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A11-1699

STATE OF MINNESOTA

IN COURT OF APPEALS

LESLIE FAIN, TRUSTEE FOR THE NEXT

OF KIN OF CHAD JAMES SWEDBERG

PLAINTIFF/RESPONDENT

VS.

KENNETH EUGENE ANDERSEN

DEFENDANT/APPELLANT

APPELLANT'S BRIEF

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A11-1699

STATE OF MINNESOTA

IN SUPREME COURT

LESLIE FAIN, TRUSTEE FOR THE NEXT

OF IN OF CHAD JAMES SWEDBERG

PLAINTIIFF/RESPONDENT

PROCEDURAL HISTORY

V.

KENNETH EUGENE ANDERSEN

DEFENDANT/APPELLANT

---

1. June 14, 2007: Complaint is filed in Becker County District Court charging appellant with one count of second-degree murder. Minn. Stat. 609.19 subd 1. (1)

2. September 17, 2007: A Becker County grand jury indicts appellant on a first-degree premeditated murder charge. Minn. Stat. 609.185. (a).

3. October 1, 2007: Appellant appears on indictment and requests an omnibus hearing.

4. March 7, 2008: A contested omnibus hearing is held. Appellant's motions suppress evidence obtained during a search warrant, dismissal of indictment and reduction of bail for interfering with witnesses, and a change of venue, which are taken under advisement and later dismissed on April 13, 2008.

5. May 1,2008: a pretrial hearing is held before Honorable judge Peter Irvine, where appellant's counsel states he is not prepared.

6. May 12-June 4, 2008: A jury trial is held in Becker County. Appellant is found guilty of first-degree murder and sentenced to life in prison on June 12, 2008.

7. June 18, 2008: Appellant files motion for new trial.

8. June 2,2008: Appellant's motion for a new trial is denied.

9. September 2, 2008: A notice of appeal is filed.

10. October 15, 2008: Trial transcripts are delivered to the State Public Defender.

11. January 30, 2009: Appellant's opening brief is filed.

12. February 22, 2010: Wrongful death suit is filed against appellant.

13. June 30, 2010: The Minnesota Supreme Court affirmed appellant's conviction.

14. December 10, 2010: Appellant files a pro se petition for post-conviction relief.

15. December 17, 2010: Summary judgement hearing is held for wrongful death suit.

16. January 19, 2011: Appellant's petition for post-conviction relief is denied.

17. March 2, 2011: District court grants partial summary judgement.

18. March 21, 2011: Appellant files notice of appeal on his post-conviction petition.

19. August 15, 2011: Appellant files opening brief appealing the district court's summary denial of appellant's pro se petition for post-conviction relief.

20. September 26, 2011: Appellant files notice of appeal regarding the civil suit.

ISSUE PRESENTED

I. WHETHER THE DISTRICT COURT ERRED WHEN SUMMARY JUDGEMENT WAS GRANTED

DECISION OF THE DISTRICT COURT

The district court granted summary judgement. In granting summary judgment, the district court ruled that appellant will be estopped from disputing the issues of liability and the case will go to trial on damages only.

APPOSITE AUTHORITY

Riverview Muir Doran, LLC v. GRP 799 N.W. 2d 167 (Minn 2010).

Fabio v. Bellmo 504 N.W. 2d 758 (Minn 1993).

Sauter v. Sauter 70 N.W. 2d 351 (Minn 1955).

STATEMENT OF THE CASE

On April 13th, 2007, Chad Swedberg was killed in Becker County, Minnesota. Appellant was indicted by a grand jury on the charge of first-degree murder.

On May 12-June 4th, 2008, a jury trial was held in Becker County District Court. The Honorable Peter Irvine presided over the trial, after which appellant was found guilty of first-degree premeditated murder. Appellant was sentenced to life in prison on June 12th, 2008.

Appellant took a direct appeal. Meanwhile, Plaintiff/Respondent filed a wrongful death lawsuit against appellant. The Minnesota Supreme Court affirmed appellant's conviction.

Appellant filed a petition for post-conviction relief on December 10th, 2010. A summary judgement hearing was held in the civil case. The district court denied appellant's petition and summary judgement was granted in the civil suit.

Appellant appeals the post-conviction ruling and files an opening brief on August 15th, 2011.

On September 26th, 2011, appellant appeals the district court's ruling. In this appeal, appellant requests a reversal of the trial court's summary judgement asserting that the district court erred when it concluded that there are no genuine issues of material fact that preclude summary judgement.

STATEMENT OF THE FACTS

A. BACKGROUND

This circumstantial case originates from the murder of Chad Swedberg on April 13th 2007. Appellant was indicted and found guilty of First-degree murder, Minn. Stat. 609.185 (a) (1) (2008) for the shooting of Chad.

Chad lived off Little White Earth Lake Road, with his wife Leslie Fain. Numerous members of Leslie's family lived in the house, Leslie's sister, Morningstar Bellcourt, and her nephew, her son, Jesse Fain and his wife Ann, and their three children.[1] (T-915-921-22-927-29).

Chad had an older brother, Ken Swedberg that lived about 300 yards to the south, along with Ken's wife Lisa, and their three children. (T-922-23-1468).

On the morning of April 13th 2007, Chad planned to process maple syrup that he was going to collect. Before leaving, Chad intended to watch a segment about a man who lived with wolves. Becoming frustrated because the show did not air, Chad asked Leslie to watch it, because he had to hurry up and get the fire going before Al Baker arrived. (T-946-951).

Within a few seconds of Chad's departure, the show aired. Leslie yelled for Chad but he did not respond. After watching the show, Leslie heard two gunshots from the woods behind her house.[2] This concerned her, because it was not hunting season, and thought there was no reason for the gunshots. (T-9510-955-970).

Leslie called Chad's phone at 8:13, 8:15, and 8:27. There was no answer. (T-955-56-070-71). Leslie then took a shower and got ready for work. Before leaving, she decided to call one more time, hoping she didn't have to walk back there. Chad's cell phone records show a missed call at 9:45 am. (T-970).

[1] Bases of the information found in (Background) are found in the (criminal) trial transcripts, which will be marked (T).

[2] Subsequent investigation revealed, that the show aired on Good Morning America between 8:05 and 8:12 am.

While walking back to check on Chad, she heard a 4-wheeler coming from the woods, where Chad was suppose to be working at. She was wondering who could be back there with him. (T-956-1000-01). Upon reaching the site, she found Chad lying on the ground and immediately called his brother, and then 911. (T-960).

Two White Earth Police Officers arrived at Chad's residence, around 10:00 am. Ken Swedberg met them, and told them, his brother was dead, and his body was 1,000 yards down the trail. The officers used Ken's 4-wheeler to get to the scene. The officers noticed that the trail was hard to navigate because of the ruts, and mud. (T-1076-78).

Leslie told the two officers about hearing the shots. At that time the officers rolled his body and noticed blood underneath his clothes. They then decided to call a supervisor. (T-1121-22). One officer stayed with the body, while the other walked back to the residence. At the intersection, the officer found Al Baker sitting on his 4-wheeler. (T-1125).

Two EMT's arrived around 10:11 am at the residence. (T-1141-41). While walking back to the scene, they had difficulty, because it was muddy and slippery. (T1135-39.1141). They confirmed that Chad had died from a gunshot. (T-1142-50). Shortly after, John Seiling from the Becker County Sheriff's Office arrived and went to the scene. He decided to check the trail's leading away from the scene. On a northbound trail, about 60 to 70 yards from Chad's body, Seiling found what appeared to be tracks. These tracks extended 20 feet in the frost, going north and returning south. (T-1173,76). Seiling quickly determined that the tracks had no relevance to the crime, because further up the trail the frost was present, and no tracks were found. (T-1178). Though other officers were present at the scene with cameras, no photos were taken, and no other officer observed these tracks or frost. (T-1176-79-1295-96).

Captain Joe Mcarthur, from Becker County Sheriff's Office arrived at Chad's residence around the same time as Seiling. Ken Swedberg yelled at him wondering, "What the hell you guy's standing here for?" (T-1496). Mcarthur had the perimeter of the woods surrounded. Ken and Mcarthur drove around the perimeter, checking trailheads, and found no tracks. (T-1338-86).

Eventually they exited the vehicle and proceeded eastbound on foot, following a road on the south side of Fish Hook Lake. The road stopped and turned to a trail that ended near the southeastern shore of the lake. (T-1347-53). They stepped onto the surface of the lake, because the ice was still frozen there. (T- 1353-54). Ken knew of two trails that came from the woods where his brother was found. One in the northeast, and one in the southeast corner. (T-1354-55). They followed the east shore towards the north trail, but only went part way and turned around. (T-1502).

