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SEPTEMBER 5, 2017
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, by and through The North Dakota Department of Corrections and Rehabilitation and the North Dakota Youth Correctional Center,	)	**Supreme Court No. 20170293**
Petitioners,	)	**District Ct. No. 08-2015-CV-02487**
v.	)	
Bruce Haskell, Judge of the District Court South Central Judicial District, and Delmar Markel	)	
Respondents.	)	

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APPEAL FROM THE DISTRICT COURT
ORDER DATED JULY 18, 2017
BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE BRUCE HASKELL

RESPONDENT MARKEL'S BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR SUPERVISORY WRIT AND BRIEF IN SUPPORT OF RESPONDENTS' PETITION FOR SUPERVISORY WRIT

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JURISDICTIONAL STATEMENT

¶1 Under N.D.Const. art. VI, § 2 and N.D.C.C. § 27-02-04, this court may invoke supervisory authority to examine a trial court decision. *State, ex rel. Harris v. Lee, 2010 ND 88,* ¶6, *782 N.W.2d 626.*

STATEMENT OF THE CASE

¶2 On December 9, 2012, several inmates at YCC were able to escape from their rooms, partially as a result of a defective and faulty locking mechanism on their doors. (Complaint at ¶ 6; Doc ID #2.) These inmates seriously assaulted Delmar Markel ("Markel") and escaped from the facility. (Complaint at ¶ 6; Doc ID #2.). Count 1 of the Complaint was entitled "Negligent or Wrongful Act" and Count 2 was entitled "Constructive and Retaliatory Discharge." The petitioner filed a Motion to Dismiss on the pleadings under Rule 12(b)(1)&(6), N.D.R. Civ. P.

¶3 In January 2016, the district court dismissed Count 2 on grounds that Markel failed to pursue administrative remedies that were available to him prior to suing for Constructive and Retaliatory Discharge. The district court denied Petitioners motion for dismissal on Count 1 as the district court found that the Complaint's allegations of negligence and failure to replace them could establish that the defendants had knowledge that an injury was certain to occur.

¶4 After discovery, YCC moved for summary judgement in essence on the same grounds as it had on the initial motion to dismiss. The district court denied summary judgment on grounds that a jury could decide YCC's acts or failure to act made Markel's injury certain to occur.

¶5 The Petition for Supervisory Writ does little but rehash the same cases and arguments that were briefed, argued, and thoroughly considered by the district court. The Petitioners up to this point have used procedural efforts to halt the proceedings at every level; avoid answering the complaint by seeking a dismissal and summary judgment, and, avoid trial by seeking a writ. This case should proceed with the facts fettered out during the discovery process. Further, *Cont. Resources v Schmalenberger*, 2003 ND 26, *656* NW2d 730, 734, holds that the writ is to control the lower court and is used only to rectify errors and prevent an injustice on an extraordinary matter and for which there is no adequate alternative remedy. Here there is no error that was shown to have been committed by the lower court on these issues. Moreover, the adequate remedy would be for the State to appeal after a trial. A petition for supervisory writ is not an alternative to appeal. Markel deserves his day in court. This is not an "extraordinary case" whereby this Court should exercise its "rare and cautious" discretion to issue a supervisory writ.

¶6 Alternatively, should this Court decide to exercise its discretion to issue a supervisory writ, this Court should also exercise its authority to issue a supervisory writ and direct the district court to reverse its Order on the motion to dismiss Count 2. Petitioners moved, and the district court granted, dismissal of Count 2 for lack of subject matter jurisdiction. Respondents assert that the district court improperly found that it did not have jurisdiction in granting the motion to dismiss Count 2. Accordingly, this Court should exercise its supervisory jurisdiction to vacate the district court's Order as void for lack of subject matter jurisdiction.

