

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 #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,

**PETITION FOR
REHEARING
N.D.R.App.P. 40**

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.

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TABLE OF CONTENTS

I. STATEMENT OF ISSUES

A. Error, misapplication of law, incorrect interpretation of law, omission of law and fact, for Supreme Court to affirm District Court Order granting summary judgment, dismissing all claims against all County and State Defendants w/prejudice based on **3 yr. scope of employment** statutes of limitation [NDCC 28-01-17(1); NDCC 28-01-22.1; NDCC 32-12.1-10]; based on a 12/27/2013 "discovery date" propounded by Defendants, **BECAUSE:**

1. District Court held Sens not entitled to defense of failure to make claim against the State [NDCC 32-12.2-03(1)] and statutory immunity [NDCC 32-12.2-03(3) because *one could reasonably find Sens' actual actions* were outside the scope of her duties; **subjecting** these actions to 6 yr. statute limitations NDCC 28-01-16. pg. 6
2. Ayling's **fraud** claims including deceit based on fraud, fraudulent reporting, fraudulent autopsy, intent to defraud, willful misrepresentation **not included in scope of** County/State Defendants' **dispositive motions**, **not adjudicated on the merits**, and **subject to 6 yr. statute of limitations** per NDCC 28-01-16(6). pg. 6
3. 3 yr. and 6 yr. statutes of limitation are at issue; when multiple statutes of limitation involved, longest time will be applied. pg.

4. District Court determined Sens *Failed to Perform Required Non-Discretionary Duty in Several Ways during autopsy Blake Ayling*, [Appendix/pg. 260/Para.46], requires factual development. pg. 8
5. District Court and Supreme Court impermissibly excluded/disregarded Affidavits, Admissions, Pleadings Under Oath & Penalties of Perjury as required by [N.D.R.Civ.P.56(c)(3)] and *de novo* standard of review. pg. 6
6. District Court impermissibly determined issues of fact based on disputed facts to uphold 12/27/2013 "discovery date." pg. 6
7. Contradictory or different conclusions may be drawn as to whether evidence was such for Ayling to be aware of facts, by 12/27/2013, that would, place a reasonable person on notice a potential claim existed against County/State Defendants, without regard to subjective beliefs. pg. 7
8. District Court and Supreme Court did not review the evidence of record in the light most favorable to Ayling to determine there is no issue as to any material fact on dispositive question regarding discovery date. pg. 7
9. County/State Summary judgment motions not based on evidentiary proof in admissible form establishing the merits of Defendants' affirmative defenses, including statute limitations. pg. 7

10.	<u>Scope of the State's summary judgment statute limitations defense regards only Sens as GF Co., excluding Sens as Co-Director UND Facility & State Forensic Examiner authorized pathologist, UND, Massello, Koponen, Wynne.</u>	pg. 7
11.	Scope of County's summary judgment statute limitations defense based only on Sens as GF Co. Coroner, excluding GF County, GF Co. States Attorney, GF County Board Commissioners.	pg. 8
II.	STATEMENT OF CASE	pg. 8
III.	DISPUTED MATERIAL FACTS	pg.10
III.	DISCUSSION/ARGUMENT	pg.18
IV.	CONCLUSION	pg.21

I. STATEMENT OF ISSUES.

A. Error, misapplication of law, incorrect interpretation of law, omission of law and fact, for Supreme Court to **affirm** District Court Order granting summary judgment, dismissing all claims against all County and State Defendants w/prejudice based on **3 yr. scope of employment statutes of limitation** [NDCC 28-01-17(1); NDCC 28-01-22.1; NDCC 32-12.1-10]; based on a 12/27/2013 "discovery date" propounded by Defendants, **BECAUSE:**

1. District Court held Sens not entitled to defense of failure to make claim against the State [NDCC 32-12.2-03(1)]; personal capacity/discretionary immunity [NDCC 32-12.2-03(3) because *one could reasonably find Sens' actual actions* were outside the scope of her duties; **subjecting** these actions to 6 yr. statute limitations NDCC 28-01-16.

2. Ayling's **fraud** claims including deceit based on fraud, fraudulent reporting, fraudulent autopsy, intent to defraud, willful misrepresentation are **subject to 6 yr. statute of limitations** per NDCC 28-01-16(6).

