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Grand Forks County No: 2017-CV-00889

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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

Plaintiff/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, et al.

Defendants/Appellees.

BRIEF OF APPELLEES 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, 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

Camrud Maddock Olson & Larson Ltd.
Attorneys at Law

CAPACITY AS DEAN OF THE UNIVERSITY OF NORTH DAKOTA SCHOOL OF MEDICINE AND HEALTH SCIENCES INCLUDING THE FORENSIC PATHOLOGY PRACTICE FACILITY, AND DR. WILLIAM MASSELLO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS NORTH DAKOTA STATE FORENSIC EXAMINER

APPEAL FROM JUDGMENTS OF DISMISSAL

THE HONORABLE STEVEN E. McCULLOUGH

NORTHEAST CENTRAL JUDICIAL DISTRICT

GRAND FORKS COUNTY, NORTH DAKOTA

RANDALL S. HANSON
Special Assistant Attorney General
North Dakota Bar # 04876
MATT A. PAULSON
Special Assistant Attorney General
North Dakota Bar # 08196
401 DeMers Avenue, Suite 500
P.O. Box 5849
Grand Forks, ND 58206 5849
Telephone: (701) 775-5595
Facsimile: (701) 772-3743
rhanson@camrudlaw.com
mpaulson@camrudlaw.com

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STATEMENT OF THE ISSUES

[¶1] Whether dismissal of Ayling's claims for failure to state a claim upon which relief can be granted was proper:

1. Against all State Defendants, on statute of limitations grounds, where the longest-applicable statute of limitations was selected (i.e., three years), where Ayling's claims arise from an allegedly botched autopsy, and where Ayling alleges investigating the autopsy and death investigation (including, but not limited to, hiring a forensic toxicologist to reevaluate the toxicology results contained in the report) more than three years prior to serving the lawsuit;
2. Against all State Defendants, on grounds that Ayling failed to timely notify the state of the claim, where Ayling alleged not presenting notice of claim to the Office of Management and Budget until more than 180 days after she began investigating the autopsy and death investigation;
3. Against all State Defendants except Dr. Sens, on discretionary and personal immunity grounds, where Ayling alleged Dr. Sens was negligently supervised and retained;

4. Against all State Defendants, on grounds that Ayling failed to serve an admissible expert affidavit establishing a prima facie case of professional negligence, where the lawsuit complains of professional negligence by a physician arising from the performance of an autopsy;
5. Against all State Defendants except Dr. Sens, for suing state employees without suing the State itself.
6. Against all State Defendants except Dr. Sens, on standing grounds, where Ayling has failed to identify what actual or threatened injury she suffered, where Ayling expresses generalized grievances that statutes and regulations have been violated, and where Ayling's claim rests of the contract rights of third persons.

STATEMENT OF THE CASE

[¶2] On or after February 16, 2017, Appellant Ayling (hereinafter "Ayling" served a lawsuit on State Defendants alleging professional negligence. See, Appellant's Brief: Appendix B.

[¶3] On August 21, 2017, State Defendants motioned the district court to dismiss Ayling's lawsuit for failure to state a claim upon which relief can be granted or, alternatively, summary judgment. See, id.: Appendix A, Index Nos. 106–107.

[¶4] The district court granted the motion. See, id.: Appendix B at ¶94. The claims against Dr. Sens were dismissed on three independently-sufficient bases: (1) non-compliance with the statute of limitations, (2) failure to timely notify the state of claims, (3) failure to serve an admissible expert affidavit establishing a prima facie case of professional negligence. Id. at ¶¶79–85. Dismissal against the other State Defendants was based on seven independently-sufficient bases: the three bases referenced above and (4) discretionary immunity, (5) personal immunity, (6) failure to bring a claim against the state, and (7) lack of standing.

[¶5] On February 22, 2018, Ayling brought a Motion to Reconsider and/or Vacate the dismissal (id.: Appendix A at Docs. No. 256–257), which was denied on April 6, 2018 (id. at Index No. 281).

[¶6] This appeal follows.

STATEMENT OF ALLEGED FACTS

[¶7] These allegations are taken from Ayling's Complaint and are assumed to be true for purposes of this appeal.

[¶8] At all relevant times, Dr. Sens, Dr. Koponen, and Dr. Wynne were employed by UND. Appellant's Brief: Addendum B at 178, §147. Dr. Sens was also the Grand Forks County Coroner. Id. at 21, §21. Dr. Massello is the State Forensic Examiner. Id. at 167, §132.

[¶9] On March 24, 2012, Dr. Sens performed an autopsy on Blake Ayling's body. Id. at 35, §23–24. On June 28, 2012, a newspaper published the autopsy results: Blake Ayling's arm was torn off by a train while he was intoxicated, he died from blood loss, and the death was an accident. Id. at 37 §27. Ayling, "very distraught," and called Dr. Sens. Id. at 38, §28. She questioned the reported 0.278 blood-alcohol concentration, and she requested a copy of the autopsy report. Id.

[¶10] On October 22, 2012, Ayling received the autopsy report. Id. at §29. She sent one or more communications to Dr. Sens, the first of which dated October 29, 2012, requesting information on the following topics: (1) the type(s) of samples that had been taken in connection with the toxicology screen, (2) the times the samples were taken, (3) the identity of the person(s) who took the samples, (4) how the samples were preserved, and (5) how the samples were tested. Id. at 38–39, §30.

[¶11] On April 6, 2013, Ayling and Dr. Sens discussed the results of the autopsy. Id. at 40, §32. Ayling expressed concerns and asked questions about Dr. Sens' performance. Id. at 40–42. Dr. Sens answered her questions and defended her conclusions. Id.

[¶12] Ayling retained a forensic toxicologist to evaluate the toxicology findings. See, id. at 46, §39. On December 27, 2013, Ayling spoke with

the forensic toxicologist. Id. He criticized the principles and methods relied upon by Dr. Sens and impugned her conclusions. Id. at 47–50.