STATEMENT OF STANDARD OF REVIEW

¶7 This Court's authority to issue supervisory writs derives from N.D. Const. art. VI, § 2, and N.D.C.C. § 27-02-04. *Dimond v. State Bd. of Higher Educ.,* 1999 ND 228, ¶ 19, 603 N.W.2d 66. The authority to issue supervisory writs is discretionary; it cannot be invoked as a matter of right. *Trinity Med. Ctr. v. Holum,* 544 N.W.2d 148, 151 (N.D.1996); *Odden v. O'Keefe,* 450 N.W.2d 707, 708 (N.D.1990). This Court determines whether it should exercise its original jurisdiction to issue remedial writs on a case-by-case basis. *Heartview Found. v. Glaser,* 361 N.W.2d 232, 234 (N.D.1985); *Marmon v. Hodny,* 287 N.W.2d 470, 474 (N.D.1980). Courts generally will not exercise supervisory jurisdiction "where the proper remedy is an appeal merely because the appeal may involve an increase of expenses or an inconvenient delay." *Fibelstad v. Glaser,* 497 N.W.2d 425, 429 (N.D.1993) (emphasis added). The Supreme Court exercises its authority to issue supervisory writs rarely and cautiously, and only to rectify errors and prevent injustice in extraordinary cases in which there is no adequate alternative remedy. *State ex rel. v. Hagerty*, 1998 ND 122, ¶ 6, 580 N.W.2d 139; *Roe v. Rothe-Seeger*, 608 N.W.2d 289, 291 (N.D. 2000).

PROCEDURAL BACKGROUND

¶8 Markel began his employment with the North Dakota Department of Correctional Rehabilitation ("DOCR") at the North Dakota Youth Correctional Center ("YCC") in March of 1985. (Complaint at ¶ 3; Doc ID #2.) He remained working there for almost 28 years. During this time, he was an exemplary and dedicated employee. (Complaint at ¶ 4; Doc ID #2.) On December 9, 2012, several inmates at YCC were able to escape from their rooms, as a result of a defective and faulty locking mechanism on their doors. (Complaint

at ¶ 6; Doc ID #2.) These inmates seriously assaulted Markel and escaped from the facility. (Complaint at ¶ 6; Doc ID #2.)

¶9 Prior to December 9, 2012, Administrators at YCC and the DOCR were made aware of faulty equipment at YCC, including, but not limited to, locking mechanism on doors to various rooms and certain "cottages" on the YCC campus. (Complaint at ¶ 5; Doc ID #2.) Despite being aware of these dangers, including the locking mechanisms on rooms where dangerous individuals were housed, YCC and the DOCR never fixed, addressed or remedied those problems. (Complaint at ¶ 5; Doc ID# 2; Helfrich Deposition at 32-33; Doc ID #59.) As a result of the aggravated assault, Markel suffered physical and emotional injuries, including being diagnosed with posttraumatic stress disorder. (Complaint at ¶ 8; Doc ID #2.) Shortly after being assaulted, Markel met with the undersigned counsel in order to assist in filing a worker's compensation claim. (Complaint at ¶ 14; Doc ID #2.) Administration at YCC became aware Markel contacted an attorney. After contacting the undersigned, both the YCC and DOCR administrator's attitudes and approach to Markel and his condition changed drastically. (Crouse deposition at 25-26; Doc ID #61.) Subsequently, administration at YCC specifically suggested that the biggest mistake Markel made was "hiring an attorney." (Crouse deposition at 80; Doc ID # 61.)

¶10 Markel treated with a psychologist and filed a claim for worker's compensation benefits as he was medically unable to return to work. (Complaint at ¶ 13; Doc ID #2.) Initially, WSI denied the claim for benefits in relation to the diagnosis of PTSD which was the cause of Markel's ongoing wage loss and disability. (Complaint at ¶ 13; Doc ID #2.) Following the aggravated assault Markel was forced to use his accrued sick leave and vacation time, as he was not receiving any other income. (Complaint at ¶ 16; Doc ID #2.)

After eight months, Markel's vacation time and sick leave were almost exhausted (Markel was still arguing with WSI over their decision), so he submitted a requisition for Shared Leave to YCC. (Crouse deposition at 32-33; Doc ID # 61.) His request for shared leave was accompanied by a medical opinion from Dr. Johnson substantiating the request for leave. (Crouse deposition at 82-83; Doc ID #61.) This would have allowed Markel's co-workers to donate him leave so he could continue to be paid during his medical absence. (Complaint at ¶ 17; Doc ID #2.) Several of Markel's immediate co-workers expressed willingness to provide annual donated Shared Leave to Markel. (Helfrich deposition at 130; Doc ID # 59.) Despite the fact shared leave from other co-workers would not impact YCC financially at all, Director Ron Crouse denied Markel's request for Shared Leave on August 14, 2013. (Crouse deposition at 28; Doc ID # 61.) Markel's request for Shared Leave was denied despite the fact that it complied with Section 54-06-14.1 & 14.2, N.D. Cent. Code. (Complaint at ¶ 19; Doc ID #2.)