3. Three (3) yr. and six (6) yr. statutes of limitation are at issue; when multiple statutes of limitation involved, longest time will be applied.

4. District Court determined Sens ***Failed to Perform Required Non-Discretionary Duty in Several Ways during autopsy Blake Ayling***, [Appendix/pg. 260/Para.46], requires factual development.

5. District Court and Supreme Court impermissibly excluded/disregarded Affidavits, Admissions, Pleadings Under Oath & Penalties of Perjury as required by [N.D.R.Civ.P.56(c)(3)] and *de novo* standard of review, which raise **disputed** issues of material fact.

6. District Court impermissibly determined issues of fact based on **disputed** facts to uphold 12/27/2013 "discovery date."

7. Contradictory or different conclusions may be drawn as to whether evidence was such for Ayling to be aware of facts, by 12/27/2013, that would, place a reasonable person on notice a potential claim existed against County/State Defendants, without regard to subjective beliefs; **disputed** issues of material fact remain for jury to decide.

8. District Court and Supreme Court **did not** review the **evidence of record in the light most favorable to Ayling** to determine there is no issue as to any material fact on the dispositive question of time of discovery.

9. County/State Summary judgment motions not based on **evidentiary proof in admissible form** establishing the merits of Defendants' affirmative defenses, including statute limitations.

10. Scope of the State's summary judgment statute limitations defense regards only Sens as GF Co., excluding Sens as Co-Director UND Facility & State Forensic Examiner authorized pathologist, UND, Massello, Koponen, Wynne.

11. Scope of County's summary judgment statute limitations defense based only on Sens as GF Co. Coroner, excluding GF County, GF Co. States Attorney, GF County Board Commissioners.

II. STATEMENT OF CASE.

12. District Court held:

(a) Sens not entitled dismissal failure bring claim against State NDCC32-12.2-03(1).

(b) One could find Sens acting outside scope duties.

(c) No personal capacity/discretionary immunity NDCC 32-12.2-02(3); allegations Sens failed perform non-discretionary duty several ways during autopsy Blake.

[**Appendix**/pg.250/¶22/pg.251/¶/pg.253/¶29/pg.259/¶43/pg.260/¶46]

13. ALL underlying facts District Court relied on to dismiss all claims against all Defendants by summary judgment (SJ) w/prejudice based on 3 yr. scope employment SOL per 12/27/2013 "discovery date" propounded by Defendants are impermissible and DISPUTED¹ and erroneously affirmed by Supreme Court. **Reversal and remand required** as discussed herein.

¹ *Parsing allegations in a complaint through summary judgment proceedings is inappropriate in a negligence case...M.M. v. Fargo Public Sch.Dist.#1, 2010 ND 102, 783 N.W.2d 806.*

14. Supreme Court required to review SJ *de novo* on *entire court record* in light favorable to non-movant to determine whether available information precluded existence of genuine issue of material fact.

McCull Farms, LLC v. Pflaum, 2013ND69; 837N.W.2d359. Supreme Court impermissibly adopted District Court verbatim; relied on conclusions State offered on appeal, **excluding** below **Affidavits/Admissions creating disputed genuine material facts**. [Sens/Writing/Admissions/Doc.#38]
[Affidavit/Ayling/Doc.#35/Ex.1]

- (a) [Sens/Unobjected/Unresponded/Admissions/Doc.#84]
- (b) [Letter/Affidavit/Ayling/08-15/2017/Doc.#123]
- (c) [Opposition/Summary/Judgment/UnderOath/Doc.#157]
- (d) [Objection/State/Brief/UnderOath/Doc.#164]
- (e) [Affidavit/Ayling/Rule56(f)/Doc.#173]
- (f) [Reply/State/Response/Rule56(f)/UnderOath/Doc.#210]
- (g) [Objections/County/Brief/UnderOath/Doc.#236]
- (h) [Affidavit/Hardin/Toxicologist/Doc.#274]

In what constitutes a material fact, we can safely ignore conclusory allegations, improbable inferences, unsupported speculation. Caroll v. Xerox Corp., 294 F.3d,231, 237 (1st Cir. 2002)

15. Facts and law ignored/misapplied/omitted; leaving remaining factual/legal issues which cannot be dismissed by scope employment 3 yr. SOL; require jury determination.

