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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
SEPTEMBER 28, 2018
STATE OF NORTH DAKOTA

IN SUPREME COURT OF STATE OF NORTH DAKOTA
600 E. Boulevard Ave.
Bismarck, ND 58505

Robin E. Ayling, individually and as parent of Blake Christopher Ayling, deceased

Plaintiff,

vs.

Mary Ann Sens, M.D., Ph.D., individually; as Grand Forks County Coroner (public official) as North Dakota State Forensic Examiner Pathologist Designee (public official); and as Co-Director of the University of North Dakota School of Medicine and Health Sciences Forensic Pathology Practice Facility,

Defendant,

and

University of North Dakota, a public University of the North Dakota University System, Dr. Mark Koponen, individually and as Co-Director of the University of North Dakota School of Medicine and Health Sciences Forensic Pathology Practice Facility, and Dr. Joshua Wynn individually and in his official capacity as Dean of the University of North Dakota School of Medicine and Health Sciences including the Forensic Pathology Practice Facility,

Defendants,

and

Grand Forks County as a political subdivision and its States Attorney David Jones in his official capacity and individually, and its Commissioners in their official capacity as a Board and individually, specifically: Gary Malm, David Engen, Tom Falck, Diane Knauf, and Cynthia Pic,

Defendants,

Supreme Court File No. 20180231
Cass Co. Court File No. 18-2017-CV00889

APPELLATE AYLING'S BRIEF

ADDENDUM

and

Dr. William Massello, individually and in his official capacity as North Dakota State Forensic Examiner,

Defendant.

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II. STATEMENT OF ISSUES.

1. Was it abuse of discretion, misapplication of law, to stay Ayling's discovery based on "judicial economy" when "good cause" burden was not met as supporting facts were false/disputed, with summary judgment motion pending, and stay effectively barred Ayling from obtaining public documents pursuant to ND "open records" laws?

2. Was it abuse of discretion, misapplication of law, to refuse to consider Ayling's Rule 56(f) Letter/Affidavit dated August 15, 2017 detailing information needed prior to opposing Summary Judgment Motion of County and Rule 12(b)(6) and/or Summary Judgment Motion of State, including reliance on Exhibit A - Affidavit of Sens containing proclamations of "pathological" and "follow-up" investigations Ayling had never heard of; heavy reliance on a contract between UND and Grand Forks County for Grand Forks County Coroner (GFCC) autopsy/death investigation services for complete immunity and evidence that Sens is not a County employee without providing copy of contract as required by Rule 56(e)(1), disputed facts as to Ayling's communications with Sens; and when North Dakota prescribes that *summary judgment is appropriate only after the non-moving party has had a reasonable opportunity for discovery to develop his position*? Choice Financial Group v. Schellpfeffer, 2006 ND 87, 712 N.W.2d 855.

3. Was it abuse of discretion to deny Ayling's Rule 56(f) Motion with Affidavit detailing documents needed (including public), attempts to obtain previously, and what aspects of summary judgment motions document will oppose - 3.5 months after filed and 2.5 months after the November 8, 2017 hearing when North Dakota prescribes that *summary judgment is appropriate only after the non-moving party has had a reasonable*

opportunity for discovery to develop his position? Choice Financial Group v. Schellpfeffer, 2006 ND 87, 712 N.W.2d 855.

4. Was it abuse of discretion, misapplication of law, to refuse to strike Affidavit of Sens when Affidavit is conclusory without facts, does not identify personal knowledge of contract nor provide copy of contract between UND and Grand Forks County required by N.D.R.Civ.P. 56(e)(1) yet relied on for complete autopsy/death investigation immunity; proclaims Sens is exclusively state employee; raises issues outside pleadings, raises disputed material facts as to communications between Ayling and Sens?

5. Did Sens Affidavit containing matters outside pleadings, which appear to be have been considered by court in determining Sens is not a County Defendant, convert State's Rule 12(b)(6) and/or summary judgment motion to one completely of summary judgment per N.D.R.Civ.P. Rule 12(d)?

6. Was dismissal pursuant to State Defendant's Rule 12(b)(6) motions proper when State did not articulate which claim against which State Defendant and did not show prima facie elements of negligence were possible?

7. Was summary judgment with prejudice properly granted for partial claims against State Defendants and all claims against County with: (a) reliance only on approximately 35 paragraphs of 187 pg. Complaint and to exclusion of court record including Ayling's Affidavits and Exhibits; (b) when motions of State/County did not include request for relief regarding Sens as Grand Forks County Coroner (GFCC) nor Grand Forks County Coroner Office (GFCCO); (c) when Ayling was precluded from all discovery, including public documents, to develop her position; (d) when discovery date fabricated by

Defendants and relied on by Court is unsupported by the record; (e) when Defendants did not meet burden of proof?

8. Was summary judgment properly granted for partial claims as plead by State and all claims plead as summary judgment by County when Sen's Admissions conclusively establish that Sens in all of her capacities violated non-discretionary duties, refused to provide public documents, had complete control over information yet refused to provide, violated NDCC 11-19.1 et seq., State Forensic Examiner Regulations, and Certifications of compliance/adherence to U.S. Dept. of Justice authored by Sens, and lied to Ayling to cover for illegal acts, etc.

9. Was dismissal of all claims against all Defendants via Rule 12(b)(6) and summary judgment proper when the scope of the County and State motions related only to their characterization of Ayling's claims as being unhappy/upset with the autopsy results and determination of Sens; not as plead by Ayling and including special/fiduciary relationship with Sens, e.g. deceit, impeding rights, negligent infliction of emotional distress, acting in concert, etc.?

10. Was it error of law to determine Sens is not a County Defendant in one sentence without analysis of law/fact [**#247**/66]?

11. Was it abuse of discretion for Court to deny Ayling's Motion Vacate/Reconsider based on its inaccurate determination the Motion was based on same facts/issues which will not be considered again rather than determining if there were sufficient grounds for disturbing the finality of the judgment, including refusal to consider Affidavit of Glenn Hardin disputing the fabricated discovery date and documentation of fraud upon the Court by counsel/parties?

12. Does consistent misconduct of parties/counsel including division of representation where Sens is represented by Atty. Hanson who represents State Defendants, to minimize and confuse claims regarding Sens as Grand Forks County Coroner; parceling and mischaracterizing Complaint allegations/facts to point of false; offering misleading/false statements, omissions; and failing to disclose legal authority in controlling jurisdiction to gain tactical advantage, all relied upon by Court negate/vacate all Orders?

III. APPELLATE JURISDICTION.

13. Order staying Ayling's discovery 07/10/17 [**#101**]. Notice Appeal [**#285**] 06/06/2018 timely N.D.R.Civ.P. 60(b)(1)-(3) and 60(b)(4-6), N.D.R.Civ.P. 60(c)(1).

14. Order refusing consider Ayling's 08/15/17 Rule 56(f) Letter/Affidavit 08/31/2017 (**#141**). Notice Appeal [**#285**] 06/06/2018 timely, N.D.R.Civ.P. 60(c)(1).

15. Order Denying Motion Strike Affidavits, Ex. H; Denying Rule 56(f) Motion; Dismissing All Claims w/Prejudice [**#247**] served on Ayling 01/26/18 by Hanson [**#253**]. 02/22/2018 Ayling filed Motion Reconsideration and/or Vacate [**#256**-**#262**]; no later 28 days after notice of entry of judgment, N.D.R.Civ.P. 59(j) and N.D.R.App.P. 4(a)(3)(A)(iv)(vi).

16. Notice of Entry Court's Order denying Motion to Vacate and/or Reconsideration 04/10/2018 (**#283**) 04/10/2018. Notice Appeal (**#285**) 06/06/18 within 60 days from 04/10/2018, N.D.R.App.P. 4(a)(1) & N.D.R.App.P. 4(a)(3)(A)(iv)(vi).

IV. STATEMENT OF CASE.

17. Ayling served Summons/Complaint **[Appendix/**pgs.15-200] on Sens and GFCo. 02/17/2017; subsequent service remaining Defendants [**#165**]. State/County mischaracterize Ayling's claims as disagreeing with decisions of Sens as Grand Forks

County Coroner; unhappy/upset with results of autopsy and investigation [**#97**/21; **#107**/¶20,¶22] to conform with out of jurisdiction/incompatible case law disposing of claims based on public duty.[1] Complaint alleges botched, illegal, negligent, incomplete autopsy/death investigation; violation of non-discretionary statutes, State Examiner regulations, Certifications Coroner compliance/adherence; omission/fabrication of material facts, deliberate acts cover for negligent, willful, reckless acts; incomplete/fraudulent reporting; negligent misrepresentations to Ayling; creating special relationship with Ayling to mislead/deceive; refusal provide public documents; breach of fiduciary duty to provide information; impeding/infringing rights; acting in concert to mislead; intentional/negligent infliction emotional distress with repeated wrongful/traumatizing acts; failure exercise reasonable care/follow standard of care; conflicts of interest; known illegal patterns practice, reckless acts inside/outside scope employment; deceit; official oppression; negligent supervision/retention; respondeat superior.

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[1] State relies Lawyer v. Kernodle, 721 F.2d 632 (8th Cir. 1983), Missouri case, claims for negligent diagnosis cause of death dismissed due to official immunity, yet recognizing exception is when statute intended to create a private cause of action. County relies Nader v. Hughes, 643 A.2d 747 (Pa.1994) where father brought mandamus action requiring coroner to conduct inquest into ruling suicide for his son's death claiming "incalculable stress and mental anguish" - "religion" and "social " to clear stigma of suicide. Court found mandatory for coroner to investigate, inquest discretionary, Nader failed reveal allegations sufficient to raise issues coroner abused discretion.

Only public duty recognized in ND is NDCC 32-12.1-03(3)(f) (County) NDCC 32-12.2-02 (State) regarding inspections/licensing, enforcing/monitoring parole, law enforcement services, fire protection services. Special relationship provides exemption to public duty, Ayling alleged, Court found standing. NDCC 28-01-17 allows private right of action against coroner in addition to NDCC 32-12.1-03 County, 32-12.2 State, liability statutes. Ayling's allegations do not relate to non-discretionary duties including negligence far beyond autopsy Blake's body. [**Addendum A**]

[<u>See</u> **Addendum A -** Statutes, Regulations, Certifications Compliance/Adherence] [2]

18. Defendants served Answers 03/31/2017, contending complete discretion; standard of care followed; no violation State/Federal laws; no deceit, willful, wanton, reckless acts; all acts in scope employment; no fabrications/omissions; no refusing to provide public documents; affirmative defenses regarding statute of limitations, immunity, standing, etc. [**Appendix C**; **Appendix D**]

19. Ayling served Requests for Production Documents on State/County met with Motions to Quash/Protective Order; hearing scheduled for 07/06/2017. Ayling served Requests for Admissions (RFA) on Sens 06/01/2017 [**#84**]. No written objections/response served on Ayling by 06/05/2017 DUE DATE (3 days mailing 30 days respond, July 4 Holiday) per N.D.R.Civ.P. 36(a)(3).

20. State[3] informed Court during 07/06/2017 hearing he would file motion dismiss on "four corners" of Complaint [Transcript/pg.15/Lines11-25]; Court allowed State 30 days to file Brief [Transcript/pg.21/Lines12-13]. Ayling raised issue that discovery is in default, no judicial authority to not respond [Transcript/pg.12/Lines5-11]. Court asked Hanson *Have you filed objections to the discovery requests? Not responses, but -- not answers but objections - all we've done is basically do the request for quashing the*

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[2] N.D.R.App.P.28(g) *If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief <u>or in an addendum</u> <u>at the end of the brief</u>.*

[3] Order [**#247**] refers to Defendants as State and County. Court recognized during 07/06/2017 hearing *I'm just calling the State Defendants even though we're probably not right on Ms. Sens calling her a State Defendant*. Court did not want to identify as Gaustad and Hanson Defendants [Transcript/pg.21/Lines8-11]. <u>By referring to Sens as State Defendant, Ayling is not accepting contentions of counsel and one sentence statement of Court that Sens is not a County Defendant [#247,</u> ¶ ???].

discovery. Okay. How about you, Mr. Gaustad, have you - Likewise.

[Transcript/pg.16/Lines12-19][4] Ayling explained discovery needs to oppose dispositive motions [Transcript/pg.10/Lines20-25, pgs. 11-13, pg.14/Lines1-6]. With only County summary judgment motion pending [**#97**] Court "scanned" before hearing [Transcript/pg.7/Lines1-2], Court stated *I'm going to rule on basis that a stay is warranted here pending the disposition of the dispositive motions that are going to be coming*. [Transcript/pg.17/Lines11-15]. Court found Ayling not been provided all documents [Transcript/pg.17/Lines1-15]. Court explained Rule 56(f) to Ayling [Transcript/pgs.17-20]. Court Order prepared by Hanson [Transcript/pg.17/Lines16-17] filed by Court 07/10/2017 stays discovery based on "judicial economy;" no retroactive application [**#101**].

21. State filed Rule 12(b)(6) and/or Summary Judgment motion 08/01/2017 [**#107**] with Exhibits A-K. Sens' Affidavit [**#108**/Ex.A] raises matters outside pleadings, e.g. *pathological investigation*, *follow-up investigation*, relies on contract between UND and GF County for coroner/death investigation services as support for complete immunity, without production of contract per N.D.R.Civ.P. 56(e)(1), contends Sens is exclusively State employee, minimizes communications with Ayling, raises material issues. Given foregoing, State motion converts to summary judgment per Rule 12(d). Without

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[4] To date Sens has not filed objection, response nor motion to amend/withdraw RFAs served 06/01/2017. *By failing to respond to JP Morgan Chase Bank's request for admissions, Skoda effectively admitted to all relevant facts contained in the request for admissions.* JPMorgan Chase Bank v. Skoda, 2014 ND 67, 844 N.W.2d 870. *If facts that are admitted under Rule 56 are "dispositive" of the case, then it is proper for the district court to grant summary judgment* (citations omitted). Quasius v. Schwan Food Company, 596 F.3d 947 (2010, 8th Cir.)

conversion, summary judgment aspects of State motion regard affirmative defenses medical malpractice expert opinion required NDCC 28-01-46; Presentment; Statute Limitations issues.

