standard, the *Yoho* court only determined a fact-specific standard applicable to that given case, holding that a substantial connection existed where, instead of merely being paid an expert's fee in the case at hand, the expert witness: (1) "maintained an employment relationship" with both the insurance company in question and other insurance companies; (2) performed consultations in other cases for the insurance company in question; (3) gave lectures to the agents and adjusters of the insurance company in question; (4) reviewed records for the insurance company in question and other insurance companies so much that ten to twenty percent of his practice consisted of doing so; and (5) the expert witness's yearly salary was partly based on his insurance consulting work.[64]

Under Colorado law, courts must apply a two-pronged test to determine whether insurance evidence offered to show a witness's bias is admissible: (1) determine if "a substantial connection exists between the witness and the insurance carrier" and (2) use the discretionary powers afforded to judges under Rule 403 of the Colorado Rules of Evidence to determine if the danger of unfair prejudice substantially outweighs the probative value of the insurance evidence.[65] In *Garcia v. Mekonnen*,[66] six years after the *Bonser* court articulated the substantial connection standard, the Colorado Court of Appeals sought to clarify the majority standard in two important ways.[67]

First, after holding that an expert witness, who testified so many times on behalf of the plaintiff's insurance carrier that nearly half of his income derived from such testimony, did not have a substantial connection with the respective insurer because no evidence showed that the expert witness'

61. *See generally* ALASKA R. EVID. 403, 411; COLO. R. EVID. 403, 411; S.C. R. EVID. 403, 411 (clarifying this jurisdictional comparison is useful because Rules 403 and 411 are similar to their counterparts in the Fed. R. Evid. and N. D. R. Evid.).

62. 548 S.E.2d 584 (2001).

63. *Id*. at 586.

64. *Id*.

65. LaFontaine, *supra* note 60, at 17.

66. 156 P.3d 1171 (Colo. App. 2007).

67. LaFontaine, *supra* note 60, at 17-18.

personal finances would be affected by an adverse judgment in the case, *Mekonnen* "established that the substantial connection test required something 'beyond mere payment in exchange for testimony at trial.'"[68] Instead, the court illustrated that the substantial connection "had to rise to the level of ownership, agency, or employment to qualify."[69] In other words, the substantial connection must be "a relationship in which a witness has a 'direct interest in the outcome of the litigation.'"[70] In fact, as long as a witness does have a direct interest in the outcome of the respective litigation, courts have recognized a substantial connection even when an expert witness and a respective insurer do not have a formal employment relationship.[71]

Second, *Mekonnen* crucially emphasized that even if a substantial connection is found, courts must still use their broad discretion under Rule 403 of the Colorado Rules of Evidence, which is nearly identical to its North Dakota and federal counterparts, to determine insurance evidence's admissibility.[72] In other words, the substantial connection standard can greatly aid and supplement courts in determining the admissibility of insurance evidence, but the foundation of this type of judicial determination still rests in the rules of evidence. In fact, the *Mekonnen* court emphasized that even if insurance evidence presents a substantial connection, judicial discretion under Rule 403 can set such a high burden of admissibility that the insurance evidence's probative value can actually weaken if other types of evidence exist to show witness bias without mentioning insurance,[73] which would support the previously stated rationale that other means besides insurance evidence should be used if those means can establish an equivalent bias.[74]

In addition to *Mekonnen*'s help clarifying the substantial connection analysis, Alaska's jurisdiction provides two types of insight. First, the Supreme Court of Alaska in *Ray v. Draeger* sheds light on the substantial

68. *Id.* at 18.

69. *Id.*

70. Ray v. Draeger, 353 P.3d 806, 812 (Alaska 2015) (quoting Mendoza v. Varon, 563 S.W.2d 646, 649 (Tex. Civ. App. 1978)).

71. *Id.* at 812-13 (citing Lombard v. Rohrbaugh, 551 S.E.2d 349, 355 (2001)). The *Draeger* court elaborately agreed with this principle by further stating, "This is particularly true given the modern corporate structure where employment and consulting relationships are often created ad hoc or through an intermediary and do not conform to traditional direct employment relationships." *Id.* at 813.

72. LaFontaine, *supra* note 60, at 18.

73. *Id.*

74. FISHMAN & MCKENNA, *supra* note 47, § 9:27.

connection standard in general.[75] Second, *Draeger* helps illustrate a set of criteria that is associated with another closely related standard for assessing the admissibility of insurance evidence under Rules 403 and 411 of the Federal Rules of Evidence in *Ventura* and any jurisdiction with similar language within its evidentiary rules. This standard is known as the economic ties standard.

