

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

<p>John Sadek and Tammy Sadek, as surviving parents of Andrew Sadek on behalf of all heirs-at-law, and the Estate of Andrew Sadek,</p> <p>Plaintiffs/Appellants,</p> <p>v.</p> <p>Jason Weber, individually and as a Richland County Sheriff's Deputy and Task Force Officer of the South East Multi County Agency Narcotics Task Force, and Richland County, North Dakota, a political subdivision,</p> <p>Defendants/Appellees.</p>	<p>Supreme Court No. 20190216</p> <p>Richland County District Court No. 39-2016-CV-128</p> <p>Southeast Judicial District</p> <p>The Honorable Jay A. Schmitz</p>
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APPEAL FROM JUDGMENT ENTERED
MAY 24, 2019 (DKT. NO. 193)

BRIEF OF APPELLANTS JOHN SADEK AND TAMMY SADEK

ORAL ARGUMENT REQUESTED

O'KEEFFE, O'BRIEN, LYSON & FOSS, LTD.
TIMOTHY M. O'KEEFFE (ND ID # 05636)
TATUM O'BRIEN (ND ID #05985)
720 Main Avenue
Fargo, ND 58103
Phone: 701-235-8000
tim@okeeffeattorneys.com
tatum@okeeffeattorneys.com
Attorneys for Appellants

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STATEMENT OF THE ISSUES

[¶1] Whether the district court erred by granting summary judgment as to Plaintiffs' negligence claims?

[¶2] Whether the district court erred by granting summary judgment as to Plaintiffs' claim for deceit?

REQUEST FOR ORAL ARGUMENT

[¶3] Plaintiffs request oral argument because they believe it would be helpful to the Court in considering the factual and legal issues presented.

STATEMENT OF THE CASE

[¶4] Plaintiffs John and Tammy Sadek are the surviving parents of Andrew Sadek (“Andrew”). Prior to his death, Andrew was recruited by Defendant Jason Weber (“Weber”), a Richland County Sheriff’s Deputy and Task Force Officer of the South East Multi County Agency (“SEMCA”) Narcotics Task Force, to act as a confidential informant.

[¶5] Andrew went missing on May 1, 2014. On June 27, 2014 his body was found in the Red River.

[¶6] John and Tammy Sadek (“Plaintiffs”) sued Deputy Jason Weber and Richland County (collectively, “Defendants”) asserting multiple claims, including deceit and negligence, for the wrongful death of Andrew Sadek on the assertion that Andrew’s death is directly related to his role as a confidential informant.

[¶7] Defendants moved for summary judgment, requesting the district court to dismiss all claims brought by the Plaintiffs. Defendants’ motion was later granted by the district court, and a Judgment of Dismissal was entered with regard to each of the Plaintiffs’ claims.

[¶8] Plaintiffs now appeal the district court’s Judgment of Dismissal.

STATEMENT OF THE FACTS

[¶9] This case arises out of the relationship between Andrew and the Defendants. Defendant Weber is employed with the Richland County Sheriff's Office. Dkt. 75 (sealed)¹ & 76 (redacted), Deposition Transcript of Jason Weber ("Weber Depo.") p.8, ln 8-9. Since 2008, Weber has been assigned to the SEMCA narcotics task force. Id. at p. 7, ln 24-25. The purpose of SEMCA is to "reduce the accessibility of drugs in the task force jurisdictional area to prevent the abuse of illegal drugs, which will decrease criminal activities." App. p. 39, SEMCA's 2011 Grant Application. This success is measured, in part, by the number of drug purchases and number of cases generated by the task force. See id.

[¶10] In April of 2013, two confidential informants working together purchased user quantities of marijuana from Andrew, first an eighth of an ounce for \$60.00, and later one gram for \$20.00. See App. p. 31, Weber Depo p. 58, ln 20-24 & p. 60, ln 15-20; and App. p. 44, Michael Levine's Expert Report. One, of these two confidential informants, had previously been found in possession of three ounces (a dealer quantity of marijuana). App. p. 30, Weber Depo p. 40, ln 21-24.

[¶11] On November 21, 2013, officers searched Andrew's dorm room and found a marijuana grinder in his possession. App. p. 31, Weber Depo p. 61, ln 10-16. At the time of this search, Weber informed Andrew about the felony charges he could face for the deliveries made in April of 2013, and told him he could either

¹ Reference to the sealed version is made simply to make the Court aware of the existence of the unredacted version and its location within the docket.

take the charges or sign up to work as a confidential informant. App. p. 33, Weber Depo p. 66, ln 15-25. Between the deliveries in April and the dorm search in November of 2013, Defendants did not make any other observations or obtain any other evidence concerning marijuana use or sale involving Andrew. App. p. 31, Weber Depo p. 60, ln 24-25 & p. 61, ln 1-3.

[¶12] On November 22, 2013, Andrew met with Defendant Weber to discuss becoming a confidential informant. See Dkt. #87 (sealed), Video Interview of Andrew Sadek (“11/22 Int.”)².

[¶13] During this meeting, Weber informed Andrew that there was “a good possibility that [he would] get some prison time if [he did not act as a confidential informant].” Id., starting at 1 minute, 4 seconds (1:04) into the video. In discussing what would be provided to Andrew in exchange for his work as a confidential informant, Weber said, “a lot of this could go away . . . at least you’re not pleading guilty to felonies.” Id. Relying on Weber’s statements, Andrew signed up to work as a Confidential Informant for Weber and the SEMCA task force in November of 2013. See generally id.; See also Dkt. 79, pg 1 (Cooperating Individual Agreement dated November 22, 2013). Weber also made it clear to Andrew that it was important for Andrew not to tell **anyone**, including other law enforcement, that he was working as an informant, explaining “if that word gets out...if you can’t buy dope, you’re not good to me.” 11/22 Int. 15:36-16:12.

² Due to format, this item is not able to be included within the Appendix. According to the Amended Clerk’s Certificate on Appeal (Dkt. #201) this item was sent to the Supreme Court via US Mail, and is available for the Court’s review.

[¶14] During the November 22, 2013 interview, Andrew stated that he did not use anything other than marijuana, but Weber asked Andrew if he could try to purchase LSD. Id. at 10:29. Weber also asked Andrew if he could set up a deal with an individual that he had never previously purchased from directly. See generally, id. between 3:08 and 7:01.

