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FILED
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OCTOBER 26, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

Plaintiff and Appellant,

-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 Appellee,

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 Appellees,

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 Appellees,

and

SUPREME COURT NO.
20180231

GRAND FORKS COUNTY
DISTRICT COURT
NO. 18-2017-CV-00889

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

Defendant and Appellee.

APPEAL FROM JUDGMENTS OF DISMISSAL

THE HONORABLE STEVEN E. MCCULLOUGH

NORTHEAST CENTRAL JUDICIAL DISTRICT

GRAND FORKS COUNTY, NORTH DAKOTA

BRIEF OF APPELLEE 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

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STATEMENT OF ISSUES PRESENTED

[¶1] Did the district court properly dismiss Plaintiff's complaint because (a) Plaintiff lacked standing, (b) the statute of limitations had expired, and (c) the County Defendants were immune by operation of discretionary, public duty, qualified, prosecutorial and personal immunity?

[¶2] Did the district court properly recognize judicial economy is best served with a stay of all discovery pending a ruling on the County Defendants' dispositive motions?

[¶3] Did the district court properly deny Plaintiff's motion to reconsider because Plaintiff reargued her prior position without presentation of extraordinary justification to reconsider the district court's previous order of dismissal?

STANDARD OF REVIEW

[¶4] "Whether the district court properly granted summary judgment is a question of law which [is reviewed] de novo on the entire record." Tangedal v. Mertens, 2016 ND 170, ¶ 7, 883 N.W.2d 871.

[¶5] "A district court has broad discretion regarding the scope of discovery, and its discovery decisions will not be reversed on appeal absent an abuse of discretion." Investors Title Ins. Co. v. Herzig, 2010 ND 169, ¶ 38, 788 N.W.2d 312.

[¶6] "A district court's denial of a motion for reconsideration will not be reversed on appeal absent a manifest abuse of discretion." Kautzman v. Doll, 2018 ND 23, ¶ 13, 905 N.W.2d 744. "A court abuses its discretion only when it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination." Id.

STATEMENT OF CASE

[¶7] Plaintiff commenced this action against Grand Forks County; its States Attorney David Jones, in his official and individual capacity; its Commissioners in their official capacity as a Board and individually against Gary Malm, David Engen, Tom Falck, Diane Knauf, and Cynthia Pic (collectively the "County Defendants") by service of a summons and complaint dated February 16, 2017. Court Doc. 1; P-App. 15-200[1].

[¶8] On July 5, 2017, the County Defendants filed a motion for summary judgment that asserted Plaintiff lacked standing to pursue a cause of action against the County Defendants, the statute of limitations has expired, and various immunities preclude liability. Court Doc. 95-98. On July 6, 2017, the Court determined judicial economy was best served by staying discovery pending the outcome of dispositive motions. P-App. 233-234.

[¶9] On January 23, 2018, the Court granted the County Defendants' motion for summary judgment for lack of standing, statute of limitations, discretionary immunity, public duty immunity, qualified immunity and personal immunity. P-App. 275. The Court dismissed, with prejudice, Plaintiff's complaint. P-App. 276.

[¶10] On February 22, 2018, Plaintiff filed a Motion to Reconsider and/or Vacate Pursuant to N.D.R.Civ.P. 59(j) and Rule 60(b). Court Doc. 257-261. On April 6, 2018, the Court denied Plaintiff's motion because Plaintiff "primarily reargue[d] points that were made" in opposition to summary judgment with no extraordinary justification to reconsider the prior decision. P-App. 281.

[1] Reference to "Court Doc." followed by a number shall refer to the district court docket number of the applicable document. Reference to "P-App." followed by a page number shall refer to Plaintiff's appendix.

STATEMENT OF FACTS

[¶11] The impetus of this case is the March 24, 2012, death of Plaintiff's son, Blake Ayling, who was found deceased on the railroad tracks in the Burlington Northern Santa Fe railyard close to the University of North Dakota. P-App. 30, 35.

[¶12] Acting as the Grand Forks County Coroner, Dr. Mary Ann Sens assumed jurisdiction of the body and performed an autopsy at the University of North Dakota School of Medicine & Health Sciences Forensic Pathology Practice Facility. P-App. 35-36.

[¶13] On October 22, 2012, Plaintiff received a copy of the autopsy report dated May 19, 2012. P-App. 38. Following her request, Plaintiff received, by letter postmarked March 4, 2013, a copy of the files maintained by the Grand Forks County Coroner, including the North Dakota Report of Death that indicated acute ethanol intoxication as a significant contributing cause of death of her son. P-App. 39. On April 6, 2013, Plaintiff, her husband, Corey Ayling, and Dr. Sens met in Minneapolis at which time Dr. Sens provided Plaintiff with additional information and answered questions. P-App. 40.

[¶14] Not knowing what happened to her son was having a significant and severe effect on Plaintiff—she was experiencing anxiety, inability to sleep or focus, and nightmares. P-App. 44. Plaintiff was "desperate" to find out what happened. P-App. 45.

[¶15] Plaintiff hired an expert to explain the toxicology report. P-App. 46. On December 27, 2013, Plaintiff discussed with her expert the findings of his review. P-App. 46-50. On February 20, 2014, Plaintiff requested a copy of the protocols for a forensic autopsy and/or the protocols Dr. Sens operated under for the autopsy of her son.

P-App. 51-59. Plaintiff stated a belief "that there are serious issues related to the Coroner generated documents that require amendment." P-App. 52.

[¶16] Following a March 17, 2014, call from the Grand Forks County State's Attorney, Plaintiff began making open records requests. P-App. 60-61. When Plaintiff believed she did not receive responsive records, Plaintiff sought the intervention of the North Dakota Attorney General but was informed that an investigation determined "Plaintiff has been provide[d] with all documents" and no further action was taken. P-App. 61.