22. In addition to discovery outlined pleadings opposing stay discovery, Ayling needed discovery regarding Sens' Affidavit, e.g. copy contract between UND/GF County in effect 03/24/2012. Ayling filed Rule 56(f) Letter/Affidavit dated 08/15/2017 with Exhibits [**#123-#135**]. Court refused to consider stating it's just a Letter and instituted brief page limits [**#141**].

23. Ayling filed Motion Strike Affidavits Sens, Massello, Wynne, Koponen, Exhibit H as conclusory, not based on personal knowledge, no facts that would be admissible in evidence per N.D.R.Civ.P. 56(e)(1) [**#155**].

24. Given mischaracterizations/parsing Complaint facts to point of false in support of dispositive motions, Ayling filed Objection to State [**#164**] 10/11/2017 and County [**#236**] 11/08/2017. State replied [**#192**], County did not.

25. Ayling filed Rule 56(f) Motion to Continue 11/8/2017 hearing to conduct discovery, including Affidavit and Exhibits [**#172-#185**]. Did not request hearing hoping decision would be issued prior 11/08/2017 hearing.

26. During dispositive motion hearing 11/08/2017, Court stated *Quite frankly I'm a little bit concerned about granting a summary judgment now because I stay discovery earlier. Obviously a Rule 12(b) motion doesn't need any discovery, doesn't need any facts because it's limited by the four corners of the pleadings ...* [Transcript/pg.41/Lines2-12]. *...my guess is the State Defendants, with the exception of Sens, which I need to look more, pretty certain they're going to be gone as a result of my*

opinion. ... with Sens, probably the best argument is the failure to file an affidavit because it seems like you are alleging, ma'am, that this is some sort of professional negligence. You used the term three or four times in your argument today "professional negligence" or "medical negligence" and we have that statute that says you have to file an affidavit with an expert opinion if your're claiming that. [Transcript/pg.42/Lines4-23] *I'm going to struggle with the County and see what we do. You may get an opportunity to conduct some discovery on that. Again, I'm not saying for sure I'm going to rule that the State Defendants are out at this time because there were some issues that you raised, primarily that Louisiana case,*[5] *that I need to look at to see if it changes my initial reactions.* [Transcript/pg.43/Lines1-5] [See #**261**, Analysis Simmons v. State]

27. Ayling concerned about mis-statements Court stating she used term "professional negligence" or "medical negligence" during hearing, which did not occur. Ayling not alleged medical malpractice; has alleged coroner negligence along with deceit, negligent misrepresentation, impeding rights, infliction of emotional distress, etc. Ayling filed post-hearing brief [#**238**]; Court refused Brief [#**243**].

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[5] Simmons v. State, No. 2015-CA-0034 regards motion dismiss coroner negligence claims. Court determined assuming allegations in Complaint to be true, coroner's office failure to investigate, perform autopsy, provide information regarding child's cause of death constitute outrageous and flagrant misconduct. In this case, Sens did not investigate, assured Ayling this was not required, did not perform a complete or legal autopsy. Statutory framework of Simmons and this case almost identical, e.g. coroner takes control of body and required to investigate. Simmons found coroner's legal control over body put coroner's office in position of power to affect Plaintiff's interests. Court determined coroner's denial of plaintiff's version facts is inapposite; only facts before Court on an exception of no cause of action are those alleged by Plaintiff; must assume facts to be true.

28. Court Order dated 01/23/2017 [**#247**] found:

> *[22] ...Ayling alleges a special relationship with Dr. Sens as part of her claim, and the facts on which she alleges such a relationship are sufficient to defeat a standing challenge. ¶*
>
> *[29] ...Ayling has sufficiently plead a special relationship outside the ordinary State employee duties of Dr. Sens.*
>
> *[43] ...Ayling alleges actual actions on the part of Dr. Sens which at this early stage, one could reasonably find to be outside the scope of her duties.*
>
> *[46] ... As for Dr. Sens, the Court finds that it cannot grant this motion in her favor. Ayling's Complaint includes an allegation that Dr. Sens failed to perform a required non-discretionary duty in several ways during the autopsy of Blake Ayling.*
>
> *[52] ...Ayling has repeatedly alleged that the Defendants, as government entities, have denied her access to public records, despite a finding by the North Dakota Attorney General's Office that she had been provided with all relevant documents at the time of her Complaint. As a result, the Court finds that additional discovery is not necessary to this motion.*
>
> *[66] ...Her arguments focus on the alleged special relationship between her and Dr. Sens, who is not a County Defendant in these proceedings.*

Court dismissed all claims against all Defendants with prejudice overall based on 3 yr. statute of limitations. Dismissed negligent supervision claims on discretion and public duty, instead of required "ordinary care" standard. Nelson v. Gillette, 1997 ND 205, 39, 571 N.W.2d 332.

29. Motion Reconsider/Vacate filed 02/22/2018 [**#257**] with Exhibits including undisputed facts regarding fictitious 12/2013 discovery date [**#258**], analysis of on point case Simmons v. State [**#261**]. Ayling submitted exhibits regarding misconduct parties/counsel throughout proceedings; County [**#271**]; State [**#277**] and Affidavit Glenn Hardin confirming Ayling did not consult with him in December 2013 regarding Sens,

autopsy report, autopsy procedures, which is Defendants' and Court basis for dismissing Ayling's claims based on ficticious discovery date 12/2013.

30. Court denied motion vacate/reconsider stating in Order filed 04/10/2018 [**#281**] *The Court entered the Memorandum Opinion and Order based on its understanding of the same facts and issues, and will not consider the same again.* Notice of Appeal filed 06/06/18 [**#285**].

V. STATEMENT OF FACTS.

31. County assumed *facts, as alleged in the complaint are true* for summary judgment [**#97**/FN 1/pg.2]. State accepted Ayling's Complaint facts as true for Rule 12(b)(6) and/or summary judgment [**#192**, ¶7]. Complaint does not include facts supporting lack of standing, expiration of statute of limitations, presentment, medical malpractice, immunity 32-12.1-03 as plead by Defendants.

32. Below are unsupported, mischaracterized, parceled facts, which are not supported by record and disputed yet relied on by Court exclusively to dismiss claims against Defendants with prejudice based on ficticious/disputed discovery date [**#247**].

(a) Ayling consulted with forensic toxicologist *because she alleged the coroner failed to follow the proper protocol* [**#97**, ¶6, ¶30].

(b) Following receipt of toxicology information, Plaintiff hired an expert to explain the information contained within the report [**#97**/¶6].

(c) By December 2013 Ayling had consulted with expert forensic toxicologist because she alleged coroner failed to follow the proper protocol [**#97**/¶29]. Ayling in *her own admission "expend[ed] funds to consult with an expert forensic toxicologist...on December 27, 2013. ... Ayling admits in Complaint that "[C]onsultation with the expert*

forensic toxicologist...seemed the best place to start trying to figure this all out was [sic] - exactly what was required of Dr. Sens as the Grand Forks County Coroner regarding the sudden and unattended death of Blake Ayling? [sic] Did she do all that was required as she assured Plaintiff numerous times. See Doc. ID#2 at ¶41 [**#107**; ¶10, ¶42, ¶48].[6] *At the very latest, Plaintiff hired a consultant on December 27, 2013 to investigate coroner practice ...* [**#107**, ¶49].

33. Following are <u>undisputed facts</u>, which were ignored/mischaracterized by Defendants and Court; not negated by admissible evidence to create only issues of law; meaning no disputed facts supporting summary judgment in favor of Ayling or differing inferences precluding summary judgment.

(a) Ayling been requesting copy of GFCo. coroner file since October 2015. [**#35**/Ex.1/pg.16(d)]; learned March 2013 (1 yr. after Blake killed) Sens attributed *acute ethanol intoxication* as significant factor. [**#35**/Ex.1/pg.17(g)] Ayling had many questions she posed in letter to Sens 03/24/2013; in response Sens suggested meeting, which occurred 04/06/2013 in Minneapolis. [**#35**/Ex.1/pg.18(h)]

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[6] This statement fraudulent, taken completely out of context, omits facts. ¶39 Complaint as written: *Plaintiff tried to look at the raw toxicology testing date received from the ND Crime Lab while looking up abbreviations and cross-referencing with articles on the Internet - she couldn't figure it out - it was like a foreign language. Plaintiff then <u>expended the funds to consult with an expert forensic toxicologist</u> to try to have some type of understanding of what this all means.* 5 pgs. of facts are skipped to end up at ¶41 which as written states: *Realizing <u>consultation with the expert forensic toxicologist</u> are opinions based on information Plaintiff had at the time and it is not uncommon for different professionals in different fields to have differing opinions, it <u>seemed the place place to start trying to figure this all out was</u> - exactly <u>what was required of Dr. Sens as the Grand Forks County Coroner</u> ...* [**Appendix**/pgs.46-51]

(b) Letter/meeting notes from 04/06/2013 meeting with Sens shows numerous assurances including Sens had done "all that was required;" Ayling was focused on toxicology rather than autopsy practice/procedures [#58/pgs.1-5]. Sens stated testing labs maintain chain of custody [**#58**/(25)]; labs determine specimens to test [**#58**/pg.10/(39)].

(c) Sens lead Ayling to believe Grand Forks Police Dept. responsible investigating agency. [**#35/**Ex.1/pg.21/¶17] Ayling appreciative of Sens' explanations/assurances; believed her. [**#35**/Ex.1/pg.21//¶18]

(d) Blake last known to be in PIKE House basement wearing jersey/backpack, not drinking, not showing signs of intoxication at 1:00 a.m. [**#50**]. Ayling wanted to know what happened - how did Blake become intoxicated, end up in the railyard with his clothes torn of, how dragged down track coming to rest with right arm torn off? Who knows what? Was foul play involved? What activity was in the railyard? [**Appendix**/pg.43; **#35**/Ex.1/pg.21//¶19] Ayling began investigating PIKE Fraternity and BNSF. [**Appendix**/pg.44/¶36; **#35**/Ex.1/pgs.321-322]

(e) Ayling learned from UND Police Incident Reports was reported drugged bag of wine at PIKE House party around same time/place Blake last known alive [**#52** (Incident Report reviewed 06/27/13; UPD File received May 2014)]. PIKE House party continued later than 1:30 a.m. [**Appendix**/pg.44/¶36; **#35**/Ex.1/pg.21/¶19]. Ayling learned foot traffic through railyard was known to UND and BNSF. [**#35**/Ex.1/pg.22/¶19]

(f) Ayling tried finding counsel regarding potential wrongful death claim, upcoming 2 yr. statute limitations; unable to given acute ethanol intoxication opinion. Ayling sent Memorandum to BNSF General Counsel hoping would result in something short of litigation. [**Appendix**/pg.44/¶37; **#35**/Ex.1/21/¶19] During conference call 12/03/2013

with BNSF General Counsel he stated was relying on what State did [toxicology tests], showed Blake had alcohol in his system; Ayling would probably never convince him that Blake was any different from trespassers where alcohol is involved. [**Appendix**/pgs.44-45; #**35**/Ex.1/pgs.21-22]

(g) Ayling devastated after conference/BNSF; tried looking at raw toxicology data from ND Crime Lab which is all she had (Sens relied on HCMC [#**57**]), couldn't figure it out, like foreign language. [**Appendix**/pg.46/¶39] Sens did not have confidence in ND Crime Lab. [#**38**/GFCCoroner-01679] Ayling realized way out of her league; decided consult with forensic toxicologist to try to understand how toxicology stuff works. [#**35/**Ex.1/pg.22//¶19] Ayling found names through Internet, forwarded records she had; consultation with toxicologist 12/27/2013. [#**35**/Ex.1/pg.22/¶20]

(h) Glenn Hardin, toxicologist, offered observations, including overall *toxicology testing of Blake's blood is not reliable without corroborating testing like urine and vitreous humor.* [#**35**/Ex.1/24(x)]

(i) Lot to take in, confusing, horrifying; did Sens do all required as she had assured Ayling? Should Ayling have the urine tested by independent lab? Can Sens state opinions/conclusions scientifically? What are synthetic drugs; how available are they? Did Sens consider and r/o post-mortem distribution, bacterial contamination? *So many questions that only Dr. Sens could answer?* [#**35/**Ex.1/pg.24/¶21]

(j) Ayling tried obtain details regarding only known urine sample at ND Crime Lab. Ayling told by AG's Office do not deal with public, person submitted specimens must contact Lab. Realizing experts have different opinions, needing Sens to contact Lab, wanting to know what was required of Sens, Ayling did some research to have

meaningful writing. [#**35**/Ex.1/pgs.24-25] Ayling sent Sens an email 02/20/2014 expressing concern and asking numerous questions. To date Sens refused to respond. [#**35**/Ex.1/pgs.27-32; [#**90**, Ex. 4]

(k) Ayling disputes Sens offered deposition, but Sens understood Ayling's 02/20/2014 email related to preparing case against BNSF. [#**38**/GFCCoroner-01680/¶6] (Inference and truth is Ayling thought if Sens took another look at toxicology, possibly test urine, maybe conclusion regarding alcohol BNSF relying on would be minimized.)