[¶15] Weber also informed Andrew that, when arranging a controlled buy, he should “try to get what you normally get,” as far as quantity was concerned. Id. at 24:45. However, while trying to set up a controlled buy at a later date, Weber explicitly instructed Andrew to try and purchase a higher quantity of drugs than what Andrew had intended. App. p. 36-37, Texts nos. 11-14, or Dkt. 80 (sealed)³. During this interview, Weber never set clear parameters as to how many buys or what quantity of drugs Andrew needed to complete to fulfill his obligations as a confidential informant. See, 11/22 Int. (“You’re going to have to do more than just two people (4:45); “We’re going to be looking at probably, you know, three or four individuals...” (8:26); “It already sounds like you have two for sure that you can do. It’s just a matter of doing two more.” (8:33)).

[¶16] In April 2014, Weber told Andrew that he needed to line up additional buys, and that Andrew should “Ask around if [he didn’t] know anyone,” and Andrew agreed to do so. App. p. 38, Texts nos. 101-102. Weber then gave Andrew a deadline of May 1, 2014 “to get the next deal done.” Id., no. 103.

³ Reference to the sealed version is made simply to make the Court aware of the existence of the unredacted version and its location within the docket.

[¶17] Andrew went missing on May 1, 2014. App. p. 34, Weber Depo. p. 95, ln 9-11. On June 27, 2014, a body was found in the Red River, and was later identified to be that of Andrew Sadek's. Dkt. 155, News Release & Dkt. 29, Autopsy Report (sealed). When Andrew's remains were found, his backpack was tied to him and was full of rocks. Dkt. 71, Deposition Transcript of Tammy Sadek, p. 73, ln. 1-2. It was determined that Andrew died as a result of a gunshot wound to his head, but the range of fire was not determined. Dkt. 29, p. 1.

[¶18] In their Complaint, the Plaintiffs alleged several claims, including: negligence/wrongful death, deceit, and fraud against Defendants, as well as survivor's claims for the non-economic damages suffered by Sadek as a result of his role as a confidential informant and Defendants' negligence, deceit, and fraud. App. p. 10-23.

[¶19] The discovery process in this case was complicated to say the least. Law enforcement still considers Andrew's death to be an active criminal investigation. Dkt. 113, Letter from Assistant Attorney General. Therefore, a large part of the discovery was kept from all parties for an extended period of time. After other efforts to gather this information was exhausted, a Subpoena Duces Tecum was served on the North Dakota State College of Science (NDSCS) Campus Police Department to produce all documents and electronic records related to the investigation of the disappearance and death of Andrew Sadek. Dkt. 107. NDSCS objected to the subpoena, but the district court ultimately issued an Order for the

release for the requested documents and electronic records on April 17, 2018. Dkt. 128.

[¶20] Following the release of these documents, Defendants moved for summary judgment, requesting the district court to dismiss all claims made against them by the Plaintiffs. Dkt. 137.

[¶21] A hearing was held on April 23, 2019 with regard to Defendants' motion for summary judgment. Transcript (Tr.) p.1. At this hearing, the district court explained that a claim for fraud asks the court to invalidate a contract and to restore the parties to their former positions. Tr. p. 5, ln 13-17. Plaintiffs' counsel agreed that rescission is not an option in this case. Id. ln 18-20. The district court ultimately granted summary judgment on the fraud claim on the ground that it is impossible to rescind the parties' contract. App. p. 56, ¶ 14, Memorandum & Order re: Defendants' Motion for Summary Judgment.

[¶22] The district court then discussed Plaintiffs' claim of deceit and Plaintiffs' position regarding the misrepresentations made to Andrew by Weber. Defense counsel raised the issue of particularity, citing to North Dakota Rule of Civil Procedure 9(b). Tr. p. 7, ln 17-25. Defense counsel claimed Plaintiffs raised allegations, in disputing Defendants' Summary Judgment Motion, outside what was stated within the Complaint with regard to the claim of deceit. Id. p. 8, ln 2-16. Countering this argument, Plaintiffs' counsel argued that if particularity was the issue related to the Plaintiffs' claim for deceit, Rule 15 of the North Dakota Rules of Civil Procedure allows a party to amend their complaint freely up until the time

of trial. Id. p. 11, ln 4-6. The district court was reminded that because of the limited access to discoverable materials until late in the proceeding, there were further, more specific, misrepresentations that came to light, that were not known at the time of drafting the complaint. Id. ln 6-15.

[¶23] The district court ultimately granted summary judgment on Plaintiffs' deceit claim based on its position that the only misrepresentation alleged in the complaint was a prediction of a future event, and not an actionable misrepresentation as a matter of law. App. p. 56, ¶ 14. The district court explained the complaint specifically alleged only one misrepresentation as the basis for the claim of deceit: Weber's statement to Andrew that there was "a good possibility" he would "get some prison time" unless he agreed to work as a confidential informant. App. p. 58, ¶ 17. In forming this decision regarding the deceit claim, the district court stated:

Ordinarily, misrepresentations amounting to fraud which will avoid a contract must relate to past or present facts, and cannot consist of unfulfilled promises or predictions with respect to future events, especially where intent to deceive is absent. One of the essential elements of fraud is that there be a false representation of a material fact which either exists in the present or has existed in the past, and a mere expression of an opinion in the nature of prophecy as to the happening or nonhappening of a future event is not actionable.

App. p. 59-60, ¶ 19, citing Sperle v. Weigel, 130 N.W.2d 315, 320 (N.D. 1964). The district court concluded that Weber's state of mind is irrelevant because the alleged misrepresentation constitutes a prediction of a future event, and therefore is not an actionable deceit as a matter of law. Id.

[¶24] Next, the district court discussed negligence with regard to Weber and whether his actions were grossly negligent, willful, wanton, and/or reckless. Discussing the claim of negligence by the elements (duty, breach, and proximate cause), the district court correctly concluded that triable issues of fact exist as to whether the defendants owed a duty of care to Andrew and whether Weber and Richland County breached a duty of care of Andrew. App. p. 61, ¶ 23, and p. 64, ¶ 26. However, the district court also concluded there was no triable issue of fact as to whether Andrew's death resulted from Defendants' alleged negligence. App. p. 65, ¶ 27. Despite evidence presented as to disputed facts on Andrew's cause of death, the district court noted that concluding Andrew's death was proximately caused by Defendants' negligence could only be based on pure speculation. App. p. 57, ¶ 16. As to the myriad facts at issue here, the district court stated:

One can only speculate, almost endlessly: Was Andrew's death a suicide or homicide? If it was suicide, why did Andrew do it? If it was homicide, who did it? What was the killer's, or killers', motivation? Was Andrew killed during a drug deal? If so, was it related to his role as a confidential informant? The heart cries out for an answer to what happened to Andrew, but the mind searches the record in vain for that answer.

