

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,

Supreme Court No. 20220155

District Court No. 39-2016-CV-00128

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.

BRIEF OF APPELLEES

APPEAL FROM THE ORDER ON PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT ON MARCH 16, 2022 (DKT. NO. 231)
APPEAL FROM THE ORDER GRANTING DEFENDANTS' MOTION FOR
SANCTIONS ON MAY 27, 2022 (DKT. NO. 240)
COUNTY OF RICHLAND
SOUTHEAST JUDICIAL DISTRICT
THE HONORABLE JAY A. SCHMITZ

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

[¶1] Whether the District Court erred in denying Plaintiffs' Motion for Summary Judgment.

[¶2] Whether the District Court abused its discretion in its Order for sanctions against Plaintiffs' counsel.

REQUEST FOR ORAL ARGUMENT

[¶3] 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

[¶4] John and Tammy Sadek (“Plaintiffs”) sued Deputy Jason Weber and Richland County (collectively, “Defendants”) asserting claims of deceit, fraud, and negligence relating to the death of their son, Andrew Sadek.

[¶5] Defendants moved for summary judgment on January 30, 2018, requesting the district court dismiss all claims brought by the Plaintiffs. Defendants’ motion was granted by the district court on May 20, 2019. A Judgment of Dismissal was entered with regard to each of the Plaintiffs’ claims (hereinafter “Judgment”). Thereafter, Plaintiffs appealed. This Court affirmed in *Sadek v. Weber*, 2020 ND 194, 948 N.W.2d 820. This Court entered a Judgment on September 15, 2020 (hereinafter “Supreme Court Judgment”).

[¶6] On February 27, 2022, Plaintiffs filed a Motion for Summary Judgment on the dismissed case. Defendants opposed the motion, arguing there was no pending case or cause of action, the motion was improper, and without merit. Defendants moved for an award of sanctions for the frivolous motion. The district court issued an Order denying Plaintiffs’ Motion for Summary Judgment on March 16, 2022, and set a hearing on Defendants’ Motion for Sanctions. The district court heard arguments on Defendants’ Motion for Sanctions on April 21, 2022, and verbally granted the Motion. The district court entered a formal Order granting Defendants’ Motion for Sanctions on May 27, 2022, and awarded reasonable attorney’s fees in the amount of \$1,750.00.

[¶7] Plaintiffs now appeal from the Order denying Plaintiffs’ Motion for Summary Judgment and Order awarding sanctions.

STATEMENT OF THE FACTS

[¶8] This case arises out of the death of Plaintiffs' son, Andrew Sadek ("Andrew"). Andrew's body was found in the Red River on June 27, 2014. (Dkt. 1; ¶ 27). An autopsy concluded that the cause of death was a gunshot wound to the head. (*Id.* at ¶ 28). The autopsy could not determine whether Andrew's death was self-inflicted, homicidal, or accidental. (*Id.*). Plaintiffs contend that Andrew's death was related to and/or caused by Andrew's role as a confidential informant for the Defendants. (*Id.* at ¶ 29). Despite many years of investigation, law enforcement has never been able to identify any facts as to what happened to Andrew.

[¶9] Plaintiffs brought suit against Defendants on April 29, 2016, asserting causes of action for fraud, deceit, and negligence. (Dkt. 1). After much discovery, Defendants moved for summary judgment on January 30, 2018, seeking dismissal of Plaintiffs' case. (Dkt. 64). The arguments were briefed and a hearing was held on April 23, 2019. Ultimately, the district court dismissed all claims as a matter of law for the reasons set forth in its Memorandum. (Dkt. 190). The district court entered its Judgment dismissing the case on May 24, 2019. (Dkt. 193). Plaintiffs appealed to the North Dakota Supreme Court. (Dkt. 196). The North Dakota Supreme Court affirmed the District Court's Judgment on September 15, 2020. *See Sadek v. Weber*, 2020 ND 194, 948 N.W.2d 820. (See also Dkt. 202; 203).

[¶10] On February 27, 2022, Plaintiffs filed a Motion for Summary Judgment arguing that the district court's original grant of summary judgment was not proper. (Dkt. 207 at ¶ 19). Defendants opposed the motion on the grounds that it was improper under the law as the case was long since closed and that the arguments raised had no merit. (Dkt. 216).