(l) Ayling contacted by Peter Welter/GFCo. States Attorney 03/17/2014 regarding "open records" requests in 02/20/2014 email; stated not calling about autopsy matters, out of expertise, Ayling asked does Sens know this? As of 03/17/2014 Ayling had no understanding of Sens as anything other than GF Co. Coroner. Ayling states in email: *Dr. Sens as Grand Forks County Coroner uses the UND facility for autopsies. However, the protocols and guidelines are related to acting as Coroner for GF County. Would it then be that the protocols and guidelines Dr. Sens must maintain and utilize for autopsies as GF Coroner would be under your hat? ... I can't imagine that I would be dealing with UND as Dr. Sens wrote the Autopsy Report as the GF County Coroner.* [#**128**]

(m) Ayling sent numerous "open records" requests to Sens, GFCo., later UND regarding protocols/standards for forensic autopsy 03/24/2012, to no avail. [#**35**/Ex.1/pgs.32-33; #**128**;]

(n) Ayling told there no documents regarding GFCC protocols/standards/procedures by Peter Welte, when provided with a USB drive 12/2014. While going through boxes documents, Ayling came across USB drive, opened every document and discovered

GFCo. had made certifications of adherence/compliance for Coroner in effect 05/10/2010-02/28/2013. [**#35**/Ex.1/pgs.34-35/¶32-¶32; **#60**]

(o) Koponen stated to Health Services Committee 07/27/16 *...we know we are missing cases which should be reported and investigated. ...frightening reality is we may not know what we are missing. We believe there are cases missed and the State and citizens are not optimally served.* [**#39**]

(p) Ayling informed Court during 11/08/2017 hearing she consulted with toxicologist because she was trying to figure out whether to bring suit against BNSF and PIKE Fraternity; did not relate to Sens. [Transcript/pg.13/Lines16-22]

(q) Glenn Hardin toxicologist provided Affidavit [**#274**] stating under oath in detail consultation related only to toxicology issues, no autopsy performance/protocols/standards/procedures as out of area expertise.

(r) Excerpts of Ayling's Complaint related to various discovery dates regarding Sens' fabrications/omissions not been negated by Defendants:

Appendix/pg.61-62, 08/2014 (State Forensic Protocols for autopsy GFCo. [**#59**]);

pgs.63-64; 12/2014 (Certifications adherence/compliance GFCC [**#60**]);

pgs.68-70, 01/2014 (Ed Bina illegally participating autopsy/required to perform death investigation [**#61**]);

pgs.74-77, 03/2015-04/2015 (Blake's roommates confirmed not drinking at apartment [**#42**-#**45**]);

pgs.80-82, 05/2015 (BNSF TrainMaster no activity on track where Blake's body was found from 10:20 p.m. 03/23/2012 to approx. 4:45 a.m. 03/24/2012 [**#55**]);

pg.84 (Blake's friend confirmed not drinking at DTD 03/23/2012 [**#46**]);

pgs. 94, 07/2015 State Forensic Examiner could not provide evidence UND Forensic Facility was authorized for autopsy 03/24/2012 per NDCC 11-19.1-11(2) [**#62**];

pgs.97-99, 05/2016 (no communications between Massello/Sens regarding coroner performance, protocols, etc. no documents regarding training, etc. for coroners [**#65**]).

34. Following are *conclusively established* matters (not exhaustive) from Sens' Admissions [**#84**]:

(a) Sens violated NDCC11-19.1-01(1), NDCC11-19.1-11(2) by requiring Ed Bina to collect blood, urine, tissues for further studies regarding sudden/unattended death of Blake 03/24/12 [RFA#124-RFA#139]. Sens acted outside scope of employment/authority [RFA#131].

(b) Sens required to comply State Forensic Examiner "Autopsy Procedure" for Blake's death; collecting 4 tubes blood, serum, bile, vitreous, urine [RFA#317]. Sens did not sample 4 tubes blood [RFA#318]; no serum [RFA#319]; no collecting bile [#320]; no vitreous humor specimen [RFA#321; RFA#291].

(c) Sens intentionally omitted from autopsy report/ND Report Death material facts Blake not drinking with roommates Dan Frost [RFA#141]; Dave Tillges [RFA#142]; Mike Zavadil [RFA#143]; no documents in GFCC file evidencing material statement fact *According to roommate, both he and Mr. Ayling had been drinking that evening* [RFA#144].

(d) Email to Ayling from Sens 02/17/2013 commended Blake wonderful child, must be special family to continue seeking answers [RFA#89]. During meeting Minneapolis

04/06/2013, Sens assured she had "done all that was required" regarding Blake's death [RFA#87]; obvious to Sens Ayling was very distraught, vulnerable, devastated, struggling not knowing chain of events leading to son's death, seeking all information possible [RFA#88]. 04/24/2013 letter from Ayling to Sens confirms discussion 04/06/2013 [RFA#335]; Sens did not notify Ayling she disagrees with 04/24/13 letter [RFA#336].

(e) Incorrect finding "intoxication" based on one postmortem blood sample with no evidence of decedent drinking to point of intoxication prior to death results in extreme hardship for family, loss of reputation decedent [RFA#381]; loss civil remedies [RFA#382]; loss truth/justice [RFA#383].

(f) Alcohol did not play pathological role Blake's death, would have died from loss of right arm/bleeding to death with/without intoxication [RFA#368].

(g) Sens cannot produce documents evidencing denial at ¶10 Answer Sens fabricated facts within autopsy report for Blake Ayling [RFA#96]; denial ¶20 Sens departed from applicable standard care or was negligent or careless while conducting autopsy of Blake Ayling [RFA#97]; denial ¶36 Sens deliberately chose not to keep notes [RFA#98]; 15th Defense Sens performed all necessary functions as GFCC and met accepted standard of practice and standards required under state and federal law [RFA#99]; denial ¶11 Sens willfully, recklessly, maliciously, negligently violated non-discretionary duties, and denial duties were non-discretionary [RFA#100].

(h) Sens <u>not</u> responded to questions posed Ayling's 02/20/14 email [RFA#324-RFA#331]. Sens <u>not</u> provided Ayling documents regarding protocols for forensic/autopsy death investigation required by GFCCO 03/24/12, protocols Sens was

operating under, required by ND State Forensic Examiner; related to inspection/accreditation of UND Forensic Pathology Facility, protocols for UND Facility for period 07/01/2011-02/28/2013 [RFA#90-#94].

(i) Sens cannot answer questions regarding chain events leading to Blake's death (manner of death) [RFA#162-171; RFA#174-179; RFA#180-188; RFA#191; RFA193-195; RFA#197-204; RFA#210-212].

(j) Hallmark of forensic science is adherence to clear and well-grounded protocols to arrive at truth based on facts, evidence, scientific principles [RFA#355].

VI. STANDARD OF REVIEW

35. *[17] A district court has broad discretion regarding **discovery**, and its decision will not be reversed on appeal absent an **abuse of discretion**.* Western Horizons Living Ctrs., v. Feland, 2014 ND 175, Para. 11, 853 N.W.2d 36.

36. *[9] ... **Rule 56(f)** is within the discretion of the district court, and the court will not be reversed unless it has **abused its discretion**.* Choice Financial Group v. Schellpfeffer, 2006 ND 87, 712 N.W.2d 855.

37. *[5] ... This Court reviews a district court's decision granting a **motion to dismiss** under **N.D.R.Civ.P. 12(b)(vi) de novo**. Brandvold at 6.* Estate of Nelson, 2015 ND 122, 863 N.W.2d 521.

38. *[6] ... Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.* M.M. v. Fargo Public School District Dist.#1, 2012 ND 79, 815 N.W.2d 273.

39. *We treat **motions for reconsideration as either motions to alter or amend a judgment** under N.D.R.Civ.P. 59(j), **or** as **motions for relief from a judgment or order***

under N.D.R.Civ.P. 60(b). Riak v. State, 2015 ND 120, 8, 863 N.W.2d 894. The standard of review for motions under Rule 60(b) ... *determine only whether the* ***court abused its discretion*** *in* ***ruling that sufficient grounds for disturbing the finality of the judgment were not established***. *Knutson v. Knutson, 2002 ND 29, 7, 639 N.W.2d 495.* Gonzalez v. Tounjian, 204 ND 156, 684 N.W.2d 653. ...

40. ***A court abuses its discretion*** *if it acts in an* ***arbitrary, capricious, or unreasonable*** *manner, or if it* ***misinterprets*** *or* ***misapplies*** *the* ***law***. Overboe v. Brodshaud, 2008 ND 112, 7, 751 N.W.2d 177. ***A court acts arbitrarily, capriciously, or unreasonably*** *when its* ***decision*** *is* ***not the product of a rational mental process*** *by which the* ***facts and law relied upon are stated together*** *for the purpose of* ***reaching a reasoned and reasonable decision***. Riemers v. Hill, 2016 ND 137, 881 N.W.2d 624.

VII. DISCUSSION

41. Stay Discovery. Rule 26(c) requires "good cause," showing *a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements*. Pochat v. State Farm Mutual Auto. Ins. Co., No. 08-5015-KES, 2008 WL 5192427 (DSD, Dec. 11, 2008) (quoting Gen. Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204, 1212 (8th Cir. 1973). Stays disfavored; when discovery is delayed/prolonged can cause unnecessary litigation expenses/difficulties, create case management problems impeding court's responsibility to expedite discovery. Simpson v. Specialty Retail Concepts, Inc., 121 F.R.D. 261, 263 (M.D.N.C. 1988). Where courts have stayed discovery pending resolution of motion, have done so for specific, unique reasons. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 US 508, 321 (2007). *...black letter law that mere filing of a motion to dismiss the complaint does not constitute "good cause" for*

the issuance of a discovery stay. (citations omitted) TE Connectivity Networks, Inc. v. All Systems Broadband, Inc., 0:13-cv-01356-ADM-FLN, 08/20/13.

42. To support "good cause" Hanson's Affidavit falsely inflates number RFPs claiming Ayling served two cumulative sets, counting subparts equals 1,670 RFPs [**#14 -** ¶5, ¶10, ¶12]; [**#15 -** ¶2]. Truth: **Ayling** informed counsel 04/03/2017 email she was having difficulty electronically providing exhibits regarding RFPs prior to leaving town, would have to wait to serve until return, in meantime attached is copy of RFPs *for your information.* 04/07/2017 email Ayling informed counsel she was uploading RFP exhibits and when complete will serve RFPs, which occurred 04/09/2017. [**#35**/Ex.1/¶5-8; **#123**/pgs.15-16]; [**#133**].

43. **State** falsely contends Ayling previously provided with information now seeking [**#14 -** ¶4, ¶10-¶12, ¶14; **#15** - ¶3; **#79**, pg. 6, 1st Para.]. **County** falsely claims Ayling provided with volumes of documents prior to litigation per "open record requests" [**#79**, pg. 6, 1st Para.; **#80 -** ¶2; **#82**]. Truth: **Court** found 07/06/2017 *I know that you've also indicated I think in your moving documents ... that another alternative reason for granting of the motion would be that the Defendants have provided all the documents sought previously. I'm not going to rule on that because I think there are for sure some documents that are included within the scope.* [Transcript/pg.17/Lines 1-13]. Now there is no "good cause."

44. County filed summary judgment motion 07/05/2017 [**#95-#97**]. Hanson states 07/06/2017 hearing not gotten *Motion to Dismiss in yet* [Transcript/pg.5/Lines11-21]. After oral argument by all parties, Court stated *I'm going to rule on the basis that a stay*

is warranted here pending the disposition of the dispositive motions that are going to be coming [Transcript/pg.17/Lines13-15].

45. Order drafted by Hanson [Transcript/pg.17/Lines11-17] filed by Court 07/10/2017 [**#101**]: *The Court recognizes that judicial economy will be best served by staying all discovery pending the outcome of the Defendants' dispositive motions.*

46. Order [**#101**] misapplies law, is abuse of discretion, doesn't include facts/law relied upon for the purpose of reaching a reasoned and reasonable decision regarding following [Riemers v. Hill, 2016 ND 137, 881 N.W.2d 624]:

(a) How/why Defendants met "good cause" burden.

(b) Particular facts making responding to discovery unusually burdensome/prejudicial beyond usual nature of discovery.

(c) How/why Complaint appears to be facially frivolous; clearly without merit.

(d) *Balance between public and private concerns*, Gen. Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204, 1212 (8th Cir. 1973).

(e) Consideration hardship to Ayling, United States v. Kordel, supra, 397 US 1, 4-5, 90 S.Ct. 763, 765 (1970).

(f) How/why discovery stayed when only pending motion was County summary judgment. ***However, summary judgment under Rule 56 is only appropriate if the nonmoving party has had a full opportunity to conduct discovery to develop information essential to its position***. *See* Anderson v. Liberty Lobby, Inc.*, 477 US 242, 250 n.5, 257, 106 S.Ct. 2505, 2511 n.5, 2514, 91L.Ed.2d 202, 213 n.5, 217 (1986); see also 11 Moore's Federal Practice, 56.10[8][a] (1998) ("****The district courts have a duty***

***under Rule 56(f) to ensure that the parties have been given a reasonable opportunity to make their record complete before ruling on a motion for summary judgment*.")

Aho v. Maragos, 1998 ND 107, 579 N.W.2d 165.

(g) How/why Ayling should be denied public records, e.g. contract between GF County and UND for GF County Coroner autopsy and death investigation services in effect 03/24/2012. (NDCC44-04-18(6) mandates "open records" requests must comply with Rules Civil Procedure/Orders when party involved in litigation. [See **Addendum A**])

47. Affidavit Sens [**#108**] attached to State's Rule 12(b)(6) and/or Summary Judgment Motion presents matters outside pleadings not excluded by Court, Does Not Meet N.D.R.Civ.P. 56(e). Court denied Ayling's Motion to Strike Affidavits of Sens, Massello, Koponen, Wynne, and Ex. H at Para. 17 of Order on basis *affidavits are standard and clearly reflect personal knowledge.* Rule 56(e) requires supporting Affidavit *must be made on personal knowledge, set out facts that would be admissible in evidence and show the affiant is competent to testify on the matters stated.* Affidavit Sens is conclusory without factual detail yet alleges medical malpractice; discretion, Sens only State employee, communications with Ayling were minimized (disputed by **#35**/Ex.1/pgs.16-21], Sens conducted *pathological* and *follow-up* investigations, which Ayling never heard of nor contained autopsy report [**#109**], coroner file [**#160**], ND Report of Death [**#63**]. Affidavit relies heavily on contract between UND/GFCo. for complete discretion, no copy provided per N.D.R.Civ.P. 56(e)(1). Does contract provide

for third-party beneficiary interest allowing for 6 yr. statute limitations?[7] *Statements in an affidavit must set out facts that would be admissible in evidence.* McColl Farms, LLC v. Pflaum, 2013 ND 169, 30, 837 N.W.2d 359. Sens' Affidavit creates issues material fact, converts 12(b)(6) motion to summary judgment. When *matters outside the pleadings are presented to and not excluded by the Court ... All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.* N.D.R.Civ.P. 12(d).

