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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

John Sadek and Tammy Sadek, as surviving parents of Andrew Sadek on behalf of all heirs-at-law, and the Estate of Andrew Sadek,

Plaintiffs/Appellants,

v.

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,

Defendants/Appellees.

Supreme Court No. 20190216

District Court No. 39-2016-CV-00128

BRIEF OF APPELLEES

APPEAL FROM THE JUDGMENT ENTERED ON MAY 24, 2019 (DKT. NO. 193)
COUNTY OF RICHLAND
SOUTHEAST JUDICIAL DISTRICT
THE HONORABLE JAY A. SCHMITZ

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

[¶1] Defendants concur with the issues set forth in the Plaintiffs' brief and will refrain from reiterating them herein.

REQUEST FOR ORAL ARGUMENT

[¶2] Defendants hereby request oral argument as it would be helpful to the Court in considering the issues presented in this appeal.

STATEMENT OF THE CASE

[¶3] Defendants concur generally with the Statement of the Case set forth in the Plaintiffs' brief and will not reiterate it herein or supplement the same.

STATEMENT OF THE FACTS

[¶4] This case arises out of the death of Andrew Sadek. ("Andrew") Andrew's body was found in the Red River on June 27, 2014. (Dkt. 1; App. p. 14, ¶ 27). Andrew had been missing since May 1, 2014. (App. p. 13, ¶¶ 23-24). An autopsy concluded that the cause of death was a gunshot wound to the head. (App. p. 14, ¶ 28). The autopsy concluded that the manner of death was undetermined, meaning that there was no determination as to whether Andrew's death was self-inflicted, homicidal, or accidental. (*See Id*. at ¶ 28). Plaintiffs contend that Andrew's death was related to and/or caused by Andrew's acting as a confidential informant. (Dkt. 1 and App. p. 10-23).

[¶5] Andrew began working as a confidential informant for the South East Multi County Agency Narcotics Task Force (hereinafter "SEMCA") in November 2013. (Dkt.1; App. p. 13 ¶ 19). Prior to becoming and serving as a confidential informant, Andrew was caught selling marijuana on April 4, 2013 and April 9, 2013. (*Id.*; App. p. 11, ¶¶ 9-10). During a search of Andrew's dorm room on November 21, 2013, a marijuana grinder was found and Andrew confessed to owning the grinder. (*Id*. at ¶ 11).

[¶6] Andrew was interviewed by Deputy Jason Weber on November 22, 2013. (*Id.* at ¶ 13). During this interview, Weber told Andrew that Andrew was facing two felony charges and one misdemeanor charge. (*Id.*) Specifically, Andrew was facing two felony counts of Delivery of a Controlled Substance in violation of N.D.C.C. §§ 19-03.1-23(1)(b), 19-03.1-05(5)(h), and 19-03.1-23.1(1)(a), both of which are Class A felony charges. (App. p. 13-14, ¶ 25). Weber told Andrew that the felony charges Andrew was facing could result in up to 40 years in prison. (App. p. 12, ¶ 14). Weber further told Andrew that there was a good possibility that Andrew would serve prison time if Andrew did not act as a

confidential informant. (*Id.* at ¶ 15). Specifically, the exact statements made by Weber to Andrew during the interview regarding the charges and potential penalties Andrew was facing were as follows:

> Weber: You're facing two felonies, and then of course the misdemeanor charge from yesterday. Two felonies of deliveries, since they took place on campus, both of them, they're enhanced, so they are Class A felonies, 20 years in prison, $20,000 fine, and/or both, OK? Potentially, the max is 40 years in prison, $40,000 fine. You understand that?
>
> Andrew: Yeah.
>
> Weber: Okay. Obviously, you're probably not going to get 40 years, but, is there a good possibility that you're going to get some prison time if you don't help yourself out? – yeah, there is.

(Dkt. 201; November 22, 2013 interview). Andrew agreed to act as a confidential informant and completed three controlled drug buys as a confidential informant from November 2013 through January 2014. (Dkt. 1; App. p. 13, ¶ 19).

[¶7] Plaintiffs assert that Andrew Sadek was a casual marijuana smoker and that SEMCA and Deputy Weber involved him in the drug trade at a deeper level. (Appellants' Brief, p. 36). This is not accurate. Weber never asked Andrew to buy a greater quantity of drugs than he had been purchasing nor did he ever direct him to buy drugs other than marijuana. (Dkt. 201). Plaintiffs cited text messages to the trial court from Weber to Andrew wherein Weber asked Andrew to try for an eighth (of an ounce) instead of a gram to support their argument that Andrew was asked to buy higher quantities of drugs than he would normally buy. (Dkt. 152 at ¶ 35). It is indisputable, however, that Andrew told Weber that it was not uncommon for Andrew to purchase an eighth of an ounce, a fourth of an ounce, or even a full ounce of marijuana. During the November 22, 2013 interview, Andrew told Weber that he could purchase *two to three ounces* of marijuana from an

individual in Fargo. (Dkt. 87, 201 at 3:45-4:00). Weber, however, asked Andrew if it would be uncommon for him to buy that amount, and Andrew indicated that this amount would be uncommon. (*Id.* at 4:00-4:15). Weber then asked about one ounce, and Andrew responded: "[t]hat would be more reasonable." (*Id.* at 4:15-4:16). Andrew went on to respond that it would be reasonable for Andrew to represent to his buyer, when buying an ounce, that Andrew was trying to sell and make some money on campus. (*Id.* at 4:16-4:20). Most notably, at the end of the interview, Andrew told Weber that Andrew normally purchased an eighth or a quarter ounce of marijuana. (*Id.* at 24:50- 24:59). Thus, when Weber asked Andrew to "try for an 8th," Weber was not asking Andrew to buy anything other than the *low end* of what Andrew had specifically told Weber was typical for Andrew to purchase.

