

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

Robin E. Ayling, individually and as parent of Blake Christopher Ayling, deceased Supreme Court File No. 20180231
GF Co. Court File No. 18-2017-CV00889

Plaintiff,

vs.

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

**APPELLATE AYLING'S
REPLY TO STATE BRIEF**

Defendant,

and

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

Defendants,

and

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

Defendants,

and

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

Defendant.

Robin E. Ayling
Pro Se
8341 Emery Pkwy. N.
Champlin, MN 55316
612-242-8324
ayling47@hotmail.com
Appellant

Daniel Gaustad
Atty. for GF County,
GF Co. States Atty.,
GF Co. Commissioners
Pearson Christenson, PLLP
24 N. 4th St.
Grand Forks, ND 58201
701-775-0521
dan@grandforkslaw.com
Attorney for Appellee

Randall Hanson
Matt A. Paulson
Atty. Sens (includes Coroner)
Wynne, Koponen, UND
Camrud, Maddock, Olson &
Larson, Ltd.
401 DeMers Ave., Suite 500
Grand Forks, ND 58201
701-775-5595
rhanson@camrudlaw.com
mpaulson@camrudlaw.com
Attorneys for Appellee

I.	TABLE OF CONTENTS.....	3
II.	TABLE OF AUTHORITIES.....	4
III.	REPLY BRIEF.....	5

II. TABLE OF AUTHORITIES

Zueger v. Carlson, 542 N.W.2d 92 (ND1996).....6

Barsness v. General Diesel & Equipment Co., Inc., 383 N.W.2d 840.....6

McCroskey v. Cass County, 303 N.W. 330, (ND1981).....6

N.D.R.Civ.P. 12(b)(6).....6, 7, 10

N.D.R.Ev.201.....7

 Addendum 1.....7

 Addendum 2.....10

Mounrail Bethel Home v. Lovdahl, 2006 ND 180, ¶11, 720 N.W.2d 630.....9

NDCC 28-01-46.....10

N.D.R.Civ.P. 12(b).....10

Transcript/07/06/2017/pg.15/Lines11-24.....10

(Bigwood, City of Wahpeton, 1997 ND 124; 565 N.W.2d 498).....10

Sanderson v. Walsh County, 2006 ND 83, ¶10, 712 N.W.2d 842.....12

NDCC 32-12.2-03; 32-12.1-04.....12

III. REPLY BRIEF

1. Hanson represents State Defendants, including Sens GFCo.Coroner. Ayling incorporates by reference facts/law/arguments contained ¶1-14 of Ayling's Reply to County Appellee Brief (**ReplyCAP**) as follows:

(a) Sens; County status [#256/¶16; #257/pgs.7-8/¶8-10;

AylingAppellateBrief(AylingAB)/pg.36/¶65].

(b) Both State/County:

(i) mischaracterize Ayling's claims (unhappy/upset autopsy results) to exclusion of actual claims/statutory standing [#257/pgs.16-17/¶21, pgs.20-22/¶30-32; #260; **AylingAB/pg.35-36/¶64**];

(ii) misapply law regarding negligent supervision [#257/pgs.17-20/¶23-28; **AylingAB/pgs.29-31/¶50-54**];

(iii) no opposition to same issues, e.g. Sens admissions preclude dismissal [**AylingAB/pgs.20-22/¶34**]; 6 year statute limitations (SOL) regarding Sens individually [#257/pgs.11-13/¶14; **AylingAB/pgs.34-63/¶62-¶63**]; scope of motions do not include request for relief regarding illegal autopsy; absent death investigation; failure perform non-discretionary duties; deceit; acting in concert; impeding rights; fraud; special/fiduciary relationship/silence/equitable estoppel tolling SOL; intentional/negligent infliction emotional distress, etc. [#257/pgs.11-12/FN8, pg.22/¶32, pg.30/FN12; **AylingAB/pg.35/¶64**]; respondeat superior claims not addressed by Court [#257/pgs.24-26/¶37-39; **AylingAB/pg.31/¶55**].

2. In effort to avoid summary judgment standards, including discovery, State claims *exhibits* were filed *in case* Court resolved matter per summary judgment; Court excluded and resolved

under 12(b)(6) [**StateAppelleeBrief(StateAB)**/pg.6/¶16]. Scope of motion set by movant Zueger v. Carlson, 542 N.W.2d 92 (ND1996). Court refused to exclude Affidavits [#108, #116-#118] nor does Order [**Appendix**/pgs.242-276] exclude exhibits [#109-#115]. State's arguments throughout Brief (**StateAB**) based on *reasonable minds cannot disagree*, which is summary judgment standard [**StateAB**/pg.11/¶25; pg.13/¶29; pg.15/¶32]. Barsness v. General Diesel & Equipment Co., Inc., 383 N.W.2d 840, ¶12.

