20220016

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEBRUARY 22, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Robert V. Bolinske, Plaintiff/Appellant, vs. Dale V. Sandstrom Gail Haggerty and Robert R. Port, Defendants/Appellees.	)	Supreme Ct Case No.: 20220016 District Ct Case No. 08-2019-CV-00877

APPEAL FROM THE BURLIEGH COUNTY DISTRICT COURT JUDGMENT DATED NOVEMBER 8, 2021 AND/OR ANY OTHER CONCLUDING DOCUMENTS AND ANY AND ALL ADVERSE RULINGS OF THE DISTRICT COURT

SOUTH CENTRAL JUDICIAL DISTRICT

BREIF OF PLAINTIFF AND APPELLANT

ROBERT V. BOLINSKE

ORAL ARGUMENT REQUESTED

Respectfully Submitted,

/s/ Robert V. Bolinske

Robert V. Bolinske (03266)
Attorney Pro Se
7600 Northgate Drive
Bismarck, ND 58504
(701) 390-6015
FirstRVB@gmail.com

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(2) The District Court erred in concluding that the action was "frivolous" and then awarding costs and attorney fees.

(3) The District Court erred in refusing to allow Plaintiff Bolinske to pursue any discovery whatsoever.

(4) The District Court erred in granting the Motion to Dismiss in light of all of the law, facts and circumstances here present and applicable.

(5) The District Court erred in failing to make any findings, response or decision on the several issues raised by Plaintiff Bolinske in Plaintiff Bolinske's Response (dated October 25, 2021) to the Order Granting Motion to Dismiss.

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(1) Did the District Court err in concluding that the doctrines of res judicata/collateral estoppel apply (when they clearly do not) in that prior litigation in the Federal Court System was dismissed "without prejudice" and not on the merits?

(2) Did the District Court err in concluding that the action was "frivolous" and then awarding costs and attorney fees?

(3) Did the District Court err in refusing to allow Plaintiff Bolinske to pursue any discovery whatsoever?

(4) Did the District Court err in granting the Motion to Dismiss in light of the law, facts and circumstances here present and applicable?

(5) Did the District Court err in failing to make any findings, response or decision on the several issues raised by Plaintiff Bolinske in Plaintiff Bolinske's Response (dated October 25, 2021) to the Order Granting Motion to Dismiss?

STATEMENT OF CASE

¶1 In February 2019, Bolinske commenced this action against former Supreme Court Justice Dale Sandstrom, his wife, Burleigh County District Judge Gail Hagerty, and "blogger" Robert R. Port. (App. P. 00003, Register of Actions)

¶2 Bolinske here alleged in his Amended Complaint many distinct causes of action, having separate and distinct statutes of limitations: Defamation, Malicious Prosecution; Abuse of Process; Conspiracy; Governmental bad Faith; Intentional Infliction of Emotional Distress and/or Negligent Infliction of Emotional Distress; Tortious Outrage; Denial of Substantive and Procedural Due Process. (App. P. 00007, Amended Complaint)

¶3 Sandstrom and Hagerty moved to stay Bolinske's case because Bolinske previously filed a similar action in Federal Court and that Motion was granted on or about May 8, 2019.

¶4 The federal district court thereafter dismissed Bolinske's case, *Bolinske v. North Dakota Supreme Court,* Civil No. 18-213 (DWF/CRH) (D.N.D. June 20, 2019), Bolinske appealed the dismissal to the Eighth Circuit Court of Appeals, , and the Appellate Court affirmed the dismissal. *Bolinske v. North Dakota Supreme Court*, No. 19-2516 (8th Cir. Aug. 4, 2020). Bolinske petitioned for certiorari, but the Supreme Court denied his petition. *Bolinske v. North Dakota Supreme Court*, 141 S. Ct. 1517 (U.S. 2021).

¶5 Sandstrom and Hagerty, then moved to lift the previously entered stay and that motion was granted on or about June 18, 2021.

¶6 Sandstrom and Hagerty then virtually immediately brought a Motion to Dismiss. Bolinske then moved for an extension of time to respond to the Motion to Dismiss and requested from counsel dates upon with he could depose Sandstrom and Hagerty. The

Motion for Extension of Time to Respond was granted, but counsel for Sandstrom and Hagerty refused to provide dates for their depositions, thus denying Bolinske the opportunity to seek discovery in this case.

¶7 The Court then issued an Order Granting Motion to Dismiss on October 7, 2021, entitling Sandstrom and Hagerty to summary judgment of dismissal with prejudice on all claims asserted in Bolinske's Amended Complaint. The Court further concluded that Bolinske's action was "frivolous" and held that the that State Defendants were entitled to an award of reasonable attorneys' fees and costs incurred in this action. [Index # 96]

¶8 The District Court's decision was based virtually entirely on the doctrines of collateral estoppel and res judicata, the Court apparently, erroneously believed that the federal action litigated all the issues and dismissed them "with prejudice." That conclusion, though, is clearly ERRONEOUS in that, as will be shown, the federal action was dismissed "WITHOUT PREJUDICE."