[¶8] A great deal of further evidence exists which contradicts Plaintiffs' claim that Andrew was not regularly engaged in the trade of drugs. Jacob Schutt told the Minnesota Bureau of Criminal Apprehension ("BCA") that he had purchased an eighth of an ounce of marijuana from Andrew approximately ten times between June and December of 2013. (Dkt. 148 at p. 3). C.B. (to maintain the confidentiality of non-parties full names were redacted and will referenced here as initials) told BCA that Andrew had supplied him with small amounts of marijuana on a couple of occasions. (Dkt. 147 at p. 3). J.R. stated that Andrew approached him concerning the availability of LSD. (Dkt. 176, BCA Report 28, Interview with J.R. at p. 6) Andrew also attempted to purchase an ounce of marijuana from J.R. on October 1, 2013. (Dkt. 173 at p. 18). Andrew offered to supply marijuana to a "T. H." on October 1, 2013. (*Id.* at p. 18-19). Andrew offered to sell some "goods" to Ju. R. on December 12, 2013, and Ju. R. offered to supply to Andrew on November 24,

2013. (*Id.* at p. 19). M.N. offered marijuana to Andrew on February 28, 2014 and March 8, 2014. (*Id.*) A.R. told the North Dakota Bureau of Criminal Investigation ("BCI") it was "common knowledge on the NDSCS Campus that if you needed drugs Andrew Sadek was the guy to go to." (Dkt. 177, BCI Report 218, Interview with A.R. at ¶ 7). Several other individuals were identified from the information in Andrew's cell phone as being involved with Andrew in the use, purchase or sale of drugs. (Dkt. 173 at p. 18-19). In total, there were approximately a dozen individuals identified as being involved with Andrew in the use, purchase or sale of drugs. (*See Id.*)

[¶9] Likewise, the evidence in this case clearly established that any representation that Andrew Sadek felt pressured to make drug buys because he could not identify targets is inaccurate. The evidence establishes that Andrew was in fact regularly engaged in the purchase and use of drugs, and was purchasing and using drugs from numerous individuals in 2014 that he did not disclose to Weber. BCA's report on the download of Andrew's cell phone revealed that on January 5, 2014, B.S. offered fungus (mushrooms) to Andrew, and on April 28, 2014, T.S. indicated to Andrew that he had access to high quality marijuana that would be available for an extended period of time. (Dkt. 173 at p. 11). The report notes that Andrew met T.S. to smoke a codeine bowl and buy a quarter ounce of marijuana from T.S. on April 19, 2014. (*Id.* at p. 21) During an interview with BCI, T.S. told BCI he purchased marijuana from Andrew a few times, and that he had sold marijuana to Andrew around ten times, and that he has sold as much as an ounce of marijuana to Andrew. (Dkt. 174, BCI Report 226, Interview with T.S. at ¶ 7).

[¶10] The report of Andrew's cell phone download notes that Andrew's last negotiated sale from B.S. was also on April 19, 2014, and that Andrew was using with him

and/or obtaining/attempting to obtain "marijuana, mushrooms, LSD and 'tabs, rolls, and zips', brownies and wax" from him. (Dkt. 173 at p. 18). B.S. told BCA that he had supplied Andrew with marijuana while the two were in high school. (Dkt. 175, BCA Report 21, Interview with B.S., at p. 6). The report also states that Andrew negotiated a sale of marijuana from P.S. on April 29, 2014. (Dkt. 173 at p. 18). In sum, there were at least three individuals from whom Andrew knew he could purchase drugs, and Andrew did not therefore need to "ask around" or make any new contacts. Further, it is undisputed that Andrew Sadek was involved in the drug trade long before he was approached by SEMCA.

[¶11] Following the interview with Deputy Weber, Andrew Sadek did agree to act as a confidential informant. He completed three controlled drug buys as a confidential informant from November 2013 through January 2014. (Dkt. 1; App. p. 13, at ¶ 19). As indicated on the Cooperating Individual Agreement signed by Andrew on November 22, 2013 and explained to Andrew by Weber during the interview on the same date, Andrew was to report to Weber on a continuous basis while actively associated with Defendants. (Dkt. 87, 201 at 16:15; Dkt. 79 at ¶ 6). Weber told Andrew that Andrew would have to check in every few days to tell Weber what Andrew found out, or what Andrew was working on, or that Andrew had not found anything. (Dkt. 87, 201 at 16:35-16:50). Text messages between Andrew and Weber indicated that this practice was followed when Andrew was setting up buys for Defendants; Andrew told Weber when Andrew was working on setting up deals, who he was planning on buying from, as well as when and where he was contemplating, and how much he was planning on buying. (Dkt. 80, text messages #1-9; 59-77; 80-87; 96-97).

[¶12] It is undisputed in this case that no one other than Andrew Sadek and Deputy Weber knew that Andrew was working as a confidential informant. This is apparent based on the exhaustive investigation of this matter by BCI and BCA as demonstrated in those entities' reports. (See Dkt. 140-145). This includes Andrew Sadek's mother, his girlfriend, his roommate and his closest friends. His parents both testified to this effect at their depositions as well. (Dkt. 71, deposition transcript of Tammy Sadek at p. 49:23-50:1; and Dkt. 74, deposition transcript of John Sadek at p. 21:21-23).

[¶13] Andrew Sadek was reported missing on May 1, 2014. (App. 34, p. 95, ln 9-11). A body was discovered in the Red River that was later identified as Andrew Sadek. (Dkt. 29, Autopsy Report (sealed)). The coroner determined that Andrew died as a result of a gunshot wound to the head but the range of fire was not determined. (*Id*.) No determination was made as to the cause of death i.e. homicide, suicide or accidental death. (*Id.*) Plaintiffs candidly testified that they have no evidence of what happened to their son and have admitted that they have no evidence that he was threatened and deny that he would have committed suicide. (Dkt. 137, p. 12-14, ¶¶ 27-28). Despite four years of investigation, law enforcement has never been able to identify any facts as to what happened to Andrew Sadek. There has never been any fact or piece of evidence identified that would even suggest how, when, where or why Andrew Sadek died. It should be noted that despite approximately three years of litigation, Plaintiffs took only two depositions. This was even after obtaining the BCI/BCA investigatory file nearly a full year before the trial court heard Defendants' Motion for Summary Judgment.