[¶13] On January 12, 2016, Ayling e-mailed notice of her claim to the Office of Management and Budget. Id. at 34, §19. She served this lawsuit against State Defendants on or after February 16, 2017. Cf. at 200. Within three months thereafter, Ayling did not serve State Defendants with an admissible expert affidavit establishing a prima facie case of professional negligence. Cf. Plaintiff's Brief at ¶60 (arguing Ayling was not required to submit an expert affidavit).

[¶14] The Complaint alleges: (1) Dr. Sens botched Blake Ayling's autopsy and death investigation (Id.: Appendix B at 67), and (2) the other State Defendants negligently trained, supervised, and retained Dr. Sens. Id. 72–73 §57.

LAW AND ARGUMENT

[¶15] The district court dismissed the lawsuit against State Defendants pursuant to N.D. R. Civ. P. 12(b)(6). This rule authorizes dismissal of lawsuits where the complaint fails to state a claim upon which relief can be granted. Id. In a 12(b)(6) motion, the Complaint's allegations are assumed to be true, and the standard of review is de novo. See, Martin v. Marguee Pacific, LLC, 2018 ND 28, ¶9 906 N.W.2d 65. Dismissals are

properly granted when "it is disclosed with certainty the impossibility of proving a claim upon which relief can be granted." Ziegelmann v. Daimler Chrysler Corp., 2002 ND 134, ¶5, 649 N.W.2d 556. If a party bringing a 12(b)(6) motion submits matters outside the pleadings, "it is within a trial court's discretion to exclude [those] material[s]." Id. at ¶15.

[¶16] State Defendants moved for dismissal or, alternatively, summary judgment. Exhibits were filed with the motion in case the district court resolved the matter under the summary judgment standard, but the district court excluded them and resolved the case under Rule 12(b)(6). Cf. Appellant's Brief: Appendix G at ¶¶79–85. Considering only the four corners of Ayling's Complaint, it is impossible for her to prove a claim upon which relief can be granted.

I. AYLING'S LAWSUIT IS BARRED BY THE STATUTE OF LIMITATIONS

[¶17] In Dunford v. Tryhus, 2009 ND 212, ¶6, 776 N.W.2d 539, this Court explained the purpose and characteristics of statutes of limitation:

> Statutes of limitation are designed to prevent plaintiffs from sleeping on their legal rights and bringing stale claims to the detriment of defendants. Statutes of limitations are a legal bar to a cause of action and begin to run when the underlying cause of action accrues. The determination of when a plaintiff's cause of action has accrued is generally a question of fact, but if there is no dispute about the relevant facts, the determination is for the court. A cause of action accrues when the right to

> commence the action comes into existence and can be brought in a court of law without being dismissed for failure to state a claim. We have recognized statutes of limitation ordinarily began to run from the commission of the wrongful act giving rise to the cause of action, and an injury usually arises contemporaneously with the wrongful act causing the injury.

(internal quotations, citation, and punctuation omitted).

[¶18] To perform the analysis, two issues needed to be resolved: (1) the date when the statute of limitations began to run, and (2) the number of years Ayling had to initiate the lawsuit after her claim accrued. The district court correctly applied a three-year statute of limitations (Appellant's Brief: Appendix G at ¶35) and determined that it began to run no later than December 27, 2013 (id. at ¶39). It concluded that Ayling's lawsuit was time-barred because it was brought after February 16, 2017. Id. at ¶¶ 35, 40.

A. The District Court did not err in Applying a Three-Year Statute of Limitations

[¶19] "[I]f there is a question [as to] which statute of limitation applies, generally the longer time will be applied." Burr v. Kulas, 1997 ND 98, ¶12, 564 N.W.2d 631. Ayling brought an action against state employees for actions taken within the scope of employment. See, infra at ¶50. She also seeks damages for the alleged professional negligence of physicians. See, infra at ¶¶51–53. Finally, she has sued a coroner, in her official

capacity, for liability arising from the performance of a discretionary act. See, infra at ¶¶8, 48. Therefore, three statutes of limitation could be applied: Section 28-01-18, subdivision 3 (two-year statute of limitations for professional-negligence actions against physicians); Section 28-01-17, subdivision 1 (three-year statute of limitations for actions against coroners acting in their official capacity); and Section 28-01-22.1 (three-year statute of limitations for actions against state employees acting within the scope of their employment). Because the longest limitations period was three years, the district court correctly applied a three-year statute of limitations.

B. Ayling's Lawsuit Accrued no Later than December 27, 2013; Therefore, Ayling's February, 2017 Lawsuit was Time-Barred

1. Applying the general rule, Ayling's lawsuit is time-barred

[¶20] Because a three-year statute of limitations applies, we must determine when it began to run. "[G]enerally[,] the statute of limitations begins to run from the commission of the wrongful act giving rise to the cause of action." Dunford, 2009 ND 212, ¶9, 776 N.W.2d 539. Here, it is alleged that Dr. Sens botched Blake Ayling's autopsy on March 24, 2012. See, Appellant's Brief: Appendix B at 67. Because the cause of action arose from the autopsy, this Court should utilize a March 24, 2012 discovery

date. Ayling did not serve her lawsuit until 2017, so the three-year statute of limitations bars her lawsuit.

2. Applying the discovery rule, Ayling's lawsuit is still barred by the three-year statute of limitations

[¶21] The district court determined the claim accrued no later than December 27, 2013. Applying the discovery rule, dismissal was still appropriate.

[¶22] Where applicable, the discovery rule "postpones a claim's accrual until the plaintiff knew, or with the exercise of reasonable diligence should have known, of the wrongful act and its resulting injury." Dunford, 2009 ND 212, ¶9, 776 N.W.2d 539. Whether a plaintiff "knew or should have known is an objective question focusing on whether [she] was appraised of facts which would place a reasonable person on notice that a potential claim exists." Id. (internal quotations omitted).