¶9 Despite the fact that the Court's error was pointed out to it in Plaintiff Bolinske's Response to Order Granting Motion to Dismiss dated October 25, 2021, the Court took no action to correct it's decision.

¶10 Thereafter, on November 4, 2021, the Court entered its Order for Judgment dismissing Bolinske's Amended Complaint, and all claims therein, with prejudice and awarding Defendants, Sandstrom and Hagerty, attorney fees in the amount of $11,559.40. (App. P. 00032)

¶11 Bolinske's action against Defenat Port was previously dismissed because of

circumstances resulting in Bolinske not responding to Port's Motion to Dismiss (1) because Bolinske was involved in a huge flood of Apple Creek, his home being entirely encircled by flood water, (2) because Bolinske believed that he and Attorney Rogneby had come to an agreement to resolve the matter, and (3) despite the fact that Bolinske communicated those facts to the Court. Those matters will be addressed in a subsequent Motion to Vacate Judgment in the Port Matter after it has been remanded to the District Court.

¶12 Defendants, Sandstrom and Hagerty, brought a motion to dismiss this case pursuant to NDRCP12. That Rule provides as follows:

> "(d) **Result of presenting matters outside the pleadings.** If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." (Emphasis added)

¶13 That motion thus became, because of matters outside the pleadings being presented, actually a motion for summary judgment pursuant to NDRCP 56.

¶14 Rule 56, NDRCP, provides, in part, as follows:

> "(f) **When affidavits are unavailable.** If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
> (1) deny the motion;
> (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or
> (3) issue any other just order." (Emphasis added)

¶15 For reasons hereinafter explained, and set forth, plaintiff Bolinske respectfully requested that the District Court either (1) deny the motion or (2) order a continuance to enable affidavits to be obtained and depositions to be taken and enable both plaintiff Bolinske and defendants to take advantage of all other discovery procedures provided by

the North Dakota rules of Civil Procedure and (4) direct that an appropriate Scheduling Order proposal be submitted to the Court.

¶16 Because of the stay previously imposed this case is "just a baby." No discovery at all has been detained by either party.

¶17 Plaintiff Bolinske did, however, attempt to take the depositions of defendants Sandstrom and Hagerty. On August 4, 2021, he requested that defendants' attorney Mat Sagsveen provide him with dates on which his clients were available for the taking of their depositions. By letter dated August 5, 2021, Attorney Sagsveen refused to provide any dates and stated that he would not agree to schedule any depositions and would oppose any other requested discovery. The factual matters set forth in this Brief were submitted to the District Court in Affidavit form.

¶18 It is suggested that Attorney Sagsveen had a duty to cooperate with the taking of the requested depositions and that he had no authority under the N.D.R.C.P. to unilaterally decide and dictate that there could be no discovery in this case.

¶19 Consequently, Bolinske respectfully invokes the protections provided by Rule 12, NDRCP to the effect that "All parties be given a reasonable opportunity to present all the material" they believe "pertinent to the motion." And, Bolinske further requests that this Court specifically grant Bolinske the protections provided to him by Rule 56 N.D.R.C.P. because no discovery has even yet occurred. It is suggested that a unilateral denial of requested discovery violates the provisions of Rule 12 and 56 and essentially denies justice itself.

¶20 Therefore, Bolinske requested that the District Court issue an order contemplated by Rule 56, N.D.R.C.P., as discussed above.

¶21 It is respectfully suggested that we, the parties and the court, must have access to ALL the facts pertinent to this case established through discovery before we can or should apply legal principles to them. To refuse to allow the use of any of the tools of discovery which the law of our state provides to plaintiff Bolinske, is totally unfair, unjust and contrary to the spirit of the N.D. Rules of Civil Procedure.

¶22 It is basic to our system of justice that both sides should have a full and fair opportunity to obtain and present all material facts before a decision and ruling on the merits is made. This basic truth is clear from prior rulings of the N.D. Supreme Court. Thus, in Johnson Farms v. McEnroe, 1997 ND 179, 568 N.W.2d 920 (1997), the Court held that the trial court erred in failing to allow plaintiff further time for discovery before ruling on a summary judgment motion where the request was sufficient to put the trial court on notice that plaintiff needed more time for discovery.

¶23 And, see Aho v. Maragos, 1998 N.D, 107, 579 N.W. 2d 165 (1998) where the N.D. Supreme Court held that the trial court erred in denying a motion for a continuance to conduct further discovery so that the party could meaningfully oppose a summary judgment motion where the time frame for conducting the hearing had been accelerated.

¶24 In the case now before the Court there has been no discovery, and defendants are, for suspect reasons, seeking not to have to even admit or deny the allegations of my (Bolinske's) Complaint.

¶25 It is suggested that simply because defendants have held prominent positions as Justice and Judge that they are entitled to no more rights than any other litigant, nor the right to deny Bolinske even basic discovery.

¶26 It is further pointed out that in a motion for summary judgment defendants have the

burden to establish that there are "no genuine issues of material fact", also considering the inferences to be drawn from the facts. Further, the evidence must be construed in favor of the party against whom the motion is made. Mody v. Gjesdal, 123 N.W.2d 33 (N.D. 1963)

STATEMENT OF FACTS and ARGUMENT

¶27 In his Amended Complaint, Bolinske alleges serious ethical and criminal violations by defendants, former N.D. Supreme Court Justice Sandstrom and N.D. District Court Judge Hagerty. Defendants Sandstrom and Hagerty are husband and wife.