[¶14] Defendants moved in this case for summary judgment seeking dismissal of Plaintiffs' claims of negligence, fraud and deceit (the fraud claims are not part of this appeal

because the Plaintiffs admit that a fraud claim is not applicable under the facts and circumstances of this case.) The only allegation made concerning the deceit claim was that Weber told Andrew Sadek during their initial interview that there was a "good possibility" that Andrew would have to face prison time if he did not help himself out. (App. p. 12, ¶ 15). It was alleged that the Defendants' negligence had proximately caused Andrew's death as well. (App. p. 15-16, ¶¶ 30-35). During the course of oral argument, Plaintiffs' counsel admitted that they do not know what happened to Andrew from the time he left his dorm room in the early morning hours of May 1, 2014 until his body was found. (Tr. p. 48:12-25 and pg. 49:1-5).

[¶15] Likewise, during the hearing, Judge Schmitz stated "I think where this all comes together in my mind is on the issue of causation that's pervasive throughout the case." (Tr. p. 28:8-10). That pervasive issue and the only conclusion that can be drawn from the record in this case was eloquently captured by Judge Schmitz in his Memorandum when he stated, "The stark reality of this case is that there is not, and perhaps can never be, any evidence of how, when, where or why Andrew Sadek died." (App. p. 67, ¶ 30). Ultimately, the trial court dismissed both the deceit and negligence claims as a matter of law for the reasons set forth in its Memorandum. (App. p. 50-68).

STANDARD OF REVIEW

[¶16] Rule 56 "is a procedural device for promptly and expeditiously disposing of an action without a trial if either party is entitled to judgment as a matter of law and no dispute exists as to either the material facts or the reasonable inferences to be drawn from undisputed facts, or if resolving the factual disputes will not alter the result." *Groleau v. Bjornson Oil Co*., 2004 ND 55, ¶ 5, 676 N.W.2d 763.

[¶17] In *Anderson v. Meyer Broadcasting Co.*, 2001 ND 125, ¶ 14, 630 N.W.2d 46, this Court outlined the respective burdens of the moving party seeking summary judgment and the party opposing a motion for summary judgment as follows:

> [a]lthough the party seeking summary judgment has the burden of showing that there is no genuine issue of material fact, the party resisting the motion may not simply rely upon the pleadings. Nor may the opposing party rely upon unsupported, conclusory allegations. The resisting party must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record by setting out the page and line in depositions or other comparable documents containing testimony or evidence raising an issue of material fact.
>
> In summary judgment proceedings, neither the trial court nor the appellate court has any obligation, duty, or responsibility to search the record for evidence opposing the motion for summary judgment. The opposing party must also explain the connection between the factual assertions and the legal theories in the case, and cannot leave to the court the chore of divining what facts are relevant or why facts are relevant, let alone material, to the claim for relief.

[¶18] This Court has repeatedly cautioned that "mere speculation is not enough to defeat a motion for summary judgment, and a scintilla of evidence is not sufficient to support a claim." *Heart River Partners v. Goetzfried*, 2005 ND 149, ¶ 8, 703 N.W.2d 330 (quoting *State v. North Dakota State Univ.,* 2005 ND 75, ¶ 8, 694 N.W.2d 225); *In re Estate of Richmond*, 2005 ND 145, ¶ 12, 701 N.W.2d 897; *Investors Real Estate Trust Props.,*

Inc. v. Terra Pac. Midwest, Inc., 2004 ND 167, ¶ 5; *Zuger v. State*, 2004 ND 16, ¶ 8; *Iglehart v. Iglehart,* 2003 ND 154, ¶ 10, 670 N.W.2d 343.

[¶19] Additionally, courts must consider the substantive evidentiary standard of proof when ruling on a motion for summary judgment. *Arndt v. Maki*, 2012 ND 55, ¶ 10, 813 N.W.2d 564. The key consideration is "whether a jury could reasonably find either that the plaintiff proved his case by the quality and quantity of evidence required by the governing law or that he did not." *Id*. at ¶ 10. When no pertinent evidence on an essential element of plaintiff's claim is presented to the trial court in opposition to a motion for summary judgment, it is presumed that no such evidence exists. *Beaudoin v. JB Mineral Services, LLC,* 2011 ND 229, ¶ 7, 808 N.W.2d 671. Whether the district court properly granted summary judgement applying all of the standards above is a question of law which this court reviews de novo. *Aarndt v. Maki*, 2012 ND 55, ¶ 10, 813 N.W.2d 564.

LAW AND ARGUMENT

[¶20] Based on the record and applicable North Dakota law, this Court will find that the district court did not err in dismissing the Plaintiffs' deceit claims as a matter of law nor did it err in dismissing the Plaintiffs' negligence claims as a matter of law. The district court was thoroughly prepared and wrote an eloquent and thoughtful Memorandum Opinion correctly applying the law and facts as to each claim and finding that there are no facts that would ever allow a jury to make a factual and evidentiary finding of proximate causation regardless of the claim presented.

I. The District Court Did Not Err in Dismissing the Plaintiffs' Claim for Deceit as a Matter of North Dakota Law.

[¶21] Fraud and deceit must be proved by clear and convincing evidence. *WFND, LLC v. Fargo Marc, LLC,* 2007 ND 67, ¶ 25, 730 N.W.2d 841. In *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), the United States Supreme Court, in applying Rule 56(c) of the Federal Rules of Civil Procedure, concluded that a higher burden of proof should have a corresponding effect on the judge when deciding whether to send the case to the jury. Therefore, when determining if a genuine factual issue as to fraud exists, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability. *State Bank v. Lindberg*, 471 N.W.2d 470, 474-75 (N.D. 1991). In ruling on a motion for summary judgment, "the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson,* 477 U.S. at 254. "There is no genuine issue if the evidence presented in the opposition affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find [fraud] by clear and convincing evidence." *Id.*

[¶22] Deceit is defined as:

> 1. The suggestion as a fact of that which is not true by one who does not believe it to be true;
> 2. The assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true;
> 3. The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or
> 4. A promise made without any intention of performing.