While walking back, they noticed the east shoreline was snow covered and determined, that nobody entered the woods. (T-1363-64). Ken also remembered he was leaving footprints as he walked across the lake. (T1506). They reached the area where the trail led back to the crime scene, in the southeast corner. Trying to exit the lake, they noticed the lake surface was mushy, and could see water near the shoreline. As they went through the cattails, they had to jump on clumps so they did not get wet. (T-1355).

While walking the trail back to the crime scene, they found no tracks during their search, other than an old partial heel print, left by Chad, where he had been trapping a few beaver.[3] (T-1359-1509).

[3] The trail that Officer Mcarthur and Ken Swedberg walked from the southeast corner of Fish Hook Lake to the crime scene is the same trail that Seiling called the north bound trail.

The BCA was asked to assist in the investigation. The crime scene team leader, Agent Patrick Warrick and staff arrived, along with Agent Dan Baumann. (T-1208-2291-94). Warrick was briefed and told that Chad's body had been moved and the crime scene contaminated. (T-2298-2315). Other than the physical evidence leading back and forth from the victims residence, no other evidence was found. (T-2311-13).

B. MURDER INVESTIGATION BEGINS

1. LESLIE FAIN

Around midday, Baumann and Seiling started to conduct interviews with witnesses. (T-1212-13, 2719). While interviewing Leslie, the investigators learned that Chad and Leslie had gotten married, but did not announce their marriage because Chad's family did not approve of her. (T-924, 958-86). Leslie also claimed that Ken and Chad had a bee business together, and Ken "ripped" Chad off in that business, and recently tricked Chad out of land by having him unknowingly sign a quick claim deed. (T-986).

In addition to the tension with Ken and his family, there were conflicts within their own household. Seven of Leslie's family member's lived at the residence as well. (T-927-29). For the most part, Chad was good-natured about the living arrangements, but on occasion he wanted them to move out. (T-955-1219). Other than, Ken Swedberg, she could not think of another person who would harm Chad. (T- 944-95, 1021,1218). Leslie suggested that the investigators speak with appellant, who would know more than she did. (T-955-1219).

2. ANN FAIN

The investigators also spoke with Ann Fain, who spent much of the morning at home with Leslie. That morning, Ann drove her son to the town of Ogema.[4] After she arrived back home

[4] Video surveillance at Ogema School shows Ann dropping her son off between 8:02-8:05 am. (T-1444-47,1696-1700).

She heard the shots as well, but did not think it was strange, because she heard shots being fired in the woods all the time. (T-1447).

Ann also recalled, that when the ambulance arrived, Morningstar yelled at her and asked her what was going on? Ann decided to call Leslie, who had just recently walked back to the woods. When Leslie answered the phone, she had a hard time understanding her, and could only hear Leslie say Chad's name. She said that she hung up on Leslie and called her husband, Jesse at work, and told him to come home, because Chad had been shot. (T-1451-52).

3. JESSE FAIN

Jesse Fain confirmed that Ann called him at work; at around 10:00 am to tell him, Chad had been shot. (T-1045). After he received the call, he rushed home and discovered that Chad was dead. (T-1945-46).

In fact, that day Jesse was planning to leave work early and help Chad. (T-1064-65). According to Jesse, he had been at the maple- site the previous night, and afterwards, he and Chad had gone to Ken's house for a short visit. (T-1050-1063-64). Jesse had not observed any tension between Ken and Chad during that visit. (T-1064)

Jesse also recalled having a conversation with Chad, a week or so before Chad's death, about the construction business with appellant. (T-1042). According to Jesse, Chad planned to stop working with appellant. (T-1042-43).

4. MORNINGSTAR BELLCOURT

Morningstar had said that she and her son had been living at Chad and Leslie's residence for about a year. (T-1705-06). She told the investigators about Ann calling Leslie, but told a different version about the context of the call. According to Morningstar, Ann spoke with Leslie and was told that Leslie believed that Chad might have had a heart attack. (T-1708-09).

Morningstar also recalled that just before noon, appellant called and asked for Chad. (T-1712-15). She told appellant that Chad was dead. (T-1713). Appellant said he was in Fargo, and that he would get there as soon as could. (T-1713).

5. KENNETH SWEDBERG

Ken, told investigators that he last saw his brother Chad, at his house the night before his death. According to Ken, they had no disagreements during that meeting. (T-1447-75).

Ken acknowledged, he and Chad had conflicts, but stated the relationship was good at the time of Chad's death (T-1475-76).

On the day Chad died, Ken awoke around 7:15 am and went outside to his truck and stir some corn syrup that he fed his bees. He used a drill with a paint mixer attached, to stir the syrup. (T-1482-84). As he finished stirring the syrup, Morningstar's son, Thomas and his daughter got on the bus at 7:40 am. (T-1484-86). He thought it was odd that Thomas was on time for the bus because he was always running late. (T-1521).

Eventually, he went back in his house and began to work on pollen patties for his bees. (T-1487). At around 8:45 am his wife Lisa left to take their daughter to an appointment, at the Ogema School. (T-1488). After his wife left, he went outside and did some work in his shop. He also tied down his truck, so he could feed his bees. After that he went back in his house to make sandwiches. (T-1488-89).

Eventually, Leslie called him, and told him to come to the maple- site because something happened to Chad. (T-1489). He drove his 4-wheeler to the site. (T-1490). At the site, he took the phone away from Leslie, and talked to dispatch. He then went to meet the police on his 4-wheeler. (T-1491-92). Ken and Officer Mcarthur checked the perimeter around the woods and the crime scene and found no evidence. (T-1338-86-1509).

6. AL BAKER

On the day of Chad's death, Al Baker told the investigators that he was going to meet Chad at the maple-site, but could not remember what time he told Chad he was going to arrive. (T-1730-32). Upon arrival at the site, Al explained that he was going to start cooking the sap that they saved from the night before while Chad was gathering wood. (T1729). Al explained that once the fire is going and the sap is poured into the evaporator, it had to be constantly watched because it will foam over and burn easily. (T-1723).

Before Al went to the site, he called Chad around 7:30 am. (T-1729,1735-36). He was asked what the purpose of the call was, " What did the two of you talk about?" (T-1730). Al explained that he supplied the lunch they ate at the maple-site and he called Chad to let him know he had to run to the grocery store in Waubun for more food. Waubun is located fifteen minutes west of his house. (T-1716,1730,1732). Al drove his Camaro convertible, because it was fast. He explained that it is a rare car and only forty-four where made. He got to the store and back very quickly. (T-1732-33).

Around 7:52 am, Al received a call from appellant and was asked if he could stop by appellant's residence and look at a tank the appellant had for storing leeches. (T-1731). This was not unusual as Al had been a family friend and had been to the appellant's residence on numerous occasions. (T-1741-42). Al did not remember if he told appellant the time he would stop by or not. (T-1732).

Within a few hours of receiving a call from the appellant, Al drove to appellant's house, but noticed he was gone. (T-1746-48). Al then left to go to the maple-site and, upon arrival, parked near the site. He proceeded to unload his 4-wheeler. (T-1746).

Suddenly, an officer appeared and told Al not to go any farther because the maple-site was a crime scene. (T-1746-48).

Al was allowed to go home after awhile. He explained that he was diabetic and needed to take as many as four different shots of insulin with food to control it. (T-1750-51). In his apparent urgency to get to the maple-site, Al had forgotten to bring his insulin as well as the food that he had gotten from the store earlier that morning. (T-1751).

Al was confronted about the conflicting statements he had made. Originally, he said that he told Chad he had to go the store in Waubun. (T-1730). But later changed that story and said it was appellant who knew he had to go to the store. (T-1762). Numerous times, Al had said that he did not go to the store before the appellant called him, (T-1732,1737,1773) but would directly contradict his statements by saying, "I don't remember what time I went to the store." (T-1733,1788).

Al was later forced to admit that he had made a statement under oath where he had said that he was suppose to be at the maple-site around 8:00 am.[5] (T-1782). Al cited the reason that he doesn't remember things is because he suffers from short-term memory loss. (T-1790).

7. DOUG DARCO

Investigators talked with Doug Darco and learned that Al Baker did not go to the Waubun store after he talked to appellant at 7:52 am on April 13th, 2007.

Doug, who is a close friend of Al Baker confirmed he was traveling west on highway 113, towards Waubun, at approximately 7:30 to 7:45 am, when he passed Al in his Camaro near Simon's creek, Al was traveling east toward his own house. (T-1939-47).