3. Court analysis dismissing claims does not include Rule 12(b)(6) analysis/determination *with certainty the impossibility of proving a claim upon which relief can be granted*. McCroskey v. Cass County, 303 N.W. 330, (ND1981). Court's standing analysis based on *arguments* with determination other State officials did not cause injury to Ayling, owed Ayling no duty [**Appendix**/pg.251/¶23]. Failure to notify state of claim explains jurisdictional issues intertwined with merits of case, Rule 12(b)(6) should be addressed using Rule 56 standards [**Appendix**/pg.254/¶30] followed by discovery date analysis based on State's mis-characterizations of Ayling's Complaint facts, exclusion of Affidavits disputing 12/2013 discovery date, concluding *reasonable person* in Ayling's position *would have been aware of facts ...* [**Appendix**/pg.255/¶34]. Determining SOL considers *arguments*, excludes face Ayling's Complaint, Affidavits, Court record, with *reasonable person* conclusion [**Appendix**/pgs.255-258/¶35-¶40].

4. Court found Ayling sufficiently pled special relationship with Sens to defeat standing challenge, actions of Sens could reasonably be found to be outside scope of duties (6 yr. SOL); Ayling's Complaint includes allegations Sens failed to perform required non-discretionary duties [**Appendix**/pgs.250/253-254/259/260/¶22, 29, 43, 46], precluding dismissal per Rule 12(b)(6).

5. While State accepts all Complaint facts as true [SAB/pg.3/¶7], every alleged "claim" and "fact" in SAB is based on mis-characterizations and outright lies (misconduct/fraud upon Court; [#277]); not supported and/or disputed by Court record, including (not exhaustive):

(a) Contrary to ¶9, ¶10, ¶24, ¶25, SAB, Ayling did not question .287 BAC, she asked about it along with other expected questions from grieving parents, including whether Blake suffered/felt pain [#38/pg.GFCCoroner-01680/¶2]. Sens explained they tried to look at *every scenario* and many people can hold their liquor at that level, didn't seem concerned [Appendix/pgs.36-38/¶26-¶28; #35/Ex.1/pg.15/¶17(a)(b)(c)]. Ayling asked questions about type of specimen, etc. in 10/29/2012 letter because autopsy report does not provide detail [#109], coroner file not provided as requested. Ayling states she was unable to find counsel regarding potential wrongful death suit against BNSF/PIKE Fraternity [Appendix/pg.44/¶37], inferring she had been in contact with prospective attorneys. Ayling requests *judicial notice* N.D.R.Ev.201; email to potential attorneys 10/2012; 12/2012 informing counsel still not yet received toxicology report. Ayling required toxicology information for wrongful death case review. [Addendum 1; Ayling's reference to researching college civil liability exposure regards PIKE Fraternity.] Sens undertook obtaining information stating she had not yet been able to connect with Hennepin to clarify some of the toxicology questions [#35/Ex.1/pg.17(e)]. Sens is knowledgeable of how important truth and facts are for the family trying to understand sudden death of a loved one, particularly child [Appendix/pgs.31-32; #131/pgs.1,5,12-23]

(b) Contrary to ¶11, ¶26-¶29, ¶31 Ayling did not express concern nor ask questions about Sens' autopsy performance on 04/06/2013, nor was the meeting "investigatory" and "adversarial." Sens encouraged Ayling to keep seeking answers, suggested a face-to-face meeting would be good [#57]. Sens scheduled meeting to answer all questions [#35/Ex.1/pg.16-

18/¶17(e)(h)]. Ayling was extremely appreciative of meeting and Sens' assurances. Ayling did not *refuse to accept Dr. Sens' conclusions*. There was no questioning nor defending of conclusions. Ayling believed all that Sens told her including she had done "all that was required" and that Blake was intoxicated at time of death. Ayling still wanted to know the chain of events leading to Blake's death, was foul play involved; she began investigating BNSF/PIKE Fraternity [#35/Ex.1,pgs.18-21/¶17(i)/¶18]. Ayling was not *suspicious that the investigation resulted in erroneous and/or incomplete conclusions about the cause(s) of death*. Sens assured Ayling she was not required to conduct an investigation inferred she was reliant on GFPD investigation and that she went above and beyond by connecting with UND Police [#35/Ex.1/pgs.18-21/¶17(i)-18]. Sens stated the "huge gap in time ... begged a lot of questions," not Ayling [#58/pg.7/¶12].