[¶17] The complaint reveals Plaintiff has a fundamental disagreement with the decision of Dr. Sens as the Grand Forks County Coroner and is consumed with frustration/grief over the loss of her son. See P-App. 99-110; Court Doc. 90, Ex. 5. However, Plaintiff's disagreement does not give rise to a cause of action against the County Defendants, individually or in their official capacity. In sum, no cognizable claim exists against the County Defendants and the district court properly dismissed Plaintiff's complaint.

LAW AND ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED THE COUNTY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

A. Introduction.

[¶18] Summary judgment is a procedural device for promptly disposing of a lawsuit without a trial if there are no genuine issues of material fact, no inferences can reasonably be drawn, or the only issues to be resolved are questions of law. Tarnavsky v. McKenzie County Grazing Assn., 2003 ND 117, ¶ 7, 665 N.W.2d 18. When considering summary judgment, a district court has no "obligation, duty, or responsibility to search the record for evidence opposing the motion for summary judgment." Zuger v. State, 2004 ND 16, ¶ 8, 673 N.W.2d 615. If no pertinent evidence on an essential element is presented in

resistance to a motion for summary judgment, it is presumed that no such evidence exists. Kummer v. City of Fargo, 516 N.W.2d 294, 297 (N.D. 1994). Moreover, "[e]ven if factual disputes exist, summary judgment is appropriate if resolution of the disputes would not change the result." Fears v. Y.J. Land Corp., 539 N.W.2d 306, 307 (N.D. 1995). Although the Court must view facts in a light most favorable to the nonmoving party, there is an "affirmative obligation of the trial judge to prevent 'factually unsupported claims and defenses' from proceeding to trial." Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 317 (1986)).

B. Plaintiff Lacked Standing to Bring a Cause of Action Against the County Defendants.

[¶19] "A party is entitled to have a court decide the merits of a dispute only after demonstrating the party has standing to litigate the issues placed before the court." Nodak Mut. Ins. Co. v. Ward Cty. Farm Bureau, 2004 ND 60, ¶ 11, 676 N.W.2d 752. The concept of standing "determine[s] if a party is sufficiently affected so as to insure that a justiciable controversy is presented to the court." Id. Standing requires a party to have, "in an individual or representative capacity[,] some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy." Rebel v. Nodak Mut. Ins. Co., 1998 ND 194, ¶ 8, 585 N.W.2d 811.

[¶20] Litigants cannot confer standing upon a person who does not have a sufficient interest in a controversy. Id. A standing determination requires a two-part inquiry:

> (1) plaintiffs must suffer some threatened or actual injury resulting from the putatively illegal action, and (2) the asserted harm must not be a generalized grievance shared by all or a large class of citizens, *i.e.,* plaintiffs generally must assert their own legal rights and interests and cannot rest their claim for relief on the legal rights and interests of third parties.

Kjolsrud v. MKB Mgmt. Corp., 2003 ND 144, ¶ 14, 669 N.W.2d 82. "The existence of standing is a question of law." Nodak Mut. Ins., 2004 ND 60, ¶ 11. In response to a summary judgment motion, a plaintiff must set forth specific facts that establish a sufficient interest in the controversy. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).

[¶21] The case of Nader v. Hughes, 1993 WL 724820 (Pa. Com. Pl. 1993), aff'd, 643 A.2d 747 (Pa. 1994), is persuasive as it presents similar factual and legal circumstances. Mark Nader died on March 8, 1987, of a gunshot wound. Nader v. Hughes, 1993 WL 724820, *1 (Pa. Com. Pl. 1993). The coroner investigated the death, ordered an autopsy, reviewed investigation reports and met the district attorney, but did not visit the scene or interview witnesses. Id. The coroner concluded the "death was caused by a self-inflicted gunshot wound, that is, a suicide." Id. After the coroner certified the cause of death, the decedent's father (plaintiff) tried to encourage the coroner to change his conclusion and investigate further. Id. The coroner maintained, "he made a reasonable investigation even though there are some things he did not do." Id. The plaintiff filed suit that alleged he "has suffered incalculable stress and mental anguish over the death of his son and over what he believes to be the refusal of the district attorney and the coroner's office to act responsibly upon the evidence." Id. This is similar to what Plaintiff asserts in this case—"Incorrect finding 'intoxication' . . . results in extreme hardship for family, loss of reputation [of] decedent; loss [of] civil remedies; loss truth/justice." Appellant Brief, ¶ 34(e) (citations omitted).

[¶22] The Nader court determined plaintiff lacked standing, "[w]hile it is understandable ... the petitioner is distressed by the finding of suicide, ... the plaintiff's

interest in the action is to relieve his stress and anguish over what he believes was a wrong decision made by the coroner and to clear the stigma of suicide from the family and the deceased." Id. at *6. Plaintiff "alleged a psychic injury" which "does not qualify as a substantial interest." Id. The court recognized although the "cause of his son's death is of more interest to him than the general public," plaintiff did not allege how the coroner's finding affected any tangible interests. Id.

[¶23] The Nader court concluded the casual connection between the injury and the coroner's actions were "too tenuous to qualify the plaintiff's interest as direct and immediate." Id. Furthermore, the relief requested would not redress the injury alleged because the court "cannot give the plaintiff exactly what he wants, that is, a change in the coroner's conclusion." Id. The trial court found no distinct injury directly caused by the acts of the coroner. Id.