¶11 Around the same time, Markel had finally reached a stipulated resolution with WSI and had been provided a proposed stipulation on August 29, 2013. (Complaint at ¶ 20; doc ID #2; Stipulation of North Dakota Workforce Safety and Insurance; Doc ID #14.) The stipulation, which both the employee (Markel) and the employer (YCC) were required to execute within 21 days was provided to the parties. (Complaint at ¶ 20.) As such, the time to sign the stipulation would expire on September 16, 2013.

¶12 Following the denial of the request for donated leave, Markel's annual leave expired effective August 27, 2013. (Complaint at ¶ 21.) Markel was out of money and his only hope of any income was with resolution of the dispute with WSI or reconsideration by YCC of the denied shared leave. (Complaint at ¶ 21; Doc ID #2.)

¶13 On September 6, 2013, YCC Director Crouse reminded Markel that his full complement of leave time ran out effective August 27, 2013, and requested Markel inform him by September 16, 2013, whether he would be returning to fulfill work responsibilities. (Complaint at ¶ 22; Doc ID #2; Crouse deposition at 86; Doc ID #61.) Interestingly, the date Director Crouse insisted Markel inform him of his decision on whether to return to work coincided with the date YCC had to decide whether to sign the WSI stipulation. (Complaint at ¶ 22; Doc ID #2.)

¶14 On September 10, 2013, the undersigned counsel sent a correspondence to Director Crouse asserting he was attempting to hold up the WSI settlement until Markel returned to work or resigned. (Crouse deposition at 77; Doc ID #61.) At that time, the undersigned counsel, advised Director Crouse that his actions appeared to be an employer attempting to coerce retirement or, in essence, threatening to discharge an employee for seeking WSI benefits, in violation of § 65-05-37, N.D. Cent. Code. (Complaint at ¶ 24; Doc ID #2.) The next day Director Crouse finally signed the WSI stipulation. (Complaint at ¶ 24; Doc ID #2.)

¶15 On September 17, 2013, six days later, Director Crouse sent a correspondence to Markel acknowledging Dr. Johnson's medical verification of Markel's inability to return to work. (Complaint at ¶ 25; Doc ID #2.) Director Crouse reminded Markel that he had denied his shared leave request, that Markel had exhausted his vacation time and sick leave, that Markel had not reported to work and had not "received approval for your absence" since the date of the assault. (Complaint at ¶ 25; Doc ID #2.) Director Crouse warned Markel that YCC was considering disciplinary action up to and including termination.

(Complaint at ¶ 25; Doc ID #2.) Director Crouse demanded a written response from Markel within five working days. (Complaint at ¶ 25; Doc ID #2.)

¶16 The undersigned counsel, on behalf of Markel, responded to Director Crouse's threat to terminate Markel on September 20, 2013. (Complaint at ¶ 26; Doc ID #2.) On September 27, 2013, the DOCR, through its counsel, proposed that they would grant Markel's shared leave request, retroactive to August 27, 2013, and lasting until October 1, 2013, provided Markel agreed to retire or resign effective October 1 and release all claims against the State. (Crouse deposition at 31-33; Doc ID # 61.) The undersigned counsel advised DOCR that it was inappropriate to use donated leave as leverage to force Markel to both resign and release any and all claims against the State. (Complaint at ¶ 27; Doc ID #2.) The DOCR rejected Markel's position. (Complaint at ¶ 27; Doc ID #2.) On October 1, 2013, Markel, as a direct result of the threat of disciplinary action, was forced to resign from his position at YCC. (Complaint at ¶ 28; Doc ID #2.).

FACTUAL BACKGROUND

¶17 Brown Cottage has 16 resident rooms. (Helfrich deposition at 10; Doc ID # 59.) The residential rooms are located in the west hallway. The rooms are on the east and west side of that hallway. When the cottage was first built in 1963, the rooms on the east hallway were three large "gang dorms." (Helfrich deposition at 10; Doc ID # 59.) In the early 1980s, the gang rooms were split up into double rooms or single rooms. (Helfrich deposition at 9-10; Doc ID # 59.)