6. Contrary to ¶19 **StateAB**, Ayling's suit was brought against all Defendants in their individual and official capacities [**Appendix**/pgs.29-30]. Ayling does not allege *professional negligence of physicians* [**AylingAppellantBrief(AylingAB)**/pgs.32-34/¶57-61]. All allegations against Sens regard non-discretionary duties [**Appendix**/pgs.120-154/¶92-130]. Sens admits in RFAs required non-discretionary duties [#84/#106/#107/#108/#109/#110/#113/#123/#140-143/#146-153/#157-159/#161/#218/#241/#246-247/#250/#254/#258/#261/#263/#270-275/#277-278/#289-290/#293/#317-323].

7. Contrary to ¶12, ¶28, ¶30-¶32, Ayling did not consult with toxicologist to *evaluate toxicology findings or conclusions*. Ayling states with detail she decided to consult with expert toxicologist because she was facing 2 yr. SOL, could not find legal representation, wondering if any mistakes with testing lab after distressing conversation with BNSF, Sens was not involved with toxicology testing stating to Ayling labs determine specimens to test, maintain chain of

custody documents, errors with post-mortem testing not uncommon [#35/Ex.1/pg.20/¶13,17; , #58/pg.2/¶20,pg.3/¶25,pg.11/¶39]. Toxicologist did not criticize principles/methods relied on by Sens nor *impunge her conclusions*. Despite numerous requests, to date Ayling has no information as to the principles/methods relied on by Sens nor information regarding specimens collected/tested [#35/Ex.1/pg.32/3rd¶]. Toxicologist did not state there was insufficient information to support 0.287 BAC, nor did Hardin state Sens did not give sufficient weight to information, nor did Ayling seek *second opinion*. Hardin did not ever state the *autopsy was negligently performed*. Hardin is not qualified to offer opinions/conclusions regarding Sens autopsy performance, nor did he offer such [#274 Affidavit Glen Hardin].

8. *A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support the finding, or if, on the entire record, a reviewing court is left with a definite and firm conviction a mistake has been made.* Mounrail Bethel Home v. Lovdahl, 2006 ND 180, ¶11, 720 N.W.2d 630. There is no support for State's mis-characterizations of Ayling's Complaint facts nor for Court's mischaracterizations, including fictitious 12/27/2013 discovery date for all Defendants [#258].

9. Assuming false statements of State were true (which they are not), State does not explain how any of the "facts" relate to any Defendant other than Sens as GFCo.Coroner. Ayling learned in July 2015 UND facility was not approved for autopsy required by NDCC [#62]. June 2016, Ayling first learned UND was more than a facility used by GFCo.Coroner to perform autopsies (previously was Altru) via letter from Def. Jones referring to contract between UND and GFCo. [#81].

- 10.** Dismissal of all Defendants per 28-01-46 (medical malpractice) improper as follows:
- (a) Medical malpractice not pled in Ayling's Complaint [**Appendix**/pgs.15-200].
 - (b) NDCC 28-01-46 raised first time in Rule 12(b)(6)/summary judgment motion [#107] post Answer in violation N.D.R.Civ.P. 12(b), despite Atty. Hanson's assurances to Court in support stay discovery forthcoming motion would be based entirely on four corners Complaint [**Transcript/07/06/2017/pg.15/Lines11-24**]. Ayling detailed prejudice and need for discovery regarding Affidavits/Exhibits provided supporting affirmative defense [#123; #173].
 - (c) Affidavits Koponen [#116], Massello [#117], Wynne [#118] indicate they had nothing to do with autopsy of Blake's body.
 - (d) Physician is not determinative factor in death. NDCC 11-19.1-01(1), 11-19.1-11(2), 11-19.1-06 require inspect/dissect deceased human body, retain organs, tissues fluids for testing, investigating medical cause of death must all be performed by State Forensic Examiner or authorized pathologist. It has been assumed Sens was State Forensic Examiner authorized pathologist on 03/24/2012; only information provided was undated/unsigned letter showing Massello's name in signature block [#62/pg.13]. Ayling requests *judicial notice* N.D.R.Ev.201 Sens' CV dated 11/2017, recently discovered Sens' CV showing bottom pg.1 Sens became State Forensic Pathologist for Grand Forks County 2013-Current. [**Addendum 2**]
https://und.edu/directory/profile-uploads/1897/sens-mary_curriculum-vita.pdf. No law protects Sens from illegally performing incomplete, incomplete, botched, autopsy! (This also supports claims against other State Defendants regarding negligent supervision, regarding patterns practice, foreseeability of harm.)
 - (e) [15] because the mention of one thing in a statute implies the exclusion of another (Bigwood, City of Wahpeton, 1997 ND 124; 565 N.W.2d 498), failure to include