C. ADMISSIBILITY OF INSURANCE EVIDENCE UNDER FED. R. EVID. 411 TO PROVE WITNESS BIAS OR PREJUDICE: THE ECONOMIC TIES STANDARD AS A SUPPLEMENT TO THE SUBSTANTIAL CONNECTION STANDARD

In *Ray v. Draeger*, the Supreme Court of Alaska crucially rejected a minority common law approach to admitting evidence to show witness bias,[76] which merely requires showing that a witness "was receiving money on behalf of the defense" and does not allow cross-examination to reveal the fact that the source of a witness's payment(s) was a respective insurance company.[77] The *Draeger* court stressed that jurors may not understand the vague reference of generally receiving money from the defense, plus the emphasis that "an expert witness with a substantial connection to insurance companies is working for the side with an interest in minimizing claims . . ." is best shown to the respective jury by describing the witness' relationship with insurers in as clear terms as possible.[78]

Not only does this minority approach contradict the majority approach under Rule 411 of the Federal Rules of Evidence,[79] the Alaska Rules of Evidence, and any jurisdiction with similar evidentiary rules for admitting insurance evidence, but limiting evidence to the vague proof of payment from the defense contradicts and devalues an evidentiary standard that is substantially related to the substantial connection majority standard: the economic ties standard.

Under the economic ties standard, a party can ask a witness, who is testifying on behalf of the opposing insured party, about the following information in order to admit liability insurance evidence to prove that respective witness's bias or prejudice:

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75. *Draeger*, 353 P.3d at 815 ("[T]he weight of factors that the trial court must balance will generally be static because the potential for unfair prejudice will probably not vary and thus should tilt in favor of admission, absent unusual factual circumstances.").

76. *Id.* at 813.

77. WRIGHT ET AL., *supra* note 48 (footnote omitted).

78. *Draeger*, 353 P.3d at 814.

79. WRIGHT ET AL., *supra* note 48; *see also Draeger*, 353 P.3d at 811 n.13.

> [A]ny economic ties between the witness and the insurance company that might be expected to color his testimony. . . . any sort of economic tie that is likely to influence the witness to favor the insurance company in his testimony may be shown, such as ownership of stock in the company, or a promise of employment, or a promise to pay the witness directly for his testimony.[80]

Furthermore, the opposing party can examine the witness regarding his prior employment with the respective insurance company, meaning that the economic tie(s) or relationship does not have to be one that is directly involved in the case at hand.[81]

The economic ties standard's similarities to the majority substantial connection standard was exemplified by the *Draeger* court, where the substantial connection emphasis was mainly based on an expert witness' "significant ties to the insurance industry"[82] or the "financial entanglements of [both the witness] and the consultancy through which he was hired,"[83] all of which are primarily focused on financial relations or connections between an expert witness and the insurance industry.[84] However, it is important to note that the economic ties standard is not identical to the substantial connection standard, because the former only focuses on financially related factors, whereas the latter is not confined to monetary factors.[85]

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80. *Id*. (footnotes omitted) ("The justification for this inquiry is reflected in the ancient Slavic proverb: 'Whose bread I eat, his song I sing.'").

81. *Id*. (footnotes omitted).

82. *Draeger*, 353 P.3d at 813 ("[S]ignificant ties to the insurance industry as indicated by receiving a sizable portion of his or her income from insurance work, being hired by a firm that derives a large portion of its income from insurance companies, or facts that otherwise suggest an interest in the outcome of the litigation.").

83. *Id*. at 815 (finding a substantial connection between an expert witness and the insurance industry where the "financial entanglements" of both the expert witness "and the consultancy through which he was hired" consisted of the expert witness being (a) highly compensated by the insurance industry to the point where his compensation for his insurance reviews represented a large percentage of his total yearly income; and (b) where the expert witness was hired for the *Draeger* case "by a company that does 98% of its work for insurance companies or defense attorneys.").

84. *E.g*., Garcia v. McKonnen, 156 P.3d 1171, 1173 (Colo. Ct. App. 2006).