App. p. 67, ¶ 31.

[¶25] However, contrary to its conclusion on Defendants' negligence relating to proximate cause, the district court concluded that Plaintiffs' proximate causation argument may be valid if it related to a deceit claim. App. p. 66, ¶ 29. The district court went on to state that:

If Andrew was misled into working for SEMCA, the dilemma in which he found himself at the end of April 2014 – either do another controlled buy, or face felony charges – arguably resulted from the deceit, and hence the issue of whether suicide was a natural and foreseeable result of inducing him to be a confidential informant might be a factual issue.

Id.

[¶26] The district court granted Defendants’ Motion for Summary Judgment with regard to the Plaintiffs’ claims for negligence. Accordingly, despite concluding that several triable issues existed, the district court granted Defendants’ Motion for Summary Judgment on all claims, ordering that each of Plaintiffs’ claims be dismissed. App. p. 68, ¶ 33-36.

[¶27] Plaintiffs now appeal the district court’s Judgment of Dismissal. App. p. 69-72.

STANDARD OF REVIEW

[¶28] This Court’s standard of review on appeal of an order granting summary judgment is well established:

Summary judgment is a procedural device for promptly resolving a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that reasonably can be drawn from undisputed facts, or if the only issues to be resolved are questions of law. Kappenman v. Klipfel, 2009 ND 89, ¶ 7, 765 N.W.2d 716; Leet v. City of Minot, 2006 ND 191, ¶ 12, 721 N.W.2d 398. Whether the district court properly granted summary judgment is a question of law that we review de novo on the record. Kappenman, at ¶ 7; Leet, at ¶ 12. Summary judgment is appropriate if the issues in the case are such that the resolution of any factual disputes will not alter the result. Leet, at ¶ 12. A party moving for summary judgment must establish there are no genuine issues of material fact and the case is appropriate for judgment as a matter of law. Kappenman, at ¶ 7. In determining whether summary judgment is appropriate, we view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences which reasonably can be drawn from the record. Kappenman, at ¶ 7; Leet, at ¶ 12. However, if the movant meets its initial burden of showing the absence of a genuine issue of material fact, the opposing party may not rest on mere allegations or denials in the pleadings, but must present competent admissible evidence by affidavit or other comparable means to show the existence of a genuine issue of material fact. Kappenman, at ¶ 7. The interpretation and application of a statute is a question of law, which is fully reviewable on appeal. Leet, at ¶ 12.

Schmidt v. Gateway Community Fellowship, 2010 ND 69, ¶ 7, 781 N.W.2d 200.

[¶29] Specifically, on review of negligence actions, this Court has said:

“Negligence and proximate cause are fact questions unless the evidence is such that reasonable minds can draw but one conclusion, and negligence actions are generally not appropriate for summary judgment.” Id. “Although negligence actions are ordinarily inappropriate for summary judgment, one of the elements of the tort of negligence is the existence of a duty on the part of the alleged tortfeasor, and whether a duty exists is generally a preliminary

question of law for the court.” Crowston v. Goodyear Tire & Rubber Co., 521 N.W.2d 401, 406 (N.D.1994)

Messer v. B&B Hot Oil Service, 2015 ND 202, ¶ 7, 868 N.W.2d 373.

LAW AND ARGUMENT

[¶30] This Court should conclude that the district court (1) erred in granting Defendants summary judgment as to Plaintiffs’ negligence claims, based on its conclusion that no triable issue of fact exists with regard to the element of proximate cause, and (2) erred in granting Defendants summary judgment as to Plaintiffs’ claim for deceit.

I. The District Court Erred by Granting Defendants’ Motion for Summary Judgment as to Plaintiffs’ Claim for Negligence

[¶31] This Court should conclude that the district court erred in granting Defendants’ summary judgment motion as to Plaintiffs’ negligence claim.

“In a negligence action, the plaintiff must prove (1) duty; (2) breach of that duty; (3) causation and (4) damages.” Barbie v. Minko Constr., Inc., 2009 ND 99, ¶ 8, 766 N.W.2d 458. When a duty does not exist, there is no negligence. Collette v. Clausen, 2003 ND 129, ¶ 11, 667 N.W.2d 617.

Chegwidden v. Evenson, 2015 ND 131, ¶ 18, 863 N.W.2d 843. Further, as noted above, negligence actions are not appropriate for summary judgment. Id.

[¶32] The district court correctly concluded “that a triable issue of fact exists as to whether the defendants owed a duty of care to Andrew because a special relationship existed between them and Andrew.” App. p. 62, ¶ 23. The elements of a special relationship require the existence of the following elements:

A special relationship is demonstrated if all of the following elements exist:
(1) Direct contact between the political subdivision and the injured party.

(2) An assumption by the political subdivision, by means of promises or actions, of an affirmative duty to act on behalf of the party who allegedly was injured.

(3) Knowledge on the part of the political subdivision that inaction of the political subdivision could lead to harm.

(4) The injured party's justifiable reliance on the political subdivision's affirmative undertaking, occurrence of the injury while the injured party was under the direct control of the political subdivision, or the political subdivision action increases the risk of harm.

N.D.C.C. § 32-12.1-03(3)(g).

[¶33] The court went on to find “that triable issues of fact also exist in regard to whether [Defendants] breached a duty of care to Andrew.” App. p. 64, ¶ 26. When discussing the elements of a special relationship, as outlined in N.D.C.C. § 32-12.1-03, the court stated that “[t]he evidence also supports an inference favorable to the plaintiffs...that the actions of [Defendants] in using Andrew as a confidential informant increased the risk of harm to him.” App. p. 63, ¶ 24.