autopsy/coroner in 28-0146 implies exclusion. Legislature instead enacted separate statute for coroner negligence NDCC 28-01-17(1) for liability incurred by the doing of an act in the coroner's official capacity or by the omission of an official duty, which Ayling pled [Appendix/pgs.120-167/¶92-¶130]. 28-01-17(1) anticipates someone other than decedent will pursue litigation; statute doesn't require admissible expert opinion.

(f) ...*medical malpractice plaintiff may establish the relevant standard of care and a prima facie case through cross-examination of the defendant physician; Greenwood v. Paracelsus Health Care*, 2001 ND 28, 622 N.W.2d 195 (citations omitted). Although Ayling precluded from all discovery, Sens established standards care as follows:

(i) Sens member ND Legislature Task Force Committee [#178] regarding Chapter 11-19.1 enacted 2009 mandating coroner standards care.

(ii) Sens authored/drafted/created/edited/consulted/approved GFCoCoroner non-discretionary "Certifications regarding use of generally accepted laboratory practices" regarding Paul Coverdell Grant, in effect 03/24/2012 [#60]; #84/RFA#104/pg.24, including adherence/compliance NAME Forensic Autopsy Performance Standards [#59/pgs.37-64]; Institute Justice Death Scene Guidelines [#159], College American Pathologists [Appendix/pgs.140-148/¶113(c)].

(iii) Sens contributed to "Autopsy Lexicon" as member College American Pathologists Autopsy Committee [#184/pg.5/Templates/¶2].

(iv) Sens created curriculum/instructor UND Forensic Death Investigation courses funded by National Institute Justice Grant 2010. Ayling requests *judicial notice* UND course description regarding Death Investigation [See **Addendum 2**].

(v) Media articles quoting Sens regarding standard of care [**#64**; **#131**; **Appendix**/pgs.31-32]; testimony to Health Services Senate Committee [**#164**/pgs.16-18/¶28].

(vi) Standard care regarding Next-of-Kin in article published by Federal SWGMDI Committee, which Sens was member [**#131**/ pgs.8-21].

(g) State nor GFCo.Coroner consider autopsy procedures "technical surgical procedures" requiring admissible expert opinion, *Larsen v. Zarrett*, 48 N.W.2d 191 (ND1993), evidenced by requiring non-physicians to illegally perform State Forensic Examiner/authorized pathologist only autopsy functions of observing/dissecting, collecting fluids, organs, tissues of deceased human [11-19.1-01(1); 11-19.1-11(2)]. State Autopsy technician required to collect specimens for various tests [**#278**]. Death Investigator Ed Bina required to collect blood, urine, tissues for further studies [**#61**/pg.4]. Facility Agreement between UND and Medical Business Services, LLC requires autopsy technician to perform *basic organ evisceration* after 10 hrs. training; after 6 mos. training must *independently ...eviscerate major organs, including head and neck, accurately weigh and record organ systems, draw toxicological samples...*[**#126**/pg.7] State job posting requires autopsy technician to weigh/measure human remains, open bodies, remove organs/tissues [**#125**].

11. Claims have been dismissed regarding NDCC 32-12.2-03(1) when the State has not been served. State has notice of Ayling's claims. In Sanderson v. Walsh County, 2006 ND 83, ¶10, 712 N.W.2d 842, Appellate Court took judicial notice that Judge Geiger is an elected district judge for State, and did not address whether naming only a state employee as a party for actions or omissions within scope of employment complies with either NDCC 32-12.2-03 or 32-12.1-04. Claims were dismissed because Sanderson did not effectuate valid service of process. Ayling

requests Court take *judicial notice* that she has named all State Defendants in their official capacities as well as individual, specified nature of claims in both capacities, and effectuated service as required [#165], which is sufficient to negate dismissal.

DATED: November 13, 2018

/s/ Robin E. Ayling
Plaintiff Pro Se
8341 Emery Parkway North
Champlin, MN 55316
ayling47@hotmail.com
612-242-8324