¶28 Bolinske's Amended Complaint sets forth the factual background for his allegations against defendants. Sandstrom and Hagerty and it is hereby incorporated herein as if set forth in full.

¶29 Bolinske is a long-time trial attorney with many years of civil and criminal litigation experience. Bolinske graduated from the University of North Dakota, Magna Cum Laude, in 1966, was there in the Honor's Program and was elected to Phi Beta Kappa. Bolinske then attended and graduated from Harvard Law School in 1969. Bolinske then joined the third largest law firm in Minneapolis-St. Paul, Cant, Haverstock, Gray, Plant, Mooty and Anderson, where he worked in civil litigation for approximately 5 ½ years. Bolinske then returned to his home state of North Dakota and practiced law with what eventually became Zuger, Kirmis, Bolinske and Smith, and later started his own law firm, the Bolinske Law Firm.

¶30 Bolinske has handled thousands and thousands of cases in which he has represented everyone from America's largest corporations (General Motors, MasseyFerguson, et. al) and America's largest insurance companies (nearly all of them, too many to list) to America's most poor and "put upon" (E.g., a quadriplegic Native American in a medical

malpractice action in a case in which Bolinske was determined to get his client a van with a lift, so that he could be driven down to the Missouri River to simply see and enjoy the river. And, he did).

¶31 Bolinske has handled nearly every type of litigation imaginable. E.g. plaintiff and defendant personal injury, plaintiff and defendant products liability, plaintiff and defendant medical malpractice, plaintiff and defendant divorce, criminal cases (out of approximately 16 criminal jury trials, he has lost only 1 ½), property disputes, workers compensation cases, and on and on.

¶32 Bolinske is satisfied that he knows what he is doing, and that he does it very well. He says this not to impress, but simply because, in over 50 years of litigation, he has proven time after time, that to be the case.

¶33 A copy of Bolinske's resume, in the form of a campaign flyer, is attached hereto as Exhibit A.

¶34 Bolinske is entirely confident that if given a chance to litigate his allegations against defendants Sandstrom and Hagerty that he would be able to convince a jury of the accuracy of all or virtually all of them. He suggests that justice, and our legal system, requires that he be given that chance. Bolinske didn't make his allegations against Sandstrom and Hagerty lightly, and certainly is not dumb enough to risk everything he has worked for his entire life, his career, and reputation, if he were not certain that he could prove them.

¶35 Come now defendants, Sandstrom and Hagerty, though, and suggest that this case be ended, dismissed, before it has even begun. Why? Bolinske suggests that they are quite frightened by what Bolinske will discover about them. And, they should be.

¶36 Defendants, Sandstrom and Hagerty, have yet to either admit or deny Bolinske's

allegations, because they have not yet put in an Answer. Bolinske suggests that he knows well just exactly why they seek to avoid admitting or denying. And, Bolinske suspects that so do all participants in this proceeding also know why.

¶37 Bolinske suggests that EVERYONE is entitled to justice and the fair use of the processes of our legal system. Not just the rich, the powerful, and the politically well connected, but also the weak and the poor and the powerless. That is what we call equal justice under the law.

¶38 Much of our legal process, contained in the North Dakota Rules of Civil Procedure, is devoted to "discovery," namely to have the right to fully investigate and establish the facts necessary to eventually prove their case. In fact, one entire section (V.) entitled "Depositions and Discovery" is devoted to just that end: Rule 26: General provisions governing discovery. Rule 27: Depositions before Action or pending appeal. Rule 30: Depositions by oral examination. Rule 33: Interrogatories to parties. Rule 34: Production of documents, et. al. Rule 35: Physical and mental examination. Rule 36: Requests for admission. Bolinske has as yet not had an opportunity to employ any of them.

¶39 Bolinske has alleged in his Amended Complaint many distinct causes of action, having separate and distinct limitations: Defamation, Malicious Prosecution; Abuse of Process; Conspiracy; Governmental Bad Faith; Intentional Infliction of Emotional Distress and/or Negligent Infliction of Emotional Distress; Tortious Outrage; Denial of Substantive and Procedural Due Process.

¶40 Each of Bolinske's claims for relief, it is believed, have a six-year statute of limitations (N.D.C.C. § 28-01-16), except defamation, which is 2 years. (But which time may be tolled by the provisions of N.D.C.C. § 32-43, the Uniform Correction or

Clarification of Defamation Act.) Here the 2-year statute of limitations was in fact tolled because Bolinske served a Demand for Retraction on defendants, Sandstrom and Hagerty on January 14, 2017.

¶41 Further, Bolinske also contends that defendants, Sandstrom and Hagerty, have engaged in the commission of a continuing tort against Bolinske, which, if proven, would tie all of Sandstrom and Hagerty's actions against Bolinske together, essentially thereby tolling the statute of limitations until 6 years after their last wrongful, tortious act. See, e.g., Fox v. Higgins, 149 NW2d 369 (N.D. 1967) and Roemmich v. Eagle Eye Development, 386 F. Supp. 1090 (2005) (U.S. District Court, North Dakota, Southwestern Division).