[¶34] However, despite the triable issues of fact regarding the elements of duty and breach of duty, the court ultimately concluded that there was no “triable issue of fact as to whether Andrew’s death resulted from the defendants’ alleged negligence in assessing the dangers posed to Andrew as a confidential informant and in training, warning, and supervising him in that role.” App. p. 65, ¶ 27. The evidence presented by Plaintiffs supports an inference that if not for the defendants’ duty and breach of duty, Andrew Sadek would still be alive today. The district court erred in concluding otherwise.

a. The District Court erred by concluding that no triable issue of fact exists with regard to the element of proximate cause

[¶35] The district court erred in holding that “plaintiffs have not produced any evidence upon which a trier of fact could reasonably find that Andrew’s death was proximately caused by the defendants.” App. p. 66, ¶ 30. If reasonable persons can disagree on the question of proximate cause, that question must be decided by the fact finder. Jones v. Ahlberg, 489 N.W.2d 276, 582 (N.D. 1992).

[¶36] In Jones, a passenger was killed in a motor vehicle accident following a high-speed police chase. 489 N.W.2d at 578. Her parents pursued a wrongful death action against the law enforcement officers, the city, and the county. Id. at 579. The district court concluded the officers were negligent and proximately caused her death. Id. The Jones defendants argued their conduct could not be the proximate cause of the victim’s death, despite their pursuit and chase. Id. at 581. This Court agreed with the plaintiffs and concluded the issue of proximate cause was for the factfinder because reasonable persons could disagree on the question of proximate cause. Id. The Jones court specifically stated:

The defendants assert that, as a matter of law, the officers’ conduct in pursuing Sampson could not be a proximate cause of the accident and Linda’s resulting death. We disagree. The question of proximate cause is one of fact and, when determined by the trial court as the factfinder, will not be overturned on appeal unless it is clearly erroneous ... Proximate cause is that cause which, as a natural and continuous sequence, unbroken by any controlling intervening cause, produces the injury, and without which it would not have occurred. Andrews v. O’Hearn, 387 N.W.2d 716 (N.D.1986). The negligence or other wrongful conduct of two or more persons may contribute concurrently as the proximate causes of an injury, and to be a proximate cause of an injury one’s conduct need not be the last cause nor the sole cause of the injury. Id., 387 N.W.2d at 727. **To warrant a finding that one’s conduct is the proximate cause of an injury, it must appear**

that the injury was the natural and probable result of the conduct and that it ought to have been foreseen or reasonably anticipated by the defendant as a probable result of the conduct.

Jones v. Ahlberg, 489 N.W.2d 576, 581–82 (N.D. 1992) (emphasis added).

[¶37] The Jones court went on to cite several police chase cases which all concluded proximate cause on whether law enforcement’s conduct caused injury were questions for the jury. Id., citing Brown v. City of Pinellas Park, 557 So.2d 161, 172 (Fla. App. 1990); Fiser v. City of Ann Arbor, 339 N.W.2d 413, 418-19 (Mich. 1983).

[¶38] Plaintiffs presented evidence in response to the motion for summary judgment providing that Andrew’s death was a direct result of his work as a confidential informant for SEMCA. The Plaintiffs evidence included a very lengthy expert opinion of Michael Levine and other evidence which establishes that Andrew was “coerced and relentlessly pressured . . . into a deadly box from which there was no exit.” App. p., 47-48. Further, as Plaintiffs provided to the district court, Mr. Levine concluded:

That, the totality of evidence reviewed through the lens of my now five decades of training and experience, indicate, beyond a reasonable certainty, that the violent death of Andrew Sadek, came as a direct result of the illegal (not legally justified) forceful and life-altering intrusion into the 20 year-old college student’s life by Defendants.

App. p. 41.

[¶39] In addition to the uncontested expert opinions of Levine, a police veteran with 50 years of training and experience, which clearly established that Andrew’s death was caused by the many failures of SEMCA in this case, Plaintiffs

also presented the district court with text messages between Weber and Andrew which support the contention that the Defendants behavior caused or clearly contributed to Andrew's death. Specifically, in April of 2014, Weber told Andrew that he needed to line up additional buys, and that he should "Ask around if [he didn't] know anyone," and Andrew agreed to do so. App. p. 38, Nos. 101-102. Weber then gave Andrew a deadline of May 1, 2014 "to get the next deal done." Id. No. 103. Andrew Sadek went missing on May 1, 2014. App. p. 34, Weber Depo. p. 95, ln 9-11. On June 27, 2014 a body was found in the Red River, and later identified to be Andrew Sadek's. See, Dkt. 155, News Release & 29, Autopsy Report (sealed). Andrew died from a gunshot wound, and his backpack was tied to him and was full of rocks. Dkt. 71, Depo. Transcript of Tammy Sadek, p. 73, ln. 1-2; Dkt. 29, p. 1.

[¶40] The primary purpose of a controlled buy, and the use of informants, is to progress a narcotic investigation into sources of supply and bigger, more important dealers. See, App. p. 45-46. The evidence in this case reveals that Defendant Weber recklessly ignored the National and professional standards related to the recruitment, management, and corroboration of criminal informants, while acting as a SEMCA Task Force officer, as they pertain to the investigation and recruitment of Andrew Sadek.

[¶41] Andrew Sadek became the target of SEMCA as a result of the Defendant Weber's reckless disregard to the prohibition against down trading. That

is, Weber used an individual known to possess and sell larger quantities of marijuana to setup merely a casual user, Andrew Sadek. In this case, two confidential informants working together set up Andrew by purchasing user quantities of marijuana from Andrew, first an eighth of an ounce for \$60.00, and later one gram for \$20.00. See, App. p. 31, Weber Depo p. 58, ln 20-24 & p. 60 ln 15-20; App. p. 44, Levine Report. One, of these two confidential informants, had previously been caught by law enforcement in possession of three ounces (a dealer quantity of marijuana). App. p. 30, Weber Depo p. 40, ln 21-24. Weber allowed this dealer confidential informant to set up a buy on Andrew, a casual user, by recruiting a friend to set up the deal, without any background investigation into the relationship between the dealer confidential informant and Andrew, in direct violation of National and professional standards. Id., Weber Depo p. 40, ln 21-25, p. 41, ln 1-8 & App. p. 31, Depo p. 60, ln. 7-14; App. p. 42-43, Levine Report.

[¶42] The evidence is clear that Defendants placed Andrew into an extremely dangerous double-duty role of informant and investigator, and that despite placing him into this role contradictory to the national and professional standards, Defendants failed to provide Andrew with the requisite training, warning, and protection. Accordingly, the district court erred in failing to conclude that proximate cause is an issue for a factfinder.