[¶24] On appeal, the plaintiff in Nader argued he suffered an injury separate and distinct from the general public because he "suffered extreme personal grief, stress, and anguish, and that he and his family were injured in that they have suffered from the blatant stigma that . . . [the decedent] . . . committed suicide." Nader v. Hughes, 643 A.2d 747, 753 (Pa 1994) (internal quotation omitted). In affirming the lack of standing, the Nader appellate court stated:

> The emotional trauma which family members of the deceased suffer, whatever the degree, does not result from the statutory duty of the coroner to investigate such a death, but results from the death of the decedent. Likewise, the discretion of the coroner whether or not to conduct an inquest is not a precipitating factor of the emotional trauma of the decedent's death. ... [A]ny stigma the family and the decedent may suffer cannot be said to have resulted from the coroner's exercise of discretion whether or not to conduct an inquest.

Id.

[¶25] Here, while it is understandable Plaintiff is distressed and upset by the finding of acute ethanol intoxication as a significant contributing factor for the cause of death for her son, see P-App. 39, Plaintiff's interest in this action can be categorized as a pursuit to discover other possible reasons for his unattended death. See P-App. 198; Nader, 1993 WL 724820, *6. Like the plaintiff in Nader, Plaintiff "has alleged a psychic injury" which "does not qualify as a substantial interest." Nader, 1993 WL 724820, *6. Plaintiff failed to allege how the actions of the County Defendants affect any of her tangible interests or how the alleged injury is not a "generalized grievance." See Nodak Mut. Ins., 2004 ND 60, ¶ 11; Nader, 1993 WL 724820, *6.

[¶26] Plaintiff cannot show a direct and substantial interest, separate from the general public, which has been adversely affected by the actions of the County Defendants. See Nader, 643 A.2d at 753. Rather, the emotional trauma suffered by Plaintiff does not result from the action of the County Defendants, but results from the unattended death of her son. Id. There is nothing alleged in the complaint to establish a causal link between the claimed injury and any actions by the County Defendants. Id.; see P-App. 194-198.

[¶27] As such, Plaintiff lacks standing because she has not suffered an actual injury resulting from the actions of the County Defendants. The harm asserted in the complaint, at best, is a generalized grievance shared by the citizenry as a whole. See Kjolsrud, 2003 ND 144, ¶ 14. Therefore, the decision to dismiss the complaint against the County Defendants, in total and with prejudice, for lack of standing must be affirmed.

C. The Statute of Limitations Precludes Plaintiff's Cause of Action Against the County Defendants.

[¶28] Assuming for purposes of this argument Plaintiff presented a claim that can withstand a standing challenge, the complaint must be dismissed as the statute of

limitations has expired. "The purpose of a statute of limitation is to prevent 'plaintiffs from sleeping on their legal rights to the detriment of the defendants.'" Am. Family Ins. v. Waupaca Elevator Co., 2012 ND 13, ¶ 9, 809 N.W.2d 337. "[S]tatutes of limitation are designed to prevent the plaintiff's enforcement of stale claims when, through the lapse of time, evidence regarding the claim has become difficult to procure or even lost entirely." Id. An action for governmental liability brought under N.D.C.C. § 32-12.1-10 must be commenced within three years after the claim for relief has accrued. N.D.C.C. § 32-12.1-10. The three year statute of limitations on the liability of political subdivisions acts to limit exposure to potential liability—a legislatively imposed quid pro quo for governmental liability. Olson v. Univ. of N. Dakota, 488 N.W.2d 386, 390 (N.D. 1992).

[¶29] "The statute of limitations generally begins to run from the commission of the wrongful act giving rise to the cause of action, unless an exception applies." Frith v. Park Dist. of City of Fargo, 2016 ND 213, ¶ 11, 886 N.W.2d 836. "Statutes of limitation protect important interests of certainty, accuracy, and repose." Kimball v. Landeis, 2002 ND 162, ¶ 29, 652 N.W.2d 330. After the statute of limitations has run, the burden is on the plaintiff to establish facts necessary to suspend or toll the statute's application. See Anderson v. Shook, 333 N.W.2d 708, 712 (N.D. 1983).

[¶30] "There are instances . . . when an injury may not be discovered at the time of the wrongful act." Am. Family Ins., 2012 ND 13, ¶ 18. In those cases, this Court has adopted the discovery rule. Id. When the discovery rule applies, the statute of limitations begins to run when "the plaintiff knew, or with the exercise of reasonable diligence should have known, of the wrongful act and its resulting injury." Wells v. First Am. Bank West, 1999 ND 170, ¶ 10, 598 N.W.2d 834. "The focus is upon whether the

plaintiff is aware of facts that would place a reasonable person on notice a potential claim exists, without regard to the plaintiff's subjective beliefs." Id. Accordingly, "after acquiring knowledge of facts sufficient to put a person of ordinary intelligence on inquiry, a party has a responsibility to promptly find out what legal rights result from those facts, and failure to do so will be construed against the party." Frith, 2016 ND 213, ¶ 11.

[¶31] Ayling asserts the complaint contains "various discovery dates" "supported by exhibits, which remain undisputed." Appellant Brief, ¶ 62. Plaintiff's argument ignores the simple fact there can only be one discovery date, the date when Plaintiff knew, or should have known, a potential claim exist, without regard to her subjective beliefs. Wells, 1999 ND 170, ¶ 10. The County Defendants recognize "when a cause of action accrues is normally a question of fact, [but] it becomes a question of law when the material facts are undisputed." Frith, 2016 ND 213, ¶ 11.

[¶32] Based upon the facts alleged in the complaint, the earliest date from which the statute of limitation may be counted is May 19, 2012, the date of the autopsy report. P-App. 38. Using this date, the statute of limitations expired on May 18, 2015, or 641 days before Plaintiff served the summons and complaint, being February 16, 2017[2]. P-App. 38.