N.D.C.C. § 9-10-02.

[¶23] Defendants assert that Plaintiffs could not prove a claim of deceit because the facts would not support the elements of the claim as listed above. It is important to remind the Court that Defendants in this case have no burden of proof. Despite this, Defendants came forward with uncontradicted evidence that the above elements could not be met. Plaintiffs' deceit (and fraud) claims are wholly based upon the assumption that Weber's claim to Andrew that Andrew would serve time in prison if Andrew did not agree to act as a confidential informant was either untrue or was a statement that Weber had no reasonable grounds for believing was true. Plaintiffs' assumption in this regard is provably false. At the time of the November 2013 conversation between Weber and Andrew, Weber was justified in believing and representing to Andrew that Andrew could face prison time, as at least one similarly-situated criminal defendant in Richland County had recently been sentenced to prison time.

[¶24] In the case of the *State of North Dakota v. Rose Ellen Maskewit*, Case No. 39-2013-CR-00096, the defendant Maskewit plead guilty to one count of possession of a controlled substance with intent to delivery, a Class A felony charge. (*See* Dkt. 70; Transcript of sentencing hearing, at p. 1:6-10). The State's recommendation was a five year deferred imposition, five years of supervised probation, with a condition of probation

to serve probationary jail time of thirty days with credit for one day previously served. (*Id.* at p. 2:12-20). At the sentencing hearing on August 6, 2013, Judge Cruff declined to adopt the State's recommendations and sentenced the defendant to a minimum of eighteen months at the North Dakota Department of Corrections and Rehabilitation, stating:

> "Well, I've taken the position in the short time I've been down here that drug dealers are engaged in a deadly trade, I guess is how I see it. Whether its marijuana, prescription pills, or what have you, that these deals go bad and there's fights over money and drugs and so forth, and it may not be local but there is a pipeline and there are people within that pipeline that lose their lives because of this type of business.
>
> I take it very seriously. I take a very dim view on people that deal drugs. I've quoted it more than once "a drug dealer's a drug dealer's a drug dealer," whether you're dealing marijuana, prescription pills, methamphetamine, or cocaine. It's a cancer to our society and there is no good reason to do it."

(*Id.* at p. 3:7-20).

[¶25] Weber signed the Criminal Information form and the Affidavit in Support of Probable Cause in the *Maskewit* case. (Dkt. 181). Weber was the first witness listed for the state in the *Maskewit* case. (Dkt. 181). As such, it cannot be disputed that Weber was well aware of the *Maskewit* case at the time of his meeting with Andrew on November 22, 2013, with said meeting occurring approximately just three months after Maskewit was sentenced to a minimum of eighteen months in prison. (Dkt. 149, Weber Affidavit). Defendants have shown that the elements of a misrepresentation amounting to deceit cannot be proven.

[¶26] The district court did not even reach that inescapable conclusion because there was another fatal flaw in the deceit claims advanced by the Plaintiffs. As a matter of North Dakota law, a fraud or deceit claim cannot be based on a prediction or prophecy as to a future event. Keep in mind that the only claim raised in the Complaint, and throughout

the pendency of the litigation, that was alleged to be a misrepresentation was Weber's statement to Andrew in the initial interview that there was a "good possibility" that he would face prison time if he did not help himself out. The district court properly found that this is a mere prediction or opinion as to a potential future event, i.e. whether or not Andrew would receive prison time for his undisputed criminal charges. (App. p. 56; 59-60).

[¶27] 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 a prophecy as to the happening or non-happening of a future event is not actionable. *Sperle v. Weigel*, 130 N.W.2d 315, 320 (N.D. 1964). Fraudulent statements cannot consist of unfulfilled promises or predictions with respect to future events, especially where intent to deceive is absent). *Id. See also Lindholm v. Shaft,* A2-01-117, 2002 U.S. Dist. LEXIS 17781, at *10 (D.N.D. Aug. 26, 2002) (Alleged fraudulent statement was not fraudulent as a matter of law where it was a mere prediction of a future act or an unfilled promise). Weber's statement as to the possibility of jail time is exactly the type of statement that the aforementioned cases explain cannot be actionable as fraud.

[¶28] In this case, there is no past or present misrepresentation alleged and candidly there cannot be. Plaintiffs were in possession of the communications between Weber and Andrew Sadek almost from the outset of the litigation and even after production of the criminal investigatory files had nearly a full year within which to identify other misrepresentations. None were forthcoming. Further, Plaintiffs' attempts to distinguish the cases relied upon by the district court are unavailing. They try to obfuscate the issue

by suggesting that there was a present representation made. Namely, that Andrew needed to act as a confidential informant to avoid potential future prison time. (See Appellants' Brief P. 34). However, that is not a misrepresentation. He could have and did choose to work as a confidential informant because that was a true option available to him. There was no present misrepresentation. The Plaintiffs also argue, without any support in the record, that Weber misrepresented Andrew's role to him. (See Appellants' Brief P. 33). How? Where is the factual support and where was that ever alleged such that Defendants could defend the claim? Simply put, both the *Sperle v. Weigel*, 130 N.W.2d 315 (N.D. 1964) and the *Kary v. Prudential Ins. Co. of America*, 541 N.W.2d 703 (N.D. 1996) completely support the district court's finding that the only alleged misrepresentation was a prediction as to a potential future event and therefore not actionable as a matter of law. It should also be noted that this issue was not even addressed by the Plaintiffs in their written response to Defendants' Motion for Summary Judgment. (See Dkt. 152).