¶18 The west hallway had both an east and west side to it. Prior to the renovations in the 1980s, the interior doors were all wooden doors with a transom over the top of the doors because of the high ceilings in all of the rooms and in the whole cottage. (Helfrich

deposition at 11-12; Doc ID # 59.) When the three large dorm rooms on the east side of the hallway were remodeled, all of the doors were replaced with metal doors. At that time the transoms above the doors were replaced. Unfortunately, the transoms on the west side of the hallway were left in place primarily due to structural and financial reasons. (Helfrich deposition at 12; Doc ID # 59.) When the locking mechanisms on the east side of the hallway were replaced (rooms 1-6) they were placed horizontally because of the header of the door allowed for horizontal connection. (Helfrich deposition at 13; Doc ID # 59.) Unfortunately, on the west side of the hallway because the doors had the wooden transom above them, the locks had to be installed vertically on those doors. The vertical metal locking mechanism on the doors to rooms 7-16 became "a management nightmare for those magnets." (Helfrich deposition at 15; Doc ID # 59.) Since the magnetic locking pieces were vertical, when the doors were opened and shut and slammed, the space would change and the gap between the doors would fluctuate. Thus, constant adjustment of the screw mechanism needed to occur in order to adjust that gap between the door and the frame. (Helfrich deposition at 16; Doc ID # 59.) Helfrich, in his deposition, described continual, "never ending" problems with doors 7-16. (Helfrich deposition at 17; Doc ID # 59.) Helfrich testified that since the doors were wood, anytime there was a temperature change or drastic changes in the season, electricians and maintenance were having to constantly come over and readjust the alignment of the doors. (Helfrich deposition at 17-18; Doc ID # 59.)

¶19 Helfrich testified in detail that he would relay his concerns regarding the problems with the locking mechanisms on doors 7-16 on at least a monthly basis "up his chain of command" including to Ron Crouse and Darrell Nitschke. Nitschke was the prior Director

of YCC. Prior to the incident which is the basis for this lawsuit, Ron Crouse was hired as Director of YCC.

¶20 Helfrich testified as to the ongoing and continuous problems regarding the locking mechanism. Indeed, he acknowledged that given the condition of the locks on doors 7-16 at Brown Cottage, it was just a matter of time until a significant incident occurred. (Helfrich deposition at 49; Doc ID # 59.) Indeed, he indicated it appeared to be "inevitable" that individuals would escape because of the problems.

LEGAL ARGUMENT

1. The District Court Has Jurisdiction to Hear Markel's Claims As He Is Not Seeking Or Obtaining Double Recovery.

¶21 The Petitioners claim that Title 65 abolishes jurisdiction for all claims by an employee against an employer for workplace injuries where the injured employee has received workers compensation benefits. The Petitioners in their brief readily acknowledge that they already pursued this defense in their prior motion to dismiss already heard by the district court. Petitioners also acknowledge that the district court has already addressed this legal theory and denied it noting that an injured employee can pursue a cause of action against his employer for an intentional injury. In their motion for summary judgment, the petitioners asserted, and now reassert, that the district court has misinterpreted the legal issues and claims that the pertinent issue is whether or not an individual can pursue both a claim for benefits under workers compensation and a separate action for damages under the intentional exception to the injury provision. The Petitioners rely on *Schlenk v. Aerial Contractors, Inc.*, 268 N.W.2d 466, 472 (N.D. 1978). Petitioners argue that even if a person can sue their employer under the intentional injury exception, it does not change the statutory scheme and, thus, if an individual seeks and obtains any benefit under workers

compensation law, they are barred from even pursuing an intentional act exclusion against the employer. Petitioners' position is simply misplaced.

