20110211

IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

Gary A. Hangsleben, on behalf of the heirs at law of Delores M. Hangsleben,	Supreme Court No.: 20110211
	Grand Forks County No.: 09-C-01665
Plaintiff-Appellant	FILED IN THE OFFICE OF THE CLERK OF SUPREME COURT
vs.	
Gail R. Halverson, Russell Halverson, Justin Halverson, Matt Halverson, Dr. Larry O. Halvorson, Dr. Robin T. Hape, Valley Eldercare Center, Valley Memorial Home, Good Samaritan Heritage Grove, and Altru Health Center,	JAN - 3 2012
	STATE OF NORTH DAKOTA
Defendants-Appellees	

APPEAL FROM SUMMARY JUDGMENTS DISMISSING PLAINTIFF'S COMPLAINT

BRIEF OF APPELLEES HALVERSON

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APPELLEES

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STATEMENT OF THE ISSUES

I. WHETHER THE TRIAL COURT ERRED IN GRANTING THE MOTIONS OF DR. LARRY O. HALVORSON, DR. ROBIN T. HAPE, VALLEY ELDERCARE CENTER, GOOD SAMARITAN HERITAGE GROVE, AND ALTRU HEALTH CENTER FOR SUMMARY JUDGMENT DISMISSING THE PLAINTIFF/APPELLANT GARY HANGSLEBEN'S COMPLAINT AGAINST THEM.

II. WHETHER THE TRIAL COURT ERRED IN GRANTING THE MOTION OF GAIL R. HALVERSON, RUSSELL HALVERSON, JUSTIN HALVERSON AND MATT HALVERSON FOR SUMMARY JUDGMENT DISMISSING THE PLAINTIFF/APPELLANT GARY HANGSLEBEN'S COMPLAINT AGAINST THEM.

STATEMENT OF THE FACTS

Gary A. Hangsleben and Gail R. Halverson are the only children of Gust Hangsleben and Delores M. Hangsleben. Russell Halverson is the husband of Gail R. Halverson. Justin Halverson and Matt Halverson are the children of Gail and Russell Halverson. Gust Hangsleben died in 1990, and his estate was probated in the Polk County, Minnesota, District Court., and is long since settled. Delores Hangsleben died at Altru Hospital in Grand Forks, ND, on January 23, 2008.

As Plaintiff/Appellant Gary A. Hangsleben is well aware, the Estate of Delores M. Hangsleben has been probated in the Polk County, Minnesota, District Court, and Gail R. Halverson was duly appointed as Personal Representative in that proceeding. Gary A. Hangsleben litigated his claims regarding that estate in the Polk County, Minnesota, proceedings. (Transcript of February 22, 2010 hearing, p. 30; Transcript of April 21, 2011 hearing, pp. 6 and 12; Appellant's Brief, p. 15)

Plaintiff/Appellant Gary A. Hangsleben initiated the case before this Court by a Summons and Complaint dated September 2, 2009, which was served on September 11, 2009. (Appendix, p. 17). In his Complaint, Mr. Hangsleben alleges negligent conduct or treatment of Delores M. Hangsleben by Dr. Halvorson and Dr. Hape, who were the physicians attending to Delores M. Hangsleben during her last illness, as well as Valley Eldercare, Valley Memorial Home, and Altru Health Center. Mr. Hangsleben has not provided the expert affidavit to support these claims, as required by Section 28-01-46 N.D.C.C.

Mr. Hangsleben, in his complaint, also alleges that Gail R. Halverson, Russell Halverson, Justin Halverson and Matt Halverson physically and financially abused Delores M. Hangsleben over a course of several years, and that her death was caused by injuries sustained from a push in 2007 from Gail R. Halverson and coercion by the Halversons causing Delores M. Hangsleben to refuse treatment when she was admitted to Altru Hospital.

Dr. Halvorson, Dr. Hape, Valley Eldercare, Valley Memorial Homes, Good Samaritan and Altru Health Systems filed respective motions for summary

judgment. Mr. Hangsleben did not respond by serving or filing any affidavits or other competent evidence. He did offer an oral argument. The Trial Court granted Summary Judgment dismissing the Complaint against these parties by its Order dated April 6. 2010 (Appendix. p. 38)

Mr. Hangsleben, by the Trial Court's Scheduling Order dated January 4, 2010, was required to disclose any experts by October 15, 2010. Defendants Halverson were required to disclose their experts by December 15, 2010. (Trial Court Docket Index No. 34). Defendants Halverson provided the required disclosure. (Trial Court Docket Index No. 70). Plaintiff/Appellant Hangsleben has made no such disclosure.

