

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)

REPLY BRIEF OF APPELLANTS JOHN SADEK AND TAMMY SADEK

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I. The District Court Erred by Granting Defendants’ Motion for Summary Judgment

[¶1] 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.

[¶2] Defendants allege in their brief that “Defendants in this case have no burden of proof.” See, Appellee Brief, ¶ 23. However, for purposes of the summary judgment issues before this Court, the burden is in fact on the Defendants to show there is no genuine dispute of material fact. “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.” Schmidt v. Gateway Community Fellowship, 2010 ND 69, ¶ 7, 781 N.W.2d 200 (citations omitted).

[¶3] The North Dakota Supreme Court has said: “Allegations of fraud and deceit generally raise questions of fact which must be proved by clear and convincing evidence.” Erickson v. Brown, 2008 ND 57, ¶ 26, 747 N.W.2d 34 (citations omitted). However, “Even undisputed facts do not justify summary judgment if reasonable differences of opinion exist as to the inferences to be drawn from those facts.” Doan ex rel. Doan v. City of Bismarck, 2001 ND 152, ¶ 7, 632 N.W.2d 815 (citing Helbling v. Helbling, 267 N.W.2d 559, 561 (N.D. 1978)).

II. In viewing the facts in a light most favorable to the Plaintiffs, an issue of fact exists regarding Plaintiffs’ deceit claim.

[¶4] Clinging to the argument that Plaintiffs’ claim of deceit can only be limited to Weber’s one statement made to Andrew, Defendants assert that Weber was justified in

believing and representing to Andrew that there was a “good possibility” of him facing prison time based on a “similarly-situated” criminal defendant, Rose Maskewit. See, Appellee Brief, ¶¶ 23-26. A review of the North Dakota public court records for Rose Maskewit reveals Ms. Maskewit had a criminal history. See generally, Grand Forks Municipal Case No. 7946931. According to the Information filed in Ms. Maskewit’s drug case, her drug charge was the result of receiving a package of 100 Hydrocodone sent through U.S. Mail. See, Dkt. 1 in Richland County Case 39-2013-CR-00096. There are stark differences between Ms. Maskewit and Andrew, who had no criminal history and was caught selling small amounts of marijuana.

[¶5] In reviewing the Affidavit and Statement of Probable Cause drafted by Defendant Jason Weber in the Maskewit matter, it is clear that even Defendant Weber did not view Ms. Maskewit and Andrew as equals. Ms. Maskewit was arrested as soon as she claimed the package of 100 Hydrocodone pills at the post office. See, Dkt. 2 in case 39-2013-CR-00096. Defendant Weber did not arrest Andrew Sadek on either occasion when Andrew sold marijuana to other confidential informants working under Defendant Weber’s direction. In fact, Weber waited several months to even confront Andrew about those sales. Clearly, based on these records, Defendant Weber only now points to Ms. Maskewit to rationalize his deceitful statements to Andrew.

[¶6] Further, the statistics show that Ms. Maskewit’s arrest and eventual prosecution was an anomaly among SEMCA’s cases. In 2011 and 2012, SEMCA documented a total of 264 individuals with felony charges, and only 12 misdemeanor arrests. See, Dkt. 157 & 158, Task Force stats for 2011 and 2012. The record reporting for 2013 did not differentiate between felony arrests and misdemeanor arrests, but SEMCA

recorded 87 arrests from January to October 2013. See, Dkt. 159, Task Force stats for 2013. Presumably, the majority of the arrests in 2013 were felony arrests, based on records from previous years. See, Dkt. 157 & 158. From 2011 to 2013, SEMCA records show approximately 345 felony arrests.

[¶7] Defendant Weber was assigned to the SEMCA Drug Task Force in 2008 and has been an officer of the task force since that time. See, Dkt. 76, Weber Depo. p. 7, ln. 24-25. In November of 2013, Defendant Weber had approximately 5 years of experience in his field. However, despite his experience and access to information related to over 345 felony arrests between January 2011 and October of 2013, the Defendants have come up with one, not so “similarly-situated” defendant, to compare to Andrew Sadek. One, out of 345; 0.2% of the total arrests. Based on the above, it is clear that Defendants’ reliance on the Maskewit matter is misplaced.

[¶8] Defendants also allege that Plaintiffs’ have brought forth a new issue on appeal by suggesting that Defendants had an *additional* duty to “deal honestly” with Andrew and argue that this is inconsistent with North Dakota law. See, Appellee’s Brief, ¶ 35 (emphasis added). This is not a new or separate issue, and this Court clearly recognizes this principal in regard to claims for deceit. “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. By pleading a deceit claim, Plaintiffs clearly put Defendants on notice of their claim that Defendants did not “honestly deal” with Andrew.

[¶9] Presumably, Defendants feel specific language regarding a duty to deal honestly with Andrew should have been stated within the Complaint, along with more

specific allegations regarding deceit. As the court is aware, Defendants allege that no authority exists to support Plaintiffs' argument that they should be permitted leave to amend their Complaint under Rule 15, should the Court find the Complaint is not stated with sufficient particularity. See, Appellee Brief, ¶ 34. Plaintiffs maintain that their Complaint puts Defendants on notice of Plaintiffs' claims without a need to amend; however, if this Court concludes otherwise this matter should be remanded to allow Plaintiffs to amend their claims.