85. *Compare* Wells v. Tucker, 997 So. 2d 908, 914-16 (Miss. 2008) (holding that no abuse of discretion occurred by the trial court in refusing to allow cross-examination of three defense experts to show possible bias as to the fact that all three experts' medical malpractice insurance coverage was through the same insurance company as the defendant Tucker and that the experts in turn might incur a $136 penalty if the plaintiffs' claim was successful, as the probative value of $136 "was substantially outweighed by the danger of unfair prejudice resulting from the admission of evidence concerning the existence of a liability insurance policy."), *with* Yoho v. Thompson, 548 S.E.2d 584, 586 (S.C. 2001) (considering factors like maintaining an employment relationship with both the insurance company in question and other insurance companies, performing consultations for the insurance company in question in other cases, giving lectures to the agents and adjusters of the insurance company in question, reviewing records for the insurance

III. ANALYSIS

In determining whether the district court clearly abused its discretion in denying Kyle a new trial on the defamation claim,[86] the Eight Circuit provided very in-depth reasoning. However, the appellate court's holding was based primarily on two main areas of the law. The legal area most relevant to North Dakota legal practitioners involved the analysis of Rules 403 and 411 of the Federal Rules of Evidence.

A. THE COURT'S APPLICATION OF THE ECONOMIC TIES STANDARD AND THE SUBSTANTIAL CONNECTION STANDARD

Overall, the Eighth Circuit remanded the defamation claim for a new trial because the district court clearly abused its discretion in denying Kyle a new trial.[87] This was due, in part, to both Ventura's counsel's prejudicial questioning of the HarperCollins witnesses and their prejudicial closing argument statements referring to the HarperCollins witnesses' knowledge of insurance coverage related to both Kyle and HarperCollins.[88] However, the Eighth Circuit subtly combined the conceptual forces of the substantial connection analysis and the economic ties standard.[89]

First, the Eighth Circuit quite simply applied the majority substantial connection analysis and determined that HarperCollins witnesses were not connected enough to the insurance carrier to allow Ventura's counsel to cross examine the HarperCollins witnesses[90] or make closing argument remarks[91] to argue that under Rule 411, the HarperCollins witnesses "were biased in favor of Kyle because HarperCollins and Kyle were covered by the same insurance policy."[92] The court determined that a substantial connection showing bias or influence by an insurance policy was lacking because the HarperCollins witnesses were simply unaware of any such

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company in question and other insurance companies so much that ten to twenty percent of the expert witness's practice consisted of doing so, and the expert witness's yearly salary was partly based on his insurance consulting work).

86. *Ventura*, 825 F.3d at 882.

87. *Id*. at 888.

88. *Id*. at 885.

89. *Id*. at 883.

90. *Id*. at 882 ("At trial, Ventura's counsel asked the witness Rosenblum, "whether she was aware Kyle's attorneys were 'being paid by the insurance company for HarperCollins' and 'HarperCollins has a direct financial interest in the outcome of this litigation because they are providing the insurance.'").

91. Specifically, Ventura's counsel argued that "'[i]t's hard to believe that [Rosenblum and Hubbard] didn't know about the insurance policy because it's right in Kyle's publishing contract.'" *Id*. at 883.

92. *Ventura*, 825 F.3d at 882.

insurance policy here.[93] However, behind this simple determination of a lack of substantial connection, contains a possibly significant expansion to the substantial connection analysis.

Specifically, the Eighth Circuit's substantial connection analysis could include the economic ties standard as well. This possibility lies within one seemingly simple sentence within the court's opinion:

> Even if [the HarperCollins witnesses] had been aware of a policy, any 'connection' they had to the insurance carrier was far too remote to create a risk of bias strong enough to outweigh the substantial prejudice of Ventura's counsel's pointed and repeated references to unproven insurance.[94]

Two strong possibilities exist from this statement involving assessing the admissibility of insurance evidence under Rules 403 and 411 of the Federal Rules of Evidence.

First, the court, based on its substantial connection analysis background information,[95] could have implicitly reaffirmed common law precedent stating that substantial connection analysis jurisdictions reject "a mere 'commonality of insurance' approach, holding that the likelihood of bias is so attenuated that the risk of prejudice substantially outweighs the probative value."[96] However, this is unlikely because the court supplemented its substantial connection analysis with an analysis based on the economic ties standard.[97] Specifically, the court concluded that no evidence showed that HarperCollins' witnesses had any economic tie to HarperCollins' insurance carrier because: "[t]hey were not currently or formerly employed by the insurance company, seeking employment with the insurance company, paid

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93. *Id*. at 883. For one, regarding Ventura's counsel's closing argument statement, the court noted that "[t]he one-line mention of insurance contained in the lengthy small-print contract merely acknowledges HarperCollins '*may* carry' insurance. The publishing contract does not establish HarperCollins actually purchased insurance, much less that Rosenblum and Hubbard knew about it." *Id*. at 883-84. Also, citing FED. R. EVID. 602, the court stressed that, "[a]s a matter of basic evidentiary foundation, Ventura never established by direct evidence or reasonable inference that Rosenblum and Hubbard even knew about any insurance coverage or possible insurance payment. Rosenblum and Hubbard had no personal knowledge on the topic and were not qualified to testify on the subject." *Id*. at 883.