¶42 Further, if Bolinske can establish through discovery that defendants, Sandstrom and Hagerty, have fraudulently concealed wrongful tortious conduct, he can commence an action within one year from the time that discovery is made. See N.D.C.C. § 28-01-24.

¶43 Further, with respect to the statute of limitations issues raised in this case regarding defamation, it is clear that that 2-year period begins to run only after it has been discovered. The claim for defamation in this case was, it is recalled, not discovered or known to Bolinske for several months, which would cause the action for defamation to have been commenced within the statute, given the 90-day tolling provisions above discussed. In any event, discovery is needed on this issue as well as the many other causes of action alleged herein.

¶44 Further, on the statute of limitations issue, the law is clear that that defense cannot be used in a motion like the one before the Court but instead must be raised only by "answer." Please see N.D.C.C. § 28-01-39 which provides that "The objection that an

action was not commenced within the time limited by law can only be taken by answer." (Emphasis added)

¶45 As the Court knows, there has been no "Answer" served or filed in this case. After the Court lifted the stay on the case by its' Order dated June 18, 2021, it gave defendants ten days from the date of the Order to respond to the Summons and Complaint, and they responded, not with an Answer, but with the subject motion to dismiss.

¶46 The factual background to this case is, in large part, set forth in Bolinske's Amended Complaint. That document will provide the Court with an "overview" of this case. It is attached hereto and hereby incorporated herein just as if set forth in full as Exhibit B. (It is respectfully requested that the Court read each Exhibit at the time it is reference in this Brief in order for the Court to more easily "follow" subsequent discussion set forth in this Brief.)

¶47 The Court's attention is next directed to Bolinske's Complaint to Disciplinary Counsel against Supreme Court (former) Justice Dale Sandstrom and District Court Judge Gail Hagerty, husband and wife, dated March 8, 2017. That document is attached hereto and hereby incorporated herein just as if set forth in full as Exhibit C.

¶48 The Court's attention is next directed to Bolinske's Petition to the North Dakota Supreme Court Seeking Leave to Appeal the Disciplinary Board's decision in the Hagerty Grievance against Bolinske. That document is dated August 28, 2017 and is also attached hereto and incorporated herein just as if set forth in full as Exhibit D.

¶49 The Court's attention is next directed to Appellant Bolinske's Petition for Rehearing in the Discover Bank v. Robert V. Bolinske case. That document dated 12-10-20 (App. P. 00075) is incorporated herein just as if set forth in full as Exhibit F. Bolinske

has been a trial attorney for over 50 years. His resume and experience suggest that he just may be somewhat intelligent and intuitive. To say that "I smell a rat" in this entire fiasco is to put it mildly. Bolinske sense a cover-up of major proportions. He suspects that the N.D. Supreme Court failed to investigate his claims against Sandstrom originally to protect Sandstrom's and the Court's reputation. He suspects that when he "pushed" the matter, at least some members of the Court became concerned that it, and they, were now involved in the matter as potential targets. It became "Nixon City." It wasn't the original alleged crime of Sandstrom for which the Court was responsible, but the Court becomes obviously suspect if it can be proven that it (or, at least some of its members) "covered up" Sandstrom's actions, which is exactly what Bolinske believes to be true. How else can one explain all the circumstances set forth above, and in the Exhibits? And why, pray tell, won't former Justice Sandstrom either admit or deny Bolinske's allegations against him, either to Bolinske or to the press? Bolinske suggests that these several persons and entities reference above have all, or some of them, conspired to throw Bolinske "under the bus," and attempt to destroy him, his career, his reputation and essentially his life in a vicious attempt to protect themselves. Bolinske respectfully suggests that, given all the strange and suspect turns this entire matter has taken that he should be entitled to pursue the truth of his allegations in this case. No one is, or should be, above the law. We now have two sitting Justices of the N.D. Supreme Court, at the very same time they were defendants in a case brought against Bolinske, actually sitting on, hearing, and deciding the case against him. Justice McEvers, one of the named defendants in Bolinske's federal action, actually acted as the Chief Justice, and wrote the opinion to boot. Justice Crowthers was the other. Clearly, they should both know that they were engaging in unethical conduct in the form

of a serious conflict of interest. Again, please see Exhibit F for the details.

¶50 Attorney Sagsveen claims that Bolinske failed to file a Notice of Claim in a timely manner (180 days). Frankly, Bolinske does not know at this time if he did or not. He does use the date "September 19, 2019" as the date a Notice of Claim was filed, but it appears that could have been either an error on his part or a typographical error. Please note that Attorney Sagsveen states that Bolinske alleges that he filed a Notice of Claim on that date, but please note that the date of another Notice of Claim Bolinske filed, is dated 9-17-17. It may be that Bolinske erroneously used the wrong date. He doesn't know because he has been unable to locate a Notice of Claim against Sandstrom and Hagerty.