Defendant/Appellees Halverson moved for Summary Judgment of Dismissal, and. in support thereof, supplied sworn affidavits of Dr. Hape, Dr. Halvorson, Gail R. Hangsleben and Russell. Justin and Matt Halverson, to the effect that Delores M. Hangsleben died of natural causes and that her death was not caused by a push or fall; and that her decision to refuse treatment was hers, alone, and not the result of coercion. (Trial Court Docket Index Nos. 89, 90, 91, and 92).

Again, Gary A. Hangsleben neither served nor filed any sworn affidavits or other competent evidence to support his allegations against the Defendants Halverson. He did present an oral argument which essentially repeated the allegations in his complaint. (See Transcript of April 21, 2011, Hearing, pp. 2 and 3).

He did make a "Motion to Compel", which was based upon a demand, *dated February 11, 2011*, (Appendix, p. 54), which was served by mail on *February 15, 2011*, (Appendix, p. 57), that Gail R. Halverson produce records of the physicians, the hospital and the nursing homes, *at 9:00 a.m. on February 18, 2011, at the location of these entities.* Defendants Halverson served and filed objections to that demand on February 24, 2011. (Trail Court Docket Index Nos. 83, 84, 85, 86, and 87).

The Trial Court granted Defendant Halvorson's Motion for Summary Judgment in part by its Order dated October 7, 2010. (Appendix, p. 45); and granted Summary Judgment dismissing Plaintiff/Appellant's complaint in its entirety by its Order dated May 17, 2011. (Appendix, p. 63).

LAW AND ARGUMENT

1. The Trial Court did not err in granting the Summary Judgment motions of Dr. Larry O. Halvorson, Dr. Robin T. Hape, Valley Eldercare Center-Valley Memorial Homes, Good Samaritan Heritage Grove and Altru Health Systems.

This brief will not address this issue at length because it pertains to parties not represented by the undersigned. However, some comments are necessary, because they illustrate the attitude and position of the Plaintiff/Appellant Hangsleben throughout these proceedings.

Mr. Hangsleben asserts that he need not furnish the expert affidavit required by Section 28-01-46 N.D.C.C. because (1) a layperson could discern the existence of medical negligence, (2) the statute contains an exception in the event

that there was a foreign substance in Delores M. Hangsleben's body which was not removed (Appellant's Brief. p. 13). and (3) the statute is unconstitutional. (Appellant's Brief, p. 16).

He has provided no evidence to support the allegations of negligence or the existence of a foreign substance in Delores M. Hangsleben's body. His complaint did not allege the existence of such a foreign substance. In fact, he did not respond to the Summary Judgment motions of these defendants, other than by his own oral and unsupported argument. He has provided no reasoning to support the position that the statute is unconstitutional, other than his own assertion that it must be so. The undersigned is unaware of any notice to the attorney general that he is contesting the constitutionality of the statute, as required by Rule 44, North Dakota Rules of Appellate Procedure.

This attitude and pattern by Mr. Hangsleben continues throughout the remainder of this case at the trial level.

It is respectfully submitted that the Trial Court did not err in granting Summary Judgment to Dr. Halvorson, Dr. Hape, Valley Eldercare, Good Samaritan and Altru Health Systems.

2. The Trial Court did not err in granting Summary Judgment dismissing Plaintiff/Appellant Hangsleben's complaint against Gail R. Halverson, Russell Halverson, Justin Halverson and Matt Halverson.

Gust Hangsleben died in 1990, and the probate of his estate was completed in the Minnesota courts years ago. Delores M. Hangsleben died on January 23, 2008. Gary Hangsleben has conceded in open court that the matters

pertaining to those estates have been litigated in the Minnesota courts, as reflected on page 30 of the transcript of the February 2010, hearing and the following exchange found at pages 5 and 6 of the transcript of the April 21, 2011, hearing:

> MR. HANGSLEBEN: It's just a clear case of fraud coming from my father's estate, probate, to my mother's and to the present time, your Honor.
>
> THE COURT: That's all been dealt with in Minnesota courts; correct?
>
> MR. HANGSLEBEN: I should have brought it forth soon after my father died but Mr. Leonard assured me that, not to do anything. So I waited five years and wrote a letter to the judge. So.
>
> THE COURT: Okay. But you have filed actions in the Minnesota Court and that's all been resolved. That has nothing to do with this action with respect to your mother's death. That's what this case is about.
>
> MR. HANGSLEBEN: That's correct, Your Honor.