[¶33] Notwithstanding this date, Plaintiff sought application of the discovery rule. See P-App. 17-21, 22-29, 46-61, 65, 67, 73, 78-79, 82, 88, 96, 138-150, 184, 188-89. Yet, even if the discovery rule applies, the statute of limitations still expired by the time Plaintiff served the summons and complaint.

February 16, 2017, is utilized as the date of service because at least one of the County Defendants was served on this date.

[¶34] Assuming the facts plead in the complaint are true, the discovery rule postpones the statute of limitations only until such time Plaintiff knew, or should have known, of the wrongful act and injury, without regard to her subjective beliefs. Tarnavsky, 2003 ND 117, ¶ 11; Wells, 1999 ND 170, ¶ 10. "[N]otice of facts, which would put a person of ordinary intelligence on inquiry, is equivalent to knowledge of all of the facts a reasonable diligent inquiry would disclose." Jones v. Barnett, 2000 ND 207, ¶ 8, 619 N.W.2d 490. A review of the pleadings establish "a reasonable person would have been placed on notice of a potential claim" against the County Defendants more than three years before February 16, 2017, the date for service of the summons and complaint. Tarnavsky, 2003 ND 117, ¶ 11; N.D.C.C. § 32-12.1-10.

[¶35] Counting three years backward from this February 16, 2017, service date, the record shows Plaintiff knew, or reasonably should have known, the existence of her alleged claim on or before February 15, 2014. Accordingly, her service of the summons and complaint more than three years thereafter was untimely. See Tarnavsky, 2003 ND 117, ¶ 11; Wells, 1999 ND 170, ¶ 10. Plaintiff admits she had "many questions about the coroner file documents" by March 4, 2013. P-App. 39-42; Appellant Brief, ¶ 33(a). Plaintiff further admits she conducted an investigation, see P-App. 28-29, and discovered the following facts prior to February 15, 2014:

1. June 28, 2012: The investigation and autopsy revealed a BAC of 0.287. Court Doc. 90, Ex. 5, p. 103.
2. July 25, 2012: Plaintiff received a copy of the investigation report dated May 31, 2012. Id. at p. 104-06.
3. September, 2012: Plaintiff traveled to Grand Forks to conduct an investigation. Id. at p. 106-07.
4. October 12, 2012: Plaintiff questioned time of death and sent a request for a homicide investigation. Id. at p. 107.

5. October 22, 2012: Plaintiff received the autopsy dated May 19, 2012. Id. at Ex. 5, 108.

6. January, 2013: Plaintiff requested a homicide investigation. Id. at p. 113.

7. March, 2013: Plaintiff was informed the Grand Forks Police Department would not conduct a homicide investigation but would request the North Dakota Bureau of Investigation review. Id. at p. 8, fn. 3; p. 113.

8. March, 2013: Plaintiff received documents from the coroner's office that "acute ethanol intoxication" was a contributing cause of death. Id. at p. 18, fn. 10; p. 22.

9. March 5, 2013: Plaintiff sent a letter to question autopsy procedure and result. Id. at p. 115.

10. April 6, 2013: Plaintiff, Corey Ayling and Dr. Sens met. Court Doc. 90, Ex. 5, p. 116. Plaintiff informed temperature was not taken and exact time of death was not determined. Court Doc. 90, Ex. 5, p. 20, fn. 12. Plaintiff informed the coroner did not conduct a death investigation. Id. at p. 74.

11. April 24, 2013: Plaintiff questioned how the autopsy report was prepared. Id. at p. 142.

12. June 10, 2013: Plaintiff received documents from the North Dakota Crime Lab. Id. at p. 133.

13. September 27, 2013: Plaintiff sent an email that "death has not been treated in a respectful manner ... There has not been a proper, thorough or complete investigation of [her son's] death." Id. at p. 153.

14. October 17, 2013: Plaintiff sent email that stated she was "dealing with the overwhelming burden of closed doors and intentional acts of agencies to purposefully avoid investigating the sequence of events that killed [her son]." Id.

15. December 13, 2013: Plaintiff stated belief that the blood alcohol report was not proper protocol and there was no police investigation. Id. at p. 155.

16. December, 2013: Plaintiff consulted an expert forensic toxicologist. Id. at p. 156-159.

[¶36] It is clear Plaintiff, throughout her investigation, discovered "facts sufficient to put a person of ordinary intelligence on inquiry" and she had the responsibility to find out

the legal rights related to those facts. Frith, 2016 ND 213, ¶ 11; Wells, 1999 ND 170, ¶ 10. Yet, Plaintiff failed to pursue her claims until February 16, 2017. Of importance, Plaintiff's subjective belief is not relevant to whether the statute of limitations requires dismissal of the complaint. See Wells, 1999 ND 170, ¶ 10. Rather, the focus is whether Plaintiff was aware of facts that would place a reasonable person on notice a potential claim exists. Id. The facts, as alleged in the complaint, reveal Plaintiff knew, or reasonably should have known, of the existence of her potential claim no later than December 2013. Indeed, Plaintiff's conduct of repeated communications expressing displeasure and allegation of impropriety regarding the autopsy can only lead to the conclusion that by December, 2013, Plaintiff knew or reasonably should have known of a potential claim. Yet, service of the summons and complaint occurred more than three years afterwards. Therefore, Plaintiff failed to promptly determine and pursue her legal rights. Frith, 2016 ND 213, ¶ 11.

[¶37] In sum, by the time the summons and complaint were served on February 16, 2017 – even if one applies the discovery rule – the three year statute of limitations under N.D.C.C. § 32-12.1-10 had already expired. Therefore, the district court properly dismissed, in total and with prejudice, Plaintiff's complaint.