III. DISPUTED MATERIAL FACTS.

16. *...underlying event medical autopsy Blake...* [Ayling v. Sens, 2019 ND 114/¶12] *..alleging Sens failed competently perform medical autopsy as part of investigation Blake's death.*

[Id./Ayling/Para.5]

DISPUTED. Ayling doesn't allege Sens failed to "competently perform medical autopsy." Underlying events regarding autopsy support illegal/reckless acts/misconduct/outside scope employment/failure perform non-discretionary duties, including following:

(a) No State documents evidencing Sens authorized 03/24/2012 to perform autopsy. [N.D.Dept.Health/08/2014/CoverLetter/Doc. #59/pg.8] [Doc.#62/pg.20]

(b) Sens admits not authorized by State Forensic Examiner to authorize autopsy; nor perform autopsy until 2013. [Motion/JudicialNotice/Filed12/28/2018/Ex.2/Sens/CV/11-2017/pg.1].

(c) UND facility not authorized for autopsy prior 09/2013. [N.D.DeptHealth/07/14/2015/Response/OpenRecords/Doc.#69]

(d) Sens admits duty perform autopsy in authorized facility per NDCC 11-19.1-11(2); UND Facility not authorized.

[Sens/Unobjected/Unresponded/RequestsAdmissions/Due07/06/2017/Doc.#84/RFA#65-66/pg.17/RFA#69/pg.18] ²

(e) Sens admits Ed Bina, investigator, illegally participated autopsy Blake; collecting blood/urine, dissecting organs/tissues.

[Doc.#84/RFA#127-130/pg.31/RFA#133/pg.32] Sens admits foregoing outside scope employment. [Doc.#84/RFA#131/pg.31]

(f) Sens admits cannot provide evidence and/or did not comply with NDCC 11-19.1-15, NDCC 11-19.1-10, NDCC 11-19.1-19

[Doc.#84/RFA#3/RFA#4/RFA#6/RFA#7/pg.5]. Sens admits cannot produce evidence performed all NDCC duties regarding Blake's death.

[Doc.#84/RFA#95/pg.22]

(g) Sens admits involved w/authoring "Certification regarding use of generally accepted...practices" for GFCo.CoronerOffice regarding autopsy/death investigation/toxicology/histology/interpretations/reporting

[Doc.#84/RFA#102/pg.24/RFA#104/pg.24]. Sens had duty adhere/comply

² NDCC 11-19.1-01(1)/NDCC 11-19.1-11(2) requires *inspection/dissection deceased human body; retention organs/tissue/fluids* **must** be performed by *state forensic examiner or authorized pathologist* in *authorized facility*.

non-discretionary "Certification" regarding Blake's death; Sens did not.

[**Doc.#84**/RFA#106-109/pg.26]

(h) Sens admits duty comply w/State Forensic Examiner Regulations, including "Request for Autopsy;" Sens did not [**Doc.**

#84/RFA#58/pg.15/RFA#70/pg.18/RFA#82-83/pg.20/RFA#316-321/pgs.82-83].

(i) Sens explained/assured Ayling did "all required" regarding autopsy; independent death investigation not required; reliant on GFPD. Ayling/Affidavit/Doc.#35/Ex.1/pgs.18-21/Para.17(i)(1)-(28)]

(j) Sens admits "special relationship" Ayling, including encouragement *continue seeking answers*. [**Doc.#84**/RFA#87-89/pg.21]

(k) Sens admits, despite requests prior litigation, knowingly didn't provide Ayling documents regarding GFCo.Coroner and UND Facility standards/protocols in effect/operating under regarding Blake's death [**Doc.#84**/RFA#90-94/pgs.21-22].

17. ***...determined Blake intoxicated, 0.278 blood-alcohol concentration at time death...death accidental.*** [Id./Ayling/Para.2]

DISPUTED.