[5] Chad was expecting Al to be there around 8:00 am. According to his wife Leslie Fain some of Chad's last few words were that he needed to hurry up and get to the maple-site and get the fire going before Al arrived. (T-946-952)

8. SHELLY MAROHL

Mrs. Marohl told investigators that on April 19th, 2007, appellant showed up at the Midwest Bank in Detroit Lakes where she works and deposited a check. Appellant explained that he had been at Chad Swedberg's funeral earlier that day. (T-2600=01).

Mrs. Marohl asked appellant if it was a hard funeral for him? The appellant said, "yes" especially since I was the last one probably to see him alive. (T-2601). She said appellant told her he had stopped by Chad's house before he went maple-syruping and asked Chad to go down to South Dakota to buy a single leech trap[6]. (T2601).

Mrs. Marohl admitted she had forgot how parts of the conversation went, but was pretty sure that appellant said he was the last person to see him alive. (T-2603-04).

9. VERNON WANDER

Vernon Wander lived near the woods where Chad died. Vernon recalled hearing two shots between 8:30 and 9:00 am in the vicinity of the maple-site. Hearing shots from Chad's direction was not unusual. Based on the sound of the shots, he believed they came from a .30-caliber gun, or a 270 or 280. (T-1539-40).

10. RUSSELL WARREN

Russell lived a very short distance from Chad's house. On the morning of Chad's death, he was shooting his .22 at blackbirds and guessed that time to be around 7:00 to 8:00 am. (T-2778-2782).

C. THE AUTOPSY

Chad's body was taken from the crime scene to the Ramsey County Medical Examiners Office, on April 13th, 2007. (T-2316) The following day, an autopsy revealed that Chad had been shot

[6] Appellant lives one hundred plus miles one way from the South Dakota Border. Previously it had been proven that the type of leech trap's appellant used consist of nothing more than a small plastic bag and some string and a foam floater. Appellant can buy one hundred of them for twenty-five dollars within a few miles of his residence. (T-1605).

twice. (T-1820) Based on the tissue damage Chad had sustained the medical examiner speculated, that the two bullets were fired from a rifle. (T-1821).

The medical examiner determined that the injuries caused Chad to bleed to death. (T_1825-26). Because there was no "stippling" around the wounds, the examiner believed the bullets were fired from a distance of at least two feet away (T-1833-40).

D. INVESTIGATORS INTERVIEW APPELLANT

Two days after Chad's death, investigators interviewed appellant. Appellant invited them in his house. He was not a suspect at this point, and he was cooperative during the interview. (T-2635-36).

Appellant was asked about his activities on April 13th, 2007. Appellant said that after he awoke, he called Chad around 7:46 am to "shoot the bull' as he always did, and to ask Chad to give him a ride to Fargo to get a loan for a leeching business. Chad declined, saying that he was going to work on maple syruping. (T-2637-40).

Shortly after, appellant called Al Baker around 7:52 am and asked him to stop by and look at a tank that he was going to use for leeches, before going to the maple-site. Al said that he would be there before 8:30 am. (T-2639-41).

At around 8:34 am, appellant called his sister, Elizabeth Andersen, to see if her oldest daughter, Amy Mertens, could provide a ride. Elizabeth told appellant that Amy could not, because Amy was already at work. (T-2226-28).

At around 8:38 am, appellant called Al Baker to see where he was, but got no answer. (T-2642). Appellant said he secured a ride from his cousin, Doug Haverkamp, and thought they left around 8:30-9:00 am to get to his appointment in Mahnomen. Appellant thought his appointment

was around 9:00-930 am. (T-2642). From Mahnomen, appellant and Doug left to go to Fargo to meet a banker, and believed his appointment was around 11:00 am. (T-2641-45).

Baumann claimed appellant said he had his phone on all morning and turned it off when he was applying for the loan. But at some point during the loan process, appellant turned on his phone and received a call from his niece, Amy. (T-2645). Appellant told the investigators that Amy told him that Ken Swedberg had been shot, but a little later, he received another call from Amy, where she informed appellant that he was dead. (T-2645).

Investigators then asked appellant if he owned firearms.[7] Appellant acknowledged that he did, in fact, own firearms, but stated other than a shotgun all his guns were at his sister, Elizabeth Andersen's place. (T-2650)

Appellant told investigators that he didn't know for sure the exact times he called and encouraged them to check his phone records to find out the exact times. (T-2746-47).

E. BCA EXAMINES BULLETS

On April 17th, 2007, BCA firearm examiner Nathan Pearlson received the bullets taken out of Chad's body from the medical examiner. (T-2415). He believed that the bullets were, a Winchester brand, Supreme Ballistic Silver Tips, but was unable to determine the weight or grain of the bullets because they were somewhat damaged. (T-2421). Pearlson was able to determine that the bullets were fired from a .30-caliber gun. He examined the impressions left on the bullets and was able to determine that the gun that fired these bullets had four land and grooves with a right hand twist. According to Pearlson, this was the most common pattern among .30-caliber guns. (T-2425).

[7] Investigators admit that they never asked appellant what type of guns he owned, they only asked appellant if he (had) firearms, which appellant openly admitted. (T-2650).

Pearlson entered those dimensions found on the bullets into the FBI database and created a list of guns that would match those impressions. This list included guns made for the U.S. military and those manufactured under the brands names; Winchester, Remington, Harrington and Richardson, Bush Master, and H and K. (T-2426, 2458).

After a careful review, Pearlson noticed that the bullets taken out of Chad did not have many individual characteristics. This was another key part of his investigation, because he knew all firearms have individual characteristics and those marks would be unique. No two guns have the same individual characteristics, and through these marks he could narrow the potential guns down to just one. (T-2407-11).

F. INVESTIGATORS FOLLOW UP ON INTERVIEWS CONDUCTED

The investigators attempted to confirm the details that appellant provided in his statement. Following appellants advice, they obtained phone records. These records confirm that the appellant called Chad and Al on the morning of Chad's death. The records confirm that appellant talked to his sister and his mother, just as he told them. (T-2720-21). Records also show that appellant called Al a second time, because he did not show up yet, just as he told them. (T-2721)

Further investigation revealed that appellant received a ride by his cousin Doug, just as he told investigators. Investigators also learned that Doug noticed nothing unusual about appellant's behavior before going into the tax preparer's office, and on the way up to Fargo as well. In fact, Doug noticed that the appellant fell asleep during the drive, (T-1592-97, 1603-04).

Appellant went to Mahnomen, to meet his tax preparer, and to Fargo to meet the banker, just as he told investigators. (T-2722). Appellant also received two calls from his niece, Amy, just as he told investigators. (T-2723).

But investigators were troubled by some inconsistencies in appellant's statement[8]. (T-2643) Based on phone records, they determined that appellant did not leave between 8:30-9:00am to Mahnomen with his cousin Doug; instead they left a few minutes after 9:30 am[9]. (T-1571-71).

In talking to Wanda Nelson at the Jackson Hewitt Tax Service in Mahnomen, the investigators learned that appellant indeed had an appointment on April 13th, 2007, but it was not until 2:00pm. (T-1655). Wanda said appellant showed up around 10:00 am that day. (T-1659). This did not surprise her, because she dealt with appellant several times before and " he would come in really late or really early... he was never on time." (T-1672-73).

Wanda was asked how appellant's demeanor was during the meeting with appellant. She stated that appellant seemed nervous as they were going over his taxes, but said that this behavior is not unusual with her customers especially when the dead line to file is only one day away. (T-1672).

Investigators talked to Nicole Knudson, who worked at Citifinancial in the Fargo/Moorhead area. (T-1675). Nicole told them that appellant had a scheduled appointment for April 12th, 2007, but did not show up. Nicole later directly contradicted this statement. "He said he would just come in whenever. We didn't have an actual time set up." (T-1681).

She did remember that on April 13th, 2007, appellant showed up to get his loan, but could not remember the exact time, because it was tax time and they were very busy. (T-1682). Nicole recalled that the appellant got his phone and was attempting to make a few calls during which time he received a call. Appellant told Nicole that he had to go because his business partner had been shot. (T-1683). She was asked if it was possible that she might have misunderstood appellant, and he actually said, "his business partners brother got shot." (T-1689).

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[8] None of the inconsistencies, revolved around 8:10 am which is the time that Leslie fain stated she heard the shots. The prosecution never submitted any evidence to contest appellant's statements that he was home during this time.
[9] Appellant told investigators to check his phone records. (T-2746-47).