D. Discretionary Immunity.

[¶38] Discretionary immunity protection for political subdivisions extends to government employees and officials. Kautzman v. McDonald, 2001 ND 20, ¶ 30, 621 N.W.2d 871. Discretionary immunity first appeared in Kitto when this Court abolished the doctrine of governmental immunity:

> [I]mmunity has been retained for certain acts which go to the essence of governing. We do not contemplate that the essential acts of governmental decision-making be the subject of judicial second-guessing or harassment

> by the actual or potential threat of litigation. We hold that no tort action will lie against governmental units for those acts which may be termed discretionary in character.

Kitto v. Minot Park Dist., 224 N.W.2d 795, 804 (N.D. 1974) (citations omitted). Discretionary immunity provides a political subdivision may not be held liable for "[t]he decision to perform or the refusal to exercise or perform a discretionary function or duty" whether the discretion is abused or the discretionary function performed is valid or invalid." N.D.C.C. § 32-12.1-03(3)(d); see also Boudreau v. Estate of Miller, 2000 ND 30, ¶ 20 n.2, 606 N.W.2d 514.

[¶39] There exists a two-part inquiry to determine if discretionary immunity applies: "(1) whether the conduct at issue is discretionary, involving an element of judgment or choice for the acting employee; and (2) if the act is discretionary, whether that judgment or choice is of the kind the discretionary function exception was designed to shield." McDonald, 2001 ND 20, ¶ 30. The first element of the discretionary immunity "is not met if a statute, regulation, or policy specifically prescribes a mandatory course of action for an employee to follow, because the employee has no rightful option but to adhere to the directive." Peterson v. Traill County, 1999 ND 197, ¶ 12, 601 N.W.2d 268. However, mandatory duties may involve an element of judgment, and when conduct involves an element of judgment this satisfies the first element. Id.

[¶40] The second element of discretionary immunity is primarily focused "on the nature of the actions taken and on whether they are susceptible to policy analysis." Id. at ¶ 13. The purpose of discretionary immunity "is to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy." Olson v. City of Garrison, 539 N.W.2d 663, 667-68 (N.D. 1995). If no social,

economic, or political policy is implicated, the second element of the discretionary immunity analysis is not met. Peterson, 1999 ND 197, ¶ 14.

[¶41] Plaintiff alleged the following actions by the County Defendants to justify her claims:

1. The county commission was required to supervise the coroner. P-App. 183, 191-192.
2. The state's attorney acts as the legal advisor to the county commission. P-App. 184.
3. The county commission is responsible to ensure "services mandated by statute and other non-discretionary regulations, standards, ordinances, policies, and certifications are provided equitably and lawfully by its public officials." P-App. 184.
4. The county commission was required to comply with the open records laws[3]. P-App. 187-189.
5. The county commission does not require coroner reports and there is no accountability to assure quality assurance. P-App. 187, 192.
6. The County Defendants have a duty to ensure Dr. Sens adhered to all forensic autopsy and medicolegal death investigation statutes, standards, protocols and procedures. P-App. 188.
7. The County Defendants refused to respond to a request for reparations after Plaintiff outlined acts alleged to constitute negligent performance of official duties. P-App. 189-191.
8. The County Defendants refused to implement policies or follow current policies to ensure Dr. Sens was performing her duties. P-App. 192.
9. The County Defendants "ignored the scope of their official functions and duties, violated state and municipal codes regulating conduct, and failed to exercise reasonable care." P-App. 194.

Discretionary immunity protects the County Defendants because the allegations contained within the complaint necessarily involved elements of judgment to satisfy the

[3] Plaintiff failed to comply with the N.D.C.C. § 44-04-21.2 to assert a cause of action for violation of the open records laws. Furthermore, the North Dakota Attorney General informed Plaintiff no violation occurred. See P-App. 60-61.

first element. See Peterson, 1999 ND 197, ¶ 12. Furthermore, the decision to implement specific policies, to investigate the conduct of county officials, how to supervise county officials, how to respond to Plaintiff's requests for investigations, are decisions based in social, economic, and political policy. Olson, 539 N.W.2d at 667-668. Therefore, discretionary immunity precludes Plaintiff's complaint.

[¶42] Accordingly, the decision of the district court to dismissed Plaintiff's complaint pursuant to discretionary immunity must be affirmed.

E. Public Duty Immunity.

[¶43] To the extent Plaintiff's claims assert the County Defendants violated a public duty, application of public duty immunity precludes such claims. According to public duty immunity, "when a statute or common law imposes upon a public entity a duty to the public at large, and not a duty to a particular class of individuals, the duty is not one enforceable in tort." Tangedal, 2016 ND 170, ¶ 18. A political subdivision or its employee may not be held liable if the claim relates, directly or indirectly, to the performance or nonperformance of a public duty. N.D.C.C. § 32-12.1-03(3)(f). Public duties include "[i]nspecting, 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." N.D.C.C. § 32-12.1-03(3)(f)(1). Public duty immunity, "in conjunction with the special relationship exception, is a useful analytical tool to determine whether the government owed an enforceable duty to an individual claimant." Ficek v. Morken, 2004 ND 158, ¶ 12, 685 N.W.2d 98.

[¶44] The purpose of public duty immunity is to describe "a political subdivision's general duty to provide general services and not a specific duty to any one individual." Tangedal, 2016 ND 170, ¶ 21. However, the "legislative history evidences an intention

that if a special relationship is established … a political subdivision may be liable for damages for injuries proximately caused by the negligence or wrongful act or omission of an employee acting within the scope of the employee's employment." Id. at ¶ 22. In applying public duty immunity, a "political subdivision and an employee may not be held liable for a claim for an injury caused by the performance or nonperformance of a public duty unless a special relationship is established." Id. at ¶ 23.