¶51 However, it is Bolinske's contention that no matter the date of any Notice of Claim, or whether one was ever filed, it just doesn't matter. That is because such a Notice of Claim is not here required. The wrongs for which Bolinske is making claim in this action were personal to Sandstrom and Hagerty. They had nothing at all to do with their jobs. They do not involve state business. They were done entirely outside the scope of their authority as governmental officials. If Sandstrom and/or Hagerty were driving their own vehicle and, through their intentional or negligent action, injured someone, that person certainly would not have to file a Notice of Claim with the state. Same here. Sandstrom and Hagerty are not Kings, Queens, or Ambassadors who are above and beyond the reach of the law. They are merely mortal beings who have no higher standing than you, or I or anyone else. Further, Sandstrom was not even a state employee or judge when the alleged defamation took place. He was a former politician and Supreme Court Justice.

¶52 Attorney Sagsveen also claims that both defendants are "immune from suit", and have "qualified immunity" or "judicial immunity". These claims are not accurate for the

very same reasons set forth in paragraph 51 above.

¶53 Attorney Sagsveen claims at page 1 of Defendants' Brief in Support of Motion to Dismiss that the "Amended Complaint" also fails to state a claim because Bolinske neither alleges nor claims that [Sandstrom and Hagerty] played any role in the adjudication of the disciplinary complaint against him. What Bolinske does allege throughout the Amended Complaint is that they conspired with and acted through their "agents" and/or friends who are suspected to be on the Inquiry Committee, in the office of Disciplinary Counsel, members of the Disciplinary Board or otherwise. See, for example, paragraphs 28, 29, 30, 31, 32, and/or 23 of the Amended Complaint. Bolinske says "suspected" because he is hardly in the inner circles of these persons, and no one is going to go around admitting such activity. There are just too many strange and unusual events, decisions and procedures, as set forth in the above referenced Exhibits, for it to be simply "coincidental". Those things happened, and they happened for a reason. This is exactly why Bolinske needs to employ the tools of discovery and his skills of investigation and cross-examination, which he has successfully employed for over 50 years as a trial lawyer. Of course, no one can prove allegations if they are not allowed to obtain discovery and litigate the issues. That is exactly why our system of justice allows us to employ all the discovery and other tools available to us. Bolinske should not have to litigate this case "on paper" as the defendants are attempting to here require. Bolinske believes they are afraid, and he strongly suspects that they have every reason to be. His intuition, his "hunches" if you will, have, over these many years as a litigator, proved to be right time after time after time. And, Bolinske firmly believes that he is right in this case. All he asks is a chance to prove it through discovery and trial, where persons will be put under oath and cross-examined.

¶54 Were Sandstrom's assertions "protected speech"? We don't know because we haven't been given the opportunity to explore exactly what he said, how he said it and why he said it, not only to blogger Robert Port but also to other persons. What we know he said was a vicious lie said about Bolinske while Bolinske was seeking a seat on the N.D. Supreme Court. And, it was said by an angry man who Bolinske believes caused his "retirement" by announcing that Bolinske was going to run against him. Sandstrom obviously knew that Bolinske's claims that Sandstrom had altered public records, a felony, would play prominently in the campaign. Bolinske suggests that Sandstrom does not want to either admit or deny (given the potential perjury involved with any answer) what Bolinske is alleging, something in this lawsuit Sandstrom is still trying to mightily avoid.

¶55 Bolinske's Complaint against Robert Port was not frivolous, and neither is his Amended Complaint in this case. To his recollection, the Port matter was dismissed because Bolinske did not timely respond to Port's Motion to Dismiss. He did not do so because he had made an appearance, and because he was working Port's attorney on the resolution of the case (to try to get Port to agree to appear as a witness,and cooperate in Bolinske's case against Sandstrom and Hagerty). And, finally, Bolinske's recollection is, it was because he was in the middle of a substantial flood. Bolinske lives right next to Apple Creek and was actually totally surrounded by flood water. He could neither get in nor get out of his home. He recalls calling the Clerk's office to explain his circumstances to get more time to respond. Bolinske is totally incompetent with computers and had no office or secretary to help him. (Under the N.D.R.C.P., he still has the opportunity to move to vacate the Judgment against him in the Port matter. Because of other commitments since the stay in this case was lifted he simply has not had the time.)

¶56 Bolinske's action in Federal Court was dismissed Without Prejudice and his present claims were certainly clearly not litigated in the farcical Hagerty grievance proceeding described in the above referenced Exhibits. The causes of action Bolinkse alleges in this case were not even discussed, let alone decided. Thus, there can thus be no "collateral estoppel" as the District Court erroneously concluded.

¶57 Bolinske's mental health is excellent, Sandstrom's claims to the contrary notwithstanding. Bolinske has twice taken and passed with flying colors, the M.M.P.I. test (Minnesota Multiphasic Personality Inventory test) which is to his knowledge the "gold standard" with respect to mental health testing. Where did Sandstrom get his information? From whom? Or, did he lie and just "make it up"? Why did he make such a repugnant and false claim, and what was his purpose? (It certainly wasn't designed to "help" Bolinske.) It was vicious, retaliatory and designed to do harm. These and the many other questions and issues are just some of the reasons we need discovery in this case.