> [i]t is not necessary that the plaintiff be subjectively convinced that [s]he has been injured and that the injury was caused by the defendant's negligence…. To trigger the running of the statute of limitations, [the plaintiff] need not fully appreciate the potential liability or even be convinced of [her] injury; [s]he need only know enough to be on notice of a potential claim.

Schanilec v. Grand Forks Clinic, Ltd., 1999 ND 165, ¶¶ 13, 19, 599 N.W.2d 253.

a. Ayling was on notice of her claim by October, 2012, where the allegations show she was investigating her son's death and demanding detailed information about how the toxicology screen was performed

[¶23] Ayling's allegations show that—more than four years before the complaint was filed—Ayling knew of facts and circumstances that put her on notice of concerns with the autopsy, the toxicology results, and the cause-of-death determinations.

[¶24] On June 28, 2012, a newspaper reported the autopsy results: Blake Ayling's arm was torn off by a train while he was intoxicated, he died from blood loss, and the death was an accident. Plaintiff's Brief: Appendix B at 37 §27. That same day, Ayling was "very distraught" and called Dr. Sens for answers. Id. at 38, §28. She questioned the reported 0.278 blood-alcohol concentration and requested a copy of the autopsy report. Id.

[¶25] On October 22, 2012, Ayling received the autopsy report. Id. at §29. She had "many questions" about the autopsy. Id. at §30. She sent one or more communications to Dr. Sens, the first of which dated October 29, 2012, requesting information that only a person investigating a death would ask for. See, id. at 38–39, §30. Specifically, she requested information on the following topics: (1) the type(s) of samples that had been taken in connection with the toxicology screen, (2) the times the

samples were taken, (3) the identity of the person(s) who took the samples, (4) how the samples were preserved, and (5) how the samples were tested. Id. at 38–39, §30. Ayling's negative response to the autopsy results, and her request for evidence substantiating the blood-alcohol concentration reported therein, shows that Ayling objectively questioned the autopsy and toxicological results. The fact that she was investigating indicates actual knowledge, and it would put an ordinary person on inquiry. Cf. Podrygula v. Bray, 2014 ND 226, ¶18, 856 N.W.2d 791. ("alerting law enforcement of suspected theft constitutes actual knowledge and would put an ordinary person on inquiry," even if the plaintiff was not "aware of the full *extent* of the injury"). The discovery rule simply asks whether a plaintiff had enough information to start investigating. Reasonable minds cannot disagree that Ayling was on notice of a potential claim.

3. Communications between Dr. Sens and Ayling demonstrate that Ayling was on notice of a potential claim

[¶26] Alternatively, on April 6, 2013, Ayling knew of facts that would put a reasonable person on notice of a potential claim. On that day, Ayling and Dr. Sens met to discuss the results of the autopsy. Id. at 40, §32. Many of the acts and omissions Ayling complains of were disclosed/explained by Dr. Sens during this meeting. See, id. at 40–42. As alleged, the following

is a non-exclusive list of information discussed on April 6, 2013: Ayling asked Dr. Sens why she had not tested Blake Ayling's urine to determine his blood-alcohol concentration, and Dr. Sens responded that testing urine would be "useless" (id. at 41, §32, subdiv. l)); Dr. Sens could not remember if she or Ed Bina had drawn the blood samples (id. at 40, §32, subdiv. f)); Ayling's then-husband asked whether vitreous humor had been tested to determine the blood-alcohol concentration, and Dr. Sens responded in the negative (cf. id. at 40, §32 subdiv. n)); Dr. Sens said that "no measures [were] taken to determine [the] actual time of death" (id. at 41–42, subdivs. r), ee)); Blake Ayling's "manner of death was deemed an accident by default instead of undetermined" (id. at 42 subdiv. w)); there was a "huge gap in time that cannot be explained," which Ayling thought "beg[ged] a lot of questions" (id. at subdiv. x)).

[¶27] The meeting was investigatory and adversarial. Ayling wanted a level of detail that supports only one inference: she was suspicious that the investigation resulted in erroneous and/or incomplete conclusions about the cause(s) of death. At that meeting, Ayling knew more than enough to put a reasonable person on notice of a potential claim. Because Ayling was investigating her son's death, her claim had accrued.

4. Ayling hired a forensic toxicologist to evaluate the toxicology results—this shows that Ayling suspected misdiagnosis

[¶28] Alternatively, the claim accrued when Ayling hired a forensic toxicologist to evaluate the report's toxicology conclusions. See, id. at 46, §39 (Ayling "expended the funds to consult with an expert forensic toxicologist to try to have some type of understanding of what this all means"). Where a plaintiff seeks a second opinion following a diagnosis, she is deemed to suspect misdiagnosis. Cf. Schanilec, 1999 ND 165, ¶16, 599 N.W.2d 253 (inferring plaintiff "suspected" misdiagnosis because he asked his physician for a referral).

[¶29] Ayling's refusal to accept Dr. Sens's conclusions supports an inference that she suspected the report contained material inaccuracies. *A fortiori*, when Ayling retained an independent expert to reinterpret the toxicology results, reasonable minds cannot disagree she suspected misdiagnosis. See, id. Ayling was on notice of a potential claim when she sought a second opinion.

5. By December 27, 2013, Ayling secured a forensic-toxicologist opinion inconsistent with the results of Dr. Sens' autopsy; under these circumstances, she was on notice of a potential claim

[¶30] Once a plaintiff knows of evidence contradicting the defendant's professional opinions, the plaintiff is on notice those opinions may have

been negligently rendered. In Schanilec, the plaintiff was misdiagnosed. Id. at ¶18. He sought a referral and obtained a second opinion, which resulted in a correct diagnosis. Id. at ¶¶3–4. On these facts, the Court held: "By the end of February 1994, Dr. Zeller diagnosed Schanilec as suffering not from fibrositis but from back problems caused by fractured vertebrae and collapsed discs. At this point, Schanilec knew the prior diagnosis … had been wrong." Id. at ¶18.