94. *Id*. at 884 (footnote omitted) (citing FED. R. EVID. 403 (2016)).

95. *See id*. at 883 (citing common law precedent stating that substantial connection analysis jurisdictions reject "a mere 'commonality of insurance' approach"); *see also supra* text accompanying notes 56-58 (stating that "a per se rule allowing the admission of commonality of insurance evidence" is the minority rule and that when either a defense witness's affiliation with the defendant's insurance company is "purely coincidental" or when both the defendant and his expert are both merely policyholders in the same insurance company, the risk of unfair prejudice in relation to insurance evidence's probative value is generally viewed as too high).

96. *Ventura*, 825 F.3d at 883 (quoting Bonser v. Shainholtz, 3 P.3d 422, 425 (Colo. 2000)).

97. *Id*.

for their testimony by the insurance company, or holders of stock in the insurance company."[98]

More importantly, the court stated that "[t]here was no risk Rosenblum and Hubbard might personally contribute to the payment of any judgment in favor of Ventura. Ventura even failed to show a judgment in his favor could adversely affect Rosenblum's and Hubbard's employment with HarperCollins."[99] While this analysis was included in the court's application of the economic ties standard, its emphasis on Rosenblum and Hubbard being personally affected by the outcome of this case aligns very closely to the substantial connection analysis emphasized by the Colorado Court of Appeals in *Garcia v. Mekonnen*. In *Mekonnen*, a substantial connection "had to rise to the level of ownership, agency, or employment to qualify."[100] The *Ventura* court's analysis also closely resembled that of the Supreme Court of Alaska in *Ray v. Draeger*, where a substantial connection must be "a relationship in which a witness has a 'direct interest in the outcome of the litigation,'" even if the expert witness and a respective insurer do not have a formal employment relationship.[101] In other words, the Eighth Circuit in *Ventura* seemed to have recognized the economic ties standard's similarities to the majority substantial connection standard[102] to the point of using the former standard as a supplement to help establish strict criteria for determining whether a substantial connection was present. This opportunity for supplementation was provided to the court by the ambiguous nature that has plagued the substantial connection standard for years.[103]

IV. IMPACT ON NORTH DAKOTA PRACTITIONERS

North Dakota has yet to join the majority of jurisdictions already applying the substantial connection analysis. It is uncertain whether this reluctance is due to North Dakota's contentment of its current status quo of assessing the admissibility of insurance evidence to prove witness bias, or if the reluctance is based on the lack of uniform criteria within the substantial connection jurisdictions. Whatever the reason may be, only time will tell if

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98. *Id.*

99. *Id.*

100. *Garcia*, 156 P.3d at 1175; *see supra* text accompanying notes 68-69.

101. *Draeger*, 353 P.3d at 812; *see supra* text accompanying notes 70-71.

102. *See supra* text accompanying notes 76-84 (using *Ray v. Draeger* to exemplify the economic ties standard's similarities to the majority substantial connection standard).

103. *See supra* text accompanying notes 60-85 (showing how common law from multiple jurisdictions have attempted to clear up the ambiguity found within the substantial connection standard, which includes a common law approach exemplifying the similarities between the economic ties standard and the majority substantial connection standard).

the recent high-profile case of *Ventura* in North Dakota's own federal circuit will have any effect on North Dakota's evidentiary common law moving forward.

A. NORTH DAKOTA COMMON LAW: STANDARDS FOR GRANTING A NEW TRIAL AND THE ADMISSIBILITY OF INSURANCE EVIDENCE

Not only has common law firmly established the right for parties to test opposing witnesses for potential "bias or interest," but modern codifications have almost universally included this right as well.[104] Furthermore, the provision from Rule 411 of the Federal Rules of Evidence that allows for admitting liability insurance evidence to prove "bias or prejudice of a witness" is contained in virtually all state codifications, or is nonetheless implicitly permitted in the few states that do not specifically refer to that specific permissible use.[105]

In fact, Rules 403 and 411 of North Dakota's Rules of Evidence have virtually identical language to their federal counterparts,[106] meaning that North Dakota appellate courts could apply the same substantial connection standard used in a majority of jurisdictions.[107] However, despite those similarities, North Dakota common law appears not to be a part of the majority of jurisdictions applying the substantial connection standard when assessing the admissibility of liability insurance evidence.