[¶11] The district court denied Plaintiffs’ Motion, stating, “there is no case, claim, or cause of action pending before this court upon which any judgment, summary or otherwise, can be rendered.” (Dkt. 231 at ¶ 3). Defendants moved for sanctions on the grounds that Plaintiffs’ Motion for Summary Judgment was frivolous and had no basis in fact or law. (Dkt. 218). The district court held a hearing to address the Motion for Sanctions on April 21, 2022. At the hearing, the district court reiterated its statement that there was no cause of action pending and the Plaintiffs’ Motion for Summary Judgment was without merit. (Dkt. 249 at 15:18-20). The district court verbally granted Defendants’ Motion for Sanctions and issued a formal Order granting Defendants’ Motion for Sanctions on May 27, 2022. (Dkt. 240).

[¶12] This appeal follows.

STANDARD OF REVIEW

[¶13] Whether the district court properly granted summary judgment is a question of law which this court reviews de novo. *Aarndt v. Maki*, 2012 ND 55, ¶ 10, 813 N.W.2d 564.

[¶14] A district court’s decision on a Rule 60(b) motion for relief is within the district court’s sound discretion and will not be overturned absent an abuse of discretion. *Grinaker v. Grinaker*, 553 N.W.2d 204, 207 (N.D.1996). An abuse of discretion exists when the trial court acts in an arbitrary, unconscionable, or unreasonable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination. *Id.* The moving party bears the burden of establishing sufficient grounds for disturbing the finality of the decree, and relief should be granted only in exceptional circumstances. *Follman v. Upper Valley Special Educ. Unit*, 2000 ND 72, ¶ 10, 609 N.W.2d 90.

[¶15] The determination whether to impose sanctions for a N.D. R. Civ. P. 11 violation lies within the sound discretion of the district court. *Strand v. Cass County*, 2008 ND 149, ¶ 16, 753 N.W.2d 872. A district court’s decision regarding sanctions will not be disturbed unless the district court abused its discretion. *Dietz v. Kautzman*, 2004 ND 119, ¶ 15, 681 N.W.2d 437 (citing *In re Estate of Dion*, 2001 ND 53, ¶¶ 45–46, 623 N.W.2d 720). If there are any factual determinations relevant to the sanctions issue, this court reviews the district court’s findings under the clearly erroneous standard. *Strand*, 2008 ND 149, ¶ 17, 753 N.W.2d 872 (citing *Simpson v. Chicago Pneumatic Tool Co.*, 2005 ND 55, ¶ 16, 693 N.W.2d 612).

LAW AND ARGUMENT

[¶16] Based on the record and applicable North Dakota law, this Court will find that the district court did not err in denying Plaintiffs’ Motion for Summary Judgment. There was no pending case before the district court for which it could possibly grant summary judgment.

[¶17] Additionally, this Court will find that the district court did not abuse its discretion in its award of sanctions against Plaintiffs. The district court properly found that Plaintiffs’ Motion for Summary Judgment was frivolous and not warranted by existing law.

I. The District Court Did Not Err in Denying Plaintiffs’ Motion for Summary Judgment and/or Motion for Relief from Judgment.

[¶18] At every juncture of this case, Plaintiffs have asserted new arguments and abandoned prior ones. Of importance is what was presented to the district court to determine whether it was proper in its denial of Plaintiffs’ Motion for Summary Judgment.

[¶19] On February 27, 2022, Plaintiffs filed what was captioned a “Motion for Summary Judgment.” (Dkt. 207). The Motion itself stated it was a “Motion to for [sic] Relief from

the Judgment dated May 24th, 2019,” and was being made pursuant to Rules 7 and 56 of the North Dakota Rules of Civil Procedure. (*Id.*). There was no mention of Rule 60 in the Motion. The accompanying Memorandum repeated the language of the Motion, again stating it was a “Motion to for [sic] Relief from the Judgment dated May 24th, 2019,” and was being made pursuant to Rules 7 and 56 of the North Dakota Rules of Civil Procedure. (Dkt. 208 at ¶ 1). Plaintiffs’ Memorandum cited Rule 60 as the governing law. (*Id.* at ¶ 12). In the concluding paragraphs of their Memorandum, Plaintiffs asked for relief “under Rule 56 of the North Dakota Rules of Civil Procedure” and requested an order granting their “Motion for Summary Judgment.” (*Id.* at ¶¶ 27, 32)

[¶20] In their summary judgment reply brief, Plaintiffs state “Defendant’s [sic] ‘assume’ Plaintiff’s [sic] seek relief under Rule 60,” implying that their motion was one for summary judgment under Rule 56, not Rule 60. (Dkt. 229 at ¶ 5). In this reply brief, for the first time, Plaintiffs argued that certain claims were still pending and had never been adjudicated by the district court. (*Id.* at ¶ 6) Regardless of what Plaintiffs captioned their motion or what rule they claim they were moving under, Plaintiffs’ motion was properly denied.