48. Ayling's August 2017 Rule 56(f) Requests Denied. During 07/06/2017 hearing Court explained to Ayling: *Because I am staying all the discovery at this point in time, I anticipate that the Plaintiff is going to make some sort of a Rule 56, I think it's (f) ... response to the motions for summary judgment asserting additional information is needed in order to respond.* [Transcript/pg.17/Lines18-22; T/pg.18/Lines 19-25; pg. 19/Lines1-3; T/pg.19/Lines21-24]. Given need for discovery to oppose summary judgment as outlined in Ayling's opposition stay discovery pleadings and Sens' Affidavit introduces matters outside pleadings with heavy reliance on absent contract between UND/GFCo. for complete discretion, Ayling filed Letter/Affidavit w/exhibits 08/23/2017 [**#123-#136**]. RE states: *2) Request for Continuance to Pursue Initial Discovery Prior to Responding to Motions for Summary Judgment of Defendants* [**#123**, pg.1]. Pg. 24/¶1:

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[7] *We hold NDCC 32-12.1 applies only to tort claims against political subdivisions. The district court erred in applying the three-year statute of limitations of NDCC 32-12.1-10 to the Finstads' contract claims.* Case remanded to determine whether 6 yr. or 10 yr. statute limitations applied to contract claims.
Finstad v. Ransom-Sargent Water Users, Inc., 2011 ND 215, 812 N.W.2d 323.

Whether a contract has been substantially performed and whether a party has breached a contract are questions of fact. Wachter v. Gratech Co., Ltd. 2000 ND 62, Para 17, 608 N.W.2d 279.

In an effort to cover all bases advocating for Plaintiff's initial discovery, this letter is dual ...Court may consider this writing as Plaintiff's Affidavit pursuant to Rule 56(f). This letter is signed under oath in the presence of a notary ... Affidavit gives Court notice of discovery needs [**#123**, pg. 3-4, 9, 12, 17-18, 23, 32, 39-43]. Court refused consider Letter/Affidavit stating *Because Ms. Ayling has not complied with the rules, the Court will not treat her letter as anything other than that: a letter.* [**#141**]

49. Court denied Ayling's Rule 56(f) motion filed 2.5 months after 11/08/2017 hearing on basis that *...Ayling has repeatedly alleged that the Defendants, as government entities, have denied her access to public records, despite a finding by the North Dakota Attorney General's Office that she had been provided with all relevant documents at the time of her Complaint. As a result, the Court finds that additional discovery is not necessary to this motion.* [**#247**/Para.52]. Ayling requested assistance from AG's Office regarding unresponded "open records" requests. Liz Brocker responded email 06/16/2014 offering advice how to word requests, stated AG's Office would not respond further [**#135**]. No determination by AG's Office Ayling had been provided all documents as of 02/16/2017 date Complaint. Court admitted during 07/06/2017 hearing Ayling had not been provided all documents [Transcript/pg.17/Lines1-15]. ND law requires discovery prior to opposing summary judgment motions and liberal application of Rule 56(f).

> *[9] The dispositive issue on appeal is whether summary judgment was properly granted.* ***Summary judgment is appropriate only after the non-moving party has had a reasonable opportunity for discovery to develop his position****. Aho v. Maragos, 1998 ND 107, 4, 579 N.W.2d 165 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.5 (19886)). Rule 56(f) allows for additional discovery before summary judgment is granted ...*
> Choice Financial Group v. Schellpfeffer, 2006 ND 87, 712 N.W.2d 855.

51. Court considered approximately 35 paragraphs of Ayling's Complaint regarding dismissal/summary judgment motions. Rule 12(b)(6) requires reviewing face of entire Complaint in light most favorable to Ayling to determine if no set of facts can be proven. Livingood v. Meece, 477 N.W.2d 183 (ND 1991). Summary judgment requires reviewing pleadings, file, affidavits, Rule 56(c). Complaint detailed and record provides documentation of non-discretionary laws, regulations, standards Sens violated, accepted by supervisors. No immunity defense for clearly established laws and regulations, unless Sens can *prove she neither knew nor should have known of the relevant legal standard*, which was not attempted. Id. Livingood.

50. Negligent Supervision/Retention Erroneously Analyzed. Count Two Complaint pleads Massello failed statutory supervision and reporting duties; had knowledge that Sens was not complying with statutory and regulatory duties; acts were allowed to continue without intervention and acquiescence. [**Appendix**/pg.167-177] Ayling later learned State Forensic Examiner's Office employs pattern of practice utilizing autopsy technicians to dissect bodies, remove organs/tissue, collect specimens [**#125**; **#278**], which is illegal per NDCC 11-19.1-01(1); 11-19.1-11(2).

51. Count Three [**Appendix**/pgs.178-183] claims against UND, Wynne, Koponen regarding responsibility to ensure Sens complying with statutes/regulations; had knowledge Sens concerned about budgets, focus was being at the helm of creating profitable regional autopsy facility, knowledge less than required specimens were being sampled, Bina illegally assisting with autopsy, failed to implement reliable system of quality assurance/control, knowledge that statutory/regulatory duties regarding autopsy/death investigation were violated. Defendants had knowledge Sens portrayed to

public all deaths are investigated, UND Facility meets all NAME inspection/accreditation standards, families deserve the truth, etc. [**Appendix**/pgs.31-32]; knowing this was not accurate yet appreciating celebrity and public funding.

52. Court found Standing for Sens; concluded claims against other State Defendants as supervisors/public officials are generalized grievances, acting within scope of employment, no duty owed to Ayling. [**#247**/Para.23/Para.29/Para.43/Para.46].

53. Court found no standing for County, States Attorney, Commissioners stating *it was not the actions of these County Defendants which caused her mental anguish; it was the sudden and shocking death of Blake. ... Ayling has not suffered an injury caused by the actions of these Defendants* [#247/56]. Injury/harm is jury determination. Rued Ins. Inc v. Blackburn, Nickels & Smith, Inc., 543 N.W.2d 770 (ND1996). Court found choices facing County Defendants were public policy considerations relating to degree of management/oversight of County services, granting summary judgment on all claims [**#247**/Para.67/Para.73/Para.78]. Court states Para. 78 *Ayling alleges reckless, grossly negligent, or willful and wanton acts on behalf of the County Defendants, but the facts alleged by Ayling in the Complaint and exhibits offered in response to these motions do not give rise to any conclusion that such conduct occurred.* Ayling's discovery was stayed, two Rule 56(f) requests were ignored by Court; now Court impermissibly finds facts are insufficient? See Para.30 Johnson Farms v. McEnroe, 1997 ND 179, 568 N.W.2d 920.

54. Standard of review for negligent supervision/retention is whether employer *failed to exercise "ordinary care" in supervising the employment relationship to prevent the foreseeable misconduct of an employee from causing harm to other employees or third*

parties. Nelson v. Gillette, 1997 ND 205, 39, 571 N.W.2d 332. Claims do not depend on finding whether employee acted within/outside scope employment when tortious acts occurred. Ayling alleges supervisory State Defendants acquiesced to Sens' acts. *In damage suits, issues of voluntariness or acquiescence generally are treated as questions of fact.* Century Park Condo. v. Norwest Bank, 420 N.W.2d 349, 352 (ND 1988)

55. Respondeat Superior Claims Not Addressed by Court. Respondeat Superior is a form of indirect liability (vicarious liability). Sens had an employment/agency relationship with State/County. *Respondeat superior is a long-standing doctrine in this state's jurisprudence.* Binstock v. Fort Yates Pub.Sch.Dist., 463 N.W.2d 837, 841-42 (ND1990). *Because the District can be liable under the doctrine of respondeat superior for Hart's alleged negligence, wrongful act, or omission ... occurring within the scope of her employment under NDCC 32-12.1-04(1), ... we reverse the summary judgment and remand for trial against the District.* M.M. v. Fargo Public Sch.Dist. #1, 2010 ND 102, 783 N.W.2d 806. NDCC32-12.1-03(1) is State counterpart. Determination as to agency is for trier of fact. Red River Commodities, Inc., v. Eidsness, 459 N.W.2d 805, 810 OND 1990; Doan v. City of Bismarck, 2001 ND 152, 632 N.W.2d 815.

56. Court determined *Ayling's Complaint includes an allegation that Dr. Sens failed to perform a required non-discretionary duty in several ways during the autopsy of Blake Ayling.* Failure to perform a statutory/regulatory duty is evidence of negligence and not discretionary. Praus v. Mack, 2001 ND 80, 626 N.W.2d 293; Olson v. City of Garrison, 539 N.W.2d 663 (ND 1995) Development of facts identifying Sens' acts in what capacity under what authority regarding which claims and whether or not considered within/outside scope employment and whether reckless, wanton, willful required.

57. <u>Court Dismissed Ayling's Claims Against all State Defendants Per NDCC 28-01-46 in error</u>. Text of 28-01-46 provides a defense for actions regarding <u>*injury or death alleging professional negligence against a physician*</u>. NDCC 28-01-46 is an affirmative defense, for which State must prove the elements by factual evidence. Scope State's motion in support 28-01-46 is Sens *utilized her medical professional training and judgment to make a medical determination as to the cause of Blake Ayling's death.* **[#107/**¶23,¶24]. Ayling does not allege anywhere in Complaint Sens was negligent in *professional role as physician*. Ayling's Complaint consistently refers to Sens as GFCC and in part relies NDCC 28-01-17 regarding liability incurred by act in coroner's official capacity and omission of an official duty.

58. Text of 28-01-46 provides defense for allegations of negligent acts <u>resulting</u> in <u>*injury or death*</u>. Sens cannot cause *injury or death* to deceased human body nor did Sens establish physician/patient relationship with Blake or Robin Ayling. Sens took charge of Blake's death per NDCC 11-19.1-15; took charge of his body per 11-19.1-10, had complete control. *An integral part of a physician's duty to a patient is the disclosure of available choices for treatment and the material and known risks involved with each treatment.* <u>Long v. Jaszczak</u>, 204 ND 194, 12, 688 N.W.2d 173. Cutting a "V" incision into a deceased human body from the chest down to the pubic bone; observe, dissect tissues, organs, collect specimens for testing; sawing into skull, pulling back scalp; cutting into layers of neck, are all procedures that could never be performed on a living human body for purposes of treatment. No patient/physician relationship was established.

59. Not all acts of coroner require physician; Sheriff, BCI Agent or Highway patrol may perform duties except inspectin/dissection/determining medical cause of death, NDCC 11-19.1-04; NDCC 11-19.1-06. Ayling alleges Sens completely violated relevant sections Chapter 11-19.01 [**Addendum A**]. Exactly which acts of Blake's autopsy were performed by Sens? Sens admitted GFCCO had a pattern of practice in effect on 03/24/2012 requiring Ed Bina, non-physician to illegally dissect organs/tissues and collect urine/blood [**#84**/RFA#124,131,139].

60. Burden proof for affirmative defense medical malpractice is showing patient's condition was result of factors other than Defendant's negligence, thus need for expert opinion *to establish the degree of care and skill required in diagnosing or treating a patient's ailments*. Winkjer v. Herr, 277 N.W.2d 579 (ND 1979) If medical malpractice would miraculously apply, how is botched, illegal, incomplete autopsy of a deceased human body performed in part by a non-physician, followed by fabrication of facts, deceit, negligent misrepresentation, etc. the result of factors other than Sens' negligence?

61. Rule 12(b)(6) burden not met. Ayling contends Rule 12(b)(6) aspects of State motion were converted by summary judgment by Sens' Affidavit. Court dismissed some claims under Rule 12(b)(6), which is unclear. Dismissal for failure to state claim did not meet burden of proof and dismissal by Court was error of law. Nowhere in State's Motion do they point to a specific statute and explain why Ayling has not shown a prima facie case. Basis for motions is legal argument and false manipulation of Ayling's Complaint facts without look at face of Complaint. Court already determined that Complaint supports standing, acting outside scope employment, failure to perform non-

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discretionary duties, which precludes dismissal per Rule 12(b)(6). Livingood v. Meece, 477 N.W.2d 183 (ND 1991)

62. Statute of Limitations, Presentment, Discovery Date, Equitable Estoppel. outlined Sec. VI herein, Defendants accepted all facts as true in Complaint and "burden of proof" was to fraudulently parse facts from Complaint to manufacture false statements in support of ficticious 12/2013 discovery date for all claims against all Defendants. ... *Parsing the factual allegations in a complaint through summary judgment proceedings is inappropriate in a negligence case because "[w]hether a certain act or failure to act is negligence depends upon the facts and circumstances of each particular case."* *Kreidt v. Burlington N.R.R., 2000 ND 150, 10, 615 N.W.2d 153 (quoting NDJI-Civil-2.05).* M.M. v. Fargo Public School Dist.#1, 2010 ND 102, 783 N.W.2d 806.

> *A defense based on the statute of limitations in a civil proceeding is an affirmative defense.* E.G. In Interest of K.B., *490 N.W.2d 713, 717 (ND 1992)*
>
> *Generally a party relying on a statute of limitations has the burden of proving that the action is barred.*
> Anderson v. ND Workers Comp. Bureau, 553 N.W.2d 496 (ND 1996)
>
> *For purposes of applying a statute of limitations, determining when a cause of action accrues normally presents a question of fact.*
> Johnson v. Hovland, 2011 ND 64, 795 N.W.2d 294
>
> *A statute of limitations defense is fact-driven and not ordinarily susceptible of summary disposition.* Waxler v. Dalsted, 529 N.W.2d 176, 179

Ayling disputed manufactured discovery date 12/2013. Ayling presented various discovery dates contained in Complaint supported by exhibits, which remain undisputed. Evidence most favorable to Ayling is prior to August 2014 she had no facts regarding requirements for autopsy/death investigation for GFCo. Coroner and no facts prior to July 2015 related to negligence of State Forensic Examiner. All she had were concerns,

questions and took great efforts to obtain facts, but for Defendants refusing to respond. Even if one could have a differing finding, such would be on disputed facts which has no place in summary judgment. Phillips Fur & Wood Co., v. Bailey, 340 N.W. 2d 448 (ND 1983).