(a) Time death unknown. Sens used time death pronounced. [**Doc.** **#38**/pg.GFC-Coroner-01680/4th¶]

18. ***Plaintiff made aware...autopsy result 06/28/2012.*** [Id. Ayling/Para. 12]...***record establishes Ayling...questioning autopsy report...06/2012.*** [Id. Ayling/Para. 13] ***Ayling questioned blood-alcohol concentration because Blake reportedly did not show signs intoxication at party or before...*** [Id. Ayling/Para.3]

(a) Media article subjective/sensationalistic 06/28/2012; *UND student from Minneapolis legally drunk.* [Doc.#110] Devastating; asked Sens why released to media before family? [Ayling/Affidavit/Doc.#35/Ex.1/pg.16/Para.(b)]

(b) Ayling ..***asked questions*** (learning) ***about*** BAC; media article first heard BAC. Sens assured **06/28/2012** people hold liquor .287BAC. 'Tried *review every scenario.* No sign movement at death scene. Ayling appreciated; maybe Blake not conscious when body came to rest with r.arm torn off. [Ayling/Affidavit/Doc.#35/Ex.1/pgs.15-16/¶17(b)(c)] Ayling so appreciative included "Coroner" in July 2012 Thank You Tribute regarding Blake's death. [Doc. #169/pg.1/4thPara.]

(c) State fabricated "questioned" autopsy report & BAC on appeal; not true; not District court determination. [Ayling/Appellant/Reply/State/Appellee/pgs.7-8/Para.5(a)-(b)].

(d) Ayling couldn't/didn't ask questions regarding autopsy report 06/28/2012; received 10/2012.

[10/22/2012/CoverLetter/Coroner/File/Doc.#160] Autopsy report doesn't opine intoxication; fits w/Sens telling Ayling 06/28/2012 many people can hold liquor .287. [Autopsy/Report/Doc. #109]

19. ***She sent letters...emails to Sens about performance...autopsy.*** [Id./Ayling/Para. 13]

(a) Ayling wanted understand son's death; needed information for prospective attorneys potential wrongful death claim. [Doc. #277/pg.12-14/¶9]

(b) 10/29/2012 requested GFCC file, toxicology information, not in autopsy report [Ayling/Letter/10-29-2012/Doc. #112].

(c) Sens promised provide coroner file 11/2012. Ayling follow-up Jan./Feb./2013. [Ayling/Affidavit/Doc.#35/Ex.1/pg.16/¶17(d)]

(d) Sens commended Ayling 02/17/2013 for *seeking answers*. [Sens/02/17/2013/Email/Doc. #57]

(e) Sens admits Ayling's questions ***expected from grieving parents.*** [Doc.#38/pg.GFC-Coroner-01680/2nd¶]

20. ***...questions coroner file...sent letter Sens 03/24/2013.***

[Id./Ayling/Para. 12] ***Ayling met Sens 04/06/2013, Sens explained autopsy report...defended...conclusions.*** [Id./Ayling/Para.3]

(a) Just learned intoxication significant cause-of-death 03/2013.

[Ayling/Affidavit/Doc.#35/Ex.1/pgs.17-18/¶17(g)(h)] FAVORABLE

INFERENCE: Why two different opinions? Sens stated 06/28/2012 people hold liquor at .287BAC?

(b) "Defended" conclusion **fabricated** by State; not District Court determination. State/Appellee/Brief/pg.4/Para.10

[Ayling/Appellant/Reply/State/pgs.7-8/Para.5(b)]

(c) Sens states under oath ***explained***/not defended during 04/09/2013 meeting. [Sens/Affidavit/Doc.#108/pg.4/Para.11]

(d) Meeting 04/06/2013 initiated/scheduled by Sens. Sens assured did "all required" regarding autopsy.

[Ayling/Affidavit/Doc.#35/Ex.1/pgs.18-21/¶17(i)(1)-(28)]

[04/06/2013/Meeting/Notes/Confirm04/24/2013/Letter/Doc.#58]

(e) 04/06/2013 meeting; appreciative/comforting/believed Sens, including Blake intoxicated. Wanted to learn how/when/where intoxicated; any foul play; Blake under 21, who supplied alcohol?

[Ayling/Objections/County/Brief/UnderPenalties Perjury/Doc.#236/pg.