[¶45] Although this Court has not determined whether public duty immunity precludes liability for the investigation of an unattended death, courts of other jurisdictions have determined no special relationship exists between the political subdivision and the family of the deceased. See Sims-Hearn v. Office of Med. Exam'r, Cty. of Cook, 834 N.E.2d 505 (Ill. 2005) (medical examiners owe no duty to members of the public while performing autopsies); Otero v. Warnick, 614 N.W.2d 177, 179 (Mich. 2000) (medical examiner's only duty is to the state); Lauer v. City of N.Y., 733 N.E.2d 184, 188-90 (N.Y. 2000); Macurdy v. Faure, 176 P.3d 880, 883 (Colo. App. 2007).

[¶46] Here, the very conduct complained about by Plaintiff, being the coroner's inspections and investigation, fits squarely within public duty immunity afforded by N.D.C.C. § 32-12.1-03(3)(f). See Paragraph 41, supra. The only exception is if Plaintiff can establish a "special relationship," as defined under N.D.C.C. § 32-12.1-03(3)(g), between Plaintiff and the County Defendants. However, the allegations in the complaint lead to the conclusion that no "special relationship" existed. A "special relationship" requires all of the following:

(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.

N.D.C.C. § 32-12.1-03(3)(g)(1)-(4). Although Plaintiff and the County Defendants communicated, there is no evidence of (1) assumption of an affirmative duty to act on behalf of Plaintiff; (2) knowledge that inaction would lead to harm; or (3) reliance by Plaintiff on an affirmative undertaking that resulted in injury or increased risk of harm while under the direct control of the County Defendants.

[¶47] Accordingly, Plaintiff cannot prove the elements to establish a special relationship and the district court properly dismissed Plaintiff's complaint pursuant to public duty immunity. See N.D.C.C. § 32-12.1-03(3)(f).

F. Qualified Immunity.

[¶48] This Court recognizes the doctrine of qualified immunity as "the need of government officials to be free from harassing lawsuits and apprehension of personal liability when they exercise authority and discretion while performing their jobs in the public interest." Livingood v. Meece, 477 N.W.2d 183, 192 (N.D. 1991) (citing Butz v. Economou, 438 U.S. 478, 506–507 (1978)). The determination of whether qualified immunity is applicable requires "an objective inquiry into the legal reasonableness of the official action." Id. (quoting Anderson v. Creighton, 483 U.S. 635, 645 (1987)). Government officials are shielded from liability as long as their conduct does not violate a clearly established statutory or constitution right which a reasonable person acting in the position of the official would have known. Id. (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). According to the United States Supreme Court:

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.

Harlow, 457 U.S. at 818-19 (citations omitted). Qualified immunity is a question of law. Hunter v. Bryant, 502 U.S. 224, 228 (1991).

[¶49] An objective inquiry, to determine the legal reasonableness of the actions of the County Defendants, revealed qualified immunity required dismissal of Plaintiff's complaint to allow the County Defendants to be free from a harassing lawsuit for the performance of their duties. See Livingood, 477 N.W.2d at 192. Plaintiff's unsupported allegations that the County Defendants were negligent, reckless, non-discretionary, in violation of the law was not sufficient to survive summary judgment. See Iglehart v. Iglehart, 2003 ND 154, ¶ 10, 670 N.W.2d 343; Kummer, 516 N.W.2d at 297; see also Paragraph 41, supra. Rather, Plaintiff was required to establish the actions of the County Defendants violated a clearly established statutory or constitution right which a reasonable person acting in the position of the County Defendants would have known. Livingood, 477 N.W.2d at 192. Plaintiff cannot do so.

[¶50] Plaintiff disagreed with the ultimate decision of Dr. Sens and wanted the County Defendants to investigate or take some formal of action against her. See P-App. 183-194; Court Doc. 90, Ex. 5. However, the decision whether or not to act does not create a cause of action or expose the County Defendants to liability. Livingood, 477 N.W.2d at 192. The purpose of qualified immunity is to prevent actions, such as this, from harassing the County Defendants for the performance of their jobs. Id. Moreover, it would not have been clear to the County Defendants that the failure to take the actions demanded by

Plaintiff would violate some statutory, constitutional or other right. Courts of other jurisdictions, applying qualified immunity, compare a coroner's function to that of a police officer. See Kompare v. Stein, 801 F.2d 883, 884 (7th Cir.1986) (medical examiner's function is analogous to a police officer and coroners enjoy the same qualified immunity); Lawyer v. Kernodle, 721 F.2d 632, 635 (8th Cir. 1983) (coroners enjoy qualified immunity).

[¶51] Accordingly, the district court properly dismissed Plaintiff's complaint pursuant to qualified immunity.

G. Prosecutorial Immunity.

[¶52] North Dakota law has adopted the widely accepted doctrine of prosecutorial immunity. See N.D.C.C. § 32-12.1-03(3)(c). The protections of prosecutorial immunity stem from the characteristics inherent in the judicial process. Lawrence v. Roberdeau, 2003 ND 124, ¶11, 665 N.W.2d 719.

> The authority is given to [the State's Attorney], so that he may . . . commence a prosecution when in his judgment the evidence is sufficient, and it would be ridiculous to hold that, after deciding that evidence was sufficient, he could only make complaint on that evidence at his peril. . . . The state's attorney acts for the state . . . and if he makes a mistake (as he sometimes will) it is the mistake of the state. [I]t would be strange, indeed, if the state's attorneys of this state . . . are not exempt from civil liability for judicial mistakes.