Under North Dakota common law, similar to federal law, the trial court has discretion in determining whether a new trial should be granted.[108] If a "clear abuse of discretion" does not exist, a trial court's decision will not be reversed on appeal.[109] Furthermore, North Dakota requires a stronger showing of an abuse of discretion in granting a motion for a new trial than denying such a motion because while denying a motion for a new trial ends a case, granting such a motion merely continues the same case with a

104. David P. Leonard, THE NEW WIGMORE: A TREATISE ON EVIDENCE: SELECTED RULES OF LIMITED ADMISSIBILITY § 6.12.1 (2016).

105. *Id*.

106. *See* N.D. R. EVID. 403, 411 (2016).

107. For clarification see N.D. R. CIV. P. 59(b) (2016), which lists the grounds for a new trial; *see also* Smith v. Anderson, 451 N.W.2d 108, 112 (N.D. 1990) (finding that in North Dakota, an abuse of discretion occurs if a trial court acts "arbitrarily, capriciously, or unreasonably.").

108. Neibauer v. Well, 319 N.W.2d 143, 144-45 (N.D. 1982).

109. *Id*.

different jury.[110] Thus, compared to an order denying a new trial, an order granting a new trial is subject to more limited appellate review.[111]

However, unlike the majority of jurisdictions that employ the substantial connection standard, North Dakota solely relies on both exceptions under Rule 411 that allow for admitting insurance evidence, and the "balancing test"[112] under Rule 403.[113]

As early as 1959, North Dakota held that a new trial was required due to prejudicial error resulting from the disclosure of the fact that a defendant did or did not have liability insurance.[114] In 1982, *Neibauer v. Well*, made an important distinction from prior North Dakota precedent by emphasizing that as long as a reference to insurance has the effect of informing the jury that the defendant has liability insurance, that statement can be prejudicial enough to warrant a new trial, even if that reference to insurance is "unexpected and inadvertent rather than solicited and deliberate."[115] However, a minor, yet important, factor in *Neibauer* was that despite the North Dakota Supreme Court's explanation of Rule 411, the plaintiff's assertion that her reference to insurance was not prejudicial was not based on the admissibility exceptions under Rule 411.[116]

This distinction was heavily emphasized in *Filloon v. Stenseth*, as the North Dakota Supreme Court noted that unlike the plaintiff in *Neibauer*, the appellants in *Filloon* specifically argued that the insurance evidence presented by them was for the admissible purpose of showing bias or prejudice under Rule 411.[117] Furthermore, while the Court appropriately stressed that merely citing a Rule 411 exception does not automatically grant the admissibility of insurance evidence, the standard used for determining the admissibility of insurance evidence was the significantly discretionary "balancing test" under Rule 403 of the North Dakota Rules of Evidence.[118] Overall, the closest North Dakota common law has driven itself away from strict adherence to Rules 403 and 411 is cumulatively

110. Ceartin v. Ochs, 516 N.W.2d 651, 652 (N.D. 1994).

111. *Id.*

112. Lacher v. Anderson, 526 N.W.2d 108, 109 (N.D. 1994).

113. N.D. R. EVID. 403 (2016) (explaining that this rule simply allows trial judges to determine if relevant evidence's "probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice; confusing the issues; misleading the jury; undue delay; wasting time; or needlessly presenting cumulative evidence.").

114. *Neibauer*, 319 N.W.2d at 145.

115. *Id.* at 146.

116. *Id.* at 145.

117. Filloon v. Stenseth, 498 N.W.2d 353, 354-55 (N.D. 1993).

118. *Id.* at 355. In other words, the *Filloon* court decided that instead of automatically excluding insurance evidence, trial courts must apply the Rule 403 balancing test to weigh the potential admissibility of insurance evidence offered under a Rule 411 exception. *Id.*

weighing evidentiary errors to determine if defendants' rights were deprived in such a prejudicial manner as to warrant the granting of a new trial.[119]

B. ADOPTING THE COURT'S FEDERAL STANDARD OF DETERMINING THE ADMISSIBILITY OF INSURANCE EVIDENCE FOR NORTH DAKOTA CASE LAW

Being within the Eighth Circuit, North Dakota can offer its legal practitioners evidentiary legal insight regarding both state and federal evidentiary matters. More importantly, however, *Ventura* indirectly poses an important challenge to North Dakota judges and justices. Specifically, *Ventura* now forces North Dakota's judicial officers to decide whether to continue on its current common law path in interpreting Rules 403 and 411 of the North Dakota Rules of Evidence, or instead, to embrace the majority substantial connection standard that is applied in its own federal circuit. This decision, as one could easily predict, is logically simple, yet practically and subtly more challenging than anticipated.