¶58 It simply cannot be true that in our society, and our legal system, that a Supreme Court Justice, the "webmaster", can commit a crime, a felony, by tampering with and distorting public records without being held accountable. Bolinske urges the Court to think about that as it re-reads Bolinske's Amended Complaint (Exhibit A) and his other submissions. Bolinske spent over two years studying this matter and submitted hundreds of pages of documentation supporting his allegation that Justice Sandstrom committed a felony by tampering with public records of the N.D. Supreme Court. Yet, somehow, "people" (the persons in the various disciplinary entities, and indeed the members of the N.D. Supreme Court itself) concluded that Bolinske acted "knowing" that his allegation against Sandstrom was untrue. The fact is, Bolinske firmly believes to this very day, that

his allegations are entirely true. There is overwhelming evidence to that effect, and none, not even a public denial by Justice Sandstrom, that Bolinske's allegations are false. Yet, look at the response and present status of this matter. Bolinske has had to slog through years of defending himself in disciplinary cases and thus far, at least, former Justice Sandstrom and his co-conspirator wife, former Judge of the Burleigh County District Court, have skated free. The disciplinary system, and too many of the people who participated in this case somehow pursued and reached a false conclusion. Bolinske asks, "Just how and why did such a result obtain?" Why, indeed? Our imaginations need not roam far for an answer. The N.D. Supreme Court, the entity at the top, created, controlled, and pays all the entities involved in the disciplinary process. Many of the persons comprising those entities have ambitions to rise higher in that system, and eventually, potentially, even be appointed to the N.D. Supreme Court itself. "People being people" regularly want to be a part of the "in", the "controlling group" or crowd and seek to impress, and surely not offend, those with power over them, here the North Dakota Supreme Court. Woe to anyone who criticizes or alleges wrongdoing of the powerful. Just look at what Bolisnke has had to endure in time, money, distress and damage to reputation as a result of doing what he fully believed was required by Rule 8.3(a) of the North Dakota Professional Rules of Conduct. Rule 8.3(a) of the North Dakota Professional Rules of Conduct, entitled "Reporting professional misconduct", requires that lawyers report misconduct. The rule specifically states:

> "A lawyer who knows that another lawyer has committed a violation of these Rules that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall initiate proceedings under the North Dakota Rules for Lawyer Discipline."

Quite ironically, defendant Hagerty claims that very same defense this action.

¶59 In its Order Granting Motion to Dismiss dated October 7, 2021, (App. P. 00022) the District Court addressed each of Plaintiff Bolinske's causes of action and very clearly based its decision to dismiss each of them almost exclusively on the grounds of "collateral estoppel," "issue preclusion," and/or "res judicata."

¶60 The Court, basically, concluded that Bolinske's causes of action were barred because they had been "litigated" in the prior federal action.

¶61 Thus, at paragraph 10 (App. P. 00024) of its decision the DistrictCourt said, in applying the doctrines of collateral estoppel, claim preclusion, and res judicata, that they "prohibit the relitigation of claims or issues that were raised or could have been raised in a prior action between the same parties which (were) resolved by final judgment in a court of competent jurisdiction."

¶62 The Court then said, referencing Bolinske's claims in this state court action, in paragraph 10 of its decision, that "these claims were raised (or could have been raised) in the federal action, were argued extensively, and were denied and dismissed by the federal district court, then the Eighth Circuit Court of Appeals and then the U.S. Supreme Court. These claims are barred by res judicata and collateral estoppel." The Court then went on to state that, as a result, "Bolinske has failed to state a claim upon which relief can be granted" and dismissed each and every one of Bolinske's causes of action.

¶63 Consequently, the Court having determined, as above, that Bolinske's claims were all barred, then, (based on its decision regarding the application of res judicata and collateral estoppel) concluded that Bolinske's claims were "frivolous" and awarded costs and attorney fees, because, as the Court said at paragraph 41 of its decision:

> "[¶41] Here, there was not any legal foundation (in fact, there was ample legal foundation to contrary in the form of res judicata and collateral

> estoppel) for an extension, modification or reversal of existing law and most of the allegations and arguments proffered by Bolinske [sic] in this matter were clearly addressed in the federal matter. Bolinske [sic] ignored the prior adjudications in an effort to continue forward with his claims in this action. Bolinske [sic] also proceeded with certain claims when all undisputed facts clearly showed he had not met statutury deadlines and statues of limitations. When one continues to make claims of a certain character without any factual (or legal) basis for it, particularly where a federal and reviewing courts had repeatedly rejected those claims in other rulings, the result is frivolous claims. Defendants are entitled to an award of costs, including reasonable attorney's fees, pursuant to N.D.C.C. § 28-26-01(2)." (emphasis added)

¶64 First, the allegations in this state court action were made at essentially the same time as the allegations in the federal action. The state action was then "stayed." Clearly, then, there were no federal court decisions in existence when the state court allegations were made. Consequently, for this reason also, collateral estoppel, claim preclusion, and res judicata are not here applicable.