Moreover, as the Trial Court determined, even if he were Delores Hangsleben's representative (which he is and was not), he would have had to commence any survival action within one year of her death, or no later than January 23, 2009. Section 28-01-26 N.D.C.C. This action was not commenced until September 9, 2009, and is thus beyond the limitation for the abuse claims contained in Mr. Hangsleben's complaint in this action. (For the record, such claims are untrue.)

Thus, as determined by the Trial Court, the only matters remaining for determination in this action, as pertains to the Defendants Halverson, are the allegations that they caused or contributed to the death of Delores Hangsleben.

There is no disagreement that Delores M. Hangsleben died at Altru Hospital in Grand Forks, ND, on January 23, 2008. The sworn affidavits of her attending physicians establish that her death was from natural causes. (Trial Court Docket Index Nos. 89 and 90). In his affidavit, Dr. Hape specifically states that her death was not caused by a push or a fall caused by any of the Halversons, or anyone else. (Trial Court Docket Index No. 89). The physicians also state that her decision to refuse surgical intervention was made with a clear mind and did not appear to be the result of coercion. (*See, also,* Appendix, pp. 115 and 116).

Contrary to his claim, Gary A. Hangsleben has simply not provided any competent evidence to support his allegations that the Halversons caused or contributed to the death of Delores M. Hangsleben. It is apparently his contention that his bald and unsupported allegations constitute evidence and entitle him to a jury trial. Rule 56 (e) (2) of the North Dakota Rules of Civil Procedure provides otherwise:

> (2) Opposing Party's Obligation to Respond. When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must, by affidavits or as otherwise provided in this rule, set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment shall, if appropriate, be entered against that party.

Mr. Hangsleben is clearly aware of this rule, since he has included it at page 117 of the Appendix. Apparently, he believes that this rule should not apply

to him. He is mistaken. Clearly, at trial, Mr. Hangsleben would have the burden of proof to show that the Defendants Halverson caused the death of Delores M. Hangsleben. Summary Judgment is appropriate against a party who fails to establish the existence of a factual dispute on an element on which that party has the burden of proof at trial. *Quality Bank v. Cavett,* 2010 ND 183, 788 N.W.2d 629. That factual dispute must be established by competent admissible evidence by affidavit or other means which evidence must raise an issue of material fact. *Abdulla v. State,* 2009 ND 148, 771 N.W.2d 246. These evidentiary matters must set forth specific facts in order to establish the existence of a factual dispute. *Perius v. Nodak Mutual Ins. Co.,* 2010 ND 80, 782 N.W.2d 355.

Plaintiff/Appellant Gary A. Hangsleben would have the Court excuse him from compliance with this rule. It is submitted that the Trial Court was correct in not doing so.

Instead of providing the required admissible evidence, Mr. Hangsleben sought to have Gail R. Halverson compelled to produce records of the physicians, the Valley Eldercare, Valley Memorial Home, Good Samaritan Heritage Grove and Altru Health Center, which records clearly were not possessed or controlled by Gail R. Halverson. His method of doing so was to serve *by mail* a "Motion to Compel Discovery" three days before he demanded that the records be produced, thus ignoring Rule 34 (b) (2) North Dakota Rules of Civil Procedure, which provides that a responding party shall have 30 days to respond to such a request. A proper objection to that request was filed. (Trial Court Docket, Index Nos. 83 and 84).

The persons and entities that possessed the records which Mr. Hangsleben demanded be produced were parties to this action from its commencement by him in September, 2009, until they were dismissed by the Trial Court on April 6, 2010. Mr. Hangsleben bases his assertion that Gail R. Halverson could produce these records on a letter from the attorney for Valley Memorial Homes (only) *dated May 21, 2008*, more than a year prior to his commencement of this action. He offers no credible explanation as to why he did not make his demand for those records while these entities were parties to this action.

In order that a party resisting a motion for summary judgment may claim the need for additional discovery in order to respond to that motion, that party must identify with particularity what information is sought, and explain how that information would preclude summary judgment, and why it has not previously been obtained. *Choice Financial Group v. Schellpfeffer*, 2006 ND 87, 712 N.W.2d 855. Mr. Hangsleben utterly failed to do so. He simply demanded "all records" pertaining to Delores M. Hangsleben.