¶22 While in most instances the worker's compensation system is the exclusive remedy, there are clear exceptions. Indeed, this Court has recognized the intentional injury exception to the exclusive remedy provisions of the worker's compensation statutes. *See Zimmerman v. Valdak Corp.*, 1997 ND 203, 570 N.W.2d 204. The *Zimmerman* Court held:

> We conclude the North Dakota Worker's Compensation Act does not preclude recovery for true intentional injuries and an employee can pursue a civil cause of action against his employer for a true intentional injury. An employer is deemed to have intended to injure if the employer had knowledge an injury was certain to occur and willfully disregarded that knowledge.

Zimmerman, 1997 ND 203, ¶ 21, 570 N.W.2d 204 (emphasis added).

¶23 In *Zimmerman*, Joshua Zimmerman, 15 years old at the time, was injured while employed at the Valley Dairy Car Wash in Grand Forks. This Court noted that, "Joshua sought compensation from the North Dakota Worker's Compensation Bureau. The Bureau accepted liability and paid associated medical expenses. The Bureau, however, denied disability and vocational rehabilitation benefits, finding he had not sustained a catastrophic injury under N.D.C.C. § 65-05.1-06.1(2)(c)(1) and that Joshua could earn wages equal to his preinjury wages as a pizza delivery boy." *Id.* Accordingly, in 1997, almost 20 years after the *Schlenk* decision, this Court analyzed the intentional injury exception to the worker's compensation laws. In that case, the Court did not conclude that Joshua Zimmerman's claims were barred in light of the fact that he had received some benefits under worker's compensation laws. Indeed, that would have been the initial threshold issue for the Court to consider. The Court did not hold that Zimmerman's claim was outright

barred because he had received worker's compensation benefits. Instead, the Court recognized that Joshua had received some benefit from WSI in the form of medical expenses. WSI specifically denied disability and vocational benefits. That factual scenario is nearly identical to the present case. WSI denied coverage for Markel's PTSD and specifically denied him disability benefits. After WSI's denial, Markel contested the finding and ultimately a resolution and settlement of disputed claim regarding worker's compensation benefits was entered into. The nature and type of benefits being sought in this lawsuit are not similar to or already covered by WSI. In short, Markel will not be receiving any double recovery if he prevails in this suit.

¶24 The district court correctly previously denied the Petitioners' motion to dismiss and motion for summary judgment on this very theory. The facts of this case, regarding this issue, have not changed since that time.

2. <u>Title 65 Does Not Abolish Jurisdiction Over Markel's Intentional Injury Claim.</u>

¶25 The Petitioners initially requested that the district court dismiss Markel's claim as soon as the suit was started based on the claimed failure to satisfy the intentional injury exception under the worker's compensation provisions. The district court addressed the matter in its Order on Motion to Dismiss dated January 21, 2016 (Doc ID #27). The district court specifically recognized that the Complaint in this case alleged that the administrators at YCC were made aware of the faulty locking mechanisms, that they not only failed but refused to remedy the problems, and that dangerous individuals were housed in areas with faulty locking mechanisms. <u>The district court concluded, "on the basis of those allegations, the court could find that the defendants had knowledge that an injury was certain to occur." The discovery to date reflects that those allegations are far more than substantiated.</u> The

district court applied the *Zimmerman "*substantial certainty" standard where this Court first recognized an intentional torts exception.

¶26 Director Bertsch, Director Bjergaard, and Directory Crouse all specifically deny any prior knowledge of faulty locking mechanisms prior to December 9, 2012. Despite the denial, the program director for Brown Cottage, for more than 33 years in that position, testified quite clearly regarding continually and repeatedly raising these concerns with these individuals. (Helfrich deposition at 26; Doc ID # 59.) Helfrich's testimony was clear and unequivocal regarding raising those concerns continuously. (Helfrich deposition at 236; Doc ID # 59.) In light of Helfrich's testimony, in contrast to the testimony of the other DOCR employees, there is a serious question of disputed fact and more importantly regarding the credibility of the witnesses. If representatives of the defendants are found not to be credible in their denial, that will also impact the apparent intentionality of their action and resulting injury.

¶27 In addition to the strong and unequivocal testimony of Helfrich, there are other serious questions in this case.

¶28 The audit which was conducted specifically at the request of the Director of DOCR raised significant questions regarding the locking mechanism and overall safety situation at YCC. Despite specific findings of prior assault and problems, Director Bertsch was "not concerned." (Bertsch deposition at 30-31; Doc ID # 60.) Her lack of concern suggests or supports the intentionality of the actions.