7/Para. 9] [Ayling/Affidavit/Doc.#35/Ex.1/pg.21/¶18]

21. May 2013-December 2013, Ayling pursuing sudden/unattended death investigation GFPD, investigating PIKE Fraternity/BNSF; seeking representation wrongful death suit; communicating w/BNSF. [Ayling

Affidavit/Doc.#35/Ex.1/pg.21/Para. 18] [Complaint/Appendix/pgs.42-44/Para.33-37]

22. *12/27/2013 Ayling spoke forensic toxicologist...questioned Sens' methods performing autopsy.* [Id./Ayling/Para.4] *By 12/2013, hired independent toxicologist...review Sens' autopsy.* [Id./Ayling/Para.12]

(a) **Ayling consulted expert forensic toxicologist to understand ND Crime Lab raw testing data after distressing conversation BNSF 12/2013.** [Ayling/Opposition/Sum.Judgment/Doc. #157/UnderOath/pg.25/Para.47]

(b) Toxicologist did not nor could not "question Sens' methods." Sens refused to provide. [Ayling/Affidavit/Doc.#35/Ex.1/pgs.27-32/Para.26(a)-(z)]

(c) Sens explained toxicology labs determine testing specimens, maintain chain custody; errors w/post-mortem testing not uncommon 04/06/2013. Consulted with expert toxicologist, try to understand toxicology after devastating T/C BNSF.

[Ayling/Affidavit/Doc.#35/Ex.1/pgs.18-21/Para.17(i)(1)-(28); pgs.21-22/¶19]

(d) **Consulting toxicologist part of decision regarding potential wrongful death claim BNSF/PIKE; 2 yr. wrongful death SOL approaching; possibly re-test/errors toxicology testing?** [Reply/StateResponseRule 56(f)Motion/Doc. #204 /UnderOath/pgs.7-8/¶8]

(e) FAVORABLE INFERENCE: BNSF relying .287BAC defense.

Sens explained errors post-mortem testing common; labs maintain chain custody/determine testing specimens. Sens didn't rely ND Crime Lab results. ND only toxicology raw testing data Ayling had. If errors with ND Lab; possibly HCMC?

(f) *At no time did I provide...Ayling w/ expert opinions related to autopsy performance, protocols, standards, and procedures, or ... coroner performance, protocols, standards, and procedures...areas are beyond scope of expertise.*

[Affidavit/Hardin/Doc.#274/¶4]

(h) 02/20/2014 email to Sens first request for protocols/standards for autopsy; questions regarding material facts/scientific interpretations; without response to date. [Ayling/Affidavit/Doc.#35/Ex.1/pgs.27-32/Para.26(a)-(z)]

(j) Sens admits knew Ayling asking questions in 02/2014 for **case she was preparing against railroad...**[Doc. #38/pg.GFC-Coroner-01680]

23. Given the foregoing disputed facts based on admissible Affidavits/Admissions, Defendants have not *clearly sustained burden of showing there is no genuine issues as to any material fact within meaning of Rule 56(c)*. Wolff v. Light, 156 N.W.2d 175 (ND1968)

IV. DISCUSSION/ARGUMENT.

24. District Court impermissibly determined 12/27/2013 "discovery date" (based on **disputed** facts) for all of Ayling's claims against all Defendants, including claims not included w/n scope of motion. By Affidavit/Admissions of record as referenced above,³ Ayling disputes every "fact" relied on by District Court to determine fabricated 12/27/2013 "discovery date."

25. Complaint alleges unauthorized autopsy performed by unauthorized personnel in unauthorized facility; failure perform non-discretionary duties.

District Court affirms: *Ayling injured ...as alleged actions of Sens.*

[Memo/Order/Appendix/pg.251/¶23] Sens not entitled to failure bring claim against state NDCC 32-12.2-03(1); Memo/Order/Appendix/pg.253/¶29].

...Ayling alleges...actions...of... Sens... one could...find...outside scope of

³ *...party raises issue of material fact preventing summary judgment by producing affidavits, sworn testimony, or other admissible evidence showing the parties are in disagreement over one or more material facts.* Kemp v. City of Grand Forks, 523 N.W.2d 406, 407 (ND 1994)

A statute of limitations defense is fact-driven and not ordinarily susceptible of summary disposition. Waxler v. Dalsted, 529 N.W.2d 176, 179 (ND 1995)
Rose v. United Equitable Ins. Co., 2001 ND 164, 632 N.W.2d 429.