A. Plaintiffs’ Motion Under Rule 60 was Untimely.

[¶21] If Plaintiffs were moving the district court under Rule 60 for relief from a final judgment, such motion was untimely. Rule 60(b) provides:

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

N.D. R. Civ. P. 60(b).

[¶22] A motion under Rule 60(b) must be made within a reasonable time, and for reasons (1), (2), and (3) no more than a year after notice of entry of the judgment or order in the action or proceeding if the opposing party appeared. N.D. R. Civ. P. 60(c)(1).

[¶23] The Judgment of Dismissal by the district court dismissing all of Plaintiffs' claims was entered on May 24, 2019. This Court's Judgment affirming the May 24, 2019, Judgment was entered on September 15, 2020. Plaintiffs did not bring their Motion until February 27, 2022, far more than a year after the Judgment was entered. Thus, if Plaintiffs' Motion was requesting relief under Rule 60, such Motion was untimely and the district court did not abuse its discretion in denying the Motion.

B. Plaintiffs Failed to State with Particularity the Grounds for Their Rule 60 Motion.

[¶24] The only way a Rule 60 motion would not have been untimely is for the remaining three grounds of Rule 60, none of which were articulated by Plaintiffs.

[¶25] A movant for relief under Rule 60(b) has the burden of establishing sufficient grounds for disturbing the finality of the judgment. *DCI Credit Servs., Inc. v. Plemper*, 2021 ND 215, ¶ 7, 966 N.W.2d 904. "A mere recitation of the grounds set forth to Rule 60(b), N.D.R.Civ.P., without specific details underlying such assertions, is not sufficient to afford relief." *Id.* (quoting *Fleck v. Fleck*, 337 N.W.2d 786, 790 (N.D. 1983)).

[¶26] Plaintiffs failed to state their grounds for relief under Rule 60. While their Memorandum contained a verbatim recitation of Rule 60, they offered no indication of

which subsection of Rule 60 the Motion was being made under. There was no discussion or analysis in their Memorandum on Rule 60. The only bare arguments Plaintiffs presented to the district court have been abandoned on appeal. For example, Plaintiffs claimed in their Memorandum that Defendants “successfully hoodwinked” the district court to obtain dismissal. (Dkt. 208 at ¶13). There was no discussion or support presented on the alleged fraud or misrepresentation. Plaintiffs have not renewed this allegation on appeal. Regardless of Plaintiffs’ failure to elaborate on this claim, a Rule 60 motion on the grounds of fraud or misrepresentation would have been untimely. *See argument supra*.

[¶27] The district court had no legal or factual basis presented to it which would have warranted relief under Rule 60. It is not the court’s job to “engage in unassisted searches of the record for evidence to support a litigant’s position.” *Minto Grain, LLC v. Tibert*, 2009 ND 213, ¶ 27, 776 N.W.2d 549. Plaintiffs failed to articulate any legal or factual basis under Rule 60 justifying relief and the district court properly denied the motion.

C. Plaintiffs’ Motion for Summary Judgment was Improper and Impermissible.

[¶28] Plaintiffs attempted to get the district court to overturn both its prior Judgment dismissing all claims and this Court’s decision affirming that Judgment. It’s procedurally improper and there is no factual or legal basis for the remedy sought. By its very nature, a motion for summary judgment is dispositive, and since there was no pending case before the district court, there was nothing to be disposed.

[¶29] Plaintiffs’ argument that there are pending causes of action is without merit. Plaintiffs cite to Rule 54(b) to argue that somehow the district court Judgment was not final as to all claims. This is simply inaccurate.

[¶30] This Court stated the Judgment was final and dismissed all claims. *See Sadek, et al. v. Weber, et al.*, 2020 ND 194, ¶ 8 948 N.W.2d 820 (“The court granted summary judgment in favor of Weber and Richland County and dismissed the case.”) Moreover, Plaintiff’s own Motion for Summary Judgment acknowledged that the case was closed and all claims had been dismissed. (Dkt. 208 at ¶ 19) (“Summary Judgment for Dismissal on all claims involved in this lawsuit was not appropriate here.”) Finally, the original Judgment would not have been appealable had it not been final.

[¶31] “Only judgments and decrees which constitute a final judgment of the rights of the parties and certain orders enumerated by statute are appealable.” *State v. North Dakota Ins. Reserve Fund*, 2012 ND 216, ¶ 4, 822 N.W.2d 38. Under N.D. R. Civ. P. 54(b), a judgment, to be final, must dispose of all claims or the district court must direct entry of a final partial judgment if the court properly expressly determines “there is no just reason for delay.”