Kittler v. Kelsch, 216 N.W. 898, 904 (N.D. 1927); see also The Perry Center, Inc. v. Heitkamp, 1998 ND 78, ¶ 45, 576 N.W.2d 505.

[¶53] The United States Supreme Court, concluding the common law rule of prosecutorial immunity to be "well settled," set forth the following explanation for the rule:

> A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of

> the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. . . . Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.

Imbler v. Pachtman, 424 U.S. 409, 424-25 (1976) (citations omitted). Furthermore, absolute prosecutorial immunity applies to claims of improper investigation before commencing prosecution. Van Cleave v. City of Marysville, Kansas, 185 F.Supp.2d 1212, 1214-15 (D. Kan. 2002); see also Burns v. Reed, 500 U.S. 478, 486 (1991).

[¶54] In sum, to the extent the Plaintiff alleged Jones failed to act in his capacity as the Grand Forks County State's Attorney, Jones is entitled to absolute prosecutorial immunity. Accordingly, prosecutorial immunity required dismissal of Plaintiff's complaint.

H. Personal Immunity.

[¶55] When a party seeks to recover for the acts or omissions of an employee of a political subdivision, the action must be brought against the political subdivision. N.D.C.C. § 32-12.1-04(1). N.D.C.C. § 32-12.1-04 "generally deals with personal liability of political subdivision employees and differentiates between acts or omissions within and outside the scope of employment and between negligence and wrongful acts or omissions and acts or omissions constituting reckless or grossly negligent conduct, or willful or wanton misconduct." Tangedal, 2016 ND 170, ¶ 13. "Under N.D.C.C. §§ 32–12.1–03(2) and 32–12.1–04(2), a political subdivision employer is liable and the employee is not personally liable for money damages for injuries proximately caused by the employee's negligence, wrongful act, or omission within the scope of the employee's

employment." Id. at ¶ 14; see also Binstock v. Fort Yates Pub. Sch. Dist. No. 4, 463 N.W.2d 837, 842 (N.D. 1990).

[¶56] The allegations against the County Defendants can be found in Count Four of the complaint. P-App. 183-194. Plaintiff asserts "[t]he States Attorney, Grand Forks County and its board of commissioners have subjected themselves individually ... to liability by negligently failing to ensure checks and balances were in place for accountability" and "[b]lind authorization ... is clearly willful and wanton negligence and misconduct." P-App. 192. Plaintiff further alleges the County Defendants "acted in bad faith, ignored the scope of their official functions and duties, violated state and municipal codes regulating conduct, and failed to exercise reasonable care under the circumstances" and are "liable in all of their capacities for their acts of negligence, misconduct, [and] recklessness." P-App. 194. There can be no debate that the actions alleged are within the scope of the County Defendants' duty. See N.D.C.C. §§ 11-09-09; 11-09-18. Thus, assuming Plaintiff's claims have any merit, the County Defendants cannot be held personally liable. N.D.C.C. § 32-12.1-04(2); Binstock, 463 N.W.2d at 842.

[¶57] The only possible exception, is if Plaintiff can prove the acts or omissions of the County Defendants rise to the level of being reckless, grossly negligent, willful or wanton misconduct. N.D.C.C. § 32-12.1-04(3). Gross negligence is "the omission of such care which even the most inattentive and thoughtless persons seldom fail to take of their own affairs, and it is such conduct as evidences a reckless temperament." Sheets v. Pendergrast, 106 N.W.2d 1, 5 (N.D. 1960). Willful or wanton misconduct requires proof of conduct that is "[r]eckless, heedless, malicious; characterized by extreme recklessness or foolhardiness; recklessly disregardful of the rights or safety of others or of

consequences." Smith ex rel. Smith v. Kulig, 2005 ND 93, ¶ 12, 696 N.W.2d 521. As such, the standard is not mere negligence but instead the acts and omissions must be shocking, willful, extreme, and demonstrate a total lack of care. Jones v. Ahlberg, 489 N.W.2d 576, 581 (N.D. 1992); Kulig, 2005 ND 93, ¶ 12.

[¶58] Moreover, the burden of proof is not simply by the greater weight of the evidence – but rather requires Plaintiff prove reckless, grossly negligent, or willful or wanton behavior by clear and convincing evidence. N.D.C.C. § 32-12.1-04(3). Plaintiff failed to allege facts sufficient to satisfy this burden. P-App. 183-194.

[¶59] Accordingly, the district court's decision to dismiss Plaintiff's complaint must be affirmed.

II. THE DISTRICT COURT PROPERLY STAYED DISCOVERY UNTIL CONSIDERATION OF THE COUNTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

[¶60] Rule 26 of the North Dakota Rules of Civil Procedure governs the scope of discovery and states, in its pertinent part, that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." N.D.R.Civ.P. 26(b)(1)(A). Rule 26(c) provides discovery protective orders are available "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including ... forbidding the discovery." N.D.R.Civ.P. 26(c)(1). "A district court has broad discretion in setting the scope of discovery," and will not be reversed "when a rational reason for entering a protective order exists." Nastrom v. Nastrom, 1998 ND 142, ¶ 7; 581 N.W.2d 919. Courts have "long rejected the use of discovery for 'fishing expeditions' to determine whether or not claims exist" and discovery intended solely to harass. Fichter v. Kadrmas, 507 N.W.2d 72, 75, fn. 4 (N.D. 1993).

[¶61] Plaintiff's discovery tactics were abusive. Plaintiff served in excess of 800 discovery requests, when considering subparts, on the State Defendants. Court Doc. 14, ¶5. Then Plaintiff served the County Defendants with over 200 discovery requests, when considering sub-parts. Court Doc. 83-83. Plaintiff's clear strategy was to propound a significant volume of cumulative, duplicative, and overly burdensome discovery intended to harass the County Defendants. Prior to the start of this litigation, Plaintiff was provided volumes of documents in response to open records requests, including copies of the autopsy and other documents in the possession of the County Defendants. Court Doc. 80-81.