Nicole said that it was possible that she had misunderstood appellant, but was pretty sure that appellant said his business partner not his partner's brother.[10] (T-1688-89-90).

Amy Mertens on the other hand, was quite certain that when she called appellant, she told appellant it was Chad who got shot. Amy said she was in shock and could of very well told appellant that it was Ken Swedberg who had gotten shot instead of Chad. Amy also confirmed that she did in fact, call appellant twice, once at 11:46 am and another time at 11:49 am but did not reach appellant. Investigators later determined that the first call went to appellant's voice mail. [11](T-2722).

G. INVESTIGATORS REINTERVIEW APPELLANT

Over a month after Chad's death, investigators spoke with appellant again. (T-2657). They found appellant in the barn tending to leeches. Appellant was cooperative, and invited the investigators into the house. Appellant was an avid hunter and the house contained numerous elk and deer mounts. (T-2657-59).

Based upon another matter several months earlier, an officer noted he had seen a .30-caliber gun present at the appellant's house. (T-1329-32). The investigators requested information about what guns he may have. (T-2659). Appellant informed them that he had transported his firearms over to his sisters place about three to four months earlier because there was speculation going around that appellant's house was going to get robbed, due to the fact he doesn't spend a lot of time there. (T-2660). Appellant told investigators that he had a pump-action 410, a 12-gauge shotgun, a 222, and a muzzleloader, at his sister's place.

[10] The prosecution claimed that the appellant did not have an appointment for April 13th, 2007. (T-2950). During the course of the trial, the prosecution never asked Nicole if the appellant had an appointment on the 13th of April 2007. This was not an issue at trial, and was made up by the prosecution. See (T-1677-93).
[11] Amy was never asked if she left a message on appellant's voice mail.

Again, the investigators openly admitted they did not ask appellant if he owned a .30-caliber weapon and openly admitted they did not ask appellant about the .30-caliber gun that was seen at his house several months earlier. (T-2661-62).

Agent Baumann claimed the reason that they did not ask appellant about a .30-caliber gun was they did not want to give any indication that they were looking for a .30-caliber gun. (T-2662). Baumann claimed that, at the time, the general public was led to believe that Chad had been shot with a small caliber gun.[12]

Agent Baumann's claims that they did not tell anybody from the general public that they were looking for a .30-caliber weapon was shown to be a deliberate deception. Baumann was forced to admit that they told Josh Bogatz and others that they were looking for a .30-caliber, and was forced to admit that they actually sent Josh to appellant's house looking for a .30-caliber weapon and .30-caliber ammunition. (T-2725-26).

H. INVESTIGATORS REINTERVIEW APPELLANT AND SEARCH PROPERTY

Nearly two months after Chad's death, investigators went to appellant's property to search appellant's house, the barn, and the curtilage. (T-2673). Before they searched, and without telling appellant about the search warrant, they interviewed appellant again. (T-2678). Appellant was quite hung-over, and they believed that appellant was coherent enough to participate in an interview. (T-2679).

Again the appellant went through his timeline for April 13th, 2007, and provided the same information as he had previously stated. Appellant insisted that he had an appointment with the tax preparer at 9:00 or 9:30 am, even when the investigators told him that they knew his appointment was in the afternoon. (T-2681). When the investigators questioned appellant again

[12] Not one person from the general public said they heard Chad was shot with a smaller gun. The only person to make this quote was agent Dan Baumann. This quote was later determined to be false, as shown above.

about the phone calls from his niece, Amy, he said that he received multiple calls that day. Appellant clarified that he received one call from Amy indicating that Ken Swedberg had been shot. (T-2682). Then, he said, Amy called him again to notify him that he was dead. (T-2682).

Finally, the investigators asked appellant whether he owned a Tikka rifle. (T-2682). Appellant acknowledged that he had owned a few Tikka rifles over the years. (T-2682). But told investigators Chad may have traded the Tikka for two muzzleloaders. (T-2682-84).

Appellant told the investigators, that before he traded the Tikka to Chad he took off the scope. (T-2684). Investigators verified that Chad in fact had purchased two muzzleloaders, and that appellant had one of them. (T-2727).

Appellant told the investigators that when he owned the Tikka, he used 150-grain ammunition with a special tip. (T-2686). Appellant was asked if he fired the Tikka, where he acknowledged that he did, and brought the investigators to two different areas. Appellant then gave them consent to search his house. (T-2691).

Prior to giving consent, appellant made special conditions on how the area was to be searched. (T-2691). Appellant stated he didn't want a bunch of marked squad cars coming down while he was conducting his leeching business. (T-2691). The investigators agreed to these conditions, and appellant also offered than an officer accompany him throughout the morning. (T-2691).

Officer John Mcarthur was assigned to accompany appellant. John Mcarthur noticed appellant reeked of booze and was sweating and starting to pace back and forth, eventually appellant ran out of the barn and started to dry heave but couldn't. This process was repeated at least three times. Mcarthur didn't know if appellant was drunk.[13] (T-2124).

[13] Though appellant was showing all the signs of being under the effects of alcohol no officer administered any type of test to see if appellant was legally intoxicated.

Officer Mcarthur said that, after some time had passed six to ten officers came walking down appellant's driveway, and appellant became upset. (T-2127). Mcarthur said that appellant contacted a lawyer, and also was contacted by his brother and said the search is over. At that point appellant was advised of the existence of the search warrant. (T-2673,2702). Mcarthur and Agent Baumann stated that Investigator Seiling served appellant the search warrant, and appellant got really mad at Seiling (T-2130). Appellant then left to go to Grand Forks.

The officers searched the barn and discovered two guns, a .22 pump action and a Tikka. The Tikka was found seemingly hid in the rafters of the barn owned by appellant's brother Frank. (T-1235, 2141-2151). The Tikka did not contain a scope. (T-2160).

I. TEST-FIRING THE TIKKA RIFLE

BCA firearm examiner Nathan Pearlson test-fired the Tikka using the same 150-grain Winchester Supreme Ballistic Silver Tip bullets found at appellant's house with the same type

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from his office. (T-2454-55).

Pearlson then took the test-fired rounds and did a bullet-lining test with the bullets taken out of Chad's body and directly stated that those bullets did not match.

> Q. But you did as you stated, you did test fired some rounds of ammunition that you had in your office; correct?
>
> A. Yes.
>
> Q. And that...that bullet couldn't be...or could not be considered a positive match with bullets found in the body of Chad Swedberg; is that correct?
>
> A. Correct. (T-2454-55).

Pearlson explained that the Tikka shared some class characteristics, but noted that none of the unique individual characteristics matched the bullets taken out of Chad's Body. (T-2466).

Pearlson further stated that after test-firing the Tikka rifle he did not no what rifle was used in the homicide.

Q. Can you tell me which rifle with what round of ammunition was used in this case.

A. No. (T-2570).

No other gun .30-caliber gun was supplied for testing though Pearlson had given the investigators a list of guns that could possibly match the bullets found in Chad's body earlier in the investigation. (T-2386-2570).

J. APPELLANT'S TRIAL

As mentioned earlier, appellant was indicted for first-degree murder. (See Rule 8 hearing, October 1st, 2007). Appellant had maintained his innocence and demanded a jury trial.

At trial, the prosecution speculated that the appellant had walked from his residence, which abutted Fish Hook Lake on the west side, across the frozen lake, and to the maple-site. He, then, allegedly killed Chad and returned the same way without leaving a shred of evidence.[14] (T-1391-93, 2170,2910,2920, 2927-28). During an experiment preformed after Chad's death, one state witness took at least 32 minutes, to make this trip. (T-1391-93,2204-05).

The prosecution presented two possible theories to explain why appellant would have a motive to kill his friend, Chad. First, they insinuated that the friendship between Chad and appellant was deteriorating because one witness, (Jesse Fain); claimed Chad was no longer going to work with appellant.[15] (T-1042-43, 2934-38).

[14] It is apparent that the prosecution did not believe their witness, Shelly Marohl's testimony as well. They never tried to present any type of evidence that appellant drove to Chad's residence on April 13th, 2007.

[15] Numerous states witnesses testified that Chad and appellant were close friends and had been for most of their life, including Leslie Fain. (T-990-1064, 1609, 1612, 1645, 1649, 1767, 1933, 2205,2777).

The second theory the prosecution advanced, to show that Chad and appellant's friendship had deteriorated, stemmed from a stolen 4-wheeler which was discovered many months earlier on Chad's property. The prosecution conjectured that appellant was afraid that Chad was a potential witness against him in the theft case. (T-2934-38, 3013). The offense carried only a probationary sentence (T-1944-51, 1955-69, 1979).