Arguably the most obvious reason for North Dakota courts to embrace the substantial connection standard is that the Eight Circuit already applies it when conducting an analysis under Federal Rules of Evidence 403 and 411. Because North Dakota's evidentiary rules regarding the admissibility of insurance evidence to show a witness' bias are virtually the same as its Eighth Circuit federal counterparts, the fact that Rules 403 and 411 of the Federal Rules of Evidence contain virtually the same language as Rules 403 and 411 of the North Dakota Rules of Evidence, would make logical sense for North Dakota courts to transition into the application of the majority substantial connection analysis. Even if North Dakota practitioners were to argue that, as exemplified in *Filloon v. Stenseth*, maintaining North Dakota's standard of adhering to the balancing test under Rule 403 for determining the admissibility of insurance evidence would provide North Dakota courts a great amount of discretion, this argument carries very little weight when considering that the substantial connection analysis also provides the majority of jurisdictions with a great amount of discretion as well. The only difference here is that the substantial connection

119. Ceartin v. Ochs, 516 N.W.2d 651, 655-56 (N.D. 1994) (concluding that trial court did not abuse its discretion in granting a new trial where (1) parties' attorneys allowed a report disclosing defendants' liability insurance to reach jury; (2) counsel's closing argument remarks referencing the existence of liability insurance; and (3) the jury's award of future economic damages neither claimed nor supported by evidence; and also stating "[p]erhaps no single irregularity would have caused much concern. Cumulatively, however, they led the trial court to believe that the defendants may have been deprived of a fair trial.").

jurisdictions share a uniform standard of assessing the admissibility of insurance evidence, while North Dakota seems to remain content on a more case-by-case approach that merely interprets Rules 403 and 411. However, the uniformity enjoyed by substantial connection jurisdictions might be a deceptive mirage.

As exemplified by cases like *Yoho v. Thompson*, *Garcia v. Mekonnen*, and *Ray v. Draeger*, the seemingly big happy family of jurisdictions that make the substantial connection analysis the majority standard still seems to lack a uniform set of criteria for establishing a substantial connection in each case between witnesses and respective insurance companies. Thus, this lack of uniformity within the substantial connection jurisdictions help justify the reluctance that some North Dakota practitioners might have in abandoning the State's current standard. However, in tandem with its high-profile status, the Eighth Circuit's extension/supplementation to the substantial connection standard in *Ventura* might help persuade other substantial connection jurisdictions to follow in its footsteps and create a more uniform substantial connection analysis. Specifically, *Ventura* might influence other substantial connection jurisdictions to also expand their criteria by supplementing the economic ties standard alongside the substantial connection analysis.

While the substantial connection analysis is not confined to financially related factors, unlike the economic ties standard, having the latter's strict set of criteria as a supplemental reference can promote greater uniformity among these jurisdictions, thus promoting a more uniform rule of law in general. This was appropriately shown in the court's opinion in *Ventura*. While the Eighth Circuit's determination of a lack of a substantial connection was simply based on the witnesses' lack of awareness of any relevant insurance policy, the *Ventura* court also likely adopted the economic ties standard as an alternative legal safety net that was used, in that case, to show a lack of substantial connection even if the witnesses were aware of an insurance policy.

In sum, the law is not static. Instead, the law is an evolutionary mechanism that changes with its surrounding environment. On a national scale, the evolving manner in which jurisdictions have assessed the admissibility of insurance evidence to prove witness bias has been chronicled for over a decade now, as the substantial connection standard grew from a minority standard as early as 2001 to the majority standard today. In fact, *Ventura* is proof that the substantial connection analysis is still changing and expanding. The expansion and evolution of the substantial connection analysis might explain North Dakota's reluctance to adopt that standard and abandon its current analytical approach. Perhaps

Ventura will alleviate some of that reluctance now that North Dakota's own federal circuit has expanded upon the majority substantial connection standard in such a high-profile case. Only time will tell whether North Dakota becomes the next link in the majority standard's chain.