[¶10] Additionally, contrary to Defendants' bold assertion that no authority exists, several courts have discussed and allowed the amending of a complaint for fraud/deceit claims even following the filing of summary judgment motions. See, Caputo v. Pfizer, Inc., 267 F.3d 181, 192 (2d Cir. 2001) (noting the district court erred by denying the plaintiffs' request to amend the complaint and by granting summary judgment); Thompson v. Gjivoje, 687 F.Supp. 922, 924-25 (S.D.N.Y. 1988) (granting leave to amend a complaint if the plaintiff could substantiate a claim of fraud after a motion for summary judgment); Fraser v. Doubleday & Co., Inc., 587 F.Supp. 1284, 1289 (S.D.N.Y. 1984) (granting plaintiffs leave to amend their complaint on a fraud claim after defendants brought motion for summary judgment); Columbus Bar Assn v. Dougherty, 789 N.E.2d 621, 623-24 (Ohio 2003) (noting that a disciplinary complaint should be allowed amendment to assert a fraud claim, even after motions were filed and a hearing was held).

[¶11] Ultimately, Plaintiffs maintain their contention that their claims against Defendants are sufficiently stated. Further, Plaintiffs' accurate interpretation and application of Miller Enterprises, Inc. v. Dog N' Cat Pet Centers of Am., Inc., 447 N.W.2d 639 (N.D. 1989), supports their position in viewing all evidence in a light most favorable

to the Plaintiffs, an issue of fact clearly exists with regard to Plaintiffs' claim of deceit precluding summary judgment. Plaintiffs' deceit claim involves factual disputes which should be determined at trial. However, this Court may reverse and remand for further proceedings to allow Plaintiffs leave to amend their Complaint, if it finds that Plaintiffs' claim of deceit is not presently stated with sufficient particularity.

III. A genuine dispute of material fact clearly exists with regard to Plaintiffs' negligence claim.

[¶12] The North Dakota Supreme 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.

Messer v. B&B Hot Oil Serv., Inc., 2015 ND 202, ¶ 7, 868 N.W.2d 373 (citations and quotation marks omitted). "Proximate cause is a separate element from a determination of negligence and is a question of fact for the jury to determine." Moszer v. Witt, 2001 ND 30, ¶ 13, 622 N.W.2d 223, 229 (citations omitted).

[¶13] Defendants have attempted to distinguish the case of Jones v. Ahlberg, 489 N.W.2d 576 (N.D. 1992) by arguing, in part, that the case of Bismarck Baptist Church v. Weidmann Indus. Inc., 201 N.W.2d 434 (N.D. 1972) is more analogous to the present matter. See, Appellee Brief, ¶¶ 45-46. This argument is flawed. The Supreme Court in Bismarck Baptist Church explained "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." Bismarck Baptist Church, at 441. See also, Appellee Brief, ¶ 46. Notably, Bismarck Baptist Church was not determined on summary judgment – instead the case proceeded to a trial. 201 N.W.2d at 438-39.

[¶14] In the present case, and unlike the circumstances in Bismarck Baptist Church, it is more probable and certainly more than mere speculation, that Andrew Sadek died as a result of his relationship with the Defendants and the Defendants' failure to monitor and protect Andrew Sadek. Viewing the evidence in a light most favorable to Plaintiffs at this point of litigation, it is not more probable that Andrew's death "might have resulted from some other cause." Id. at 441. Further, in light of the differing burdens on summary judgment and at trial, along with the disputed facts here, this Court should conclude the district court erred in granting Defendants' summary judgment motion.

[¶15] Andrew's death was a foreseeable consequence of his relationship with Defendants and Defendants' failure to supervise Andrew's activities. Andrew was working as a confidential informant/undercover investigator before, and between, April 7, 2014 and the time of his disappearance. Viewing all evidence in a light most favorable to the Plaintiffs, the fact that Andrew's parents, friends, and roommate did not know about his role in working for Defendants does not mean that no other individual was able to obtain this information. Andrew was explicitly told by Weber not to tell anyone that he was working as a confidential informant. Dkt. 87, 11/22 Int. at 15:24.

[¶16] As to causation, approximately fifty individuals were interviewed following Andrew's disappearance and death. Those who knew Andrew generally did not believe that Andrew was suicidal. Only one of Andrew's friends thought Andrew may have committed suicide, but he concluded that it was possible that Andrew "couldn't take turning on his friends or giving up information and was pushed by whatever and committed suicide," and otherwise he believed Andrew was killed by "whoever he was dealing with." See, Dkt. 164, BCA Report 10. As far as any other comments within these interviews

regarding Andrew's death as a suspected homicide, they are almost all, unsurprisingly, focused around Andrew's connection to the drug trade.