[¶29] Further, there is legal authority which demonstrates that the future prediction in this case is even more a prophecy than other representations that have been found insufficient to state a claim. In Judge Hovland's opinion in the *Olin* case, he stated that "the future is impossible to predict and for this reason predictions as to future events are not actionable." (Dkt. 172, *Olin v. Dakota Access, LLC*, No. 1:17-cv-00007, 2017 U.S. Dist. LEXIS 166924, at *10 (D.N.D. Oct. 10, 2017) Judge Hovland noted that the use of the word "would" in the allegations in that case demonstrated that the statements at issue were predicated on the predicted happening of a future event. *Id.* The word "would" comes up in this case, as the Complaint alleges that "Weber asserted that Andrew Sadek ***would*** serve time in prison for charges of Delivery of a Controlled Substance, if he did not work

as a confidential informant". (Dkt. 1 at p. 18, ¶ 48) (Emphasis added). Weber was not even so definitive as to use the word "would"; Weber actually told Andrew that there was a ***good possibility*** of Andrew getting some prison time if Andrew did not agree to cooperate. (Dkt. 87, 201 Interview at 0:36-1:10). The Complaint also alleges that "Weber told Andrew Sadek that the felony charges he was ***potentially*** facing ***could*** result in up to 40 years in prison, fines of up to $40,000, or both". (Dkt. p. 12, ¶ 14) (Emphasis added). The "misrepresentations" alleged in this case are even more speculative and predictive than those in *Olin*.

[¶30] Plaintiffs argue to this Court that they should be permitted to amend their Complaint pursuant to Rule 15 of the Rules of Civil Procedure. (See Appellants' Brief p. 32). They also argue throughout their brief, as they did to the district court, that there were other misrepresentations that establish a claim for deceit. Those arguments fail as a matter of law.

[¶31] The heightened pleading requirements of N.D.R.Civ.P. 9(b) support that Plaintiffs' new allegations of misrepresentations could not be considered by the district court or this Court. N.D.R.Civ.P. 9(b) states that in alleging fraud, a party must state with particularity the circumstances constituting fraud. *See also Miller Enters. v. Dog N' Cat Pet Ctrs.,* 447 N.W.2d 639, 643 (N.D. 1989) ("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**.") (Emphasis added). Claims for deceit also require compliance with N.D.R.Civ.P. 9(b). *Olin v. Dakota Access, LLC*, 910 F.3d 1072, 1076 (8th Cir. 2018). The purpose of the heightened pleading standard in N.D.R.Civ.P. 9(b) is to enable defendants to respond specifically, at an early

stage of the case, to potentially damaging allegations. *Olin v. Dakota Access, LLC*, No. 1:17-cv-00007, 2017 U.S. Dist. LEXIS 166924, at *10 (D.N.D. Oct. 10, 2017) Plaintiffs' attempts to add new allegations as to its fraud and deceit claims nearly three years after this case was initiated must be disregarded.

[¶32] Plaintiffs try to distinguish the *Miller v. Cat N Dog Enterprises Inc.*, 447 N.W.2d 639 (N.D. 1989) case by suggesting that the case stands for the proposition that the pleading with particularity requirement can be satisfied by reference to other evidence in this case that demonstrates the opposing party had ample opportunity to defend against the claim. That is a misreading and misinterpretation of the case. In *Miller*, the Court did find that as to the allegation plead in the Complaint, the defendant had sufficiently been apprised of the claim to defend it and no further particularity was required. The court specifically indicated this by referencing its review of the pleadings. *See Miller* at 643. Here, Defendants never have argued that the only allegation in the Complaint as to an actionable misrepresentation was not plead with particularity. Defendants have vigorously defended against that claim.

[¶33] The remaining argument pertaining to the *Miller* case is misplaced. They suggest that the court was holding that fraud/or deceit claims could be divined from other evidence adduced in the case through discovery. This is incorrect. The court actually was responding to the argument that the facts did not support a claim for fraud. *Miller* at 643. The court simply found that there was sufficient competent admissible evidence to support the particularly plead allegation of fraud in the Complaint. *Id.* In no way did the court establish a new rule whereby Rule 9(b) can be satisfied by reference to evidence adduced during the course of litigation. That type of exception would essentially be an abrogation

of Rule 9(b) and would require defendants to discern what fraud or deceit claims were being advanced as a case progressed. This is exactly contrary to the actual state of the law. Parties are required to plead in a Complaint with particularity each and every asserted fraudulent or deceitful misrepresentation. *See e.g. Rolin Mfg. v. Mosbrucker,* 544 N.W.2d 132, 138 (N.D. 1996) (indicating that a civil RICO claim must be pled the same particularity required in the pleading of fraud (which) essentially means that you must plead dates, times and places of fraudulent statements and who made them.) Simply put, North Dakota law does not permit a party to require an opposing party to discern the alleged fraudulent or deceitful from non-particular parts of a pleading nor from evidence adduced during discovery.

[¶34] Likewise, with respect to Plaintiffs' argument that they should be permitted to amend their Complaint under Rule 15 to specifically plead additional deceitful representations, Plaintiffs could not produce any case from any jurisdiction in which a court allowed a party to amend its Complaint after dispositive motions had been filed or after an appeal from a dismissal of a fraud or deceit case. The reason for this is that no such authority exists. Such an exception would basically swallow Rule 9(b) as there would be no party that would not allege that they could establish fraud or deceit after a case had been litigated and was subject to a dispositive motion if only they could amend their Complaint. The purpose of Rule 9(b) is to allow a defendant to properly defend claims of fraud or deceit and allowing an ever moving target, especially at the late stages of litigation, would thwart that purpose and would perpetuate litigation and uncertainty. The argument is misplaced and does not accurately state North Dakota law.

[¶35] Further, Plaintiffs' attempts to cite other portions of their Complaint as being allegations of misrepresentations is misplaced. (See Appellants' Brief at p. 30). These are nothing more than allegations taken from the negligence assertions in the Complaint and do not specifically allege any misrepresentations. For instance, alleging failure to train and supervise is not a particular pleading of a misrepresentation constituting deceit. In fact, it is not even a misrepresentation. *Id*. Similarly, Plaintiffs' attempts at suggesting that there is some additional duty to "deal honestly" that has been breached is simply not consistent with North Dakota law. Further, such an issue cannot be raised for the first time on appeal.