[¶62] The district court properly determined the County Defendants should not be subjected to the burden of discovery prior to a decision on filed dispositive motion. See Kouba v. State, 2004 ND 186, ¶ 16, 687 N.W.2d 466. In fact, until the "threshold immunity question is resolved, discovery should not be allowed." Livingood, 477 N.W.2d at 192. Simply, good cause existed for the exercise of discretion, in the interest of judicial economy, to stay discovery until the threshold issues of standing, statute of limitations, and immunity were determined.

[¶63] Plaintiff filed a motion pursuant to Rule 56(f), N.D.R.Civ.P., to seek relief from discovery stay prior to responding to the motion for summary judgment. Court Doc. 172. Plaintiff asserts the denial of this request was an abuse of discretion because summary judgment is only appropriate after the nonmoving party has a reasonable opportunity to conduct discovery. Appellant Brief, ¶¶ 2, 46(f). However, "when further discovery would not involve an issue which is the subject matter of the summary judgment motion,

a trial court does not abuse its discretion in deciding the motion without granting the Rule 56(f) request." Perry Ctr., 1998 ND 78, ¶ 10.

[¶64] Rather, Rule 56(f) requires plaintiff to "show[] by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition." N.D.R.Civ.P. 56(f). A decision on a Rule 56(f) motion is within the discretion of the district court. Choice Fin. Group v. Schellpfeffer, 2006 ND 87, ¶ 9, 712 N.W.2d 855. This Court has cautioned:

> It is not enough, however, for a party invoking [Rule] 56(f) to merely recite conclusory, general allegations that additional discovery is needed. Rather, N.D.R.Civ.P. 56(f) requires that the party, preferably by affidavit, identify with specificity what particular information is sought, and explain how that information would preclude summary judgment and why it has not previously been obtained.

Vicknair v. Phelps Dodge Indus., Inc., 2011 ND 39, ¶ 19, 794 N.W.2d 746. Not only did Plaintiff fail to provide this information, the discovery sought was not relevant to the issues presented within the motion for summary judgment. P-App. 268-269, 272, 274. In addition, Plaintiff had received numerous relevant documents through the myriad of open records requests she made prior to instituting this litigation with a determination by the North Dakota Attorney General's office that "Plaintiff has been provide[d] with all documents." See P-App. 60-61; Court Doc. 81.

[¶65] Accordingly, the decision of the district court to stay discovery and deny Plaintiff's Rule 56(f) motion must be affirmed.

III. THE DISTRICT COURT PROPERLY DENIED PLAINTIFF'S MOTION TO RECONSIDER AND/OR VACATE.

[¶66] Motions to reconsider are treated 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)." Greywind v. State, 2015 ND 231, ¶ 11, 869 N.W.2d 746. Under Rule 59(j), "[a] motion to alter or amend a judgment must be served and filed no later

than 28 days after notice of entry of the judgment." N.D.R.Civ.P. 59(j). According to Rule 60(b), "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding." N.D.R.Civ.P. 60(b). Motions made pursuant to Rules 59(j) and 60(b) should "not to be used as a substitute for appeal" or "to relieve a party from free, calculated, and deliberate choices" made. Hildebrand, 2016 ND 225, ¶ 16.

[¶67] Motions to amend or for relief from the judgment are within the sound discretion of the district court. MayPort Farmers Co-Op v. St. Hilaire Seed Co., 2012 ND 257, ¶ 8, 825 N.W.2d 883. Under this standard, Plaintiff was required to demonstrate the district court acted "arbitrarily, unconscionably, unreasonably," or misinterpreted or misapplied the law. Korynta v. Korynta, 2006 ND 17, ¶ 7, 708 N.W.2d 895. As the leading treatise explained, "reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." Wright & Miller, 11 Fed. Prac. & Proc. Civ.2d § 2810.1 (3rd ed.); see also Shull v. Walcker, 2009 ND 142, ¶ 14, 770 N.W.2d 274.

[¶68] As a result, in seeking reconsideration, "'something more' or 'extraordinary' which justifies relief must be present." See Overboe v. Odegaard, 496 N.W.2d 574, 579 (N.D. 1993). This requirement exists because "[a] motion to amend findings of fact, or to amend a judgment, may not be used to relitigate factual questions and present evidence which was available to be presented" at the outset to the district court. Heller v. Heller, 367 N.W.2d 179, 183 (N.D. 1985).

[¶69] Plaintiff's motion for reconsideration did not contain a single new legal argument or factual assertion not previously been presented to the district court. P-App. 281. In

failing to present anything new, Plaintiff failed to satisfy the heavy burden required for the district court to overturn its prior decision. Heller, 367 N.W.2d at 183.

[¶70] Accordingly, the district court properly denied Plaintiff's motion for reconsideration and the district court's decision must be affirmed.

CONCLUSION

[¶71] For the forgoing reasons, the County Defendants request this Court affirmed, in total, the district court's order dismissing Plaintiff's complaint.

[¶72] Dated this 26th day of October, 2018.

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CERTIFICATE OF COMPLIANCE

[¶73] The undersigned, as attorney for Appellees in the above matter, and as the author of the above brief, hereby certifies, in compliance with Rule 32(a)(8) of the North Dakota Rules of Appellate Procedure. The above brief was prepared with proportional type face and the number of words in the above brief, excluding words in the table of contents, table of authorities, and certificate of compliance, totals 7,892 words.

[¶74] Dated this 26th day of October, 2018.

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