C. THE SUBSTANTIAL CONNECTION STANDARD WILL PREVENT NORTH DAKOTA FROM AIMLESSLY WANDERING ON A CASE-BY-CASE BASIS OF ANALYSIS

Even if the substantial connection analysis jurisdictions do not enjoy an elegantly uniform set of criteria, it is important to remember this standard's close alignment with the underlying rationale for the admissibility of insurance evidence. In *Vasquez v. Rocco*, before adopting the substantial connection standard,[120] the Connecticut Supreme Court stressed that even if a jurisdiction's rules of evidence allow admission of insurance evidence to prove witness bias or prejudice,

> A concern remains, however, that jurors might be influenced by such evidence because they may believe that an insurance company is better able than the parties to bear any loss resulting from the defendant's alleged negligence. Although today's jurors probably assume that all physicians carry malpractice insurance, "the introduction of evidence on the subject tends to emphasize something that is usually irrelevant and that may have an adverse effect on the quality of the jury's deliberations and conclusions." Nevertheless, the risk of undue prejudice to the defendant resulting from the introduction of such evidence must be weighed against the plaintiff's right of cross-examination regarding motive, interest, bias or prejudice, a right that may not be unduly restricted.[121]

In other words, the *Vasquez* court crucially emphasized the need to weigh virtually every trial participant's interests when determining the admissibility of insurance evidence, including the defendants, the plaintiffs, and each jury member. This emphasis on balancing multiple interests throughout the trial process is arguably the reason for why a majority of jurisdictions have adopted the substantial connection analysis, which

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120. Vasquez v. Rocco, 836 A.2d 1158, 1165 (Conn. 2003).

121. *Id.* at 1163 (footnote and citations omitted); *see also supra* note 58 and accompanying text (emphasizing "the risk of unfair prejudice in relation to insurance evidence's probative value is generally viewed as too high when either a defense witness's affiliation with the defendant's insurance company is 'purely coincidental' or when both the defendant and his expert are both merely policyholders in the same insurance company").

provides an objectively beneficial supplement for jurisdictions' evidentiary rules similar to Rules 403 and 411 of the Federal Rules of Evidence.

To put it frankly, the substantial connection analysis gives teeth to any judicial analysis regarding the admissibility of insurance evidence to prove witness bias. At the same time, the substantial connection analysis still affords trial judges a great deal of discretionary power, only now they will have an analytical compass instead of wandering aimlessly on a case-by-case basis. While the *Ventura* court appropriately utilized this analytical compass, North Dakota continues to wander aimlessly with its mere reliance on the balancing test under Rule 403 of the North Dakota Rules of Evidence.

With or without the supplemental assistance of the economic ties standard, the substantial connection analysis still places a burden on an offering party's insurance evidence to pass a certain threshold to gain admissibility, otherwise other means besides insurance evidence should probably be used to establish bias.[122] This threshold is clearly emphasized in *Vasquez*:

> Underlying this analysis is the premise that only some relationships between a defendant's expert witness and the defendant's insurance carrier give rise to an inference of bias that outweighs the countervailing risk that jurors might use the evidence for an improper purpose. Thus, when a witness has a substantial connection to the defendant's insurer, such as that of agency, employment or control, evidence of that relationship is considered sufficiently probative of bias that it is admissible despite the risk of prejudice to the defendant. On the other hand, when the witness is merely a policyholder of the defendant's insurer, the witness is unlikely to be influenced by that relationship and, consequently, the risk of prejudice to the defendant from the admission of such evidence is deemed to outweigh its probative value. Thus, in the absence of any other connection between the witness and the defendant's insurer, evidence that the witness and the defendant are insured by the same carrier is insufficient to justify the admission of that evidence under the "substantial connection" test.[123]

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122. *See supra* note 59 and accompanying text (stressing "it has even been encouraged to use other means besides introducing insurance evidence if those means can establish an equivalent bias").

123. *Vasquez*, 836 A.2d at 1164-65 (citations omitted).

Thus, within the term "substantial," the substantial connection analysis can assess relevant insurance evidence's connection to a witness in terms of its degree, quantity, or both, so long as that connection shows the insurer is likely influencing a respective witness to bias his testimony. For example, in *Yoho v. Thompson*, the South Carolina Supreme Court held that the substantial connection standard was met due to a quantitatively sufficient amount of cumulative evidence.[124] Meanwhile, the Colorado Court of Appeals in *Garcia v. Mekonnen* took a different approach, focusing less on the amount of evidence, and instead focused more on the degree of influence that insurance evidence could have on a respective witness.[125] While each approach is subtly different, both can still be used to provide trial judges with a more reliable framework of determining the admissibility of insurance evidence to prove witness bias under the substantial connection analysis.