When the prosecution rested its case, defense asked for a judgment of acquittal on the charges of first and second-degree murder. (T2765-70). Defense argued the prosecution did not prove two elements of the crime charged. Mainly, the prosecution failed to prove that appellant caused the death, and also prove that premeditation and/or intent existed. (T-2765-69).

The District Court judge, did not grant the judgment of acquittal, but inferred that he was having a hard time deciding whether this case should be dismissed or not.

"...I am not uncomfortable telling you folks that I have struggled with this.."(T-2769-70).

Appellant did not testify at trial. (T-2812-15). In closing arguments, defense argued that the prosecution's wholly circumstantial case failed to prove appellant's guilt beyond a reasonable doubt. (T-2974-75). After two days of deliberating, the jury found appellant guilty of first-degree murder. (T-3041). Appellant was sentenced to life in prison.

K. APPELLANT APPEALS

The Minnesota State Public Defenders Office filed a notice of appeal on behalf of appellant. They raised three issues on appeal; Probable cause of the search warrant, violation of rights by monitoring and recording attorney-client privilege calls and insufficiency of evidence.

Appellant, on his behalf added to the issues of insufficiency of evidence and jury misconduct in his Pro Se brief.

L. WRONGFUL DEATH SUIT FILED

Around the end of February 2010, Leslie Fain (plaintiff) filed a wrongful death suit. The suit was based on theories of negligence and battery, and was seeking compensatory damages.

M. MINNESOTA SUPREME COURT RULES

Around June 30th, 2010, The Minnesota Supreme Court affirmed appellant's conviction. See State v. Andersen, 784 N.W. 2d 320 (Minn 2010). In doing so, Justice Allen Page noted that this case was close to dismissing. Justice Anderson and Meyer concurring with Page. Id at 336.

N. APPELLANT FILES PETITION FOR POSTCONVICTION RELIEF

On, or around December 10th, 2010, appellant filed for post-conviction relief, raising seven issues. See AA-pgs1-3. Appellant also supplied a memorandum to support the petition. See AA-pgs-4-57.

O. SUMMARY JUDGEMENT

On December 17th, 2010, a hearing was held on a motion for summary judgement filed by the plaintiff. Plaintiff told the court that they believed they there was no genuine material facts in dispute regarding appellant's liability portion of their lawsuit and the case should go to trial on damages only. See SJH-pg-15.

Plaintiff asserted that, since appellant was convicted for first-degree murder and the Minnesota Supreme Court upheld the conviction, appellant should be collaterally estopped regarding liability. Plaintiff explained that under Minnesota law, to be estopped, four elements have to be met.

AA-refers to appellant's appendix
SJH-refers to summary judgement hearing.

1.The issue has to be identical to the one in the prior adjudication.

2. There needs to be a final judgement on the merits.

3. The estopped party was a party or in privity with a party to the prior adjudication and.

4. The estopped party was given a full and fair opportunity to be heard on the adjudicated issue. See SJH-pgs-17-18.

Appellant opposed the motion, stating there was never a negligence charge brought against appellant in any court. See SJH-pg-29. Appellant also stated that there has not been a final judgement on the criminal case because appellant had discovered that the prosecution withheld material evidence, amongst other things, and until the issues raised have been adjudicated, summary judgement should not be granted. See SJH-pgs-29-38.

Plaintiff then argued that the issue of withholding evidence, and the rest of the grounds in the post-conviction motion are a feeble attempt to prolong summary judgement and reiterated that summary judgement should be granted because the Minnesota Supreme Court affirmed the conviction. See SJH-pgs-39-40.

In response, appellant argued that nowhere, in any part of the Minnesota Supreme Court's ruling, does it talk about withholding evidence and/or the other issues in the post-conviction petition and summary judgement should not be granted. See SJH-pgs-38, 41-43.

The judge then took the issues under advisement. See SJH-pgs-43-46.

P. POSTCONVICTION RELIEF DENIED

On January 19th, 2011, the Honorable Judge Lisa Borgen, who was not the trial judge, denied appellant's petition. In summary, denying appellant's petition, the district court ruled that appellant was not entitled to an evidentiary hearing, either because appellant's claims are barred

by State v. Knaffla 243 N.W. 2d 737 (Minn 1976), or were capable of being decided without the need for an evidentiary hearing. See AA-pgs-193-200.

Q. PLAINTIFF IS GRANTED PARTIAL SUMMARY JUDGEMENT

On March 2nd, 2011, the district court granted partial summary judgement and ruled that appellant will be estopped from disputing the issue of liability and this case will go to trial on damages pursuant to Minnesota's wrongful death statute. See AA-pgs-210-20. Appellant now appeals.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN SUMMARY JUDGEMENT WAS GRANTED

A. STANDARD OF REVIEW

On appeal, a reviewing court reviews a trial court's summary judgement decision de novo. In doing so, it determines whether the court properly applied the law and whether there are genuine issues of material facts that prelude summary judgement. Riverview Muir Doran, LLC v. GRP 790 N.W. 2d 167, 170 (Minn 2010. This court must view the evidence in the light most favorable to the party against whom summary judgement was granted. Fabio v. Bellmo 504 N.W. 2d 758, 761 (Minn 1993).

B. INTRODUCTION

1. SUMMARY JUDGEMENT STANDARD

Rule 56 of the Minn. R. Civ. P. provide that summary judgement is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any submitted, show that there is no genuine issue as to any material fact. The purpose of summary judgement is designed to secure a just, speedy, and inexpensive determination of an action. DLH, INC v. Russ

566 N.W. 2d 60, 69 (Minn 1997). Where the record taken as a whole, could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. Id at 69.

However, summary judgement is inappropriate if the nonmoving part (appellant) presents sufficient evidence to permit a reasonable person to draw a different conclusion. Schroeder v. St. Louis Cnty 708 N.W. 2d 497, 507 (Minn 2006). As measured by the above standards, the evidence that appellant presented in his post-conviction petition, memorandum, and briefs was legally sufficient to preclude summary judgement and the district court erred when it ruled that appellant was estopped on arguing liability.

C. APPELLANT'S POSTCONVICTION ISSUES PREVENT SUMMARY JUDGEMENT

As shown in AA-pgs 202-09, appellant with the aide of counsel is appealing the district court's ruling when it denied appellant's post-conviction petition. Appellant believes the district courts erred when it used the post-conviction court's ruling to determine that there was no genuine issue of material fact that preclude summary judgement in the petition. In showing there was error, appellant will go through each issue using the same sequence found in the post-conviction petition.*

GROUND A. NEWLY DISCOVERED EVIDENCE

The newly discovered evidence of Morningstar Bellcourt's boyfriend (Brian) leaving Chad's residence in a blue pickup precludes summary judgement for many reasons.

1. Everyone living at Chad's house was asked who was present on the day of Chad's death. See AA-pgs-6-60. No one admitted seeing Brian that morning, or mentioned that he regularly visited Chad's place. This should cause the rational trier of fact to cease and wonder why this information was not disclosed.

* Additional facts can be found in appellant's appendix regarding the post-conviction issues.

2. The fact that Ken Swedberg also saw Brian leaving from Chad's residence around the exact time it would have taken to commit the murder and leave is something that should not be glossed over. See AA-pgs-6, 7, 63.
3. Because the prosecution did not present one shred of evidence that connected appellant to the crime scene, but the prosecution did find plenty of physical evidence, in the form of foot tracks, leading back and forth from the victim's residence. See AA-pgs-8.
4. The fact that Ken Swedberg wrote in his notes and showed people that he saw Brian leaving in the blue pickup. This is something that should also not be overlooked. See AA-pgs- 63-125, 130-31.
5. Besides notes, there are aerial photos taken later that day on April 13th, 2007, (appellant does not have the aerial photos) that were used at trial, that unknown to anyone show the exact blue pickup driven by Brian sitting in the back of Chad's yard. This should also make the rational fact-finder pause, and create a sense of wonder as to why this truck would now be sitting there.
6. The fact that the post-conviction court made several factual errors by saying that Ken Swedberg did not see the pickup leave or tell another person that he seen Brian drive the truck away should way heavy on the fact that appellant did not have a full and fair advantage to adjudicate the grounds raised. See AA-pgs 194-95, 231-33, 243-45, 267-69,279.
7. Also, one should look at the whole trial record of this completely circumstantial Case and not overlook what this newly discovered evidence would do to the prosecutions case. Surely, some of the prosecution's key witnesses testimony

would have been shown to be aruse. And one should not overlook the prosecution had to use their testimony to get their conviction. More importantly, this evidence now shows an alternative perpetrator that has never been adjudicated. It is not unreasonable to conclude that the district court judge would have dismissed the charges had he known about this evidence at the time of the motion for the judgement of acquittal. (T2769-70) It is, therefore not unreasonable to conclude that a rational trier of fact would dismiss this civil suit as well, especially if s/he would have known that the prosecution withheld evidence and used the falsified testimony to gain their conviction, which will be shown later in, grounds C, D, E and F.