[¶43] In the present matter, just as in Jones, Weber's reckless pursuit and chase of Andrew Sadek is directly connected to Andrew's disappearance and death. Once Andrew agreed to work as a Confidential Informant, he was under Weber's

direct control and supervision. Defendants breached their duty by failing to use Andrew as a confidential informant in accordance with national and professional standards related to the recruitment, management, and corroboration of criminal informants. According to Jones, “[t]o warrant a finding that one’s conduct is the proximate cause of an injury, it must appear that the injury was the natural and probable result of the conduct and that it ought to have been foreseen or reasonably anticipated by the defendant as a probable result of the conduct.” 489 N.W.2d at 581-82. As the district court in this case stated, “Weber’s knowledge that Andrew could be harmed if he was not properly trained or supervised in conducting illegal drug transactions is readily inferred from Weber’s training, experience and deposition testimony.” App. p. 63, ¶ 24.

[¶44] Like in Jones, law enforcement’s conduct proximately caused Andrew’s death, or at the very least, reasonable persons could disagree on that issue. Although the negligence here is different from a 100-mile-per-hour police chase resulting in the death of an innocent party, the elements of duty, negligence, and causation exist. Defendants here negligently chased and pursued Andrew Sadek and ultimately placed him in an impossible situation from which death, or serious injury, was foreseeable as the probable result.

b. The District Court erred by failing to view all evidence in a light most favorable to the Plaintiffs on their negligence claim

[¶45] Despite the district court’s finding with regard to the causation element on Plaintiffs’ negligence claim, the district court explained that the

Plaintiffs' contention "may be valid if the issue was proximate causation on the Plaintiff's deceit claims." App. p. 66, ¶ 29. Summary judgment is appropriate against parties who fail to establish the existence of a factual dispute on an essential element of their claim and on which they will bear the burden of proof at trial. Hilton v. N.D. Educ. Ass'n, 2002 ND 209, ¶ 23, 655 N.W.2d 60 (citations omitted). The evidence is reviewed in a light most favorable to the non-moving party. Trinity Health v. North Cent. Emergency Servs., 2003 ND 86, ¶ 15, 662 N.W.2d 280. The non-moving party also receives the benefit of all inferences that can reasonably be drawn from the evidence. Riemers v. City of Grand Forks, 2006 ND 224, ¶ 7, 723 N.W.2d 518, 521.

[¶46] In this case the district court explains:

If Andrew was misled into working for SEMCA, the dilemma in which he found himself at the end of April 2014 – either do another controlled buy, or face felony charges – arguably resulted from the deceit, and hence the issue of whether suicide was a natural and foreseeable result of inducing him to be a confidential informant might be a factual issue.

App. p. 66, ¶ 29. This explanation not only contradicts the district court's granting of summary judgment on the claim of deceit, but also contradicts its finding with regard to the element of proximate cause and granting of summary judgment on the claim of negligence. If it is true that evidence exists which "supports an inference ...that the actions of [Defendants] in using Andrew as a confidential informant increased the risk of harm to him," then a when viewing the evidence in the light most favorable to the Plaintiffs a reasoning mind could conclude that Andrew's

death was a proximate cause of the Defendants' negligence. App. p. 63, ¶ 24. This is especially true where the only evidence that exists points to Andrew Sadek's death being caused by Andrew's role as a confidential informant and his relationship with the Defendants. There is no evidence to the contrary, and Defendants presented no alternative causation evidence to the district court. Accordingly, the district court's conclusion as to proximate cause was in error in light of its own findings.

[¶47] The actions of the Defendants in this case with regard to Plaintiffs' claims of negligence and deceit overlap one another, and if there is a question of fact the relates to causation and the claim of deceit, then an issue of fact is also clearly present with regard to causation and the Plaintiffs' claim of negligence. The dilemma in which Andrew found himself in at the end of April 2014 not only resulted from Defendants' deceit, but also from Defendants' breach of their duty. Plaintiffs request this Court reverse the district court because it erred by (1) granting summary judgment on Plaintiffs' negligence claim as a whole in light of its conclusions on duty and breach; (2) concluding proximate cause did not exist under a negligence theory, but existed under a deceit theory; and (3) failing to view the evidence in a light most favorable to the Plaintiffs in determining no evidence supported proximate cause despite evidence to the contrary.

II. The District Court Erred by Granting Defendants' Motion for Summary Judgment as to Plaintiffs' Claim for Deceit

[¶48] Next, this Court should conclude the district court erred in granting Defendants' summary judgment motion as to Plaintiffs' claim for deceit. This Court

should conclude that Weber's misrepresentations as clearly identified in Plaintiffs' Complaint constitute deceit, moreover the other misrepresentations made by Weber to Andrew should have been considered by the court in making its decision, instead of disregarded under Rule 9, for failure to plead with particularity. Alternatively, if the Court concludes the Plaintiffs' Complaint lacks particularity, the Court should conclude that based on the entirety of the evidence now available, the proper remedy would be to grant leave to Plaintiffs to amend their complaint. On this matter, summary judgment was improper and this Court should reverse the district court's decision on Plaintiffs' deceit claims.

a. The district court erred in concluding Plaintiffs' deceit claim was not plead with sufficient particularity under N.D.R.Civ.P.9(b) and in disregarding evidence presented on that basis

[¶49] In this case, the district court improperly disregarded all of the evidence of misrepresentations made by Weber to Andrew. Other than one specific misrepresentation about prison time, the district court found that if the misrepresentation was not specifically stated in the the complaint, then evidence of the statement(s) was not to be considered. Specifically, the district court held:

The plaintiffs contend that Weber made other misrepresentations to Andrew. That argument runs afoul of Rule of Civil Procedure 9(b), however, which requires the complaint "to state with particularity the circumstances constituting fraud." The plaintiffs cannot avoid summary judgment by arguing that misrepresentations were made that were not alleged in the complaint...The only misrepresentation alleged in the complaint is Weber's opinion or prediction about whether Andrew might be sentenced to prison if the felony charges were actually filed sometime in the future. That statement is not an actionable misrepresentation as a matter of law, and therefore, the plaintiffs' deceit claims must be dismissed.

App. p. 61, ¶ 21-22.