¶65 Second, and even more important, is the fact that none of Bolinske's causes of action were even actually litigated in federal court. The federal court(s) determined only that they did not have jurisdiction over the various causes of action and dismissed them, not with prejudice, but instead clearly denied Bolinske's motion to amend his complaint "WITHOUT PREJUDICE." (emphasis added) Nor did the federal courts even consider Bolinske's several causes of action, as is made clear by the District Court's Conclusion and Order, which are hereinafter set forth in full:

> "**CONCLUSION**
>
> The Court declines the parties' invitation to delve deeply into matter of immunity, governmental bad faith, and related issues. At this stage it would be improper for this Court to weigh in on substantive legal questions that are properly before the North Dakota Supreme Court in Bolinske's

pending matter."

"**ORDER**

Based on the files, records, and proceedings herein, and for the reasons set forth above, **IT IS HEREBY ORDERED** that Plaintiff Robert V. Bolinske's Motion to Amend his Complaint (Doc. No. 24) is **DENIED WITHOUT PREJUDICE. IT IS FURTHER ORDERED** that Defendants the North Dakota Supreme Court, the State of North Dakota, the Disciplinary Board of the North Dakota Supreme Court, the Office of Disciplinary Counsel, the Inquiry Committee West, North Dakota Supreme Court Former Justice Dale Sandstrom, North Dakota District Judge Gail Hagerty, North Dakota Supreme Court Justice Lisa K. McEvers, and North Dakota Supreme Court Justice Daniel Crothers' Motion to Dismiss (Doc. No. [7]) is **GRANTED WITHOUT PREJUDICE.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: June 20, 2019

s/ Donovan W. Frank
DONOVAN W. FRANK
United States District Judge"

(Emphasis added.)

¶66 It is basic "hornbook" law that for collateral estoppel, claim preclusion or res judicata to apply, there must have been prior litigation in which (1) the claims were fully litigated, (2) actually conclusively decided, (3) a clear decision on the merits and (4) an adverse final judgment. That is clearly not what the facts, and legal proceedings in this case demonstrate to be true.

¶67 Black's Law Dictionary, Deluxe Fourth Edition, defines collateral estoppel as follows:

> "**COLLATERAL ESTOPPEL.** The collateral determination of a question by a court having general jurisdiction of the subject. Small v. Haskins, 26 Vt. 209.
> Conclusiveness of judgment in prior action where subsequent action is upon a different cause of action. Babcock v. Babcock, 63 Cal.App.2d 94, 146 P.2d 279, 281.
> Where complaint in a divorce action alleged that there was community property, and divorce decree found that all allegations of complaint were true and sustained by evidence, the decree was a conclusive determination that husband's insurance policies were not community property, and under the doctrine of "collateral estoppel" divorced wire was estopped from litigating that issue upon husband's death. Maxwell v. Maxwell, 66 Cal.App.2d 549, 152 P.2d 530, 532."

¶68 Res judicata is defined by the same source as follows:

> "**Res judicata.** A matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. A phrase of civil law, constantly quoted in the books. Epstein v. Soskin, 86 Misc.Rep. 94, 148 N.Y.S. 323, 324; Rule that final judgment or decree on merits by court of competent jurisdiction is conclusive of rights of parties or their privies in all later suits on points and matters determined in former suit. American S. S. Co. v. Wickwire Spencer Steel Co., D.C.N.Y. 8 F.Supp. 562, 566. And to be applicable, requires identity in thing sued for as well as identity of cause of action, of person and parties to action, and quality in persons for or against whom claim is made. Freudenriech v. Mayor and Council of Borough of Fairview, 114 N.J.L. 290, 176 A. 162, 163. The sum and substance of the whole rule is that a matter once judicially decided is finally decided. Massie v. Paul, 263 Ky. 183, 92 S.W.2d 11, 14. See, also Res Edjudicata, supra."

North Dakota law is to the same effect. Res judicata and collateral estoppel prohibit relitigation of claims that were raised or could have been raised in a prior proceeding between the same parties or their privies, and which were resolved by a final judgment in a court of competent jurisdiction. They are both questions of law and fully reversable on appeal. See, for example, Plains Trucking, LLC v. Cresap, 932 NW 2d 541, 2019 ND 226 and Witzke v. City of Bismarck, 718 NW 2d 586, 2006 ND 160.

¶69 Here there have been no conclusive final determinations, or even actual litigation of Bolinske's several causes of action, again, because they were dismissed without prejudice. In U.S. District Court, in Judge Donovan Frank's very own words, they were

not even addressed in the federal court action. Consequently, those causes of action remain alive and Bolinske, for the above stated reasons, should be entitled to fully litigate them in this state action.

¶70 It is therefore respectfully submitted that Judge Hurly's decision, for the above stated reasons, is erroneous, and that that being so, Bolinkse's causes of action were not, and could not, be "frivolous." Consequently, the Order granting an award of attorney fees is likewise erroneous and should be vacated.

¶71 For all the reasons set forth Bolinske's Response to Motion to Dismiss, and for all the reasons set forth herein, this litigation should be allowed to proceed. It is hardly right, fair, or just that Bolinske not be allowed to pursue and fully litigate his claims in the face of erroneous conclusions of law, especially when there has been allowed no discovery whatsoever.