Moreover, under Rule 34 (a), North Dakota Rules of Civil Procedure, a demand that a party produce and permit copying of designated documents is limited to documents *that are in the possession, custody or control of the party upon whom the request is served. Bachmeier v. Wallwork Truck Centers,* 507 N.W.2d 527 (ND 1993). Gail R. Halverson did not have possession, custody or control of the records which Plaintiff/Appellant Hangsleben.

Additionally, there is no reliable indication that the records which were demanded would support Mr. Hangsleben's claims. (See Appendix, p. 115). He

is well beyond the time when he was required to disclose expert witnesses, as required by the Trial Court's Scheduling Order (Trial Court Docket Index No. 34), and has not done so. He is not competent to interpret the medical records which he sought. However, he asserts that he will be able to produce "expert witness testimony, nursing staff notes, and reports from a private investigation team" at trial. (Appellant's Brief, p. 15).

Clearly the nursing staff notes and reports from a private investigation team would be inadmissible hearsay. In regard to expert witness testimony, Mr. Hangsleben appears to believe that he can disregard the Trial Court's Scheduling Order. Inadmissable hearsay statements cannot be used in summary judgment proceedings. *Farmers Union Oil Co. v. Harp,* 462 N.W.2d 152 (ND 1990).

It is respectfully submitted that the Trial Court properly denied Mr. Hangsleben's "Motion to Compel".

Mr. Hangsleben has not served, filed or produced any competent factual evidence supporting his claims against the Halverson Defendants. He simply restates in oral argument the unsupported allegations of his complaint. The Trial Court was amply justified and did not err in granting Summary Judgment dismissing the Plaintiff's complaint.

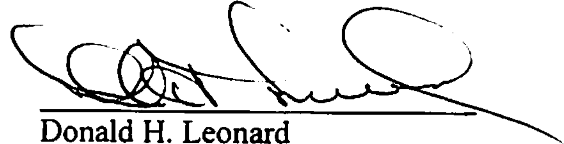
CONCLUSION

Plaintiff/Appellant Gary A. Hangsleben would have this Court permit him to ignore all applicable Orders, Rules, Statutes, and applicable case law, and proceed to jury trial based solely on his unsubstantiated allegations, without any

requirement that he produce a competent showing to support those allegations. It is respectfully submitted that this is not permissible under the applicable law.

The Trial Court must be affirmed in all respects.

Dated this 29th day of December 2011.



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STATEMENT PURSUANT TO RULE 34 (a) NORTH DAKOTA RULES OF APPELLATE PROCEDURE

Pursuant to Rule 34 (a), North Dakota Rules of Appellate Procedure, the undersigned, on behalf of the above-named Appellees, states that oral argument NEED NOT be permitted. The facts and the law are crystal clear. The only dispute is over the assertion by Plaintiff/Appellant Gary A. Hangsleben that he need not comply the any pretrial requirements, and is entitled to proceed to jury trial without doing so. Oral argument will not serve any purpose.

Dated this 29th day of December 2011.

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IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

Gary A. Hangsleben, on behalf of the heirs at law of Delores M. Hangsleben,	)	**Supreme Court No. : 20110211**
	)	**Grand Forks County No.: 09-C-01665**
Plaintiff-Appellant	)	
vs.	)	
Gail R. Halverson, Russell Halverson, Justin Halverson, Matt Halverson, Dr. Larry O. Halvorson, Dr. Robin T. Hape, Valley Eldercare Center, Valley Memorial Home, Good Samaritan Heritage Grove, and Altru Health Center,	)	
Defendants-Appellees	)	

AFFIDAVIT OF SERVICE BY MAIL

State of Minnesota
County of Polk

William L. Bridges, being first duly sworn on oath hereby deposes and says that on the 30th day of December, 2011, he served the **BRIEF OF APPELLEES HALVERSON** upon the following named persons or entities by depositing a true, correct and complete copy of the same in the United States mails, postage prepaid, at East Grand Forks, MN, addressed as indicated below:

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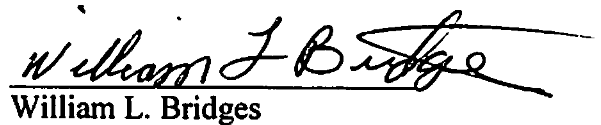
Dated this 30th day of December, 2011.



William L. Bridges

Subscribed and sworn to before me this 30th day of December, 2011, by William L. Bridges.