¶29 Helfrich also specifically testified that the audit contained findings and information that documented Crouse's acknowledgement of information regarding faulty locking mechanisms prior to December 9, 2012. (Helfrich deposition at 70; Doc ID # 59). That

information, along with 90 percent of the audit report, appears to have been redacted from the audit but not by any of the individuals at DOCR or YCC. If the audit report contains a clear contradiction of Crouse's testimony, it also reflects on the intentionality.

¶30 The petitioners have also not produced any records from 2011 regarding requisition orders. The lack of production of this information is troubling

¶31 Helfrich also testified that, in general, communications documenting the request that these locks be fixed or addressed would be contained in email communications between the program directors and plant services or other individuals at YCC. Helfrich testified there would certainly be significant emails and documentation of these issues. Despite his testimony, the defendants have not produced even one email that addresses these issues. The defendants cannot redact and fail to produce evidence and then claim the material evidence is not in dispute.

¶32 In light of the fact that the facts as outlined above demonstrate disputed facts as to the intentionality of the injury, in conjunction with the apparent failure to adequately and reasonably participate in the discovery process, the district court denied Petitioners' motion for summary judgment. Applying the *Zimmerman* standard, the district court found that Markel may be able to prove an injury to him was certain to occur because administrators at YCC were made aware of the faulty locking mechanisms [and] not only failed but refused to remedy the problems, and that dangerous individuals were housed in areas with faulty locking mechanisms.

¶33 In response to *Zimmerman*, the North Dakota Legislature further defined the scope of the intentional injury exception by amending the Workers' Compensation Act to state: "The sole exception to an employer's immunity from civil liability under this title . . . is an

action for an injury to an employee caused by an employer's intentional act done with the conscious purpose of inflicting injury." On June 30, 2016, this Court was again asked to decide whether an employer could face a civil suit under the intentional torts exception to the workers' comp exclusive remedy rule in *Bartholomay v. Plains Grain & Agronomy, LLC.*

¶34 This Court concluded that under § 65-05-06, N.D. Cent. Code, the employer must engage in an "intentional act" and have a "conscious purpose of inflicting the injury." *Bartholomay*, 2016 ND 138 ¶ 10. Petitioners argue that it is not enough for Markel to prove his injury was "certain to occur" under *Zimmerman* and that Markel must also meet the *Bartholomay* standard. YCC awareness of faulty locks and refusing to repair or replace them proves that the YCC administrators did commit an intentional act with a "conscious and deliberate intent directed to the purpose of inflicting injury." At a minimum those facts raise disputed facts regarding the intentional injury exception.

¶35 First, Markel has shown that YCC has engaged in an intentional act. Markel has alleged that administrators at YCC and DOCR were made aware of faulty equipment at YCC, including, but not limited to locking mechanisms on doors to various rooms in certain cottages on the YCC campus. (Helfrich deposition at 26, 31-32; Doc ID # 59). Markel has alleged that despite the knowledge of these dangers and problems, YCC and DOCR never addressed or remedied the problems. (Helfrich deposition at 33, 128; Doc ID # 59.)

¶36 Markel also alleges that administration at both YCC and DOCR had been made aware of faulty locking mechanisms well in advance of the aggravated assault and escape on December 9, 2012. (Helfrich deposition at 32, 94; Doc ID # 59.) Moreover, Markel

has asserted that administration of both YCC and DOCR refused to fix the faulty locking mechanisms despite this knowledge. ((Helfrich deposition at 33, 128; Doc ID #59.)

¶37 Count 1 against the State asserts that the State committed "wrongful" and "negligent" acts including but not limited failing to fix or correct faulty locking mechanisms. The wrongful acts consist of YCC and DOCR's intentional act in not fixing the locking mechanism. As noted above, the North Dakota Supreme Court has held "an employer is deemed to have intended to injure if the employer had knowledge an injury was certain to occur and willfully disregarded that knowledge." *Zimmerman*, 1997 ND 203, ¶ 21, 570 N.W.2d 204.