[¶50] The district court erred in concluding that Plaintiffs' complaint failed to put Defendants' on notice of the basis of their deceit claim, and erred in not considering other evidence of misrepresentations made by Weber to Andrew as stating failure to properly plead them in the complaint. "Complaints are construed liberally so as to do substantial justice." Jablonsky v. Klemm, 377 N.W.2d 560 (N.D. 1985). Regarding pleading with particularity, this Court has said:

No particular form or language is required in alleging fraud so long as the elements constituting fraud may be found from reading the whole pleading. See Krueger v. St. Joseph's Hospital, *supra*; 37 C.J.S. Fraud § 81 (1943). However, when the plaintiff makes an allegation of fraud the defendant must receive enough information to prepare a response and defense, and the plaintiff must apprise the defendant fairly of the charge. See 2A J. Moore, Moore's Federal Practice, *supra*. See also Deutsch v. Flannery, 823 F.2d 1361 (9th Cir. 1987) (pleading satisfies particularity requirement for fraud if it identifies circumstances constituting fraud so that the defendant can prepare an adequate answer); Bosse v. Crowell Collier and MacMillan, 565 F.2d 602 (9th Cir. 1977) (circumstances constituting fraud need only be so identified that the defendant can prepare an adequate answer from the allegations); Zatkin v. Primuth, 551 F.Supp. 39 (S.D. Cal. 1982) (pleading of fraud is sufficient if it identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer).

Miller Enterprises, Inc. v. Dog N' Cat Pet Centers of Am., Inc., 447 N.W.2d 639, 643 (N.D. 1989). While there are distinct differences between fraud and deceit, this Court has held that claims for both require the same degree of specificity in pleadings pursuant to N.D.R.Civ.P.9(b). See Kuntz v. State, 2019 ND 46, ¶ 51, 923 N.W.2d 513, 528. Based on the Court's synonymous treatment of fraud and deceit

for the purposes of particularity in the case of Kuntz, it should find that this statement in Miller Enterprises also rings true for claims of deceit.

[¶51] In Miller Enterprises, a pet store franchisee sought to void a franchise agreement based on fraud. 447 N.W.2d at 642. The defendant franchisor argued the franchisee failed to allege fraud with particularity and the district court erred in denying its summary judgment motion. Id. The complaint in Miller Enterprises alleged misrepresentation and fraud in inducing the franchisee to sign the agreement, along with alleging a lack of assistance and training given to the franchisee. Id. This Court, after detailing the particularity standard above, concluded the district court did not err in denying the franchisor's summary judgment motion. Id. This Court noted the allegation of fraud and explanation in the complaint, concluding the defendant was apprised fairly of the charge of fraud against it. Id. Specifically, this Court stated:

[Plaintiff] countered Dog N' Cat's motion **by submitting excerpts of his interrogatory answers and deposition** along with a brief in opposition to the motion for summary judgment. **These excerpts stated that Dog N' Cat misrepresented the training and assistance it would give to Miller, and that Jim Miller did not in fact receive the training and assistance which was represented to him.** Evaluating the evidence presented to the trial court by both parties in a light most favorable to the party opposing the motion, we conclude that the trial court did not err in denying Dog N' Cat's motion for summary judgment. **The trial court believed the issue of whether or not Dog N' Cat misrepresented the training and assistance it would provide Miller under the franchise agreement should be determined at trial.** We affirm the trial court's denial of Dog N' Cat's motion for summary judgment.

Id. at 642-43 (emphasis added).

[¶52] At no time did the Miller Enterprises court conclude that all statements considered in summary judgment of a deceit claim must be specifically delineated in the complaint to be considered, as that is not the standard even under Rule 9(b) as stated above. In this case, the district court incorrectly ignored evidence, treating the summary judgment motion as a judgment on the pleadings motion, disregarding most of the evidence presented about the misrepresentations made to Andrew about his role as a confidential informant in this case. To disregard that evidence was an error. The district court should have considered all of the evidence of deceit, and viewed it in the light most favorable to the Plaintiffs.

[¶53] “Deceit is a tort available when a party has breached an obligation imposed by law to honestly deal with another party.” Irish Oil and Gas, Inc. v. Riemer, 2011 ND 22, ¶ 28, 794 N.W.2d 715. This Court has said of fraud:

In addition, the suppression of a material fact, which a party is bound in good faith to disclose, is equivalent to a false representation. Verry v. Murphy, 163 N.W.2d 721 (N.D.1969). Fraud may arise not only from misrepresentation but from concealment as well. For concealment to constitute fraud, there must be suppression of facts which one party has a legal or equitable obligation to communicate to another. One who stands in a confidential or fiduciary relationship to another party must disclose material facts and must reveal enough information to prevent misleading the other party. See Klein v. First Edina Nat. Bank, 293 Minn. 418, 196 N.W.2d 619 (1972); Guy v. Schuldt, 236 Ind. 101, 138 N.E.2d 891 (1956).

Krueger v. St. Joseph’s Hospital, 305 N.W.2d 18, 25 (N.D. 1981).

[¶54] This Court should read the Plaintiffs’ Complaint in its entirety, considering every allegation included, which clearly assert a deceit claim based on Defendants’ breach of their obligation to honestly work with Andrew Sadek. See

generally, App. p. 10-23. Specifically, Plaintiffs' Complaint stated: "Defendants failed to determine whether Andrew Sadek was qualified to serve in an undercover capacity, Defendants failed to train Andrew Sadek to perform undercover operations, Defendants failed to reasonably supervise Andrew Sadek, Defendants failed to take reasonable steps to protect the safety and life of Andrew Sadek." App. p. 14, ¶ 30. "[Defendants] recruited and had an ongoing relationship with Andrew Sadek from the start of his recruitment as a confidential informant...Andrew Sadek was under the control and supervision of [Defendants]." App. p. 15, ¶ 34 & p.16-17, ¶ 41. "[D]ue to the highly dangerous nature of the undercover activities that [Defendants] directed Andrew Sadek to perform...[Defendants] placed Andrew Sadek, an untrained civilian, within a zone of risk; created and permitted dangers to exist; and subjected him to a heightened risk of harm." App. p. 15, ¶ 35 & p. 17, ¶ 42. "[Defendants] failed to...reasonably train, warn, supervise and protect [Andrew Sadek]." App. p. 16, ¶ 36 & p. 17, ¶ 43. "[Defendants] gained an advantage over Andrew Sadek, by misleading Andrew to his detriment." App. p. 19, ¶ 60 & App. p. 20, ¶ 65.