¶72 Bolinske is appearing pro-se. Rule 3.5 of the N.D. Rules of Court provide that he is, as such, not subject to electronic filing. That being the case, the Clerk of Court's calculation notwithstanding, this response, by his calculation, is not due until March 2, 2022. (I will attempt to serve and file this Brief by February 22, 2022, but if that is not possible, suggests that it is not actually due until March 2, 2022, and, if necessary, hereby requests an extension of time to that date.)

¶73 It appears to the undersigned that the District Court has here clearly erred. The parties, it is submitted, should not therefore have been subjected to the time, delay and expense of yet another one or so year delay required by an appeal of this decision. Justice, fairness and adherence to the sanctity of the rule of law, and due process, it is respectfully submitted, require reconsideration and reversal of the District Court's decision ordering

dismissal of this action.

CONCLUSION

¶74 Defendant's Sandstrom and Hagerty were granted judgment in this case. To have granted their motion, it is respectfully submitted, was certainly reversible err. In American State Bank & Trust Co. v. Sorenson, 539 N.W. 2d 59, (N.D. 1995), the North Dakota Supreme Court held that the trial court should only grant summary judgment, viewing the evidence in the light most favorable to the resisting party, if there were no genuine issues of material fact and no conflicting inferences that could reasonable by drawn from undisputed facts. And, further, that summary judgment is appropriate only if the only questions to be decided are questions of law.

¶75 The motion to dismiss, in this case, which became a motion for summary judgment certainly cannot survive those standards. Consequently, plaintiff Bolinske urges that this Court (1) reverse the District Court's decision, (2) vacate the judgment, (3) remand the case, and (4) order a reasonable continuance so that discovery can take place. This Court is, accordingly, requested to also reverse the decision that this action was "frivolous" and vacate the award of attorney fees.

¶76 Oral argument is necessary in this case because important issues of law are involved as is the right to discovery in an action before summary judgment is granted and an action is deemed frivolous.

¶77 Finally, defendants are again hereby advised that they should not destroy or delete any written or electronic communication between themselves and/or any of the other entities, and/or members, identified herein relating in any way to plaintiff Bolinske and/or this case. To do otherwise would constitute an unethical destruction of potential evidence

and be considered spoliation.

Respectfully re-submitted this 28th day of February 2022.

/s/ Robert V. Bolinske
Robert V. Bolinske
Attorney Pro se
7600 Northgate Drive
Bismarck, ND 58504
701-390-6015
Firstrvb@gmail.com
Bar No. 03266

CERTIFICATE OF COMPLIANCE

¶78 The undersigned certifies pursuant to N.D.R.App.P. § 32(a)(8)(A) that the BRIEF OF APPELLANT contains 28 pages.

Respectfully re-submitted this 28th day of February 2022.

/s/ Robert V. Bolinske
Robert V. Bolinske
Attorney Pro se
7600 Northgate Drive
Bismarck, ND 58504
701-390-6015
Firstrvb@gmail.com
Bar No. 03266

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Robert V. Bolinske, Plaintiff/Appellant, vs. Dale V. Sandstrom Gail Haggerty and Robert R. Port, Defendants/Appellees.	))))))))))	Supreme Ct Case No.: 20220016 District Ct Case No. 08-2019-CV-00877

APPEAL FROM THE BURLIEGH COUNTY DISTRICT COURT JUDGMENT DATED NOVEMBER 8, 2021 AND/OR ANY OTHER CONCLUDING DOCUMENTS AND ANY AND ALL ADVERSE RULINGS OF THE DISTRICT COURT

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2022, the **BRIEF OF PLAINTIFF AND APPELLANT and PLAINTIFF-APPELLANT BOLINSKE'S APPENDIX** were filed and served electronically upon:

Jesse Walstad
jwalstad@vogellaw.com

Monte Lane Rogneby
mrogneby@vogellaw.com

Matthew Arnold Sagsveen
masagsve@nd.gov
ndag@nd.gov

Dated this 22nd day of February 2022.

/s/ Robert V. Bolinske
Robert V. Bolinske (03266)
Attorney Pro Se
7600 Northgate Drive
Bismarck, ND 58504
(701) 390-6015
FirstRVB@gmail.com

20220016

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEBRUARY 28, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

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APPEAL FROM THE BURLIEGH COUNTY DISTRICT COURT JUDGMENT DATED NOVEMBER 8, 2021 AND/OR ANY OTHER CONCLUDING DOCUMENTS AND ANY AND ALL ADVERSE RULINGS OF THE DISTRICT COURT

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2022, the **BRIEF OF PLAINTIFF AND APPELLANT and PLAINTIFF-APPELLANT BOLINSKE'S AMENDED APPENDIX** were filed and served electronically upon:

Jesse Walstad
jwalstad@vogellaw.com

Monte Lane Rogneby
mrogneby@vogellaw.com

Matthew Arnold Sagsveen
masagsve@nd.gov
ndag@nd.gov

Dated this 28th day of February 2022.

/s/ Robert V. Bolinske
Robert V. Bolinske (03266)
Attorney Pro Se
7600 Northgate Drive
Bismarck, ND 58504
(701) 390-6015
FirstRVB@gmail.com