[¶31] This is analogous to the immediate case. On December 27, 2013, the forensic toxicologist criticized the principles and methods relied upon by Dr. Sens, and he impugned her conclusions. Appellant's Brief: Appendix B at 46, §39. He disagreed that testing urine would be "worthless," and he thought it a "red flag" that urine was not tested for alcohol. Id. at 47, §39, subdiv. c). He thought the "[b]iggest error was not collecting the vitreous humor," which was ostensibly "basic forensics." Id. at 48, §39, subdiv. d). He opined that "the toxicology testing of Blake's blood [was] not reliable without corroborating tests." Id. He further opined that the "conclusions in the autopsy were not stated scientifically" (id. at subdiv. e), and there was insufficient information to support the 0.287 reading (id. at f)). He thought that, given the difference in blood-alcohol concentration derived from peripheral vessels (i.e., 0.287) and from

central vessels (0.247), the "testing of additional samples" should have been performed (id. at 49, §39, subdiv. g)). He also raised concerns that Dr. Sens did not give sufficient weight to information that may have called the toxicology results into question (e.g., witness statements indicating that decedent was not showing signs of intoxication when last observed alive) (id. at 50, §39, subdiv. h)).

[¶32] Ayling consulted with a forensic toxicologist who told her the autopsy was negligently performed. Reasonable minds cannot differ in concluding Ayling was both objectively and subjectively on notice of a potential claim.

[¶33] The latest discovery date supported by the allegations is December 27, 2013. Ayling did not serve her Complaint until February, 2017. That is more than three years after the claim accrued. Dismissal against all State Defendants should be affirmed.

II. DISMISSAL OF AYLING'S LAWSUIT AGAINST ALL STATE DEFENDANTS SHOULD BE AFFIRMED BECAUSE AYLING DID NOT TIMELY NOTIFY THE STATE OF THE CLAIM

[¶34] The district court correctly dismissed the lawsuit against all State Defendants for non-compliance with Section 32-12.2-04, subdivision (1). Before an action can be brought against the state or its employees, a plaintiff

> must present to the director of the office of management and budget ***within one hundred eighty days after the alleged injury is discovered or reasonably should have been discovered*** a written notice stating the time, place, and circumstances of the injury, the names of any state employees known to be involved, and the amount of compensation or other relief demanded.

Id. (emphasis added). The statute requires written notice of a claim to be given; actual notice is insufficient. Earnest v. Garcia, 1999 ND 196, ¶6, 601 N.W.2d 260. "A party seeking to bring a claim against the State or its employees must strictly comply" with the statute. Moen v. State, 2003 ND 17, ¶5, 656 N.W.2d 671. "A court lacks subject matter jurisdiction to entertain a lawsuit in the absence of a timely filing of a notice of claim." Id. Therefore, if "a party suing the state fails to satisfy the notice of claim provision, … dismissal of the party's complaint is proper." Knutson v. Barnes Co., 2002 ND 68, ¶5, 642 N.W.2d 910. Moreover, dismissal as a matter of law is appropriate when "the uncontroverted facts establish that a reasonable person would have been placed on notice of a potential claim" more than 180 days before notice was given. Cf. Tarnavsky v. McKenzie Cnty. Grazing Ass'n, 2003 ND 117, ¶11, 665 N.W.2d 18 (summary judgment case).

A. State Defendants are Covered by the Statute

[¶35] This Court has held that UND is "an arm of the State." Ledbetter v. Rose, 467 N.W.2d 431, 434 (N.D. 1991) (overturned on other grounds by Bulman v. Hulstrand Const. Co., Inc., 521 N.W.2d 632 (N.D. 1992)). The statute applies to UND. See, Cooke v. University of North Dakota, 1999 ND 238, ¶¶1, 11, 603 N.W.2d 504 (dismissing lawsuit against UND pursuant to the statute).

[¶36] The other State Defendants are state employees. See, Appellant's Brief: Appendix B at 29–30, §8 ("All defendants are being sued individually … as well as in their official capacities, in the course of their employment, and in the scope of their duties"); id. at 33, §14–16 (alleging Dr. Sens, Dr. Koponen, and Dr. Wynne are UND employees and Dr. Massello is the State Forensic Examiner).

[¶37] Consequently, all State Defendants are covered by the statute.

B. Ayling Failed to Notify the State Within 180 Days of the Discovery Date

[¶38] To determine whether notice was timely given, a court should: (1) determine the discovery date, and (2) determine whether notice was served within 180 days thereafter. See, Tarnavsky, 2003 ND 117, ¶11 665 N.W.2d 18. The district performed this analysis correctly:

> In this case, the underlying event was the medical autopsy of Blake, occurring March 24, 2012. Ayling was made aware of the autopsy result on June 28, 2012. By December, 2013, she had hired an independent toxicologist in order to review Dr. Sen's autopsy. The toxicologist gave several indications of actions that may have allegedly been below the standard of care. As a result, Ayling "discovered" her injury no later than December, 2013.

Appellant's Brief: Appendix G at ¶34.

[¶39] It is undisputed that Ayling did not present a written notice-of-claim to the Office of Management and Budget until January 12, 2016. See, Appellant's Brief: Appendix B at 34, §19. The district court recognized that this was "well outside the one hundred eighty day requirement." Id.: Appendix G at ¶34. Dismissing the claims against all State Defendants was appropriate.

III. AYLING'S CLAIMS AGAINST UND, DR. KOPONEN, DR. WYNNE, AND DR. MASSELLO WERE APPROPRIATELY DISMISSED BECAUSE DISCRETIONARY FUNCTIONS ARE IMMUNE FROM JUDICIAL REVIEW

[¶40] The district court correctly applied North Dakota Century Code Section 32-12.2-02, subdiv. 3b, to dismiss the claims against UND, Dr. Koponen, Dr. Wynne, and Dr. Massello. Id. at ¶46. The statute provides:

> Neither the state nor a state employee may be held liable under this chapter for … [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….