[¶55] All of these alleged, particular, failures of the Defendants, and their creation of danger and heightened risk of harm point to the Defendant's breach of their obligation to honestly work with Andrew Sadek.

[¶56] When discussing the Plaintiffs' claim for deceit, the district court's Order states "[t]he only misrepresentation alleged in the complaint is Weber's opinion or prediction about whether Andrew might be sentenced to prison." App. p.

61, ¶ 21. While this may be the only specific accusation under the deceit heading within the Complaint, when read in its entirety Plaintiffs' Complaint clearly addresses other specific obligations of Defendants which were breached in their dealings with Andrew Sadek. Further, in light of the special relationship between Andrew and Defendants, as discussed above, in which Defendants "by means of promises or actions" and through their "affirmative undertaking" were additionally obligated to work honestly with Andrew. See N.D.C.C. § 32-12.1-03(3)(g).

[¶57] Here, like in Miller Enterprises, Plaintiffs have sufficiently plead their deceit claim to allow Defendants to be fully apprised of the claim. Defendants were aware of the deceit claim and could adequately answer the allegations against them. Unlike Miller Enterprises and other cases regarding pleading with particularity, Defendants never moved for a more definite statement, moved to dismiss, nor moved for a judgment on the pleadings. See Kuntz, 2019 ND 46, ¶ 45, 923 N.W.2d 513 (requesting judgment on the pleadings); Northstar Founders, LLC v. Hayden Capital, USA, LLC, 2014 ND 200, ¶ 30, 855 N.W.2d 614 (moving for a more definite statement); Lang v. Shafer, 2000 ND 2, ¶ 3, 603 N.W.2d 904 (moving for judgment of dismissal on the pleadings based on a failure to plead with particularity). Instead, Defendants did not raise any specific concerns about an inability to adequately respond to Plaintiffs' allegations of misrepresentations made to Andrew in this matter until the time of filing their reply brief in support of their renewed motion for summary judgment, after this litigation had been pending for nearly three years. Dkt. 170 (Reply Brief), ¶ 4-5. Also similar to Miller Enterprises,

Plaintiffs' complaint identifies issues of a lack of training and supervision as the basis of a deceit or fraud claim, as alleged here. In light of the lengthy, detailed complaint and clear allegations pleading the elements of deceit against Defendants, this Court should conclude the district court erred in ignoring Plaintiffs' valid deceit claims and granting Defendants' summary judgment motion.

[¶58] Should the Court be inclined to find that the Plaintiffs' Complaint is not sufficiently specific with regard to their claims of deceit, the Plaintiffs request the Court to remand for further proceedings, in order to allow Plaintiffs an opportunity to amend their Complaint pursuant to the liberal amendment standard in N.D.R.Civ.P. 15. N.D.R.Civ.P. 15(a) allows for a party to "amend its pleading only with the opposing party's written consent or the court's leave. Leave shall be freely given when justice so requires." "N.D.R.Civ.P. 15 promotes a liberal policy of amending pleading. . . . The policy of Rule 56 to quickly dispose of futile litigation must be accommodated with the Rule 15 objective of deciding a dispute on its merits." First Nat. Bank & Tr. Co. of Williston v. Jacobsen, 431 N.W.2d 284, 289 (N.D. 1988) (Meschke, J., concurring and dissenting).

[¶59] Accordingly, this Court should conclude the district court erred as a matter of law in concluding that Plaintiffs' deceit claim was inadequately plead and asserted.

b. The district court erred by concluding Weber's misrepresentations are not actionable as "a prediction of a future event" and in viewing the facts in the light most favorable to the Plaintiffs, an issue of fact clearly exists regarding deceit in this case precluding summary judgment

[¶60] The district court erred in granting Defendants’ summary judgment motion based on its conclusion that Weber’s misrepresentations to Andrew could not constitute deceit as they were a mere prediction of future events. Actions involving state of mind, like fraud, are not usually suited for summary judgment. See Kary v. Prudential Ins. Co. of America, 541 N.W.2d 703, 706 (N.D. 1996). In this case, the district court cited Sperle v. Weigel and Kary v. Prudential Ins. Co. of America in support of this conclusion. Kary v. Prudential Ins. Co. of America, 541 N.W.2d 703, 705-06 (N.D. 1996); Sperle v. Weigel, 130 N.W.2d 315, 320 (N.D. 1964).

[¶61] Both cases are distinguishable from the present matter. In Sperle, the issue was whether it was fraud for an apartment seller to tell a buyer that they would be able to pay the purchase price from rental profits in six years. 130 N.W.2d at 320. This Court noted there was no misrepresentation as to the value of the apartment, there was no great disparity in education, use of the English language, and no fiduciary or confidential relationship existed. Id. This Court then concluded there were no fraudulent representations in the agreement between the parties. Id.

[¶62] In a similar issue in Kary, an employee alleged he was fraudulently induced to accept a job based on misrepresentations as to compensation. 541 N.W.2d at 704-05. This Court noted “statements of value and predictions of future earnings or profits fall within the class of statements whose truth or falsity cannot be precisely determined.” Id. at 706. The employee’s compensation depended on

his efforts in sales, and this Court concluded the prediction of a future event was not actionable. Id. Further, this Court went on to consider the employee's reliance on the alleged misrepresentations and concluded the employee did not raise a reasonable inference as to the employee's reliance. Id. Accordingly, this Court concluded the employee failed to raise an issue of material fact on an essential element of his claim and affirmed the award of summary judgment. Id. at 707.

[¶63] Here, Weber misrepresented present facts, i.e. that if Andrew did not presently serve as a confidential informant, that Andrew would be charged with two felonies and serve time in prison for possessing a small amount of marijuana in the past. Weber also misrepresented facts about what Andrew would be required to do as a confidential informant. Weber misrepresented to Andrew what his role would be, and again, in light of their special relationship, these promises and lies constituted deceit. Weber's misrepresentation was based in part on past and present facts, due to Andrew's conduct and what Weber intended to do.