¶38 Second, the facts as outlined above demonstrate clearly that YCC has acted with a "conscious purpose of inflicting the injury." Petitioners argue Markel is unable to satisfy the standard of proof required under *Bartholomy* because Markel has been unable to show that his injuries were a result of an intentional act committed by the YCC with the conscious purpose of harming Markel. Rather, his injuries were a result of the youth residents at YCC. However, the entire crux of the plaintiff's claim is the culpability and actions and liability of the state actors in this case. Indeed, the heart of Markel's claim is the intentional injury exception to the worker's compensation provisions. Although certain juvenile inmates caused the actual physical assault, this claim is being brought against the state employees for their actions in all but assuring this assault would occur.

¶39 Under the *Bartholomay* standard, "gross, wanton, willful, deliberate, intentional, reckless, culpable, or malicious negligence" falls short "of a conscious and deliberate intent directed to the purpose of inflicting injury." *Bartholomay*, 2016 ND 138 ¶ 10. Under the

circumstances of this case, the conduct of the YCC goes beyond gross, wanton, willful, deliberate, intentional, reckless, culpable, or malicious negligence.

¶40 Helfrich, in his deposition, described continual, "never ending" problems with doors 7-16. (Helfrich deposition at 17; Doc ID # 59.) Helfrich testified that since the doors were wood, anytime there was a temperature change or drastic changes in the season, electricians and maintenance were having to constantly come over and readjust the alignment of the doors. (Helfrich deposition at 17-18; Doc ID # 59.)

¶41 As the program director for Brown Cottage for over 33 years, there is no other single individual that would have the type of experience and exposure to the situation at Brown Cottage and the problems with the locking mechanisms. Helfrich testified in detail that he would relay his concerns regarding the problems with the locking mechanisms on doors 7-16 on at least a monthly basis "up his chain of command" including to Ron Crouse and Darrell Nitschke. Nitschke was the prior Director of YCC. Prior to the incident which is the basis for this lawsuit, Ron Crouse was hired as Director of YCC.

¶42 Helfrich testified as to the ongoing and continuous problems regarding the locking mechanism. Indeed, he acknowledged that given the condition of the locks on doors 7-16 at Brown Cottage, it was just a matter of time until a significant incident occurred. (Helfrich deposition at 49; Doc ID # 59.) Indeed, he indicated it appeared to be "inevitable" that individuals would escape because of the problems.

¶43 Jurisdiction is not abolished under Section 65-05-06. Although Title 65 has narrowed the scope of the intentional injury exception, Markel has sufficient evidence to prove YCC committed an intentional act with the conscious purpose of inflicting injury thus removing YCC's immunity from civil liability as an employer.

3. The District Court Has Jurisdiction over Markel's Constructive and Retaliatory Discharge Claim Because Markel Was Not Required to Further Exhaust His Administrative Remedies.

¶44 Respondent's petition this Court for a supervisory writ directing the district court to vacate its order granting Petitioners Motion to Dismiss Count 2. In January 2016, the district court dismissed Count 2 on the grounds it lacked subject matter jurisdiction because Markel failed to pursue administrative remedies that were available to him prior to suing for constructive and retaliatory discharge. The State argued dismissal of Count 2 was appropriate claiming that Markel failed to "exhaust his administrative remedies." In essence, the State asserted that Markel should have let himself be fired and then seek an administrative hearing on that issue. Parties are not required to exhaust administrative remedies if exhaustion would be futile. *Tracy v. Central Cass Public School District*, 1998 ND 12, ¶ 13, 574 N.W.2d 781. Indeed, "the exhaustion of remedies doctrine has several well recognized exceptions." *Kadlec v. Grindale Township Board of Township Supervisors*, 198 ND 165, ¶ 25, 583 N.W.2d 817 (emphasis added). The Court noted:

> Whether "exhaustion of remedies" applies in each case depends on a mixed bundle of considerations. "Including, but not limited to, expertise of administrative bodies, statutory interpretation, pure questions of law, constitutional issues, discretionary authority of the courts, primary, concurrent, or exclusive jurisdiction, inadequacies of the administrative bodies, etc." Thus, if exhaustion would be futile, or if a case involves only the interpretation of the unambiguous statute, exhaustion is not required.

Kadlec, 1998 ND 165, ¶ 25 (citations omitted) (emphasis added).