§ 32-12.2-02, subdiv. 3b.

[¶41] State Defendants are all state employees or an arm of the State. See, supra at ¶¶35-36. They are all covered by statute.

[¶42] The acts and omissions complained of are discretionary functions. Section 32-12.2-02, subdivision 3b, provides that the state and its employees cannot be held liable for claims based upon discretionary functions, irrespective of whether the discretion is abused. This Court applies a two-part test to determine whether a state employee's act or omission was discretionary: "(1) whether the action is a matter of choice for the acting employees, and (2) whether that judgment or choice is of the kind that the discretionary function exception was designed to shield." Knutson v. Fargo, 2006 ND 97, ¶19, 714 N.W.2d 44 (internal quotations and punctuation omitted).

[¶43] Ayling complains of "negligent supervision, negligent retention, and failure to report [Dr. Sens] to a medical disciplinary board." Appellant's Brief: Appendix G at ¶29; accord id.: Appendix B at 72–73 §57 (complaining Dr. Sens was not required to follow appropriate "policies and procedures," that "quality assurance programs" were not in place, that she was not adequately supervised, and that she was not made to

follow appropriate "standards and protocols"). These decisions involve policy judgments and are clearly discretionary functions.

[¶44] State Defendants are aware of no North Dakota decisions considering whether the management of state employees constitutes a discretionary function. Previously, this Court has relied on federal cases interpreting discretionary-function immunity. See, Olson v. Garrison, 539 N.W.2d 663, 665–66 (N.D. 1995).

A. Federal Cases hold that Training and Supervising Government Employees Involves a Discretionary Function

[¶45] The federal courts of appeal have held that the hiring, training, and supervising of government employees involves policy judgments shielded by discretionary-function immunity. See, e.g., Tonelli v. U.S. 60 F.3d 492, 496 (8th Cir. 1995); Vickers v. U.S., 228 F.3d 944, 950 (9th Cir. 2000); Burkhart v. Washington Metro. Area Transit Auth., 112 F.3d 1207, 1217 (D.C. Cir. 1997); Richman v. Straley, 48 F.3d 1139, 1146–1147 (10th Cir. 1995); see also, Carlyle v. U.S., Dept. of the Army, 674 F.2d 554, 556–57 (6th Cir. 1982).

B. The Federal Cases Accord with North Dakota Law

[¶46] Decisions about hiring, training, supervising, and retaining state employees involve matters of choice that are susceptible to policy analysis.

> Supervision decisions involve a complex balancing of budgetary considerations, employee privacy rights, and the need to ensure public safety. The extent of training with which to provide employees requires consideration of fiscal constraints, public safety, the complexity of the task involved, the degree of harm a wayward employee might cause, and the extent to which employees have deviated from accepted norms in the past. Such decisions are surely among those involving the exercise of political, social, or economic judgment.

Burkhart, 112 F.3d at 1217.

[¶47] Furthermore, this Court has held that a physician's dismissal from the UND's Medical School constituted a "discretionary function" within the meaning of Section 32-12.2-02. See, Abdullah v. State, 2009 ND 148, ¶24, 771 N.W.2d 246. This case only addressed terminations, but there is no principled reason to distinguish terminations from supervision, retention, and other employee-management decisions. Therefore, this Court should affirm the dismissal of UND, Dr. Koponen, Dr. Wynne, and Dr. Massello.

C. The Public Policy Considerations Underlying the Discretionary-Immunity Statute would be Adversely Affected if Coroners could be Sued for the Performance of Autopsies and Death Investigations

[¶48] In Putthoff v. Ancrum, 934 S.W.2d 164, 170 (Tex. Ct. App. 1996), the Texas Court of Appeals gave compelling policy reasons for classifying the work of coroners as discretionary functions:

> [If coroners were not afforded discretionary-function immunity,] the constant threat of lawsuits would unduly burden [coroners] in performing [autopsies] and would inevitably influence cause of death determinations. This would seriously harm the public by interfering with the efforts of law enforcement to investigate crime and hinder the search for truth in the criminal justice process.

These are the policy considerations underlying the discretionary-immunity statute. Accordingly, discretionary immunity should be extended to State Defendants.

IV. AYLING'S CLAIMS AGAINST DR. KOPONEN, DR. WYNNE, AND DR. MASSELLO WERE APPROPRIATELY DISMISSED ON A THEORY OF PERSONAL IMMUNITY

[¶49] North Dakota Century Code Section 32-12.2-03, subdivision 2, provides: "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." Ayling bears the burden of proving that the state employees acted outside the scope of their duty by "clear and convincing evidence." Id. at subdiv. 3.

[¶50] Ayling alleged, "All defendants are being sued individually … as well as in their official capacities, in the course of their employment, and in the scope of their duties." Appellant's Brief: Appendix B at 29–30, §8. Ayling alleges "negligent supervision, negligent retention, and failure to

report [Dr. Sens] to a medical disciplinary board." Id.: Appendix G at ¶29. Correctly allocating the burden of proof, the district court held as follows:

> Here, this immunity should preclude any claims…. Ayling makes a blanket allegation of actions outside the scope of duties on the part of all Defendants, but … she does not allege what those actions are. While the Court is to view all facts in the light favorable to the Plaintiff …, here Ayling has not plead sufficient facts to defeat such a motion nor has she identified such facts in response to this motion. While Ayling states that the State Defendants' actions were outside the scope of their duties, based on the facts of the Complaint as plead, the Court finds that there is only one reasonable interpretation here: that each of the State Defendants as individuals[,] save Dr. Sens[,] was acting within the scope of his duties as a State Employee.

Id. at ¶43. Dismissal of Ayling's lawsuit against Dr. Koponen, Dr. Massello, and Dr. Wynne should be affirmed.