GROUND B. CONFRONTATION

As shown in AA-pgs 9-11, 150-52, 234, 245-46, 269, appellant believes that his right to confrontation was violated and his trial and appellant counsel were not effective for failing to object to the witnesses testimony and not raising this issue on direct appeal. Surely, if trial and appellant counsel were not effective, a conviction should not stand under any circumstance or summary judgement be granted on liability when appellant did not have a full and fair right to be heard on the adjudicated issue (appellant being responsible for Chad's death). The issue of ineffective assistance of counsel will further be addressed in grounds F and G.

GROUND C. VIOLATION OF RULE 9 DISCOVERY REQUIREMENT AND BRADY

From all the evidence appellant has supplied on the prosecution consistently withholding evidence, there should be absolutely no doubt that appellant did not have a full and fair trial. See AA-pgs-12-15, 53-56, 67-70, 152-54, 234-35, 246-48, 269-72, 279.

The state had been warned at the contested omnibus hearing about withholding evidence. See AA-pgs-12, 234, 246, 269-72. It's obvious that the prosecution didn't care about the judge's

warnings, or they would have looked at their file and turned over all the requested evidence that they had possession of. Instead, the prosecution unethically withheld reports that had been written *well* before the omnibus hearing, until their witnesses were getting on the stand. See AA-pgs-270-71.

It's impossible for appellant's counsel to be effective when the prosecution does not abide by the law. Appellant could not have a full and fair trial! This violation alone should preclude summary judgement because appellant *did not* have a full and fair trial and is entitled to one.

The prosecution withheld other evidence until well after the trial was over. See AA-pgs 69, 70, 96-97, 266.[16] This withheld evidence precludes summary judgement for many reasons and proves that appellant did not have a full and fair trial.

In a careful review of the prosecution's gun expert's testimony, as mentioned earlier, (see I. Test Firing the Tikka Rifle) one can infer the prosecution knew that they had not found the gun the fired the fatal bullets yet.

The withheld evidence of concern is an interview conducted with Al Baker. As the summary report shows, the prosecution sent three investigators from three different agencies to document one of their suspect's guns. See AA-pgs-96-97. [17]

Looking at the withheld reports, it shows that Al Baker had four weapons capable of firing .30-caliber ammunition. Had the defense had the report available to them, they would have clearly been able to see that Al Baker had four weapons (three rifles and one pistol) instead of two he testified too. See AA-pgs 12-15, 152-54, 234-35, 246-48. This would have damaged

[16] Appellant's trial was completed on June 2nd, 2008. The prosecution signed a sworn affidavit that shows that they turned over evidence many days after the trial ended. See AA-pgs-67-71.
[17] It is unknown if this interview was recorded or transcribed because the prosecution has never turned over any further evidence in connection with interview, such as follow up reports, etc…

the prosecution's case, when defense could have confronted Al Baker about his discrepancies in his sworn testimony with the known facts about his .30-caliber weapons. But as stated, defense did not have this luxury and the perjured testimony went uncorrected.

Of greater concern is the fact that Al Baker allegedly sent a .30-caliber weapon to his "niece", whom there is no name or address for, in Alaska. The problem with this is that he allegedly sent this .30-caliber to Alaska in the midst of an on going investigation in which the prosecution's agents were actively looking for a .30-caliber weapon.[18]

Adding insult to this violation, the prosecution did not ask Al Baker about getting rid of his .30-caliber weapon during trial! One can understand why. If this would have come to the defenses attention, we could have attacked the quality of the prosecution's circumstantial case, especially when the investigators were still looking for a .30-caliber weapon two days before appellant's trial.

In the post-conviction court's ruling, which is nearly verbatim to the prosecution's post-conviction response, the district court stated that even if the prosecution withheld this evidence, appellant had failed to show that the report contained any material facts that would have resulted in an acquittal, or a more favorable result. The court also said that the report showed Al Baker had .30-caliber guns and the amount of guns he possessed was not relevant to the issues at appellant's trial. See AA-pgs-108-09, 196.[19]

[18] The .30-caliber gun that Al Baker allegedly sent to Alaska, during the time investigators were looking for a .30-caliber murder weapon, was on the FBI's database list as a possible match to the bullets found in Chad's body. See (T- 2426, 2458) and AA-pgs-96-97.

[19] The district court believed that appellant had this information available at the time of direct appeal and applied the Knaffla bar rule. As shown in AA-pgs-261-67, appellant did not have the withheld reports and the Knaffla rule does not apply.

The prosecution's response and the district court's ruling, stating that a withheld interview with one of their suspects about his .30-caliber weapons being irrelevant to the issues at appellant's criminal trial is disturbing in many ways.

Had Chad's death stemmed from him being stabbed or he been in a hit-and-run, surely the investigators would have been looking for the knife or vehicle that caused the death. In these cases, appellant agrees that a withheld report about investigators looking at a person's guns would have no relevance to the issues at appellant's trial, but being Chad was murdered with a .30-caliber weapon makes any interview conducted with the suspects about the guns he possessed at the time of the murder, beyond relevant, especially a report that the defense could have used to impeach Al Baker on the stand, and possibly prove appellant's innocence.[20]

This withheld reports precludes summary judgement because it has never been in front of a rational trier of fact due to the prosecution's failure to disclose. It is not unreasonable to infer that this case would be dismissed on the grounds that the district court judge noted he was struggling over whether he should dismiss the case solely on the evidence presented by the prosecution during the criminal trial. (T-2769-70).

GROUND D. PROSECUTION COMMITTED MISCONDUCT BY ARGUING FACTS THAT HE KNEW TO BE FALSE

This goes hand and hand with the issues mentioned above. As shown in AA-pgs-16-17. 53-54. 153-54, 235, 248-49, 272, the prosecution had repeated a theme of attack they used throughout trial to infer appellant's guilt. "The only person aside from the police officer, who is going to know Chad was killed with a.30-caliber gun is the person who killed him with a .30-caliber gun, and that person isn't going to want to talk about a .30-caliber gun".

[20] To add to all of this, the prosecution misled the post-conviction court by stating that Al baker had admitted to possessing .30-caliber weapons at the time of the murder. See AA-pg-109. This is a false statement because the withheld report would have been dated April 13th, 2007, not thirteen months after Chad's death. See AA-pgs-96-97.

Later, to help provide suspects with alibis pertaining to the weapons these people possessed, the prosecution stated, "Everyone is showing off their .30-caliber guns *except* Kenny Andersen". The prosecution *knew* this argument was blatantly false due to the fact that Al Baker had allegedly sent a .30-caliber to his "niece" in Alaska, therefore, making it impossible to "show off" a gun in Minnesota.[21]

Appellant agrees only the police and the murderer knew that Chad was killed with a .30-caliber weapon, so only the murderer would have a reason to deny owning or possessing a .30-caliber weapon. See AA-pg-110. As proven by the trial record of the prosecution's lead agent, Dan Baumann, when questioning appellant, the investigators never inquired whether appellant owned or possessed a .30-caliber gun. (T-2650, 2662).

Had the withheld report been turned over, the prejudicial remarks directed toward appellant throughout the trial and closing argument would have never been said, *especially* when Al Baker would have been shown to be the *only* one who denied owning or possessing a .30-caliber weapon to the jury, specifically the two that were mentioned in the withheld report and the one he allegedly sent to his "niece" in Alaska.

As shown in Brown v. Borg 951 F2d 1011 (9th cir 1991) when the prosecution withholds evidence that is favorable to the accused, deliberately misleads the court and the jury, and makes inferences that are untrue during trial. They are violating the accused due process rights where the conviction must not stand. It is appellant's argument that summary judgement should not be upheld when the trial record used was in part unethical, but also deliberately misleading to obtain a conviction.

[21] Upon questioning from the investigators about possessing .30-caliber weapons, Al Baker had stated that he sent a weapon to his "niece" in Alaska and never provided her name or address Investigators never followed up on this matter to have this weapon "shown off" to them.