[¶32] As Plaintiffs have conceded, the Judgment was not certified under Rule 54(b). As such, the Supreme Court acquired jurisdiction because it was a final judgment of the rights of the parties, having disposed of all claims. The district court here had no ability to rule on a Motion for Summary Judgment on a case where all claims had been dismissed.

[¶33] The Plaintiffs told the district court they believed that the wrongful death claim was still pending. (Dkt. 229 at ¶ 6; Dkt. 249 at 4:18-20). Plaintiffs do not reiterate this allegation on appeal, nor did they raise it in their Motion for Summary Judgment (only in their reply memorandum did they mention this allegation).

[¶34] Plaintiffs’ Complaint charged Counts 1 and 2 as “Negligence/Wrongful Death.” (Dkt. 1 at ¶¶ 33-46). They were pled as one in the same count. The dismissal of the negligence claim was one in the same as dismissal of the wrongful death claim. They rely

on the same allegations. Specifically, Plaintiffs pled that Defendants owed Andrew Sadek a duty of care, that Defendants failed to exercise reasonable care, and that Defendants' negligence was the direct and proximate cause of his death. (*Id.*).

[¶35] The district court ruled in its Order granting summary judgment that there was no “evidence upon which a trier of fact could reasonably find that Andrew’s death was proximately caused by the defendants’ negligence.” (Dkt. 190 at ¶ 30). Without a finding of proximate cause, the district court granted Defendants summary judgment on the negligence claims. (*Id.* at ¶ 32). Plaintiffs fail to understand that this dismissal based on a lack of proximate cause meant a dismissal of the wrongful death cause of action as well. Plaintiffs cannot maintain a wrongful death claim where there has been a finding of no proximate cause.

[¶36] Wrongful death actions are intended to compensate the survivors of the deceased for the losses they have sustained as a result of a wrongful killing. *Weigel v. Lee*, 2008 ND 147, ¶ 14, 752 N.W.2d 618 (internal citation omitted). The relevant statute provides:

Whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would have entitled the party injured, if death had not ensued, to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation, limited liability company, or company which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or of the tort-feasor, and although the death shall have been caused under such circumstances as amount in law to felony.

N.D.C.C. § 32–21–01 (emphasis added).

[¶37] A wrongful death claim cannot be maintained without a finding of a wrongful act, neglect, or default. As stated, Plaintiffs pled negligence as the basis for their wrongful death claim. The district court ruled, and this Court agreed, that there was no evidence to support

a finding of proximate cause – an essential element to negligence. Without the underlying negligence, there can be no wrongful death claim.

[¶38] Plaintiffs continue to assert that there either is proximate cause or that proximate cause is not necessary to establish negligence. These arguments, however, are not proper at this stage. Plaintiffs are attempting to relitigate foreclosed issues. Plaintiffs would have this Court remand this matter back to the district court to issue a finding on liability. (Appellants’ Brief at ¶ 41). Res judicata prevents such an action.

[¶39] Res judicata prevents relitigation of claims that were raised, or could have been raised, in prior actions between the same parties or their privies. *Ungar v. North Dakota State Univ.*, 2006 ND 185, ¶ 11, 721 N.W.2d 16. Thus, res judicata means a valid, existing final judgment is conclusive with regard to claims raised, or those that could have been raised and determined, as to their parties and their privies in all other actions. *Id.* Res judicata applies even if subsequent claims are based upon a different legal theory. *Id.*

[¶40] Plaintiff’s Motion for Summary Judgment stated “Plaintiffs are entitled to relief... because no triable issue of fact exists as to whether Defendants owed a duty of care...” (Dkt. 208 at ¶ 27). Plaintiffs fail to understand that summary judgment was granted based on a lack of proximate cause, not on a lack of duty. (Dkt. 190 at ¶ 32). The claim of negligence was raised in the original case, decided by the district court, appealed, and affirmed by this Court. Plaintiffs are barred from relitigating these issues.

[¶41] Plaintiffs’ Motion for Summary Judgment was improper as there was no pending case before the district court and the issues Plaintiffs attempt to relitigate have been necessarily decided in the original proceedings and appealed to this Court. As such, the district court properly denied Plaintiffs’ Motion.

II. The District Court Did Not Err in Granting Defendants' Motion for Sanctions.

[¶42] The district court did not abuse its discretion in awarding Defendants sanctions.