V. DISMISSAL AGAINST ALL STATE DEFENDANTS FOR FAILURE TO FILE AN ADMISSIBLE EXPERT OPINION ESTABLISHING A PRIMA FACIE CASE OF PROFESSIONAL NEGLIGENCE SHOULD BE AFFIRMED

[¶51] The district court correctly dismissed the lawsuit against all State Defendants because Ayling failed to comply with N.D. Cent. Code § 28-01-46. That statute provides:

> Any action for injury or death alleging professional negligence by a physician … must be dismissed without prejudice on motion unless the plaintiff serves upon the defendant an affidavit containing an admissible expert

> opinion to support a prima facie case of professional negligence within three months of the commencement of the action.

A. North Dakota Century Code Section 28-01-46 Applies to all State Defendants

[¶52] The statute applies to all State Defendants, most of which are physicians. The University of North Dakota is covered because the statute applies to both direct-liability and vicarious-liability claims. See, Johnson v. Bronson, 2013 ND 78, ¶¶2, 18, 830 N.W.2d 595.

[¶53] In terms of subject matter, Ayling was allegedly injured by a physician's professional negligence—i.e., she alleges injuries resulting from a botched autopsy. Accordingly, Section 28-01-46 applies. Ayling was required to submit an admissible affidavit establishing a prima facie case of professional negligence. Ayling conceded that she did not submit an expert affidavit. Cf. Appellant's Brief at ¶60 (arguing why she was not required to submit an expert affidavit).

B. The Obvious Occurrence Exception does not Apply

[¶54] The obvious occurrence exception applies only to cases that are plainly within the knowledge of a layperson. "In an obvious occurrence case, expert testimony is unnecessary precisely because a layperson can find negligence without the benefit of an expert opinion." See Larson v. Zarrett, 498 N.W.2d 191,195 (1993). Where an expert witness will be

required to establish "the applicable standard of care," this weighs against an occurrence's obviousness. See, Cartwright v. Tong, 2017 ND 146, ¶14, 896 N.W.2d 638 (necessity of expert testimony used to reject "obvious occurrence" argument).

[¶55] Forensic interpretation of postmortem data and toxicology findings are clearly outside the understanding of lay jurors. Because expert testimony would be required to determine the standard of care, the obvious occurrence exception is inapplicable. The Court should affirm dismissal against all State Defendants because Ayling failed to serve an expert affidavit within 90 days of initiating the lawsuit.

VI. AYLING'S LAWSUIT WAS CORRECTLY DISMISSED AGAINST ALL STATE DEFENDANTS BECAUSE AYLING FAILED TO SUE THE STATE OF NORTH DAKOTA

[¶56] The district court correctly dismissed the lawsuit against UND, Dr. Koponen, Dr. Wynne, and Dr. Massello for Ayling's failure to sue the State of North Dakota itself.

[¶57] North Dakota Century Code Section 32-12.2-03, subdivision (1), provides: "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." The State Defendants are all either an "arm of the state" or

"state employees." See, supra at ¶¶35-36. Allegations of negligent supervision, negligent retention, and failure to report Dr. Sens to a medical disciplinary board are all actions occurring within the scope of employment. Id. Affirmance is appropriate.

VII. DISMISSAL OF AYLING'S CLAIMS AGAINST UND, DR. KOPONEN, DR. WYNNE, AND DR. MASSELLO SHOULD BE AFFIRMED BECAUSE AYLING DOES NOT HAVE STANDING

[¶58] The district court correctly dismissed the claims against UND, Dr. Koponen, Dr. Wynne, and Dr. Massello for lack of standing. A court may not decide the merits of a dispute, unless the plaintiff demonstrates that she has standing to litigate the issues before the court. Kjolsrud v. MKB Management Corp., 2003 ND 144, ¶13, 669 N.W.2d 82. "Standing is the concept used to determine if a party is sufficiently affected so as to insure that a justiciable controversy is presented to the court." Id. (internal quotations omitted). "The litigant must have an interest … in the cause of an action, or a legal or equitable right, title, or interest in the subject matter of the controversy in order to invoke the jurisdiction of the court." Whitecalfe v. N.D. Dept. Transportation, 2007 ND 32, ¶15, 727 N.W.2d 779. The standing analysis 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.

Id. The existence of standing is a question of law, which is reviewed de novo. Id.

A. Ayling has not Alleged a Threatened or Actual Injury Caused by State Defendants

[¶59] The first prong requires Ayling to have suffered "some threatened or actual injury resulting from the putatively illegal action." Id. Put otherwise, there must be: (1) a legally cognizable injury, and (2) causation.

1. Ayling did not allege a legally cognizable injury, and therefore prong one of the standing test was not satisfied

[¶60] Not all individualized harms satisfy the "threatened or actual injury" standard. See, Rebel v. Nodak Mut. Ins. Co., 1998 ND 194, ¶10, 585 N.W.2d 811. The district court correctly determined that Ayling did not allege a threatened or actual injury:

> Here, it is difficult to casually link any injury [suffered by] Ayling to any State Defendant [except Dr. Sens]. . . . Ayling alleges that UND, Dr. Koponen, and Dr. Wynne failed to ensure the quality of Dr. Sens' performance, failed to supervise Dr. Sens, and failed to fulfill statutory duties. The alleged failures of these officials did not cause an actual injury to Ayling and they owed her no particular duty in the performance of these duties.

Appellant's Brief: Appendix G at 250–51, ¶¶22–23.

[¶61] This Court should affirm for the following reasons: (1) Ayling has failed to adequately brief the issue of injury-in-fact; (2) the mental stress of believing a death investigation resulted in incomplete and/or inaccurate conclusions is not a legally cognizable injury; and (3) State Defendants owed no duty to Ayling to perform the death investigation in any particular way, and therefore no legal interest of Ayling's was invaded.

a. Ayling has inadequately briefed the issue of standing

[¶62] Ayling has failed to comprehensibly articulate what legally-cognizable injury she suffered. She also failed to pinpoint allegations that support her theory. This Court is not obligated to search Ayling's 187-page Complaint for allegations supporting standing. It is not obligated to develop a theory of standing for her. Smestad v. Harris, 2011 ND 91, ¶5, 796 N.W.2d 662 (where appellant's position is not developed into "comprehensible arguments," it is "inadequately briefed," which "precludes relief on appeal").