GROUND E. SECRETLY RECORDING ATTORNRY-CLIENT PRIVELEGED PHONE CALLS

This argument follows the last two issues, showing appellant did not have a "full and fair trial." In talking to counsel, appellant could hear clicking noise and asked counsel to check if there jail had blocked our calls from being recorded. Being assured many times by jail and the prosecution that our numbers had been placed onto the do not record (blocked) list, appellant and counsel decided to stage a prank over the phones to see if then conversations were having *were* in fact, being monitored.

Counsel told appellant over the phone that, the next time he visited he would bring drugs. See AA-pgs-18-19. After a mind-boggling result, *including the counsel nearly stripped-searched upon arrival,* the prosecution was confronted about monitoring our calls. At that time, they admitted that they were secretly listing in on conversations. After having some heated arguments with jail staff and the prosecution, a contract was written and signed, ensuring that the prosecution would not be monitoring or recording any of the conversations between appellant and defense, which *included* the private investigator, and that their numbers would be placed on the blocked list. See AA-pg-78.

A month later, appellant was informed by jail staff that the prosecution was still illegally monitoring appellant's conversations. A hearing was during which Captain Joe Mcarthur stated that the jail has a policy to record and monitor all calls unless they are on the do not record list. Mcarthur also stated the reason appellant's calls were being recorded and monitored was due to the appellant failing to supply a list of numbers to be on the blocked list. Mcarthur continued by stating that the reason appellant's numbers did not get placed on the list a second time was due to a software upgrade that changed how numbers get entered into the jails blocked list.

When asked about the contract agreement, Mcarthur explained that he allowed the landline to be blocked, but made a decision to take the cell phone off of the blocked list and not tell the defense about it. See AA-pg-20. Mcarthur said that the jail does not believe that a private investigator should be under the attorney-client privilege. See AA-pg-20.

Agent Baumann was called at the hearing, where he revealed that he and Mcarthur *had* listened to appellant's call, *but* would hang up once they could *determine* it was between appellant and his counsel, (which *included* the private investigator).

This outraged the judge, who made a bench order demanding the prosecution to block both cell phone and landline numbers of the investigator and *all* of the numbers of appellant's counsel from being recorded and monitored. See AA-pg-20.

A few months later, when trial started, the prosecution seemed to know appellant's defensive strategy. At one point during the trial, the prosecution had admitted material as being unedited and accurate into evidence. While watching the video, defense realized that the evidence had been altered from the original recording. See AA-pg-258. During the trial, appellant and counsel had no way of proving that the prosecution was illegally listening to and recording the attorney-client calls that they had insisted were being blocked and using the information in those calls to alter their evidence and testimony.

As shown in AA-pgs-21-249, a civil suit was later filed for illegally monitoring attorney-client calls. Admissions were made by numerous people proving that Captain Joe Macarthur's previous testimony was a complete lie. The prosecution was *seemingly* involved in the listening in of appellant's calls to his counsel and private investigator, as well. See AA-pg –21. In a further investigation by the new jail administrator, information was uncovered showing that the prosecution secretly did not block the private investigator's cell phone number and also, used

these calls against appellant in court. See AA-pgs-21, 158-59. As shown, by their own writing, appellant has proven that the jail staff was ordered to block the numbers mentioned above. See AA-pg-294.

From the time of the hearing until trial was complete, the prosecution had unlimited access to thirty or more calls made between appellant and the private investigator. See AA-pg-142. Therefore, it would be safe to say that appellant did not have a full and fair trial, especially since the prosecution altered evidence and testimony by secretly listing to conversations that are *suppose* to be protected by law. How much evidence and testimony was altered has yet to be determined.

This should preclude summary judgement for many reasons, especially since the prosecution had the audacity to say that the district court did not order them to block the investigator's cell phone numbers while knowing that to be false.

GROUND F. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

The issued raised in appellant's post-conviction petition under ineffective assistance of trial counsel show that appellant did not have a full and fair opportunity to be heard on liability.

In the post-conviction court's order under Ground F, AA-pg-194-99, the appellant was believed to have known about the issues at the time of direct appeal and applied the Knaffla bar rule. As shown in AA-261-67, appellant had no idea about the issues at the time of direct appeal and the Knaffla bar rule should not have been applied. Even so, Knaffla rule does not apply to Rule 56 of the Minn. R. Civ. P. (summary judgement). The court's role (as they have suggested) at summary judgement, is to independently look at appellant's post-conviction issues and determine if there are genuine issues of material fact that preclude summary judgement. See AA-SJH-pg-43. This never happened.

Had the court independently reviewed appellant's petition under Ground F, one can see appellant's trial counsel was ineffective. In viewing the evidence in the light most favorable to the nonmoving party (appellant) as this court must, and assuming the facts addressed in Ground F, (AA-pgs-18-57, 159-173, 236-39, 250-51, 273-79) are true, clearly show that there are genuine issues of material facts that preclude summary judgement.

GROUND G. INEFFECTIVE ASSISTANCE OF APPELLANT COUNSEL

When trying to appeal a conviction to prove your innocence and show that your trial was unfair, one must have all the evidence or material to do so. This is evident when the district court assigned appellant to know of all the facts of his case. Without evidence, one is left to guess whether or not counsel was effective, etc...

As in this case appellant did not have the proper material, such as a complete trial record and discovery. For these reasons and the fact appellant's counsel failed to raise all the proper issues at the time of direct appeal, mentioned above, summary judgment should not be granted when appellant did not have a full and fair opportunity to be heard on the issue of liability.

NEWLY DISCOVERED EVIDENCE

Another extremely important fact that has come to light is the discovery of more falsified testimony. Originally appellant brought this issue under ineffective assistance of trial counsel in the post-conviction petition. See AA-pgs-37-40, 167-68. It has now turned out to be newly discovered evidence of falsified testimony. As mentioned in AA-pgs-37-40, and this brief, the prosecution had advanced a theory that Chad Swedberg was killed over a stolen 4-wheeler being found on his land.

The prosecution called Investigator Jeff Nelson, who testified that he interviewed Chad before his death about the 4-wheeler being found on his land. Jeff testified that when he

interviewed Chad, he could tell from his demeanor that Chad was telling the truth. Chad had told many stories how the 4-wheeler might have gotten on his land, but said that he had personally never seen it there, although he hunted the same woods where it was found.

Had Jeff Nelson told the truth at appellant's trial that he had personally found out that appellant did not steal the 4-wheeler, as the prosecution inferred, there is a reasonable probability that the charges would have been dismissed when the district court judge stated he was struggling whether he should dismiss the case based on the prosecutions evidence.
This evidence was crucial to the prosecutions case and proves that appellant did not have a full and fair opportunity to be heard on liability, especially when the prosecution may have known about this evidence as it appear. See AA-pg-277.

SEARCH WARRANT

As shown in AA-pgs-56-57, 277, appellant has claimed that had he had access to discovery, or been able to keep the DVD with the partial discovery on it, he would have been able to conclusively prove that the prosecution's agents falsified more testimony at trial (search warrant).

As mentioned earlier in this brief, (H. INVESTIGATORS REINTERVIEW APPELLANT AND SEARCH PROPERTY), Agent Dan Baumann testified that after interviewing appellant they requested consent to search appellant's place, at which time appellant gave consent with special conditions that no squad cars be present while appellant was conducting his leeching business. (T-2691). Investigators agreed to these conditions and assigned Investigator John Mcarthur to accompany appellant while they conducted their search.

John Mcarthur said that while appellant was doing his leeching business, appellant noticed six to ten officers walking down the driveway, where appellant asked him why the

officers are coming down the hill. Mcarthur testified that he told appellant that the officers were going to start searching the outbuildings, when appellant became upset and called his brother. He said that the search was going to stop because his brother owned the outbuildings and does not want them searched.

Both Investigator John Mcarthur and agent Baumann testified that Investigator John Seiling personally served appellant with a copy of the search warrant. (T-2130). In fact, Investigator Mcarthur testified that appellant got into an argument with Investigator Seiling over the search warrant. (T-2130).

The prosecution called appellant's brother, Frank Andersen, at trial. Frank testified he, in fact, called appellant, but stated he only told appellant that investigators could not search his house until he saw a search warrant. Frank stated that, as far as he was concerned, the police could search anything else, except his house. Frank testified that he never told appellant that he did not want the police in any of his outbuildings. (T-2179-80).

In closing arguments, the prosecution admitted the .30-caliber gun (Tikka) found in Frank's outbuilding could not be a match in this case, "We can't prove it's the rifle by forensics," but inferred that because appellant did not want the officers to search the outbuildings and he is lying about what his brother told him, he must be guilty. (T-2930, 2670).[22]

As mentioned above, appellant did not have discovery available at the time of direct appeal, or during the time of writing the post-conviction petition. However, for this appeal, appellant has secured partial discovery and can conclusively prove that the testimony mentioned above was falsified.