North Dakota, on the other hand, has no such framework to assess how much influence an insurance carrier might have on a respective witness at trial. Instead, the court in *Filloon v. Stenseth* merely ensured that insurance evidence cannot be automatically excluded at trial.[126] This common law standard basically informs trials judges that the likelihood of a witness being influenced and biased from his connection with a respective insurance carrier completely depends on judicial discretion.

In other words, North Dakota common law places offering parties at the mercy of a trial judge without the safety net of judicial restraints like the substantial connection analysis or even the economic ties standard. This is not to say that North Dakota trial judges are untrustworthy or incompetent. Instead, the lack of any set standard also jeopardizes judicial decision making. Without a standard like the substantial connection analysis, North

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124. *See supra* notes 62-64 and accompanying text (exemplifying the satisfaction of the substantial connection standard through cumulative evidence where "[I]nstead of merely being paid an expert's fee in the case at hand, the expert witness: a) 'maintained an employment relationship' with both the insurance company in question and other insurance companies; b) performed consultations in other cases for the insurance company in question; c) gave lectures to the agents and adjusters of the insurance company in question; d) reviewed records for the insurance company in question and other insurance companies so much that ten to twenty percent of his practice consisted of doing so; and e) the expert witness's yearly salary was partly based on his insurance consulting work.").

125. *See supra* notes 65-69 and accompanying text (emphasizing that the substantial connection standard demanded more than mere payment in exchange for trial testimony, and instead required a connection between a witness and insurer "to rise to the level of ownership, agency, or employment to qualify").

126. *See supra* note 118 and accompanying text (stressing that while merely citing a Rule 411 exception does not automatically grant the admissibility of insurance evidence, the standard used for determining the admissibility of insurance evidence was merely the greatly discretionary "balancing test" under N.D. R. EVID. 403).

Dakota trial judges are forced to aimlessly rule on the admissibility of insurance evidence to prove bias, even if they are unfamiliar with this area of the law. Without any guideposts to assist trial judges here, biased witnesses could be erroneously deemed unbiased and vice versa. Until this judicial discretion is checked, North Dakota insurance evidentiary jurisprudence will likely remain in an uncertain case-by-case atmosphere.

V. CONCLUSION

Overall, with regard to the defamation claim, the Eighth Circuit in *Ventura v. Kyle* vacated both the defamation judgment and damages award and remanded the defamation claim for a new trial.[127] Within its holding to grant a new trial, the Eighth Circuit adopted a majority standard in the substantial connection analysis to bolster the codified method of determining the admissibility of insurance evidence under Rules 403 and 411 of the Federal Rules of Evidence. In essence, applying the substantial connection standard to the determination of insurance evidence's admissibility still provides the trial court with a plethora of leeway and discretion when deciding cases, but the substantial connection standard helps to keep the trial court's discretion in check on a more uniform basis.

However, while the substantial connection standard is widely accepted, the way in which to determine whether a substantial connection exists between an expert witness and the insurance industry is not uniformly applied in each jurisdiction adopting that standard, leaving room for interpretation among each jurisdiction applying the substantial connection analysis. Therefore, as a supplement to the substantial connection analysis, the Eighth Circuit applied the similar, yet different, economic ties standard to help determine that Kyle was entitled to a new trial based on the district court's abuse of discretion for allowing Ventura's counsel to ask overly prejudicial questions related to insurance to the two witnesses from the publisher of Kyle's book, HarperCollins, as well as reference to Kyle's insurance in their closing argument.

Although North Dakota resides in the Eighth Circuit, its common law does not adopt the substantial connection analysis and merely interprets Rules 403 and 411 of the North Dakota Rules of Evidence, leaving arguably too much discretion in state trial courts' hands. Since Rules 403 and 411 of North Dakota's Rules of Evidence are virtually identical to their federal counterparts, North Dakota common law could easily adopt the majority

127. Ventura v. Kyle, 825 F.3d 876, 888 (8th Cir. 2016). In addition, the court reversed the unjust enrichment judgment and vacated the accompanying damages award as well. *Id.*

substantial connection standard. However, North Dakota common law may merely uphold the status quo due to the substantial connection standard's lack of uniform criteria.

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