[¶36] Again, if this was sufficient, Rule 9(b) may as well be repealed as defendants would never be entirely sure what alleged misrepresentations to defend. Plaintiffs seem to forget that they have the burden of proof and Defendants are not required to search the pleadings and evidence for possible misrepresentations. Plaintiffs in this case even suggest that Defendants were remiss for not raising this issue before the dispositive motion phase of the case. Obviously, the Defendants were unaware that Plaintiffs intended to assert additional misrepresentations until receiving the brief in response to the Motion for Summary Judgment. This illustrates the reason for Rule 9(b) in the first instance and demonstrates why the Plaintiffs' arguments are incorrect. Further, the Plaintiffs have completely failed to explain why they did not move to amend at some point earlier in the case. The case was litigated for over three years and as pointed out all of the facts concerning communications between Weber and Andrew Sadek were known for a minimum of almost a year before Defendants' renewed dispositive motion was filed. Further, Defendants had moved for summary judgment earlier in the case and Plaintiffs

were well aware of Defendants' intent to argue against the fraud and deceit claims and yet they did no additional discovery nor did they seek to amend the Complaint. The Court was correct in finding that there was only one particularly plead allegation of deceit that was not actionable as a matter of law.

[¶37] Lastly, and perhaps most importantly, the Plaintiffs could never establish that any representation was the proximate cause of any harm to Andrew Sadek. The district court did not reach this issue because it was not necessary. However, as this Court can see from the record, the district court's comments at oral argument and from the Memorandum Opinion and Order dismissing this case, the district court correctly concluded that lack of proximate cause permeated this entire case. The district court found that there is no evidence as to what, when, where, how and why Andrew died. The district court was also correct that endless speculation about that subject is required to reach any hypothetical conclusions. It is a requirement of a deceit claim that even after establishing the elements of fraud/deceit a party must establish that the fraud/deceit proximately caused actual damages. *WFND, LLC v. Fargo Marc*, 2007 ND 67, ¶ 25, 730 N.W.2d 841. In this case, even if the actionable claim for deceit had been plead, the element of proximate cause could never be established. Despite Plaintiffs' effort to try and create an inconsistency in the district court's analysis, it is beyond clear that the record in this case correctly led the district court to conclude that proximate cause could never be established in this case regardless of the claim being asserted. The deceit claims were properly dismissed as a matter of law.

II. The District Court Properly Dismissed Plaintiffs' Negligence Claims as a Matter of Law.

[¶38] Actionable negligence consists of a duty, breach, and an injury that was proximately caused by the breach**.** *Iglehart v. Iglehart*, 2003 ND 154, ¶ 11, 670 N.W.2d 343, 347. In a negligence action, the plaintiff has the burden of proving by a preponderance of the evidence that the defendant was responsible for some negligent act or omission, and that such act or omission was the proximate cause of the plaintiff's injuries and damages. *Leno v. Ehli*, 339 N.W.2d 92, 96 (N.D. 1983). Furthermore, it is well settled that the mere fact an injury has occurred, without more, is not evidence of negligence on the part of anyone; rather, such negligence must be affirmatively established. *Northwestern Equipment, Inc. v. Cudmore*, 312 N.W.2d 347, 352 (N.D. 1981); *Anderson v. Kroh*, 301 N.W.2d 359, 362 (N.D. 1980); *Haga v. Cook*, 145 N.W.2d 888, 891 (N.D. 1966) ("defendant's negligence never is presumed merely from proof of the accident, but must be affirmatively established"). Proximate cause is an essential element to a negligence claim. Both negligence and proximate cause must be found to impose liability. *Mozer v. Witt*, 2001 ND 30, ¶ 13, 622 N.W.2d 223. A proximate cause is a cause which, in natural and continuous sequence, produces the injury and without such the injury would not have occurred. *Rued Ins., Inc. v. Blackburn, Nickels & Smith, Inc.*, 543 N.W.2d 770, 773 (N.D. 1996).

[¶39] "It is never enough for the plaintiff to prove merely that the plaintiff has been injured by the negligence of someone unidentified. Even though there is beyond all possible doubt negligence in the air, it is still necessary to bring it home to the defendant. The purpose of this requirement is to link the defendant with the probability, already established, that the accident was negligently caused. On this too the plaintiff has the

burden of proof by a preponderance of the evidence; and in any case where it is clear that it is at least equally probable that the negligence was that of another, the court must direct the jury that the plaintiff has not established a case." *Barbie v. Minko Constr. Inc*., 2009 ND 99, ¶ 9, 766 N.W.2d 458; citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 39, at 248 (5th ed. 1984) (footnotes omitted) (quoting *Newing v. Cheatham*, 15 Cal. 3d 351, 124 Cal. Rptr. 193, 540 P.2d 33, 41 (Cal. 1975)).

[¶40] This Court has stressed the plaintiffs must prove the defendant's conduct was more probably the cause of the injury:

> [I]f from the plaintiff's evidence it is as probable that the injury and damage of which the plaintiff complains resulted from a cause for which the defendant is not responsible as it is that such injury and damage resulted from a cause for which the defendant would be responsible, a prima-facie case of proximate cause has not been made and the plaintiff cannot recover, since plaintiff's recovery must be based upon more than mere speculation.

Investors Real Estate Trust, 2004 ND 167, ¶ 9, 686 N.W.2d 140 (quoting *Bismarck Baptist Church v. Wiedemann Indus., Inc.*, 201 N.W.2d 434, 441 (N.D. 1972)).

[¶41] The record in this case clearly establishes that Andrew Sadek's fate is not known and possibly can never be known. Plaintiffs admitted to the district court that what happened to him from seeing him leave the dorms in the early morning hours of May 1, 2014 until his body was found is unknown. (Tr. p. 48-49). Judge Schmitz properly found that there is no competent admissible evidence as to what, when, where, why or how Andrew died. (App. p. 66-68). If this case had been allowed to go to trial, a jury would have had no choice but to speculate as to all of those very important questions, all of which bear on proximate causation. That is exactly what Rule 56 is intended to prevent. To quote *Barbie v. Minko*, Plaintiffs must be able to bring home that some negligent act or omission by the Defendants caused harm to Andrew. This cannot be done.