Rule 11 states in pertinent part:

By presenting to the court a pleading, written motion, or other paper, whether by signing, filing, submitting, or later advocating it, an attorney or self-represented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or will likely have evidentiary support after a reasonable opportunity for further investigation or discovery. . .

N.D. R. Civ. P. 11(b).

[¶43] A district court has discretion under N.D.C.C. § 28–26–01(2) to decide whether a claim is frivolous and the amount and reasonableness of an award of attorney fees, but when the court decides a claim is frivolous, the court must award attorney fees. *Estate of Pedro v. Scheeler*, 2014 ND 237, ¶ 14, 856 N.W.2d 775. “A claim for relief is frivolous under N.D.C.C. § 28–26–01(2) only if there is such a complete absence of actual facts or law a reasonable person could not have expected a court would render a judgment in that person's favor.” *Id.* (quoting *Estate of Dion*, 2001 ND 53, ¶ 46, 623 N.W.2d 720).

[¶44] Plaintiffs first took issue that Defendants filed their Motion for Sanctions at the same time as their Response to Plaintiffs' Motion for Summary Judgment. “A motion for sanctions must be made separately from any other motion.” N.D. R. Civ. P. 11(c)(2).

Defendants complied with this rule. They filed their Response to Plaintiffs' Motion for Summary Judgment. (Dkt. 216). In separate filings, Defendants filed a Notice of Motion for Sanctions, Motion for Sanctions, and a Brief in Support of Motion for Sanctions. (Dkt. 217-219). Defendants made their motion for sanctions separately from any other motion.

[¶45] Plaintiffs next argue that Defendants did not describe the specific conduct that warranted sanctions. Defendants' Brief in Support of its Motion for Sanctions outlined over numerous paragraphs the specific allegations warranting a finding that Plaintiffs' Motion was frivolous. (Dkt. 219 at ¶¶ 8-15).

[¶46] The district court's order stated:

For the reasons stated in the Court's Order denying the summary judgment motion (Docket No. 231), and the additional reasons stated on the record, the court found that the motion was frivolous under the standards of Rule 11(b)(2), i.e., the legal contentions made in the motion for summary judgment were not warranted by existing law nor by a non-frivolous argument for changing existing law.

(Dkt. 240 at ¶2). In the referenced Order denying Plaintiffs' Motion for Summary Judgment, the district court noted:

I have read the brief twice; to call the arguments and assertions in it baffling and bizarre is an understatement. More to the point, the [Supreme Court Opinion and Judgment] establish beyond the need for argument that there is no case, claim, or cause of action pending before this court upon which any judgment, summary or otherwise, can be rendered.

(Dkt. 231 at ¶ 3).

[¶47] Moreover, on the record, Defendants' counsel stated:

First of all, it's articulated in our responsive briefing, but if we have to put it on the record, the first and foremost, this matter was dismissed, and the timeframe for either reconsideration of the appeal, and certainly a Rule 60 motion, had long since expired. So technically, as I pointed out in the letter I sent to this court, I don't even think there's a jurisdiction of anyone to rule on anything because technically there's no case pending.

But beyond that, none of the rules cited apply because they're either time barred or inapplicable, and we've heard that here again. And I'll just give one example for the record. Rule 54 was raised. There was never a Rule 54 certification of this matter. It was litigated to a conclusion and appealed from a final judgment. So there's a fundamental misunderstanding of the entire case that was set forth.

Everything about this is frivolous, including the arguments trying to put a petition forth that 20 some people signed to incorporate a dissenting opinion against the majority. It's unheard of.

(Dkt 249 at 19:4-20:2)

[¶48] The district court, having heard arguments, made a finding of frivolity and granted the award of sanctions. (Dkt. 240; 249 at 15:18-20; 25:2-4). Plaintiffs' Motion lacked any legal basis and even if there was a legal basis, lacked any factual support. No reasonable person, nonetheless a competent attorney, could have expected the district court to reopen a closed case and issue judgment in their favor. The district court did not abuse its discretion in awarding sanctions.

CONCLUSION

[¶49] 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 denied Plaintiffs' Motion for Summary Judgment and properly granted Defendants' Motion for Sanctions. These two Orders should be affirmed in all respects and the Defendants granted whatever additional and further relief this Court deems just and proper.

Dated: September 8, 2022.

FISHER BREN & SHERIDAN, LLP

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CERTIFICATE OF COMPLIANCE

[¶50] 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 19 pages, not including this Certificate of Compliance.

Dated September 8, 2022.

FISHER BREN & SHERIDAN, LLP

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