> *The issue now arises regarding whether or not any genuine issues of material fact exist concerning the knowledge Anderson had or in the exercise of reasonable diligence should have had, regarding Dr. Shook's alleged negligence. This is a genuine issue of fact which prevents the court from granting the motion for summary judgment.* Anderson v. Shook. 333 N.W.2d 708 (ND 1983)

63. Court found *...Ayling alleges actual actions on the part of Dr. Sens which at this early stage, one could reasonably find to be outside the scope of her duties.* [**#247**/Para.43]. Under this scenario there is potential 6 yr. statute of limitations and was error of law to dismiss claims against Sens based on 3 yr. statute of limitations.

64. Scope motions for State and County Exclude Sens as Grand Forks County Coroner (GFCC). Sens falsely maintains she is State employee exclusively because compensation comes from State [**#108**]. County falsely contends in Brief [**#97**, Para.34] only allegations against County Defendants found Count Four of Complaint [Appendix/pgs.183-194], relating negligent supervision/respondeat superior claims against GF County, States Attorney, Commissioners. Neither State nor County challenged underlying factual basis for claims against Sens as Grand Forks County Coroner (GFCC) found in Count One of Complaint [**Appendix**/pgs.120-167], majority Ayling's claims. Court erred in dismissing all claim against all Defendants with prejudice [**#247**, Para.94] when scope of motion did not include relief for GFCC/GF County Coroner Office; burden of showing absence of genuine issues material fact was not met by State/County. *The moving party, however, has the initial burden of showing the*

absence of genuine issues of fact. ... *In this case, Boomers did not challenge the factual basis for Zueger's claims, but raised purely legal issues*. Zueger v. Carlson, 542 N.W.2d 92 (ND 1996).

65. Court erroneously, unilaterally determined Sens Not a County Defendant. Court merely states *Her arguments focus on the alleged special relationship between her and Dr. Sens, who is not a County Defendant in these proceedings* [**#247**, Para.66]. Sens is County employee per NDCC 32-12.1-02(3) defining employee as *officer* or *servant* whether *elected* or *appointed* and whether or not *compensated*. Sens was appointed Coroner by Commissioners, signed Oath of Office as Coroner, County provides Coroner with vehicles, paging services, liability insurance [**#267**/Para.5]. Sens is agent of County per NDCC 3-03-01, 3-03-02, 3-03-05, 3-03-07, 3-03-09. If there is dispute regarding agency, *The question of agency is a fact question for the trier of fact.* Red River Commodities, Inc., Eidsness, 459 N.W.2d 805, 810 ON.D. 1990); Doan v. City of Bismarck, 2001 ND 152, 632 N.W.2dd 815. Whether or not Sens is County Defendant does not absolve County of liability for acts of Coroner Office per NDCC 32-12.1-03(1) relating to acts *within the scope of employee's employment or office*, whether or not willful, wanton and reckless.

66. Abuse of Discretion for Court to deny Ayling's Motion to Vacate and/or Reconsider. Ayling provided detailed examples of misconduct on part of counsel/parties; pointed to conflicting facts, misapplication of law, fact that Court did not consider entire record. Ayling provided Affidavit of toxicologist stating he did not consult regarding autopsy procedures/protocols or Sens performance as outside area of expertise, negating ficticious 12/2013 discovery date. Court did not provide a legal/factual analysis; stating

only that Ayling's Motion is based on same facts/issues and will not be considered again. [**#281**/Para.5].

CONCLUSION

67. Based on foregoing Ayling requests Appellate Court vacate all Orders and remand for discovery and trial on the merits/disputed issues of fact.

DATED: 09/28/2015

/s/___Robin Ayling____________
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20180231
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
SEPTEMBER 28, 2018
STATE OF NORTH DAKOTA

IN SUPREME COURT OF STATE OF NORTH DAKOTA
600 E. Boulevard Ave.
Bismarck, ND 58505

Robin E. Ayling, individually and as parent of Blake Christopher Ayling, deceased

Supreme Court File No. 20180231
Cass Co. Court File No. 18-2017-CV00889

Plaintiff,

vs.

Mary Ann Sens, M.D., Ph.D., individually; as Grand Forks County Coroner (public official) as North Dakota State Forensic Examiner Pathologist Designee (public official); and as Co-Director of the University of North Dakota School of Medicine and Health Sciences Forensic Pathology Practice Facility,

Defendant,

APPELLATE AYLING'S BRIEF

ADDENDUM

and

University of North Dakota, a public University of the North Dakota University System, Dr. Mark Koponen, individually and as Co-Director of the University of North Dakota School of Medicine and Health Sciences Forensic Pathology Practice Facility, and Dr. Joshua Wynn individually and in his official capacity as Dean of the University of North Dakota School of Medicine and Health Sciences including the Forensic Pathology Practice Facility,

Defendants,

and

Grand Forks County as a political subdivision and its States Attorney David Jones in his official capacity and individually, and its Commissioners in their official capacity as a Board and individually, specifically: Gary Malm, David Engen, Tom Falck, Diane Knauf, and Cynthia Pic,

Defendants,

and

Dr. William Massello, individually and in
his official capacity as North Dakota State
Forensic Examiner,

Defendant.

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ADDENDUM A

Statutes, Regulations, Certifications

[Required by N.D.R.App.P. 28(g)]

1-01-15, 1-01-17, 4-12-04-01, 4-12-04-04,

TITLE 3 AGENCY CHAPTER 3-01 CREATION AND TERMINATION OF AGENCY

3-01-01. Definition. Agency is the relationship which results when one person, called the principal, authorizes another, called the agent, to act for the principal in dealing with third persons.

3-01-02. General and special agent defined. An agent for a particular act or transaction is called a special agent. All others are general agents.

3-01-03. Actual and ostensible agency defined. An agency is either actual or ostensible. It is actual when the agent really is employed by the principal. It is ostensible when the principal intentionally or by want of ordinary care causes a third person to believe another to be the principal's agent, who really is not employed by the principal.

3-01-04. Who may appoint an agent - Who may be agent. Any person having capacity to contract may appoint an agent and any person may be an agent.

3-01-05. Authorization to agent. An agent may be authorized to do any acts which the agent's principal might do, except those to which the principal is bound to give personal attention.

3-01-06. How agency created. An agency may be created and an authority may be conferred by a prior authorization or a subsequent ratification.

3-01-07. No consideration necessary. The relationship of principal and agent can be created although neither party receives consideration.

3-01-08. Ratification of agency - How made - Extent. A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified or, when an oral authorization would suffice, by accepting or retaining the benefit of the act with notice thereof. A ratification is not valid unless at the time of ratifying the act done the principal has power to confer authority for such an act and ratification of part of an indivisible transaction is a ratification of the whole.

3-01-09. Retroactive ratification limited. No unauthorized act can be made valid retroactively to the prejudice of third persons without their consent.

3-01-10. Rescission of ratification. A ratification may be rescinded when made without such consent as is required in a contract or with an imperfect knowledge of the material facts of the transaction ratified, but not otherwise.

3-01-11. Termination of agency.

1. An agency is terminated as to every person having notice thereof by: a. Expiration of its term; b. Extinction of its subject; c. Death of the agent; d. Renunciation by the agent; or e. Incapacity of the agent to act as such.

2. Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated as to every person having notice thereof by: a. Its revocation by the principal; b. Death of the principal; or c. Incapacity of the principal to contract.

CHAPTER 3-02 PRINCIPAL AND AGENT RELATION

3-02-01. Acts done by or to agent. Every act which legally may be done by or to any person may be done by or to the agent of such person for that purpose, unless a contrary intention clearly appears.

3-02-02. Actual or ostensible authority. An agent has such authority as the principal actually or ostensibly confers upon the agent. Actual authority is such as a principal intentionally confers upon the agent or intentionally or by want of ordinary care allows the agent to believe the agent possesses. Ostensible authority is such as the principal intentionally or by want of ordinary care causes or allows a third person to believe the agent possesses.

3-02-03. Agent authority. Every agent has actually such authority as is defined by this title unless specially deprived thereof by the agent's principal, and has even then such authority ostensibly, except as to persons who have actual or constructive notice of the restriction upon the agent's authority.

3-02-04. Authority limited to specific terms. When an authority is given partly in general and partly in specific terms, the general authority gives no higher powers than those specifically mentioned.

3-02-05. General authority limited. An authority expressed in general terms, however broad, does not authorize an agent to act in the agent's own name unless doing so is the usual course of business, to define the scope of the agent's agency, or to do any act that a trustee is forbidden to do under chapters 59-09, 59-10, 59-11, 59-12, 59-13, 59-14, 59-15, 59-16, 59-17, 59-18, and 59-19.

3-02-06. Form of authorization. An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing, other than an instrument covered by chapter 41-03 can be given only by an instrument in writing.

3-02-07. Fraud limits authority. An agent never can have authority, either actual or ostensible, to do an act which is, and is known or suspected by the person with whom the agent deals to be, a fraud upon the principal.

3-02-08. Authority to do necessary acts and make representations. An agent has authority:

1. To do everything necessary or proper and usual in the ordinary course of business to effect the purpose of the agent's agency.

2. To make a representation respecting any matter of fact, not including the terms of the agent's authority, but upon which the agent's right to use the agent's authority depends and the truth of which cannot be determined by the use of reasonable diligence on the part of the person to whom the representation is made.

3-02-09. When agent may disobey instructions. An agent has power to disobey instructions in dealing with the subject of the agency in cases when it is clearly for the interest of the agent's principal that the agent should do so and there is not time to communicate with the principal.

3-02-10. Authority to warrant property sold. Authority to sell and convey real property includes authority to give the usual covenants of warranty. Authority to sell personal property includes authority to warrant the title of the principal and the quality and quantity of the property.

3-02-11. Authority of general and special agent to receive price. A general agent to sell, who is entrusted by the principal with the possession of the thing sold, has authority to receive the price. A special agent to sell has authority to receive the price on delivery of the thing sold, but not afterwards.

3-02-12. Agent must inform principal - Not exceed authority. An agent must use ordinary diligence to keep the agent's principal informed of the agent's acts in the course of the agency. An agent must not exceed the limits of the agent's actual authority as defined by this title.

3-02-13. When agent can delegate powers. An agent, unless specially forbidden by the agent's principal to do so, can delegate the agent's powers to another person in any of the following cases, and in no others:

1. When the act to be done is purely mechanical.

2. When it is such as the agent personally cannot, and the subagent lawfully can, perform.

3. When it is the usage of the place to delegate such power. 4. When such delegation is specially authorized by the principal.

3-02-14. Lawful subagent principal's agent. A subagent lawfully appointed represents the principal in like manner with the original agent, and the original agent is not responsible to third persons for the acts of the subagent.

3-02-15. Responsibility of mere agent or unauthorized subagent. A mere agent of an agent is not responsible as such to the principal of the latter. If an agent employs a subagent without authority, the former is a principal and the latter is the former's agent and the principal of the former has no connection with the latter.

CHAPTER 3-03 PRINCIPAL AND THIRD PERSON RELATION

3-03-01. Rights and liabilities accruing to principal. An agent represents the agent's principal for all purposes within the scope of the agent's actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from the transactions within such limit, if they had been entered into on the agent's own account, accrue to the principal.

3-03-02. Principal bound when agent exceeds authority. When an agent exceeds the agent's authority, the agent's principal is bound by the agent's authorized acts so far only as they can be plainly separated from those which are unauthorized.

3-03-03. When ostensible authority binding. A principal is bound by acts of the principal's agent under a merely ostensible authority to those persons only who in good faith and without ordinary negligence have incurred a liability or parted with value upon the faith thereof.

3-03-04. Instrument within scope of authority binding. Any instrument within the scope of the agent's authority by which an agent intends to bind the agent's principal does bind the principal if such intent is plainly inferable from the instrument itself.

3-03-05. Notice to principal or agent. As against a principal, both principal and agent are deemed to have notice of whatever either has notice and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other.

3-03-06. Incomplete execution of authority. A principal is bound by an incomplete execution of an authority when it is consistent with the whole purpose and scope thereof, but not otherwise.

3-03-08. Setoff against agent. One who deals with an agent without knowing or having reason to believe that the agent acts as such in the transaction may set off against any claim of the principal arising out of the same all claims which the person dealing with the agent might have set off against the agent before notice of the agency.

3-03-09. Negligence of agent. Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of the principal's agent in the transaction of the business of the agency, including wrongful acts committed by the agent in and as a part of the transaction of the business, and for the agent's willful omission to fulfill the obligations of the principal. The principal is not responsible for:

1. Other wrongs committed by the principal's agent unless the principal has authorized or ratified them, even though they are committed while the agent is engaged in the principal's service.

2. Injuries or death to passengers and other persons or damage to properties resulting from:

a. Operation or use of a motor vehicle, not owned, leased, or contracted for by the principal in a ridesharing arrangement, as defined in section 8-02-07.

b. Information, incentives, or other encouragement to agents to participate in a ridesharing arrangement, as defined in section 8-02-07.

CHAPTER 3-04 AGENT AND THIRD PERSON RELATION

3-04-01. Agent warrants authority. One who assumes to act as an agent thereby warrants to all who deal with that person in that capacity that the person has the authority which the person assumes.

3-04-02. When agent liable as principal. One who assumes to act as an agent is responsible to third persons as a principal for that person's acts in the course of that person's agency in any of the following cases, and in no others: 1. When, with that person's consent, credit is given to that person personally in a transaction. 2. When that person enters into a written contract in the name of that person's principal without a good-faith belief in having the authority to do so. 3. When that person's acts are wrongful in their nature.

CHAPTER 9-10 OBLIGATIONS IMPOSED BY LAW

9-10-01. Injury to the property or person of another. Every person is bound without contract to abstain from injuring the person or property of another or infringing upon any of that person's rights.