[¶17] Additionally, as to causation, Defendants state, "Andrew was involved in the drug trade before he ever met Defendants and was heavily involved during his work as a confidential informant (**unknownst to Weber**)." See, Appellee Brief at ¶ 42 (emphasis added). Defendants argue that "numerous things could have happened to Andrew not involving the Defendants." Id. First of all, this points to a material and disputed fact from which more than one conclusion can be drawn regarding Defendants' breach of their duties because (1) Weber had no idea what Andrew was, or was not doing, while he was working as a confidential informant, and (2) Weber acted against the goals and purpose of SEMCA.

[¶18] On November 22, 2013, Weber told Andrew:

"your days of smoking weed, possessin' weed, possession of drug paraphernalia are done. Okay?... While you're working with me. Now, once we're done working, if you want to go back to your old ways and do whatever, then it's just a cat mouse game again between me and you."

....

And the reason I say that is because it helps with your credibility and all that stuff, okay? We work with a lot of different people out there and we have eyes everywhere. So don't be caught doing it okay?

....

we will find out.

Dkt. 87, 11/22 Int. at 14:51-15:23.

[¶19] A confidential informant cannot cut all ties with the drug trade and drug use but still be a useful confidential informant that can successfully arrange controlled buys. Here, Weber told Andrew he can go back to using marijuana once he completed his tasks for Weber. However, is it a foreseeable consequence of a confidential informant's work that he may go back to his "old ways" after he reports to law enforcement on the people he regularly uses with or purchases from? No. On the same token, is it a breach of a drug task

force officer's duty to ignore their confidential informant's everyday transactions, if they in fact intend to maintain credibility of their witnesses and task force? Weber admits it is by stating "we have eyes everywhere...we will find out." Id.

[¶20] Yet, by Defendants own admissions, they did not have eyes on Andrew on any sort of regular basis and had no clue of Andrew's drug activity during the time he was working as a confidential informant. This is even more clear when reviewing the lack of oversight and investigation by Weber with regard to his handing of other informants which he used to target Andrew Sadek in the first place. This is discussed in detail within Plaintiff's Response to Defendants' Summary Judgment motion. Dkt. 152. To summarize, Weber's actions were in direct opposition to the goal and purpose of SEMCA, to reduce the accessibility of drugs and prevent the abuse of illegal drugs. He was clearly willing to use confidential informants to create favorable statistics for the purposes of funding, but had no care or concern with those same individuals abusing illegal drugs, so long as they served their purpose to SEMCA's financial benefit. See, Dkt. 152, ¶¶ 52-60.

[¶21] Contrary to the Defendants' position, the most common and most reasonable conclusion that can be reached in light of the available evidence, is that Andrew's death was a proximate cause of his relationship with the Defendants and the Defendants' failure to monitor and protect Andrew Sadek in and around the time of his disappearance and death. In an addition to the above, we know that Andrew had been given a deadline of May 1, 2014 to "get the next deal done" or have warrants cut for his arrest. App. p. 38, Texts no. 103. It was on this very date that Andrew went missing.

[¶22] Plaintiffs' expert believes the evidence indicates Defendants substandard, and/or corrupt and/or reckless misuse of authority was the direct cause of Andrew's death.

See, Dkt. 160, p. 144 (Levine Report). However, Defendants' argue that Plaintiffs' reliance on their expert report is improper for purposes of summary judgment, as it is not in affidavit form. See, Appellee Brief, ¶ 43. Defendants' attempted to make this argument with the district court, but as Plaintiffs pointed out, all of the police reports and the majority of the discovery and evidence would all have to be treated similarly to Levine's report, as none of it is in affidavit form but could be presented at trial. See, Tr. p. 59, ln. 15-23. The district court ultimately agreed with this position. Id. at Tr. pg. 59, ln. 24-25 and pg. 60, ln. 1-3. Further the district court relied, positively, on Levine's report when finding that an issue of whether the defendants breached any duty to Andrew must be left to the trier of fact, as Levine's report stated that Weber and SEMCA breached several standards in training, supervising, and documenting Andrew's activities as a confidential informant. App. p. 64, ¶ 26. Defendants have not appealed this issue, and this Court should conclude Defendants' have waived any issue regarding admissibility of the expert report on appeal. These same undisputed findings speak to the proximate cause of Andrew's death being more likely than not a result of his relationship with Defendants, and the Defendants' breach of their duties owed to Andrew Sadek.

Dated this 15th day of November, 2019.

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CERTIFICATE OF COMPLIANCE

The undersigned, hereby certifies, in compliance with N.D.R. App. P. 32(e) and 32(a)(8), that the total number of pages of the above brief does not exceed 12 pages.

Dated this 15th day of November, 2019.

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

[¶] KAYLA J. PETERSON, being first duly sworn, deposes and says that on November 15, 2019 she served the following documents:

REPLY BRIEF OF APPELLANTS JOHN SADEK AND TAMMY SADEK

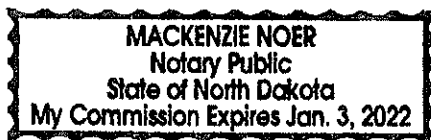
electronically via email to:

Corey J. Quinton cquinton@fisherbren.com




KAYLA J. PETERSON

Subscribed and sworn to before me this 15th day of November, 2019.



(SEAL)



Notary Public
Cass County, North Dakota