[¶64] While it is not the only misrepresentation made by Weber to Andrew in this case, Weber's statements regarding the likelihood of Andrew serving prison time in the event he did not work as a confidential informant is not a prediction of a future event. Weber's statements, especially in light of his many misrepresentations, constitute deceit based on present facts. When viewing all evidence in its entirety, a reasoning mind could easily conclude that Andrew believed without a doubt that he would have to plead guilty to two felony charges, and serve prison time, unless he

could successfully perform undercover buys for Weber. This becomes apparent in simply reviewing Weber's interview with Andrew on November 22, 2013:

"...like I said you are facing two felonies and then of course, a misdemeanor charge from yesterday. Two felonies of deliveries, since they took place on campus, both of them, they're enhanced, so they're Class A felonies. Twenty years in prison, \$20,000 fine and/or both. Okay, so potentially the max is 40 years in prison, \$40,000 fine" (0:36) "...is there a good possibility that you're going to get some prison time if you don't help yourself out? – yeah, there is. K? That's probably not a way to start off your young adult life and career, right?" (1:04) "...depending upon how you do, and so forth, you know, a lot of this could go away. ...is it all going to go away? Probably not. Are you gonna probably going to have to plead guilty to like maybe a misdemeanor possession of marijuana? Probably. You know. Um. But at least you're not pleading guilty to felonies." (1:30)

11/22 Int.

[¶65] Here, Weber is clearly ignoring one of the longest standing principles of the American criminal justice system: an individual is innocent until proven guilty. Weber clearly overwhelmed Andrew with the idea that he will have to plead guilty to two felony charges if he does not act as a criminal informant. Weber acted the part of investigator, prosecutor, judge, and jury, all rolled into one, during the course of this interview. However, Andrew was never given any information about the rights he would have to defend himself, if he had in fact been charged with the crimes Weber had hanging over his head. This is just one example of Weber suppressing facts, or giving information of other present facts, that mislead Andrew to his detriment.

[¶66] Additionally, and throughout this entire case, Defendants have tried to maintain an argument that Andrew Sadek was not asked "to do something that

[he] wouldn't normally go out and already do or that [he hadn't] already been involved in." App. p. 29, Weber Depo. p. 12, ln 20-23. When Weber was trying to get Andrew to act as a confidential informant, he made misleading statements to coax Andrew into altering his position from a local college student who casually and occasionally smoked pot, into someone who actively and regularly engaged in the trade of drugs.

[¶67] Weber stated to Andrew during the November 22nd interview, "we are not out here to make people into drug dealers." 11/22 Int. at 17:38. Later on, when Andrew asked, "Is there a certain amount that you want me to purchase, or just anything?" and Weber replied, "Try to get what you normally get." 11/22 Int. at 24:45.

[¶68] However, during this interview and after, Andrew was asked if he could buy other types of drugs, at higher quantities, more frequently than normal, and from people that he typically did not buy from. See, 11/22 Int. at 10:29 (Weber asking Andrew if he could try and purchase LSD); 12:12 (Sadek stating he doesn't buy weed often); 3:08 and 6:55 (Weber asking Sadek if he could buy directly from an individual who he'd never purchased from in the past). Additionally, when Andrew text Weber to set up the first controlled buy and told Weber how much he intended to buy, Weber told him to ask for a higher quantity. App. p. 36-37, Nos. 11-14. At one point, Weber also explicitly instructed Andrew "You need to get something lined up or I am going to charge you out. There is a lot of dope on

campus. Ask around if you don't know anyone. We need to get these done." App. p. 38, No. 101.

[¶69] Here, contrary to Sperle, there was a great disparity between the parties to this agreement, there was a disparity in education, and a special relationship existed between the parties. Andrew was cornered into an agreement that put him at great personal risk, as evidenced by his death, with no bargaining power. Weber misrepresented the facts and the possible punishment to Andrew. The parties had a special relationship, as discussed above, creating a duty. Further, unlike Sperle and Kary, the misrepresentation here did not involve a "statement of value and prediction of future earnings," but rather whether Andrew would be sentenced to forty years in prison. Additionally, Andrew was deceived in what his role as a confidential informant would be prior to agreeing to become an informant. Weber told Andrew he would only be purchasing similar substances and amounts from individuals he knew. However, as evidenced by text messages stated above in the spring of 2014, Weber was asking Andrew to purchase different higher quantities of drugs, different types of drugs, from people he did not know, all of this is contrary to what Weber told Andrew when he agreed to become an informant.

[¶70] The road that Weber mapped out for Andrew, with regard to what his young adult life would look like if he didn't work as a confidential informant, was a one-way street leading right to prison. Towards the end of the interview on November 22nd, Andrew confirmed his understanding that this terrible vision of his future, painted by Weber, would go away if he worked as a confidential informant:

Weber: “Start working on your contacts, let’s get some of these deals done, that way the faster you get done, the faster—”
Andrew: “This all gets cleared up.”
Weber: [nodding] “--this gets cleared up and you don’t have this weighing on ya and so forth...”

11/22 Int. at 24:08.

[¶71] Plaintiffs have shown there is a genuine dispute of material fact as to each essential element of deceit when viewing all of the evidence in the light most favorable to the non-moving party. Therefore, this Court should conclude the district court erred in granting summary judgment on Plaintiffs’ deceit claim.

CONCLUSION

[¶72] This Court should reverse the district court’s Judgment of Dismissal with regard to the Plaintiffs’ claims of deceit and negligence, and remand this matter for further proceedings.

Dated this 7th day of October, 2019.

O’KEEFFE, O’BRIEN, LYSON & FOSS, LTD.

/s/ Tatum O’Brien
TIMOTHY M. O’KEEFFE (ND ID # 05636)
TATUM O’BRIEN (ND ID #05985)
720 Main Avenue
Fargo, ND 58103
Phone: 701-235-8000
tim@okeeffeattorneys.com
tatum@okeeffeattorneys.com
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

[¶73] The undersigned, as attorney for the Appellants, John and Tammy Sadek, in the above-entitled matter, and as the author of the above brief, hereby certifies, in compliance with Rule 32(e) and Rule 32(a)(8) of the North Dakota Rules of Appellate Procedure, that this document complies with the page limitations and includes 38 pages, not including this Certificate of Compliance.

Dated this 7th day of October, 2019.

O'KEEFFE, O'BRIEN, LYSON & FOSS, LTD.

/s/ Tatum O'Brien

TIMOTHY M. O'KEEFFE (ND ID # 05636)

TATUM O'BRIEN (ND ID #05985)

720 Main Avenue

Fargo, ND 58103

Phone: 701-235-8000

tim@okeeffeattorneys.com

tatum@okeeffeattorneys.com

Attorneys for Appellants