9-10-02. Deceit - Definition. A deceit within the meaning of section 9-10-03 is:

1. The suggestion as a fact of that which is not true by one who does not believe it to be true;

2. The assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true;

3. The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or

4. A promise made without any intention of performing.

9-10-03. Damages for deceit. One who willfully deceives another with intent to induce that person to alter that person's position to that person's injury or risk is liable for any damage which that person thereby suffers.

9-10-04. Intent to defraud - Presumption. One who practices a deceit with intent to defraud the public or a particular class of persons is deemed to have intended to defraud every individual in that class who actually is misled by the deceit.

9-10-06. Willful acts and negligence - Liability. A person is responsible not only for the result of the person's willful acts but also for an injury occasioned to another by the person's want of ordinary care or skill in the management of the person's property or self. The extent of the liability in such cases is defined by sections 32-03-01 through 32-03-18.

CHAPTER 11-11 BOARD OF COUNTY COMMISSIONERS

11-11-11. General duties of board of county commissioners. The board of county commissioners:

1. Shall superintend the fiscal affairs of the county.

2. Shall supervise the conduct of the respective county officers.

3. May cause to be audited and verified the accounts of all officers having the custody, management, collection, or disbursement of any moneys belonging to the county or received in their official capacity.

4. Before March fifteenth of each year, shall have the county auditor prepare general purpose financial statements in accordance with generally accepted accounting principles. Public notice that financial statements have been prepared and are available for inspection must be published in the official newspaper.

CHAPTER 11-19.1 MEDICAL COUNTY CORONER

11-19.1-01. Definitions. As used in this chapter, unless the context otherwise requires:

1. "Autopsy" means the inspection or dissection of a deceased human body and retention of organs, tissue, or fluids for diagnostic, educational, public health, or research purposes.

2. "Casualty" means death arising from accidental or unusual means.

3. "City" means a city organized under the laws of this state.

4. "Physician" includes physicians and surgeons licensed under chapter 43-17.

5. "Reportable circumstances" includes one or more of the following factors:

a. Obvious or suspected homicidal, suicidal, or accidental injury;

b. Firearm injury;

c. Severe, unexplained injury;

d. Occupant or pedestrian motor vehicle injury;

e. An injury to a minor;

f. Fire, chemical, electrical, or radiation;

g. Starvation;

h. Unidentified or skeletonized human remains;

i. Drowning;

j. Suffocation, smothering, or strangulation;

k. Poisoning or illegal drug use;

l. Prior child abuse or neglect assessment concerns;

m. Open child protection service case on the victim;

n. Victim is in the custody of the department of human services, county social services, the department of corrections and rehabilitation or other correctional facility, or law enforcement;

o. Unexplained death or death in an undetermined manner;

p. Suspected sexual assault; or

q. Any other suspicious factor.

11-19.1-02. County coroner. Each organized county, unless it has adopted one of the optional forms of county government provided by this code, shall have the office of county coroner which said office shall be held by an officer chosen in the manner prescribed in this chapter.

11-19.1-03. Appointment of coroner - Term - Vacancy. The board of county commissioners shall appoint a coroner for a term of five years. The board shall notify the state forensic examiner in writing of any appointment under this section. If the office of coroner becomes vacant by death, resignation, expiration of the term of office, or otherwise, or if the coroner becomes permanently unable to perform the duties of office, the board of county commissioners shall appoint a qualified individual to fill the vacancy, who shall give and take the oath of office as prescribed for coroners. If the duly appointed, qualified, and acting coroner is absent temporarily from the county or is unable to discharge the duties of office for any reason, the coroner may appoint an individual with the qualifications of coroner to act in the coroner's absence or disability, upon taking the prescribed oath for coroners.

11-19.1-04. Eligibility. 1. Subject to the qualifications, training, and continuing education requirements determined by the state forensic examiner, the following individuals are eligible to serve as coroner:

a. A physician licensed under chapter 43-17;

b. An advanced practice registered nurse or registered nurse licensed under chapter 43-12.1;

c. A physician assistant licensed under chapter 43-17; and

d. Any other individual determined by the state forensic examiner to be qualified to serve as coroner.

2. The coroner may appoint assistant or deputy coroners subject to the qualifications, training, and continuing education requirements determined by the state forensic examiner.

11-19.1-06. Individuals authorized to act in absence of coroner. In those counties in which a coroner does not reside or is not available, the duties of coroner must be performed by the sheriff, the state highway patrol, or any special agent of the bureau of criminal investigation. The sheriff, the state highway patrol, or special agent shall call upon the nearest coroner or deputy coroner from an adjacent county to investigate the medical cause of death of all coroner cases within said county. In those situations in which, because of distance or adverse conditions, a coroner is not available, the sheriff, the state highway patrol, or special agent shall request the state forensic examiner or the forensic examiner's designee to investigate and certify as to the medical cause of death.

11-19.1-08. Records of coroner's office. The coroner shall keep full and complete records. All records must be kept in the office of the coroner if the coroner maintains an office as coroner. If the coroner maintains no separate office, the records must be kept in

the office of the recorder of the county, unless the board of county commissioners designates a different official. The records must be properly indexed, stating the name, if known, of every deceased individual, the place where the body was found, date of death, cause of death, and all other available information required by this chapter. The report of the coroner and the detailed findings of the autopsy, if one was performed, must be attached to the report of every case. The coroner promptly shall deliver or cause to be delivered to the state's attorney of the county in which a death occurred copies of all necessary records relating to every death in which the coroner or state's attorney determines further investigation advisable. The sheriff of the county, the police of the city, or the state highway patrolmen on duty in that county in which the death occurred may be requested to furnish more information or make further investigation by the coroner or the coroner's deputy. The state's attorney may obtain from the office of the coroner copies of records and other information necessary for further investigation. Except for a report of death and autopsy reports, which may be used and disclosed only as authorized by subsection 4 of section 11-19.1-11, all records of the coroner are the property of the county and are public records.

11-19.1-10. Deceased human bodies to be held pending investigation. All deceased human bodies in the custody of the coroner must be held until such time as the coroner after consultation with the state's attorney, the police department of the city, the state highway patrolmen on duty in that county, or the sheriff has reached a decision that it is not necessary to hold the body longer to enable the coroner to decide on a diagnosis, giving a reasonable and true cause of death, or that the body is no longer necessary to assist any one of those officials in their duties.

11-19.1-11. Autopsies - Notice of results.

1. The coroner or the coroner's medical deputy, if the coroner deems it necessary, may take custody of the deceased human body for the purpose of autopsy. When the coroner does not deem an autopsy necessary, the sheriff or state's attorney may direct an autopsy be performed.

2. The autopsy must be performed by the state forensic examiner or by the state forensic examiner's authorized pathologist at a facility approved by the state forensic examiner.

3. Upon the death of a minor whose cause of death is suspected by the minor's parent or guardian or the coroner or the coroner's medical deputy to have been the sudden infant death syndrome, the coroner or the coroner's medical deputy, after consultation with the parent or guardian, shall take custody of the body and shall arrange for the performance of the autopsy by the state forensic examiner or a pathologist designated by the state forensic examiner, unless the county coroner, sheriff, state's attorney, and the parent or

guardian all agree that an autopsy is unnecessary. The parents or guardian and the state health officer must be promptly notified of the results of that autopsy.

4. A report of death, an autopsy report, and any working papers, notes, images, pictures, photographs, or recordings in any form are confidential but the coroner may use or disclose these materials for purposes of an investigation, inquest, or prosecution. The coroner may disclose a copy of the report of death in accordance with the authority of the state forensic examiner under section 23-01-05.5 and may disclose an autopsy photograph or other visual image or video or audio recording subject to limitations in section 44-04-18.18. The coroner shall disclose a copy of the autopsy report to the state forensic examiner.

11-19.1-12. Coroner may order removal of body. Where the county does not provide a morgue or morgue facilities for the use of the coroner, the coroner may use existing hospital facilities. When post mortem is completed at county morgue facilities or existing hospital facilities, the coroner after getting expressed order of the person lawfully entitled to the custody of the deceased person's remains as to the funeral home of the person's choice, shall order the remains released to such funeral home, or the coroner after getting the expressed order of the person lawfully entitled to the custody of the deceased person's remains, as to the funeral home of the person's choice, may order the remains removed to such funeral home and the necessary post mortem conducted there.

11-19.1-13. Cause of death - Determination. The cause of death, the manner of death, and the mode in which the death occurred must be incorporated in the death certificate filed with the registrar of vital statistics of this state. The term "sudden infant death syndrome" may be entered on the death certificate as the principal cause of death only if the child is under the age of one year and the death remains unexplained after a case investigation that includes a complete autopsy of the infant at the state's expense, examination of the death scene, and a review of the clinical history of the infant.

11-19.1-15. Notice of next of kin, disposition of personal belongings - Disposition of body when next of kin cannot be found. The coroner of the county in which a death is discovered shall take charge of the case and ensure that relatives or friends of the deceased individual, if known, are notified as soon as possible, giving details of the death and disposition of the deceased individual. If the relatives or friends of the deceased are unknown, the coroner shall dispose of the personal effects and body in the following manner:

1. After using such clothing as may be necessary in the final disposition of the body, the remaining personal effects of the deceased must be turned over to law enforcement for appropriate disposition.

2. The remains must be: a. Disposed of in accordance with section 23-06-14; or b. Otherwise disposed of in accordance with the laws governing the burial of indigent persons within this state.

11-19.1-16. Coroner's fees paid out of county treasury - Fees to be charged by coroner - Duty of county auditor - Certain expenses paid by the state.

1. The fees and mileage as provided by section 11-10-15 allowed to the coroner shall be paid out of the county treasury of the county of residence of the deceased person and the coroner's bill shall be presented to the county auditor and shall be paid upon approval and order of the board of county commissioners.

2. The state department of health shall audit, and if found correct, certify for payment by the state treasurer duly itemized and verified claims of the coroner, the coroner's medical deputy, and pathologist for the necessary expenses incurred or paid in the performance of an autopsy of a child whose cause of death was suspected to have been the sudden infant death syndrome.

11-19.1-17. Application. The requirements of this chapter apply to every county in this state.

11-19.1-18. State forensic examiner - Authority - Costs.

1. The state forensic examiner may order an autopsy and exercise all powers and authority bestowed upon the office of the coroner and, at any time, may assume jurisdiction over a deceased human body. Whenever requested to do so by the local coroner, acting coroner, or the local state's attorney, the state forensic examiner or the examiner's designee shall assume jurisdiction over a deceased human body for purposes of investigating the cause of death, the manner of death, and the mode in which the death occurred.

2. Except for the cost of an autopsy performed by the state forensic examiner or the examiner's designee and for the cost of an autopsy, investigation, or inquiry that results from the death of a patient or resident of the state hospital or any other state residential facility or an inmate of a state penal institution, all costs with respect to the autopsy, the transporting of the body for autopsy, and the costs of the investigation or inquiry are the responsibility of the county.

11-19.1-19. Required reports to state forensic examiner. On the form and in the manner prescribed by the state forensic examiner, the coroner or any individual acting as coroner shall report to the state forensic examiner every death of which the coroner is notified or which the coroner investigates.

11-19.1-20. State forensic examiner - Required consultation. The coroner or any individual acting as a coroner shall actively consult with the state forensic examiner's office in every death involving an inmate of a state, county, or city penal institution; death involving a child under the age of one when in apparent good health; and death that the coroner or acting coroner believes may have resulted from an accident, a suicide, or a homicide, under suspicious circumstances, or as a result of child abuse or neglect.

12.0-01.4 ???? 12.1-02.01 12.1-02-03, 12.1-03-01,

CHAPTER 12.1-09 TAMPERING AND UNLAWFUL INFLUENCE

12.1-09-03. Tampering with physical evidence. 1. A person is guilty of an offense if, believing an official proceeding is pending or about to be instituted, or believing process, demand, or order has been issued or is about to be issued, he alters, destroys, mutilates, conceals, or removes a record, document, or thing with intent to impair its verity or availability in such official proceeding or for the purposes of such process, demand, or order. 2. The offense is a class C felony if the actor substantially obstructs, impairs, or perverts prosecution for a felony. Otherwise it is a class A misdemeanor. 3. In this section, "process, demand, or order" means process, demand, or order authorized by law for the seizure, production, copying, discovery, or examination of a record, document, or thing.

CHAPTER 12.1-11 PERJURY - FALSIFICATION - BREACH OF DUTY

12.1-11-01. Perjury.

1. A person is guilty of perjury, a class C felony, if, in an official proceeding, the person makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a false statement previously made, when the statement is material and the person does not believe the statement to be true.

2. Commission of perjury need not be proved by any particular number of witnesses or by documentary or other types of evidence.

3. If in the course of one or more official proceedings, the defendant made a statement under oath or equivalent affirmation inconsistent with another statement made by the defendant under oath or equivalent affirmation to the degree that one of them is necessarily false, both having been made within the period of the statute of limitations, the prosecution may set forth the statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant to be true. Proof that the

defendant made such statements constitutes a prima facie case that one or the other of the statements was false, but in the absence of sufficient proof of which statement was false, the defendant may be convicted under this section only if each of such statements was material to the official proceeding in which it was made.

4. For purposes of this section, "false statement under oath or equivalent affirmation" includes a writing made in accordance with chapter 31-14.

12.1-11-02(1)(2), 12.1-11-05, 12.1-11-04(1)-(4)

12.1-11-03(1), 12.1-13-01, 12.1-15-01, 12.1-14-01.

12.1-11-04. General provisions.

1. Falsification is material under sections 12.1-11-01, 12.1-11-02, and 12.1-11-03 regardless of the admissibility of the statement under rules of evidence, if it could have affected the course or outcome of the official proceeding or the disposition of the matter in which the statement is made. Whether a falsification is material in a given factual situation is a question of law. It is no defense that the declarant mistakenly believed the falsification to be immaterial.

2. It is no defense to a prosecution under sections 12.1-11-01 or 12.1-11-02 that the oath or affirmation was administered or taken in an irregular manner or that the declarant was not competent to make the statement. A document purporting to be made upon oath or affirmation at a time when the actor represents it as being so verified shall be deemed to have been duly sworn or affirmed.