[¶42] Plaintiffs relied almost exclusively on the report of their paid expert Michael Levine to try and establish a factual issue. There are a number of issues with this approach but foremost amongst them is the fact that despite a 157 page long report, Mr. Levine nowhere establishes the how, what, when, where and why of Andrew Sadek's death. Put another way, he fails to establish that the alleged wrongdoing of the Defendants caused harm to Andrew. Instead, he contents himself with generalities and blithely concludes that Andrew must have been harmed by the actions or omissions of the Defendants. This is because he cannot know what happened to Andrew any more than anyone else. Simply saying that being involved in the drug trade can be dangerous or stressful is not enough. Furthermore, it is beyond established that Andrew was involved in the drug trade before he ever met Defendants and was heavily involved during his work as a confidential informant (unbeknownst to Weber). Hence, if Mr. Levine is simply positing that it is dangerous to be involved with the drug trade then his report actually establishes that numerous things could have happened to Andrew not involving the Defendants, i.e. he could have been murdered by his drug contacts for his personal use, etc.

[¶43] Plaintiffs' reliance on Mr. Levine's report is improper as a matter of law regardless of how ineffective it is in establishing negligence. This report cannot be considered in the context of a summary judgment motion because it is unsworn and not admissible. *See* Dkt. 187*, Lammle v. Gappa Oil Co*., 2009 Minn. App. Unpub. LEXIS 42, *16 (Minn. Ct. App. January 13, 2009) ("the expert opinions are in the form of reports and are thus inadmissible hearsay. *See* Minn.R.Civ.P. 56.05 (requiring that affidavits supporting and opposing summary judgment 'shall set forth such facts as would be admissible in evidence.'"). *See also Kay v. Fairview Riverside Hosp.*, 531 N.W.2d 517,

520 (Minn. App. 1995), *review denied* (Minn. July 20, 1995) (expert reports may not be considered in opposing a summary judgment motion if they are not submitted in proper affidavit form); *Itasca County Soc. Servs. v. Milatovich*, 381 N.W.2d 497, 498 (Minn. App. 1986) (trial court erred in granting summary judgment based on report not in evidence or affidavit form).

[¶44] N.D.R.Civ.P. 56 is identical to its Minnesota counterpart with respect to the requirements of affidavits and admissibility. *See* N.D.R.Civ.P. 56(e)(1) ("A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated."). Because Mr. Levine's report is not in affidavit form, it should not be considered. Even if it was in affidavit form, it does not constitute competent admissible evidence because it primarily consists of hyperbolized opinions not based on facts. Especially the fact that it is unknown as to what happened to Andrew. In that way, his opinions are likely not even admissible because they are not helpful to the court or the jury. It is simply cloaking the unknown in the illusion of authority when in actuality Mr. Levine adds nothing to the evidence in this case.

[¶45] Plaintiffs also argue that the *Jones v. Ahlberg*, 489 N.W.2d 576 (N.D. 1992) case advances their cause. This is incorrect. Like all the arguments advanced by the Plaintiffs, it has the same glaring omission. Namely, that in *Jones*, the cause or instrumentality of the injured party was clearly established. There was no dispute that the decedent in that case died after a motor vehicle crash that occurred after a police chase. The same is true for all of the police chase cases cited in the *Jones* opinion as well. An actual reading of the opinion makes it clear that the defendant law enforcement officers

were arguing that proximate cause could not be established because the fault of the driver of the pursued vehicle was the proximate cause of the decedent's death (the decedent was a passenger in the pursued vehicle). *Jones* at 581. This court simply found that it would not be warranted to conclude that the pursued driver's negligence was the sole proximate cause of the decedent's death. *Jones* at 582. The case does not stand for the proposition that any time law enforcement is involved with the death of someone, proximate cause is an issue of fact. Here, the circumstances are completely different because the cause of Andrew's death is unknown and there is no way from an evidentiary standpoint, or otherwise, to tie the Defendants to that death other than by speculation. That being the case, *Jones* actually supports the Defendants' arguments and the district court's findings because here there is no triable issue of fact for the jury on the issue of whether any act or omission on the part of the Defendants caused Andrew's death.

[¶46] This case is more analogous to *Bismarck Baptist Church v. Weidmann Indus. Inc*., 201 N.W.2d 434 (N.D. 1972). In *Bismarck Baptist Church*, a church was damaged by a fire of unknown cause, and the church sued several contractors who were involved in the construction and/or provisions of materials and equipment at the church for damages caused by the fire. *Id.* at 437. On the evidence which had been produced at the trial, the court found that the plaintiff had failed to sustain its burden of proof to establish the cause of fire and had failed to prove by a preponderance of the evidence that the defendants, or any of them, were liable for the damage to the plaintiff's church. The court pointed out that all that the plaintiff actually had proved was that a fire had occurred and that its property had been damaged. The court asserted that if it were to find for the plaintiff on the record made by the plaintiff, it would be compelled to guess at what actually

had happened because nothing in the record showed that the contractor had been negligent or that any of the other defendants had done anything or failed to do anything which would make them liable for the fire. Other than showing that a fire actually had occurred, the plaintiff had not proved its case or established its claim against any of the defendants. In the opinion of the trial court, the fire marshal and the fire chief who testified as to the cause of the fire were merely speculating on what might have caused the fire, and that such speculation was not a proper basis for a judgment against any of the defendants. The court thereupon ordered the Complaint of the plaintiff to be dismissed as to all of the defendants. *Id.* at 438-39. On appeal, the North Dakota Supreme Court upheld the district court:

> We might speculate on what might have started the blaze, and we could come up with a number of theories. For example, there was a young peoples' meeting in the church on the night of the fire. There are many things which we might imagine could have happened. None of the young people were called as witnesses. Suffice it to say that under the circumstances it is as probable that the fire and the damage which it caused might have resulted from some cause other than a defective switch, as it is probable that the fire was due to some malfunction of the switch. Under the evidence, it would be necessary to speculate on the cause of the fire if we were to hold for the plaintiff. Since that is true, the plaintiff has not sustained its burden of proof.