¶45 In this case exhaustion of remedies was futile. Markel would have had to stay and be terminated. After almost a 28-year exemplary record of employment with the State as a well-liked dedicated employee, Markel did not want to end by being "fired." Indeed, in this case, the exhaustion clearly would have been futile given the facts of this matter.

¶46 The facts of this case reflect that as soon as Markel retained an attorney and filed for worker's compensation benefits, Crouse and YCC turned against him. (Crouse deposition at 25, 80; Doc ID # 61.) It is evident by the eight month struggle with YCC including the fact that despite medical verification of an inability to return to work, Crouse was stating Markel's leave was unsupported. (Crouse deposition at 82, 83, 84, 85; Doc ID # 61.) The facts reflect that Crouse arbitrarily refused to even grant Markel's request for Shared Leave. It is reflected in the fact that Crouse withheld his approval of the resolution and stipulation with WSI in an attempt to coerce Markel to resign. It is reflected by the fact that YCC by and through assistant attorney general Tyler attempted to specifically utilize the shared leave benefit as leverage to force Markel to resign and release all claims against the State. It is reflected by the fact that after all of this, including medical verification of inability to return to work, Crouse advised Markel that disciplinary action was about to occur, including termination. The question regarding whether or not an action is futile is whether or not some different outcome could have been obtained. In this case, despite the fact that Markel apprised Crouse's supervisors of the situation, advised the director of OMB of the situation, and specifically discussed the matter with an assistant attorney general representing YCC, Crouse's direction and decision could not be changed. Allowing himself to be fired and then further trying to change Crouse's mind clearly would have been futile.

¶47 As additional evidence that further administrative remedies were futile, the undersigned contacted LeAnn Bertsch, the Director of the North Dakota Department of Corrections and Rehabilitation on July 24, 2014. (See Exhibit 3 of Lawrence King Affidavit; Doc ID #17.) That correspondence outlined the allegations regarding retaliatory

discharge. In response DOCR, through Bertsch, rejected Markel's position. (See Exhibit 4 of Lawrence King Affidavit; Doc ID #17.) In follow up the undersigned emailed Director Bertsch requesting a face-to-face meeting. (See Exhibit 5 of Lawrence King Affidavit; Doc ID #17.) In response, the undersigned was advised that the DOCR did not see any purpose for having a meeting. Director Bertsch's refusal to even meet with Markel and his counsel simply confirms that any sort of administrative process would have clearly been futile.

CONCLUSION

¶48 The case law concerning supervisory writs is clear: this extraordinary relief is only to be used in limited circumstances. Those circumstances include cases of emergency or to prevent injustice. Petitioners request does not rise to this level. Granting a supervisory writ would lead this Court down a slippery slope, inundating the Court with requests to invoke its original jurisdiction to review every case where a party does not agree with the rulings of district court. This matter is not appropriate for such an extraordinary measure.

¶49 Alternatively, if the Court exercises its supervisory jurisdiction over Count 1, it should equally exercise its authority over Count 2. The trial court incorrectly concluded it did not have jurisdiction over the retaliatory discharge claims based on the alleged failure to exhaust administrative remedies.

¶50 For the reasons as stated above and the reasons set forth in Respondents' Brief, Respondents respectfully request this Court deny Petitioners' Petition for Supervisory Writ or, in the alternative, grant the Respondents' Petition for a Supervisory Writ.

Dated this 5th day of September, 2017.

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CERTIFICATE OF COMPLIANCE

¶51 The undersigned certifies the above brief is in compliance with N.D.R. App. P. 32(a)(8)(A) and the total number of words in the brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certification of compliance totals 5704 words.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Respondent Markel's Brief in Opposition to Petitioners' Petition for Supervisory Writ and Brief in Support of Respondent's Petition for Supervisory Writ** was on the 5th day of September, 2017, served as follows:

James E. Nicolai – via email – jnicolai@nd.gov

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STATE OF NORTH DAKOTA

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Respondent Markel's Brief in Opposition to Petitioners' Petition for Supervisory Writ and Brief in Support of Respondent's Petition for Supervisory Writ** was on the 6th day of September, 2017, served as follows:

James E. Nicolai – via email – jnicolai@nd.gov

The Honorable Bruce Haskell – via email – bhaskell@ndcourts.gov

By: /s/ Lawrence E. King
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