3. It is a defense to a prosecution under sections 12.1-11-01, 12.1-11-02, or 12.1-11-03 that the actor retracted the falsification in the course of the official proceeding or matter in which it was made, if in fact he did so before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding or the matter.

4. In sections 12.1-11-01 and 12.1-11-02, "statement" means any representation but includes a representation of opinion, belief, or other state of mind only if the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation.

CHAPTER 12.1-11 PERJURY - FALSIFICATION - BREACH OF DUTY

12.1-11-01. Perjury.

1. A person is guilty of perjury, a class C felony, if, in an official proceeding, the person makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a false statement previously made, when the statement is material and the person does not believe the statement to be true.

2. Commission of perjury need not be proved by any particular number of witnesses or by documentary or other types of evidence.

3. If in the course of one or more official proceedings, the defendant made a statement under oath or equivalent affirmation inconsistent with another statement made by the defendant under oath or equivalent affirmation to the degree that one of them is necessarily false, both having been made within the period of the statute of limitations, the prosecution may set forth the statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant to be true. Proof that the defendant made such statements constitutes a prima facie case that one or the other of the statements was false, but in the absence of sufficient proof of which statement was false, the defendant may be convicted under this section only if each of such statements was material to the official proceeding in which it was made.

4. For purposes of this section, "false statement under oath or equivalent affirmation" includes a writing made in accordance with chapter 31-14.

12.1-11-02. False statements.

1. A person is guilty of a class A misdemeanor if, in an official proceeding, he makes a false statement, whether or not material, under oath or equivalent affirmation, or swears or affirms the truth of such a statement previously made, if he does not believe the statement to be true.

2. A person is guilty of a class A misdemeanor if, in a governmental matter, he:

a. Makes a false written statement, when the statement is material and he does not believe it to be true;

b. Intentionally creates a false impression in a written application for a pecuniary or other benefit, by omitting information necessary to prevent a material statement therein from being misleading;

c. Submits or invites reliance on any material writing which he knows to be forged, altered, or otherwise lacking in authenticity;

d. Submits or invites reliance on any sample, specimen, map, boundarymark, or other object which he knows to be false in a material respect; or e. Uses a trick, scheme, or device which he knows to be misleading in a material respect.

3. This section does not apply to information given during the course of an investigation into possible commission of an offense unless the information is given in an official proceeding or the declarant is otherwise under a legal duty to give the information. Inapplicability under this subsection is a defense.

4. A matter is a "governmental matter" if it is within the jurisdiction of a government office or agency, or of an office, agency, or other establishment in the legislative or the judicial branch of government.

12.1-11-03. False information or report to law enforcement officers or security officials. A person is guilty of a class A misdemeanor if that person:

1. Gives false information or a false report to a law enforcement officer which that person knows to be false, and the information or report may interfere with an investigation or may materially mislead a law enforcement officer; or

2. Falsely reports to a law enforcement officer or other security official the occurrence of a crime of violence or other incident calling for an emergency response when that person knows that the incident did not occur. "Security official" means a public servant responsible for averting or dealing with emergencies involving public safety.

12.1-11-04. General provisions.

1. Falsification is material under sections 12.1-11-01, 12.1-11-02, and 12.1-11-03 regardless of the admissibility of the statement under rules of evidence, if it could have affected the course or outcome of the official proceeding or the disposition of the matter in which the statement is made. Whether a falsification is material in a given factual situation is a question of law. It is no defense that the declarant mistakenly believed the falsification to be immaterial.

2. It is no defense to a prosecution under sections 12.1-11-01 or 12.1-11-02 that the oath or affirmation was administered or taken in an irregular manner or that the declarant was not competent to make the statement. A document purporting to be made upon oath or affirmation at a time when the actor represents it as being so verified shall be deemed to have been duly sworn or affirmed.

3. It is a defense to a prosecution under sections 12.1-11-01, 12.1-11-02, or 12.1-11-03 that the actor retracted the falsification in the course of the official proceeding or matter in which it was made, if in fact he did so before it became manifest that the falsification

was or would be exposed and before the falsification substantially affected the proceeding or the matter.

4. In sections 12.1-11-01 and 12.1-11-02, "statement" means any representation but includes a representation of opinion, belief, or other state of mind only if the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation.

12.1-11-05. Tampering with public records.

1. A person is guilty of an offense if he: a. Knowingly makes a false entry in or false alteration of a government record; or b. Knowingly, without lawful authority, destroys, conceals, removes, or otherwise impairs the verity or availability of a government record.

2. The offense is: a. A class C felony if committed by a public servant who has custody of the government record. b. A class A misdemeanor if committed by any other person. 3. In this section "government record" means: a. Any record, document, or thing belonging to, or received or kept by the government for information or record. b. Any other record, document, or thing required to be kept by law, pursuant, in fact, to a statute which expressly invokes the sanctions of this section.

12.1-11-06. Public servant refusing to perform duty. Any public servant who knowingly refuses to perform any duty imposed upon him by law is guilty of a class A misdemeanor.

12.1-11-07. Fraudulent practice in urine testing. A person is guilty of a class A misdemeanor if that person willfully defrauds a urine test and the test is designed to detect the presence of a chemical substance or a controlled substance. A person is guilty of a class A misdemeanor if that person knowingly possesses, distributes, or assists in the use of a device, chemical, or real or artificial urine advertised or intended to be used to alter the outcome of a urine test.

TITLE 23 HEALTH AND SAFETY CHAPTER 23-01 STATE DEPARTMENT OF HEALTH

23-01-05.4. Department to employ state forensic examiner - Qualifications - Duties. The state department of health may employ and establish the qualifications and compensation of the state forensic examiner. The state forensic examiner must be a physician who is board-certified or board-eligible in forensic pathology, who is licensed to practice in this state, and who is in good standing in the profession. The state forensic examiner shall:

1. Exercise all authority conferred upon the coroner under chapter 11-19.1 and any other law;

2. Consult with local coroners on the performance of their duties as coroners;

3. Conduct investigations into the cause of death of and perform autopsies on any deceased human body whenever requested to do so by the acting local county coroner or the local state's attorney;

4. Provide training and educational materials to local county coroners, law enforcement, and any other person the state forensic examiner deems necessary;

5. Maintain complete records of the cause, manner, and mode of death necessary for accurate health statistics and for public health purposes; and

6. Perform other duties assigned by the state health officer.

28-01-16. Actions having six-year limitations. The following actions must be commenced within six years after the claim for relief has accrued: 1. An action upon a contract, obligation, or liability, express or implied, subject to the provisions of sections 28-01-15 and 41-02-104. 2. An action upon a liability created by statute, other than a penalty or forfeiture, when not otherwise expressly provided. 3. An action for trespass upon real property. 4. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property. 5. An action for criminal conversation or for any other injury to the person or rights of another not arising upon contract, when not otherwise expressly provided. 6. An action for relief on the ground of fraud in all cases both at law and in equity, the claim for relief in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

28-01-17. Actions having three-year limitations - Exceptions. The following actions must be commenced within three years after the claim for relief has accrued: 1. An action against a sheriff or coroner upon a liability incurred by the doing of an act in the sheriff's or coroner's official capacity and by virtue of that office, or by the omission of an official duty, including the nonpayment of money collected upon an execution. However, this subsection does not apply to an action for an escape.

CHAPTER 32-03 DAMAGES AND COMPENSATORY RELIEF

32-03-01. Damages for any injury. Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages.

32-03.2-02. Modified comparative fault. Contributory fault does not bar recovery in an action by any person to recover damages for death or injury to person or property unless

the fault was as great as the combined fault of all other persons who contribute to the injury, but any damages allowed must be diminished in proportion to the amount of contributing fault attributable to the person recovering. The court may, and when requested by any party, shall direct the jury to find separate special verdicts determining the amount of damages and the percentage of fault attributable to each person, whether or not a party, who contributed to the injury. The court shall then reduce the amount of such damages in proportion to the amount of fault attributable to the person recovering. When two or more parties are found to have contributed to the injury, the liability of each party is several only, and is not joint, and each party is liable only for the amount of damages attributable to the percentage of fault of that party, except that any persons who act in concert in committing a tortious act or aid or encourage the act, or ratifies or adopts the act for their benefit, are jointly liable for all damages attributable to their combined percentage of fault. Under this section, fault includes negligence, malpractice, absolute liability, dram shop liability, failure to warn, reckless or willful conduct, assumption of risk, misuse of product, failure to avoid injury, and product liability, including product liability involving negligence or strict liability or breach of warranty for product defect.

CHAPTER 32-12.1 GOVERNMENTAL LIABILITY

32-12.1-01. Legislative intent. This chapter creates additional powers and optional and alternative methods for the single and specific purpose of enabling political subdivisions to pay and to compromise claims and judgments, to issue bonds to fund and satisfy the same, to levy taxes in amounts necessary for such purposes without respect to limitations otherwise existing, and to compromise judgments and make periodic payments on such compromised amount.

32-12.1-02. Definitions. As used in this chapter, unless the context otherwise requires:

1. "Claim" means any claim permitted by this chapter brought against a political subdivision for an injury caused by a political subdivision or an employee of the political subdivision acting within the scope of the employee's employment or office.

2. "Commissioner" means the insurance commissioner.

3. "Employee" means any officer, employee, board member, volunteer, or servant of a political subdivision, whether elected or appointed and whether or not compensated. The term does not include an independent contractor, or any person performing tasks the details of which the political subdivision has no right to control.

4. "Injury" means personal injury, death, or property damage.

5. "Personal injury" includes bodily injury, mental injury, sickness, or disease sustained by a person, and injury to a person's rights or reputation.

6. "Political subdivision":

a. Includes all counties, townships, park districts, school districts, cities, public nonprofit corporations, administrative or legal entities responsible for administration of joint powers agreements, and any other units of local government which are created either by statute or by the Constitution of North Dakota for local government or other public purposes, except no new units of government or political subdivisions are created or authorized by this chapter.

b. Does not include nor may it be construed to mean either the state of North Dakota or any of the several agencies, boards, bureaus, commissions, councils, courts, departments, institutions, or offices of government which collectively constitute the government of the state of North Dakota.

7. "Property damage" includes injury to or destruction of tangible or intangible property.

8. "Public nonprofit corporation" means a nonprofit corporation that performs a governmental function and is funded, entirely or partly, by the state, a city, county, park district, school district, or township.

32-12.1-03. Liability of political subdivisions - Limitations.

1. Each political subdivision is liable for money damages for injuries when the injuries are proximately caused by the negligence or wrongful act or omission of any employee acting within the scope of the employee's employment or office under circumstances in which the employee would be personally liable to a claimant in accordance with the laws of this state, or injury caused from some condition **or** use of tangible property, real or personal, under circumstances in which the political subdivision, if a private person, would be liable to the claimant. The enactment of a law, rule, regulation, or ordinance to protect any person's health, safety, property, or welfare does not create a duty of care on the part of the political subdivision, its employees, or its agents, if that duty would not otherwise exist.

2. The liability of political subdivisions under this chapter is limited to a total of two hundred fifty thousand dollars per person and one million dollars for any number of claims arising from any single occurrence regardless of the number of political subdivisions, or employees of such political subdivisions, which are involved in that occurrence. A political subdivision may not be held liable, or be ordered to indemnify an employee held liable, for punitive or exemplary damages.

3. A political subdivision or a political subdivision employee may not be held liable under this chapter for any of the following claims:

a. A claim based upon an act or omission of a political subdivision employee exercising due care in the execution of a valid or invalid statute or regulation.

b. The decision to undertake or the refusal to undertake any legislative or quasi-legislative act, including the decision to adopt or the refusal to adopt any statute, charter, ordinance, order, regulation, resolution, or resolve.

c. The decision to undertake or the refusal to undertake any judicial or quasi-judicial act, including the decision to grant, to grant with conditions, to refuse to grant, or to revoke any license, permit, order, or other administrative approval or denial.

d. The decision to perform or the refusal to exercise or perform a discretionary function or duty, whether or not such discretion is abused and whether or not the statute, charter, ordinance, order, resolution, regulation, or resolve under which the discretionary function or duty is performed is valid or invalid.

e. Injury directly or indirectly caused by a person who is not employed by the political subdivision.

f. A claim relating to injury directly or indirectly caused by the performance or nonperformance of a public duty, including:

(1) Inspecting, licensing, approving, mitigating, warning, abating, or failing to so act regarding compliance with or the violation of any law, rule, regulation, or any condition affecting health or safety.

(2) Enforcing, monitoring, or failing to enforce or monitor conditions of sentencing, parole, probation, or juvenile supervision.

(3) Providing or failing to provide law enforcement services in the ordinary course of a political subdivision's law enforcement operations.

(4) Providing or failing to provide fire protection services in the ordinary course of a political subdivision's fire protection operations.

g. "Public duty" does not include action of the political subdivision or a political subdivision employee under circumstances in which a special relationship can be established between the political subdivision and the injured party. A special relationship is demonstrated if all of the following elements exist:

(1) Direct contact between the political subdivision and the injured party.

(2) An assumption by the political subdivision, by means of promises or actions, of an affirmative duty to act on behalf of the party who allegedly was injured.

(3) Knowledge on the part of the political subdivision that inaction of the political subdivision could lead to harm.

(4) The injured party's justifiable reliance on the political subdivision's affirmative undertaking, occurrence of the injury while the injured party was under the direct control of the political subdivision, or the political subdivision action increases the risk of harm.

4. This chapter does not obligate political subdivisions for an amount that is more than the limitations upon liability imposed by this chapter. Subject to this chapter, any payments to persons constitute payment in full of any compromised claim or judgment or any final judgment under this chapter.

5. Notwithstanding this chapter, a political subdivision or its insurance carrier is not liable for any claim arising out of the conduct of a ridesharing arrangement, as defined in section 8-02-07. 6. A political subdivision is not liable for any claim based on an act or omission in the designation, repair, operation, or maintenance of a minimum maintenance road if that designation has been made in accordance with sections 24-07-35 through 24-07-37 and if the road has been maintained at a level to serve occasional and intermittent traffic.

32-12.1-04. Political subdivision to be named in action - Personal liability of employees - Indemnification of claims and final judgments.