If one looks at AA-pgs-296-99, one can clearly see *beyond a shadow of a doubt*, that

[22] The prosecution failed to mention that another gun was found in the same outbuilding as the Tikka, a .22-calber rifle. See AA-pg-298.

Investigator John Seiling did not serve appellant with a copy, or even show appellant the search warrant. Seiling admits that after the initial interrogation with appellant, he *left appellant's place* and drove to the town of White Earth looking for Frank Andersen at his work place to inquire where appellant was sighting in a .30-caliber gun the previous fall. Seiling admits that he did not return to the Andersen's residence until after the appellant had left to sell leeches in Grand Fork. See AA-pgs –296-99.

This undisputable evidence makes it impossible for Agent Baumann and Investigator Mcarthur's testimony to be true, especially when Mcarthur had the audacity to swear under oath that appellant and Seiling actually got into an argument after he served a copy of the search warrant.

The report above is not the only piece of evidence that appellant now has to show that the testimony stemming from the search warrant was untrue[23]. Looking at AA-pgs-300-07, a transcribed recording of a conversation between Agent Baumann and appellant (after Seiling for White Earth) and the trial record shows what really happened.

The evidence clearly shows that six or ten officers *did not* walk down appellant's driveway as Mcarthur stated earlier. Instead, some officers drove marked squad cars down while appellant was buying leeches from customers, in which case appellant got mad because, prior to giving consent to search, investigators agreed with appellant that no marked squad cars will be present. See AA-pgs-305-06.

Contrary to Mcarthur's sworn testimony, appellant did not care which buildings were searched. In fact, as this proves, appellant encouraged the investigators to search all of the buildings. See AA-pgs-300-07. Around this time, appellant's brother called and told him that he did not want people in his house unless they provided a search warrant. (T-2179-80).

[23] Appellant did not have this evidence available to use at earlier appeals to prove the above testimony was falsified.

Appellant confronted Mcarthur and Baumann about the search warrant and asked to see it. Neither Mcarthur nor Baumann had a search warrant so appellant and Mcarthur left searching for Seiling, but never found him. (T-2129-30). Upon arrival at appellant's house, appellant talked with Agent Baumann, at which time appellant told him Frank was pissed off that there were officers searching his house without a warrant. Appellant then stated it was still okay to search the outbuildings and left for Grand Forks to sell leeches. Before leaving, appellant told Baumann that if any questions needed to be answered, he could call appellant on the phone number provided earlier. Agent Baumann acknowledged that Seiling had never been there to serve appellant with a search warrant, because he stated that a search warrant would be produced and a copy of it, along with a search receipt, would be left on appellant's table. See AA-pg-305.

As shown above, a lot of testimony and inferences made about the testimony stemming from the search warrant was untrue. Certainly, it was prejudicial towards appellant and proves that appellant did not have a full and fair opportunity to be heard on liability, which should preclude summary judgement

MINNESOTA SUPREME COURT

As mentioned earlier, the plaintiff/respondent argued that the four elements of collateral estoppel are met in this case on liability when the Minnesota Supreme Court affirmed appellant's conviction.

As shown above in this brief and appendix, this circumstantial case was tainted from the beginning to the end by the prosecution's unethical acts. At no time did the district judge, jury, or the Minnesota Supreme Court find out what really happened when the prosecution illegally recorded appellant's attorney-client phone calls, or the withholding of exculpatory evidence, or the falsified testimony, etcetera, found throughout appellant's post-conviction petition.

One cannot argue that this case is standing on shaky grounds. As the trial record shows, the prosecution's circumstantial case was built solely on witnesses credibility because there is no physical evidence that connects appellant to the crime scene in any way, shape, or form.

Had any of the evidence mentioned above been seen or learned about during appellant's criminal trial, surely it is easy to conclude that a rational fact-finder would have found these key witnesses testimony to be irrelevant, which would have literally destroyed the prosecutions case.

Summary judgement should never be granted on such a tainted record, nor should the plaintiff/respondent be able to use the Minnesota Supreme Court's ruling when the court unknowingly used falsified testimony to affirm appellant's conviction.

There are other issues wrong with the Minnesota Supreme Court's ruling as well. When the court did their pain staking review of this circumstantial case, they made factual errors in their ruling to infer a circumstance that proved appellant's guilt.

If one looks carefully at State v. Andersen 784 N.W. 2d 320, 325, the court came to the conclusion that, after appellant left the tax preparer in Mahnomen, he went to Moorhead to obtain a loan, but didn't have an appointment, on April 13th, 2007, which happened to be the date of Chad's death. Also the prosecution alleged in their closing arguments, that the appellant did not have an appointment on the 13th. However, this never was an issue at trial. In fact, if one looks at Nicole Knudson's (Moorhead banker) sworn testimony at appellant' trial, not once was she asked if appellant had an appointment on the 13th. Agent Baumann, however, testified under oath that through their investigation they found out that appellant, indeed, had an appointment on the 13th of April 2007. Investigator Seiling also confirmed appellant called the Moorhead bank at 9:30 am on the 13th of April 2007. See AA-pg-144.

Not only was this a factual error, but also when the court concluded that appellant made false statements to police about his whereabouts around the time Chad was shot, infers a circumstance proving appellant's guilt, which is not true as well. Id at 330.

In order for appellant to make a false statement around the time of Chad's death, appellant would have to have said that he left around the exact time of Chad's death, which was between 8:08-12 am. As the record shows, this is not the case. Instead, appellant said he left his house well after the murder of Chad, making the court's conclusion that appellant made false statements untrue.

Also one should not miss where the court had to change some facts around to come to this conclusion. "Andersen told police he met his cousin at his cousin's house between 8:30-9:00 am, in order to go to a 9:00-9:30 am appointment with a tax preparer." Id at 330.

If one looks at 784 N.W. 2d 325, the court wrote a completely different version of appellant's conversation with police about where he met his cousin for a ride, "the end of his sister's driveway" a very short distance from appellant's house, not the ten plus miles away to his cousin's place. Id at 325.

Another factual error is when the court concluded that appellant made false statement about his ownership and possession of a .30-caliber weapon at a time when the general public believed Chad was shot with a smaller caliber gun because of information provided by the police. Id at 330.

This conclusion is wrong in many ways. As shown by the sworn testimony of agent Baumann, he admitted that appellant was never asked about owning or possessing a .30-caliber gun during the investigation. (T-2661-62). In fact, not one person from the public ever *said, or*

testified that they heard Chad was shot with a smaller caliber gun based on information provided by the police during the investigation.

Contrary to this conclusion is the sworn testimony of Agent Baumann, *admitting under oath*, that he was telling numerous people from the general public that Chad was shot with a .30-caliber, therefore making this conclusion untrue.

CONCLUSION

As shown in this brief and accompanying appendix, appellant strongly asserts that the district court erred when it granted partial summary judgement and ruled appellant will be estopped from disputing the issues of liability.

Appellant takes the position that he never had his day in court to prove his innocence, in which case his trial counsel was obviously ineffective shown by all the falsified testimony allowed in at appellant's trial. Appellant's counsel can never be effective when the prosecution withholds exculpatory evidence, allows falsified testimony into evidence at trial by key witnesses, secretly records appellant's attorney-client phone calls, and alters evidence, etcetera.

Also one should not forget that appellant was denied access to discovery and was also denied his constitutional right to assist in his defense. More importantly, appellant is still uncovering evidence that conclusively proves that some of the prosecution's witnesses falsified evidence that was the heart of the prosecutions case. Appellant can never have a full and fair trial when this type of egregious violations still continues.

The record used to gain summary judgement should not have been used especially when it was so tainted from the beginning to the end. Appellant has shown there are genuine issues of material facts that preclude summary judgement and respectfully request that the district court's ruling be reversed and a trial ordered on the issues of liability.

Dated: January 10th, 2012.

Respectfully submitted

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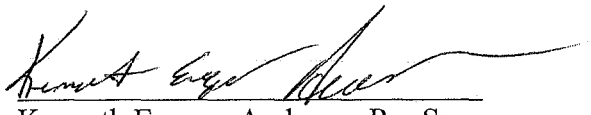
CERTIFICATION THAT BRIEF COMPLIES WITH

MINN. R. APP. P. 132.01 SUBD 3

The undersigned certifies that the brief submitted herein, using a proportional spaced font size of 13 contains less than 13,000 words and complies with the type/volume limitations of the Minnesota Rules Of Civil Appellant Procedure 132.



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