[¶63] Ayling's discussion of injury-in-fact is incomprehensible. Her arguments fail to apply the relevant legal standards. They fail to distinguish between allegedly wrongful acts and injuries caused thereby.

She argues as though bare allegations of unlawful acts establish standing, which begs the issue altogether. See, Appellant's Brief at 7–8, ¶ 17 (disputing that her injury is being "unhappy/upset" with the results of [the] autopsy and investigation" but failing to explain what her cognizable injury was). Alleging that laws were violated is not the issue: she must demonstrate the violation infringed upon a perceptible and legally-recognized interest. By failing to adequately brief the issue, it was waived.

b. Ayling failed to allege a legally cognizable injury

[¶64] If Ayling is deemed to have adequately briefed the issue, she has still not identified a threatened or actual injury. The closest issues raised would be as follows: if a negligent autopsy and death investigation resulted in an incorrect/incomplete cause-of-death determination:

> (1) Would resulting psychic injury to a decedent's parent (e.g., negative feelings arising from (a) uncertainty as to how the decedent died, or (b) the perception that the decedent's reputation was harmed by the cause-of-death determination) be an injury-in-fact?
>
> (2) Would any legally-recognized interest of Ayling's have been violated by the negligent autopsy?

Even assuming Ayling raised these arguments, her claim still fails. Psychic injuries resulting from negligent/incomplete death investigations

are not injuries-in-fact, and coroners owe no duty to decedents' parents. No legally-recognized interest is invaded by a negligent autopsy.

c. Alleged psychic injuries regarding the autopsy and death investigation are not "threatened or actual injuries"

[¶65] An actual injury occurs where a legally-recognized interest of the plaintiff is invaded by the putatively illegal action of the defendant. See, Whitecalfe, 2007 ND 32, ¶15, 727 N.W.2d 779 (plaintiff must have "a legal or equitable right, title, or interest in the subject matter of the controversy in order to invoke the jurisdiction of the court."). As previously noted, not all "interests" suffice. See, Rebel, 1998 ND 194, ¶10, 585 N.W.2d 811 (non-party to insurance contract lacked standing to bring declaratory judgment action to establish coverage under the insurance contract, notwithstanding his clear interest in being paid and the fact that non-payment was to his detriment).

[¶66] Because not all interests are legally protected, we must consider whether Ayling has alleged a legally recognized interest.

[¶67] Ayling's Complaint alleges psychic harms. See, e.g., Appellant's Brief: Appendix B at §1, subdiv. 10) (expressing a desire to "bring about awareness" about the facts and circumstances surrounding the death); id. at 44, §36 ("[n]ot knowing" the circumstances of the death "was having significant and severe effects"); id. at 62, §47 ("Plaintiff was devastated"

that "answers were gone forever" as a result of Dr. Sens' acts and omissions); id. at 89, §73 (complaining of emotional trauma caused by Dr. Sens' not amending the coroner documents); id. at 88, §72 (complaining the autopsy gives the impression "Blake Ayling is an unfortunate drunk college kid who caused his own death").

[¶68] The psychic injuries subdivide into: (1) negative feelings caused by Ayling not knowing the facts and circumstances surrounding her son's death, and (2) negative feelings resulting from the perception that Blake's memory has been stigmatized by Dr. Sens conclusions.

[¶69] State Defendants are aware of no North Dakota case conferring standing upon a plaintiff under similar circumstances. Looking at out-of-state cases, psychic injuries are not injuries-in-fact. In Nader v. Hughes, 1993 WL 724820 *1, *1 (Com. Pl. 1993), aff'd, 643 A.2d 747 (Pa. 1994), a Pennsylvania court determined that the decedent's father did not have standing to sue the coroner over an allegedly deficient autopsy. The facts of Nader are analogous to the immediate case. The father disputed the conclusion of a coroner's autopsy and urged him to change his conclusion and conduct an inquest. Id. The coroner maintained he had conducted a reasonable investigation and refused. Id. The father sued for a writ of mandamus and alleged the following injuries:

> The plaintiff, Frank Nader, is the father of the deceased, and has ***suffered incalculable stress and mental anguish*** over the death of his son and over what he believes to be the refusal of the … coroner's office to act responsibly upon the evidence in the matter of Mark Nader's death. Further, the plaintiff has an intense interest, both religious … and social, in ***clearing the stigma of suicide*** from the family and the deceased.

Id. (emphasis added).

[¶70] In analyzing standing, the court considered whether the father had a "substantial, direct, and immediate interest" in the matter. Id. at *4. In determining whether a legally-cognizable injury had occurred, the court reasoned as follows:

> Plaintiff essentially has alleged a psychic injury…. [Such] psychic injury does not qualify as a substantial interest…. The cause of his son's death is of more interest to him than the general public. One of the most unbearable experiences in one's life is the death of a child. Nevertheless, the coroner's finding is not binding on anybody and the plaintiff has not alleged how the supposed stigma of suicide has affected any of his tangible interests.

Id.