1. An action for injuries proximately caused by the alleged negligence, wrongful act, or omission of an employee of a political subdivision occurring within the scope of the employee's employment or office shall be brought against the political subdivision. If there is any question concerning whether the alleged negligence, wrongful act, or omission occurred within the scope of employment or office of the employee, the employee may be named as a party to the action and the issue may be tried separately. A political subdivision must defend the employee until the court determines the employee was acting outside the scope of the employee's employment or office.

2. An employee shall not be personally liable for money damages for injuries when the injuries are proximately caused by the negligence, wrongful act, or omission of the employee acting within the scope of the employee's employment or office.

3. No employee may be held liable in the employee's personal capacity for acts or omissions of the employee occurring within the scope of the employee's employment **unless** the acts or omissions constitute reckless or grossly negligent conduct, or willful or wanton misconduct. An employee may be personally liable for money damages for

injuries when the injuries are proximately caused by the negligence, wrongful act, or omission of the employee acting outside the scope of the employee's employment or office. The plaintiff in such an action bears the burden of proof to show by clear and convincing evidence that the employee was either acting outside the scope of the employee's employment or office or the employee was acting within the scope of employment in a reckless, grossly negligent, willful, or wanton manner. Employees may be liable for punitive or exemplary damages. The extent to which an employee may be personally liable pursuant to this section and whether the employee was acting within the scope of employment or office shall be specifically stated in a final judgment.

CHAPTER 32-12.2 CLAIMS AGAINST THE STATE

32-12.2-01. Definitions. As used in this chapter, unless the context otherwise requires:

1. "Claim" means any claim for money damages brought against the state or a state employee for an injury caused by the state or a state employee acting within the scope of the employee's employment whether in the state or outside the state.

2. "Injury" means personal injury, death, or property damage.

3. "Occurrence" means an accident, including continuous or repeated exposure to a condition, which results in an injury.

4. "Personal injury" includes bodily injury, mental injury, sickness, or disease sustained by a person and injury to a person's rights or reputation.

5. "Property damage" includes injury to or destruction of tangible or intangible property.

6. "Scope of employment" means the state employee was acting on behalf of the state in the performance of duties or tasks of the employee's office or employment lawfully assigned to the employee by competent authority or law.

7. "State" includes an agency, authority, board, body, branch, bureau, commission, committee, council, department, division, industry, institution, instrumentality, and office of the state.

8. "State employee" means every present or former officer or employee of the state or any person acting on behalf of the state in an official capacity, temporarily or permanently, with or without compensation. The term does not include an independent contractor.

9. "State institution" means the state hospital, the life skills and transition center, the state penitentiary, the Missouri River correctional center, the North Dakota youth correctional center, the North Dakota vision services - school for the blind, the school for the deaf, and similar facilities providing care, custody, or treatment for individuals.

32-12.2-02. Liability of the state - Limitations - Statute of limitations.

1. <u>The state may only be held liable for money damages for an injury proximately caused by the negligence or wrongful act or omission of a state employee acting within the employee's scope of employment under circumstances in which the employee would be personally liable to a claimant in accordance with the laws of this state, or an injury caused from some condition or use of tangible property under circumstances in which the state, if a private person, would be liable to the claimant</u>. No claim may be brought against the state or a state employee acting within the employee's scope of employment except a claim authorized under this chapter or otherwise authorized by the legislative assembly. The enactment of a law, rule, or regulation to protect any person's health, safety, property, or welfare does not create a duty of care on the part of the state, its employees, or its agents, if that duty would not otherwise exist.

2. The liability of the state under this chapter is limited to a total of two hundred fifty thousand dollars per person and one million dollars for any number of claims arising from any single occurrence. The state may not be held liable, or be ordered to indemnify a state employee held liable, for punitive or exemplary damages. Any amount of a judgment against the state in excess of the one million dollar limit imposed under this subsection may be paid only if the legislative assembly adopts an appropriation authorizing payment of all or a portion of that amount. A claimant may present proof of the judgment to the director of the office of management and budget who shall include within the proposed budget for the office of management and budget a request for payment for the portion of the judgment in excess of the limit under this section at the next regular session of the legislative assembly after the judgment is rendered.

3. Neither the state nor a state employee may be held liable under this chapter for any of the following claims:

a. A claim based upon an act or omission of a state employee exercising due care in the execution of a valid or invalid statute or rule.

b. A claim based upon a decision to exercise or perform or a failure to exercise or perform a discretionary function or duty on the part of the state or its employees, regardless of whether the discretion involved is abused or whether the statute, order, rule, or resolution under which the discretionary function or duty is performed is valid or invalid. Discretionary acts include acts, errors, or omissions in the design of any public project but do not include the drafting of plans and specifications that are provided to a contractor to construct a public project.

c. A claim resulting from the decision to undertake or the refusal to undertake any legislative or quasi-legislative act, including the decision to adopt or the refusal to adopt any statute, order, rule, or resolution.

d. A claim resulting from a decision to undertake or a refusal to undertake any judicial or quasi-judicial act, including a decision to grant, to grant with conditions, to refuse to grant, or to revoke any license, permit, order, or other administrative approval or denial.

e. A claim relating to injury directly or indirectly caused by a person who is not employed by the state.

f. A claim relating to injury directly or indirectly caused by the performance or nonperformance of a public duty, including: (1) Inspecting, licensing, approving, mitigating, warning, abating, or failing to so act regarding compliance with or the violation of any law, rule, regulation, or any condition affecting health or safety. (2) Enforcing, monitoring, or failing to enforce or monitor conditions of sentencing, parole, probation, or juvenile supervision. (3) Providing or failing to provide law enforcement services in the ordinary course of a state's law enforcement operations.

g. "Public duty" does not include action of the state or a state employee under circumstances in which a special relationship can be established between the state and the injured party. A special relationship is demonstrated if all of the following elements exist: (1) Direct contact between the state and the injured party. (2) An assumption by the state, by means of promises or actions, of an affirmative duty to act on behalf of the party who allegedly was injured. (3) Knowledge on the part of the state that inaction of the state could lead to harm. (4) The injured party's justifiable reliance on the state's affirmative undertaking, occurrence of the injury while the injured party was under the direct control of the state, or the state action increases the risk of harm.

h. A claim resulting from the assessment and collection of taxes.

i. A claim resulting from snow or ice conditions, water, or debris on a highway or on a public sidewalk that does not abut a state-owned building or parking lot, except when the condition is affirmatively caused by the negligent act of a state employee.

j. A claim resulting from any injury caused by a wild animal in its natural state.

k. A claim resulting from the condition of unimproved real property owned or leased by the state.

l. A claim resulting from the loss of benefits or compensation due under a program of public assistance.

m. A claim resulting from the reasonable care and treatment, or lack of care and treatment, of a person at a state institution where reasonable use of available appropriations has been made to provide care.

n. A claim resulting from damage to the property of a patient or inmate of a state institution.

o. A claim resulting from any injury to a resident or an inmate of a state institution if the injury is caused by another resident or inmate of that institution.

p. A claim resulting from environmental contamination, except to the extent that federal environmental law permits the claim.

q. A claim resulting from a natural disaster, an act of God, a military action, or an act or omission taken as part of a disaster relief effort.

r. A claim for damage to property owned by the state.

s. A claim for liability assumed under contract, except this exclusion does not apply to liability arising from a state employee's operation of a rental vehicle if the loss is not covered by the state employee's personal insurance or by the vehicle rental company.

4. An action brought under this chapter must be commenced within the period provided in section 28-01-22.1. 5. This chapter does not create or allow any claim that does not exist at common law or has not otherwise been created by law as of April 22, 1995.

32-12.2-03. State to be named in action - Personal liability and defense of employees - Indemnification of claims and final judgments.

1. An action for an injury proximately caused by the alleged negligence, wrongful act, or omission of a state employee occurring within the scope of the employee's employment must be brought against the state.

2. A state employee is not personally liable for money damages for an injury when the injury is proximately caused by the negligence, wrongful act, or omission of the employee acting within the scope of employment.

3. A state employee may not be held liable in the employee's personal capacity for acts or omissions of the employee occurring within the scope of the employee's employment. A state employee may be personally liable for money damages for an injury when the injury is proximately caused by the negligence, wrongful act, or omission of the employee acting outside the scope of the employee's employment. The plaintiff in such an action bears the burden of proof to show by clear and convincing evidence that the employee was acting outside the scope of the employee's employment. The extent to which an employee may be personally liable under this section and whether the employee was acting within the scope of employment must be specifically stated in a final judgment.

4. Except for claims or judgments for punitive damages, the state shall indemnify and save harmless a state employee for any claim, whether groundless or not, and final

judgment for any act or omission occurring within the scope of employment of the employee if the employee provides complete disclosure and cooperation in the defense of the claim or demand and if the employee has given written notice of the claim or demand to the head of the state entity that employs the state employee and to the attorney general within ten days after being served with a summons, complaint, or other legal pleading asserting that claim or demand against the state employee.

5. A judgment in a claim against the state is a complete bar to any claim by the claimant, resulting from the same injury, against the employee whose act or omission gave rise to the claim.

6. The state shall defend any state employee in connection with any civil claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring within the scope of the employee's employment if the employee provides complete disclosure and cooperation in the defense of the claim or demand and if the employee requests such defense in writing within ten days after being served with a summons, complaint, or other legal pleading asserting a cause of action against the state employee arising out of a civil claim or demand. The request for defense must be in writing and provided to the head of the state entity that employs the state employee and the attorney general. The head of the state entity that employs the state employee shall advise the attorney general as to whether that person deems the employee's actions that are the subject of the action to have been within the scope of the employee's employment. The determination of whether a state employee was acting within the scope of employment must be made by the attorney general. If the attorney general determines that the employee was acting within the scope of the employee's employment, the state shall provide the employee with a defense by or under the control of the attorney general or the attorney general's appointee. This section is not a waiver, limitation, or modification of any immunity or other defenses of the state or any of its employees, nor does it create any causes of action against the state or any of its employees.

7. For any claim brought under this chapter, a state employee may choose to hire the employee's own separate defense counsel to represent the state employee in the litigation. If the state employee chooses to hire separate defense counsel, subsections 4 and 6 do not apply to the state employee in that litigation and the state will not indemnify, save harmless, or defend the state employee nor pay for the state employee's defense or any judgment against the state employee.

43-17.1-05.1. Reporting requirements. A physician, a physician assistant, or a fluoroscopy technologist, a health care institution in the state, a state agency, or a law enforcement agency in the state having actual knowledge that a licensed physician, a physician assistant, or a fluoroscopy technologist may have committed any of the grounds for disciplinary action provided by law or by rules adopted by the board shall

promptly report that information in writing to the investigative panel of the board. A medical licensee or any institution from which the medical licensee voluntarily resigns or voluntarily limits the licensee's staff privileges shall report that licensee's action to the investigative panel of the board if that action occurs while the licensee is under formal or informal investigation by the institution or a committee of the institution for any reason related to possible medical incompetence, unprofessional conduct, or mental or physical impairment. Upon receiving a report concerning a licensee an investigative panel shall, or on its own motion an investigative panel may, investigate any evidence that appears to show a licensee is or may have committed any of the grounds for disciplinary action provided by law or by rules adopted by the board. A person required to report under this section who makes a report in good faith is not subject to criminal prosecution or civil liability for making the report. For purposes of any civil proceeding, the good faith of any person who makes a report pursuant to this section is presumed. A physician who obtains information in the course of a physician-patient relationship in which the patient is another physician is not required to report if the treating physician successfully counsels the other physician to limit or withdraw from practice to the extent required by the impairment. A physician who obtains information in the course of a professional peer review pursuant to chapter 23-34 is not required to report pursuant to this section. A physician who does not report information obtained in a professional peer review is not subject to criminal prosecution or civil liability for not making a report. For purposes of this section, a person has actual knowledge if that person acquired the information by personal observation or under circumstances that cause that person to believe there exists a substantial likelihood that the information is correct. An agency or health care institution that violates this section is guilty of a class B misdemeanor. A physician, physician assistant, or fluoroscopy technologist who violates this section is subject to administrative action by the board as specified by law or by administrative rule.

44-04-03. Attorney general and state's attorney to prosecute officer for failure to make report. Upon the willful neglect of any public officer to make any report required by law, the officer or board to whom such report should be made promptly shall notify the attorney general or the state's attorney of such failure to report. The attorney general or state's attorney shall investigate the neglect of duty complained of, and, if in the opinion of the attorney general or state's attorney, the officer has not a sufficient excuse for such failure, the attorney general or state's attorney shall prosecute such officer.

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STATE OF NORTH DAKOTA

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STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN

Thomas H. Rieman, being first duly sworn on oath states that on September 28, 2018 he served electronically Appellant's Brief, Addendum A, Appendix A, B and on September 29, 2018 he served Appendix C, D, E, F, G, H, I upon:

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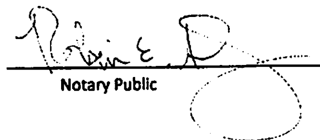
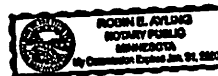
Thomas R. Rieman is at least 18 years of age and not a party to this litigation.

Subscribed and sworn to before me

this 29th day of September, 2018



Notary Public



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OCTOBER 1, 2018
STATE OF NORTH DAKOTA

Ayling v. Sens, et al.
Supreme Court File No. 20180231

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Thomas H. Rieman, being first duly sworn on oath states that on October 1, 2018 he served electronically corrected pg. 34 of Appellant's Brief regarding year 2013 to correctly show 2014 in 3rd sentence from bottom of page and Appendix A (inadvertently omitted), upon:

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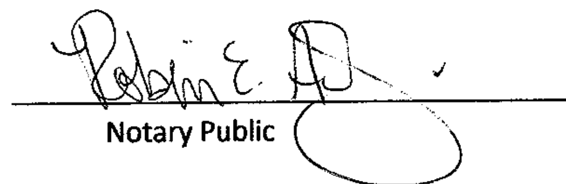
Subscribed and sworn to before me

this 1st day of October, 2018



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