Id. at 441.

[¶47] Plaintiffs will of course be able to prove that Andrew's death occurred, and for the purposes of this motion, the fact that Plaintiffs were damaged is not in dispute. However, an enormous degree of speculation as to the cause of Andrew's death is necessary for any finding that Defendants are liable to Plaintiffs in this case. Reasonable minds can draw but one conclusion from the evidence in this case – there is no *evidence* that Andrew's death was caused by his acting as a confidential informant, nor is there any *evidence* that his death was caused by any actions or inactions of the Defendants.

[¶48] Plaintiffs have argued that the district court did not give all reasonable inferences to them or look at the evidence in a light most favorable to them. Nothing could be further from the truth. As has been reiterated over and over throughout this brief and the case in general, there is no evidence of what happened to Andrew other than that he died of a gunshot wound to the head. The case law is clear that inferences must be reasonable. It is not reasonable to suggest that simply because Andrew was working as a confidential informant that his death must be related to that work. Taking the Plaintiffs' arguments at face value, they are essentially suggesting that because Andrew was acting as a confidential informant at some point prior to his death Defendants are strictly liable for anything that happened to him thereafter.

[¶49] As has been repeatedly pointed out, if this case were tried, a jury would have no choice but to speculate whether Andrew was murdered or committed suicide, if he was murdered when, where, how and why did that occur and if he committed suicide how and why did he do so. The Plaintiffs point to the fact that he was found with a backpack full of rocks and that he left the dorms on the day Weber was going to charge him out but those facts alone do not solve the above questions. The district court aptly addressed these issues both in oral argument and in its Memorandum Opinion and Order. As found by Judge Schmitz, there are a myriad and perhaps endless number of things that could have happened to Andrew after he was seen leaving his dorm and it would be sheer guesswork to even suggest that it had anything to do with Defendants. Under those circumstances, it is entirely appropriate to find that proximate cause cannot be established as a matter of law even if the other elements of negligence were established, which is not conceded by the Defendants.

[¶50] There are too many facts that are unknown in this case for any claim to be brought against anyone. We do not know where Andrew was going and what he was planning on doing when he left his dorm room on the night of May 1, 2014. We do not know where he died. We do not know when he died. We do not know if he was killed by another, or if he committed suicide. If Andrew was killed by another, we do not know who killed Andrew, nor do we know their reasons for doing so. If Andrew committed suicide, we do not know his reasons for doing so. In short, apart from the fact that Andrew was killed by a gunshot to the head, there is a total lack of evidence as to what happened (and why it happened) between the time Andrew left his dorm room on the night of May 1, 2014 and the time his body was discovered on June 27, 2014.

[¶51] What we do know is that Andrew's disappearance and death did not occur during a controlled buy. We know that there is no evidence that anyone knew he was a confidential informant prior to his disappearance. We know that there is no evidence that Andrew was performing any actions as a confidential informant at the time of his disappearance or death. Allowing this case to proceed against the Defendants under those circumstances would be improper and inapposite to North Dakota law.

[¶52] Defendants cannot say it any better in sentiment or conclusion than Judge Schmitz said when he stated, "One can only speculate, almost endlessly: Was Andrew's death a homicide or suicide? 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). The district court properly dismissed both the deceit and negligence claims of the Plaintiffs and

it is the only result that could ever obtain from the facts and evidence constituting the record.

CONCLUSION

[¶53] For all the foregoing reasons and based on the record and applicable North Dakota law, it is clear and indisputable that the district court properly dismissed the Plaintiffs' claims of deceit and negligence as a matter of law and the district court's Order dismissing the case with prejudice should be affirmed in all respects and the Defendants granted whatever additional and further relief this Court deems just and proper.

Dated this 1st day of November, 2019.

FISHER BREN & SHERIDAN, LLP

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CERTIFICATE OF COMPLIANCE

[¶54] The undersigned, as attorney for the Appellees, Jason Weber and Richland County, 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 35 pages, not including this Certificate of Compliance.

Dated this 1st day of November, 2019.

FISHER BREN & SHERIDAN, LLP

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

John Sadek and Tammy Sadek, as surviving parents of Andrew Sadek on behalf of all heirs-at-law, and the Estate of Andrew Sadek, Plaintiffs/Appellants, v. 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, Defendants/Appellees.	Supreme Court No. 20190216 Richland County District Court No. 39-2016-CV-00128 **AFFIDAVIT OF ELECTRONIC SERVICE**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

[¶1] Katie Rudnick, being first duly sworn, deposes and states that on November 1, 2019 she served the following document:

BRIEF OF APPELLEES

electronically via email to:

Timothy M. O'Keeffe – tim@okeeffeattorneys.com
Tatum O'Brien – tatum@okeeffeattorneys.com

Katie Rudnick

Subscribed and sworn to before me this 1st day of November, 2019.

(SEAL)

TYLER CARLSON
Notary Public
State of North Dakota
My Commission Expires Dec 7, 2021

Notary Public
Cass County, North Dakota

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

John Sadek and Tammy Sadek, as surviving parents of Andrew Sadek on behalf of all heirs-at-law, and the Estate of Andrew Sadek, Plaintiffs/Appellants, v. 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, Defendants/Appellees.	Supreme Court No. 20190216 Richland County District Court No. 39-2016-CV-00128 **AFFIDAVIT OF ELECTRONIC SERVICE**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

[¶1] Katie Rudnick, being first duly sworn, deposes and states that on November 5, 2019 she served the following document:

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Katie Rudnick

Subscribed and sworn to before me this 5th day of November, 2019.

(SEAL)

TYLER CARLSON
Notary Public
State of North Dakota
My Commission Expires Dec 7, 2021

Notary Public
Cass County, North Dakota