[¶71] The immediate case is analogous. Assuming that not knowing the circumstances surrounding her son's death resulted in psychic injury, it is insufficient to constitute an actual injury. Similarly, a psychic injury predicated upon the perception that Blake's memory has been stigmatized does not meet the actual injury requirement. Because Ayling

failed to articulate a threatened or actual injury, the dismissal should be affirmed.

d. Coroners owe no duty to decedent's family respecting their performance of autopsies or death investigations

[¶72] No legally-recognized interest of Ayling was invaded by the alleged negligence. Coroners do not owe a duty to the families of the decedents they perform autopsies on. See, Lawyer v. Kernodle, 721 F.2d 632 (N.D. 1983) (although coroner performed a negligent autopsy that resulted in decedent's husband being charged with murder, coroner owed no duty to decedent's husband, and, therefore, the court dismissed his negligent diagnosis claim); Lauer v. New York, 95 N.Y.2d 95, 97–98, 103 (2000) (although a negligent autopsy by a municipal medical examiner resulted in the police investigating plaintiff for the death of his son, and although the examiner failed to modify the report or notify law enforcement once he discovered his son actually died of an aneurism, coroner owed no duty to plaintiff; therefore, plaintiff's negligent infliction of emotional distress claim failed); Sims-Hearn v. Office of Medical Examiner, Cook Co., 834 N.E.2d 505, 510 (Ill. Ct. App. 2010) (medical examiner owes no duty of care to individual citizens to perform autopsies"); Otero v. Warnick, 614 N.W.2d 177, 182–83 (Mich. Ct. App. 2000) (although the forensic odonatologist may have prepared his report in an incompetent and

reprehensible manner, the medical examiner's only duty was to the state and the county medical examiner"); Putthoff v. Ancrum, 934 S.W.2d 164, 170 (Tex. Ct. App. 1996) (recognizing that autopsies are performed for the "sole governmental function" of making cause-of-death determinations, and distinguishing physicians rendering healthcare to the living, who have a duty of care to patients, and physicians performing autopsy procedures, who do not); accord, N.D. Cent. Code § 32-12.1-03, subdiv. (1) ("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.")

[¶73] Because no duty was owed to Ayling to perform an autopsy or death investigation, alleged deficiencies in the autopsy or death investigation do not satisfy the injury-in-fact requirement.

2. If Ayling suffered an actual injury, it was not caused by State Defendants

[¶74] The district court identified the injury Ayling suffered: "the sudden and shocking death of Blake…." Appellant's Brief: Appendix G at 251, ¶23. His death was not caused by State Defendants.

B. Because Ayling's Complaint Alleged Generalized Grievances, and Rested on the Rights of Third Persons, Dismissal was Appropriate

[¶75] Ayling fails on prong two of the standing test. "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." Whitecalfe, 2007 ND 32, ¶18, 727 N.W.2d 779.

1. Ayling's allegations that statutes and regulations were violated are generalized grievances

[¶76] Ayling alleges the violation of statutes and regulations setting standards for the performance of autopsies and death investigations. This begs the question of standing.

[¶77] Ayling argues that statutes and regulations cited in her Brief require certain standards and protocols to be adhered to in the performance of autopsies and death investigations. She alleges State Defendants violated these statutes and regulations. Even assuming a violation, it would be irrelevant.

[¶78] The only injury alleged by Ayling is the shared harm experienced by all citizens and taxpayers when the government fails to comply with the law; this is precisely the kind of undifferentiated, generalized grievance

about the conduct of government that the standing requirement bars. See, Lance v. Coffman, 549 U.S. 437, 442 (2007).

2. Ayling's arguments that contracts were breached rest on the rights of third persons

[¶79] Even assuming the breach of contracts to which Ayling was not a party, it would be irrelevant. There is no allegation that State Defendants contracted with Ayling to perform Blake Ayling's autopsy. To any extent State Defendants were contractually obligated to follow certain standards or protocols, those duties were owed to the parties to the contract(s).

[¶80] Where a litigant's claim "rest[s] on the legal rights and interests of third parties," the litigant does not have standing to sue. Ackre v. Chapman & Chapman, P.C., 2010 ND 167, ¶¶12, 16, 788 N.W.2d 344. A stranger to a contract does not have standing to enforce its terms. Cf. Rebel, 1998 ND 194, ¶¶10, 12, 585 N.W.2d 811. Ayling lacks standing to prosecute the breach of a contract to which she is a stranger. Dismissal is therefore consistent with the rule against third-party standing.

VIII. THE COURT DOES NOT NEED TO ADDRESS THE DISCOVERY DECISIONS BECAUSE MATTERS OUTSIDE THE PLEADINGS WERE NOT CONSIDERED

[¶81] The Court did not consider matters outside the pleadings. Cf. Appellant's Brief ¶¶2–46 (showing extensive citation to the complaint and no citations to matters outside the pleadings). Ayling's 187-page

Complaint made allegations that made it impossible for the district court to grant the relief requested, irrespective of what discovery may disclose.

[¶82] The Court need not reach the discovery issues because they are not final and appealable orders and because, if reversed, it would not change the outcome of the case.

IX. The District Court Did Not Abuse Its Discretion in Denying Ayling's Motion for Reconsideration

[¶83] Denying Ayling's motion to reconsider was appropriate. "A district court's denial of a motion for reconsideration will not be reversed on appeal absent a manifest abuse of discretion." Id. at ¶13. Ayling's only argument that discretion was abused was that the district court misapplied the law.

[¶84] Ayling had the burden of "establishing sufficient grounds for disturbing the finality of the judgment." See, Anderson v. Baker, 2015 ND 26, ¶10, 871 N.W.2d 830. Ayling did not identify any legal errors committed by the Court; rather, she reargued the meritless positions previously advanced. See, Appellant's Brief: Appendix H at ¶13. As demonstrated throughout this brief, the district court correctly applied the law to the undisputed allegations, and the law required dismissal. The district court did not abuse its discretion in denying the motion to reconsider.

X. CONCLUSION

[¶85] In conclusion, we ask this Court to AFFIRM the judgment of the district court.

RESPECTFULLY SUBMITTED this 29th day of October, 2018.

s/ Randall S. Hanson
RANDALL S. HANSON
Special Assistant Attorney General
North Dakota Bar # 04876
MATT A. PAULSON
Special Assistant Attorney General
North Dakota Bar # 08196
401 DeMers Avenue, Suite 500
P.O. Box 5849
Grand Forks, ND 58206 5849
Telephone: (701) 775-5595
Facsimile: (701) 772-3743
rhanson@camrudlaw.com
mpaulson@camrudlaw.com
Attorneys for Defendants 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, 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, and Dr. William Massello, individually and in his official capacity as North Dakota State Forensic Examiner