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In Supreme Court

STATE OF NORTH DAKOTA

Grand Forks Co. No. 94-C-01617

Jace Reed,

Plaintiff-Appellant,

vs.

University of North Dakota, John Gasparini,
James Scanlon, Craig Perry, Chad Peterson, and
North Dakota Association for the Disabled, A North Dakota Corporation,

Defendant-Respondents.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Herein, Appellant Jace Reed submits his Reply to the arguments of both the Appellees, University of North Dakota (UND) and the North Dakota Association for the Disabled (NDAD). Neither UND nor NDAD present compelling arguments that would prevent this Court from remanding Mr. Reed's cause of action for a trial.

UND

UND continues to insist, without support and in the face of overwhelming evidence to the contrary, that Reed's contract claim was addressed on the merits in the Minnesota action. UND merely makes the bald assertion that the decision from the Minnesota courts was on the merits while making no effort to explain the fact that discovery before the trial court was explicitly limited to jurisdictional issues¹; objection was made to any discovery beyond that scope²; and that the district court decision specifically noted that summary judgment was not being granted on the breach of contract claim other than in its relation to the court's specific jurisdiction³. This Court must conduct the type of analysis undertaken in Dolajak v. State Auto & Cas. Underwriters, 252 N.W.2d 180 (ND 1977) in order to determine whether the Minnesota decision was on the merits. UND makes no effort to argue that the analysis mandated by Dolajak is not required. Such an analysis inevitably leads to the conclusion that the Minnesota decisions were not on the merits as is required for the application of *res judicata*.

¹A. App. 11.

²A. App. 74-89; 90.

³A. App. 43.

Alternatively, UND argues that Judge Leclerc might not have granted summary judgment on the basis of *res judicata*. (UND Brief, p. 3). Granted, his Order only states that there are no genuine issues of material fact. When read in conjunction with his earlier Order of May 6, 1996 (A. App. 60) and the arguments that took place before him (Trans. p. 4), it would seem clear that he did apply *res judicata* in order to dismiss Reed's claim. If he did not, and instead found that the claim failed on its merits as a matter of law, he impermissibly weighed the evidence in coming to his decision, as argued in Reed's main Brief. See, Appellant's Brief, pp. 16-20; Red River Human Services Foundation v. DHS, 477 N.W.2d 225, 299 (ND 1991); Brown v. North Dakota State University, 372 N.W.2d 879, 883 (ND 1985).

UND also asserts that it had no notice of the present breach of contract as required by NDCC 32-12-03. (UND Brief, pp. 16-17). UND apparently does not consider the federal action and the Minnesota state action as notice prior to this lawsuit of a breach of contract claim against UND. Service was had upon UND and they vigorously defended those actions: their present contention is specious. They also state that "Reed has never alleged that he presented a claim to the agency before filing suit". That is not true. Reed would refer this Court to his Memorandum in Opposition to Defendant UND's Motion for Dismissal dated October 13, 1994, p. 6 where such an allegation was made. Of course, if it is UND's position that they did not refuse the breach of contract claim as contemplated in NDCC 32-12-03 and instead are allowing it, this appeal is moot.

UND also cites the case of In re DES Litig., 7 F.3d 20, 24 (2nd Circuit 1993) for the proposition that the Minnesota Court of Appeals properly adjudicated the merits of Reed's case. (See, UND Brief, p. 13). In the first place, there is no way that the Minnesota appellate court could have decided that issue on its merits in that the merits were never even presented to the trial court in Minnesota. Moreover, the citation to In re DES Litig. is quite misleading. That case discussed the ability of a prevailing party to challenge adverse interlocutory determinations. The quote taken out of context by UND relates to a trial court assuming the existence of subject matter jurisdiction and adjudicating on the merits. In re DES Litig., 7 F.3d 20, 24 (2nd Circuit 1993).

While *res judicata* is a doctrine that promotes efficiency, it cannot be used to deny a litigant his day in court. As Reed's contract claim has merit and those merits have never been addressed by a jury of his peers, his claim against UND in this regard must be remanded for trial.

NDAD

In its Brief, NDAD asserts that it owed no duty to Mr. Reed because he was not a participant in the Run the Red race. (NDAD Brief, p. 19). They go so far as to state "it is irrefutable that Jace Reed was not a participant in the 1991 Run the Red . . .". (Id., p. 13). NDAD buttresses this illogical contention by pointing out that Reed did not compete for prizes. One need only refer to NDAD's own representations in order to refute the contention that Reed was not a participant. In their brochure advertising the 1991 race, the following language appears: "Each year people **participate** in Run the Red who do not compete for prizes, the University of North Dakota Fighting Sioux

hockey team has used Run the Red as part of its fall training . . .". (A. App. 153). At least prior to this litigation, NDAD considered the hockey team and those who did not compete for prizes as participants in the race. All participants, including Jace Reed were certainly owed a duty of care.

NDAD also goes to some lengths in citing an Arizona statute on joint and several liability and discussing Arizona holdings thereon. What they fail to point out is that the Arizona statute's⁴ definition of "acting in concert" does not include acts ratifying or adopting another negligent action as the North Dakota statute does. It is the ratification and adoption of UND's actions by NDAD (and vice-versa) that serves as a basis for joint liability in this case. NDAD also points out additional facts that lead to the conclusion that they ratified and/or adopted the acts of UND when they point out that the only "non-Run the Red" personnel allowed on the racecourse during the event were UND hockey coaches, staff and assistants. (NDAD Brief, p. 13; NDAD App. 87-89.) This is very nearly explicit adoption and ratification of UND's acts. As argued in the main brief, UND personnel specifically conferred with NDAD as to locations of water stations and ambulance coverage. (Appellant's Brief, p. 28; A. App. 184). Thus, there was evidence before the trial court in this case of each Appellees' ratification and adoption of the others acts.

NDAD has seen fit to present matters to this Court that were not in the record before the trial court. While objectionable, Appellant Reed does not take particular issue with that tactic but would point out that all of his factual assertions are direct inferences

⁴AZ ST § 12-2506(F)(1)

from the record before the trial court and must, given the nature of summary judgment proceedings, have been assumed as true by the trial court (and this Court) in reaching its ruling. Appellant would also point out that NDAD mischaracterized Jace Reed's testimony in its argument in regards to the effect of the release. In their Brief, at page 20, they state that "he understood the risks of distance running, including the specific types of injuries he sustained, at the time he signed the release." This is false in two respects. Reed's relevant testimony is excerpted by NDAD in their Appendix at pages 91-93. In the first place, he never testified that he read the release at the time he signed it and his "understanding" of its terms was as of the date of his deposition. Secondly, nowhere in his testimony does he in any way testify that he understood the specific types of injuries (ventilator dependency and multiple organ transplants, amongst others) that he sustained.

Nothing in NDAD's arguments should deter this Court from finding that they were negligent, ratified and/or adopted the negligence of UND, and owed Mr. Reed a duty of care that survives their ineffective release. Mr. Reed's case against NDAD should be remanded for trial.

CONCLUSION

Based upon the above arguments, Jace Reed respectfully requests that the Orders of Judge Leclerc denying him the opportunity for a trial be reversed and his case remanded for a trial forthwith.

Dated: _____

8/18/95

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