Summary judgment should be granted only if...no genuine issue of fact...no conflicting inference from the facts. ...If the court deemed it necessary to make findings of fact as distinguished from a mere recital of facts, then the issuance of a summary judgment by the trial court was improper. Albers v. NoDak Racing Club, Inc., 256 N.W.2d 355 (ND 1997)

duties. Not entitled to personal capacity immunity defense NDCC 32-12.2-

03(3) [Memo/Order/Appendix/pg. 259/Para. 43] Sens

failed...perform...non-discretionary duty...several ways during autopsy

Blake, not entitled to discretionary immunity

Memo/Order/Appendix/pg.260/Para.46.

26. Complaint also alleges fraudulent concealment, fraudulent deceit; intent

defraud [Complaint/Appendix/pgs. 118-130/Para.89-119] Fraud claims not

included in scope Defendants' motions mis-characterizing Ayling's claims as

disagree/unhappy/upset with Sens' autopsy/investigation results as GF

Co.Coroner [County/Brief/Doc.#97/pg.5/Para.9]

[State/Brief/Doc.#107/pgs.8-9/Para.21-22]. 4. Had fraud claims had

been included, subject to 6 yr. NDCC 28-01-16(6) SOL. Issue arose in Burr v.

Kulas regarding RICO claim against the State where claimed 7 yr. SOL applied.

Supreme Court agreed noting 28-01-22.1 states *When not otherwise*

***specifically provided by law* ... Burr v. Kulas, 1997 ND 98, 564 N.W.2d 631.**

Regarding County, 3 yr. SOL applies to tort claims against county. Finstad v.

Ransom Sargent Water Users, Inc., 2011 ND 215. Fraud involves intentional

deception/unlawful gain and not subject to 3 yr. negligence SOL. *A six year*

limitation period is applicable to actions for fraud and deceit. NDCC 28-01-16(6).

Kuntz. v. Muehler, 1999 ND 215, Para. 6, 603 N.W.2d 43.

27. District Court ignored its own holdings, including Sens acted outside scope employment, not entitled to personal capacity immunity, subject to SOL per NDCC 28-01-16(6). Supreme Court affirming dismissal all claims w/prejudice per 3 yr. scope employment statutes NDCC 28-01-17(01); 28-01-22.1; 32-12.1-10 error/omission of law. Acts outside scope employment and fraud subject to 6 yr. SOL per NDCC 28-01-16.

28. Currently, 3 yr. and 6 yr. SOL apply to overlapping claims/allegations. District Court relies on Burr v. Kulas, 1997, ¶12, 564 N.W.2d 631; when multiple SOL are at issue, longest time will be applied as support for 3 yr. SOL, excluding outside scope employment/fraud 6 yr. SOL. Under all circumstances, longest period is 6 yrs. SOL.

29. Factual development regarding failure perform non-discretionary acts including: (a) which Sens' capacity involved with which non-discretionary duty not performed; (b) was failure to perform w/n scope employment;⁴ (c) when did Ayling discover based on facts which non-discretionary duty was not performed; (d) was failure perform non-discretionary duty outside scope employment, involve fraud subjecting to 6 yr. SOL; (e) was failure

⁴ *Because District can be liable under doctrine of respondeat superior for Hart's alleged negligence, wrongful act or omission...occurring within scope employment under NDCC 32-12.1-04(1)...we reverse summary judgment and remand for trial against district. Id. MM v. Fargo Public Sch. Dist. #1.*

reckless/misconduct⁵ subjecting Sens to personal liability? **Reversal** and **remand** required.

30. Scope of County/State Motions regarding SOL regard Sens as GFCo.Coroner⁶ to exclusion Sens' State capacities; other State/County Defendants. [County Brief/Doc.#97/pgs.11-18/Para.23-31] [State/Brief/Doc.#107/pgs.18-21/Para.43-50] Ayling had no knowledge of Sens as anything other than GFCo.Coroner up to and past 03/2014. *Sens as GFCo.Coroner uses UND facility for autopsies...protocols and guidelines related to acting as Coroner...can't imagine would be dealing with UND as Sens wrote autopsy report as GFCo.Coroner.* [Email/Ayling/Welte/03/17/2014/Doc.#128/pg.1]

V. CONCLUSION

31. Ayling's claims regarding outside scope employment, fraud, and failure to perform non-discretionary duties are viable/hanging in the balance, including those with 6 yr. statute of limitations, yet erroneously dismissed by 3 yr. scope employment SOL. **Reversal and remand is necessary.**

DATED: May 17, 2019

⁵ *Recklessness is a question for the jury...Slaubaugh v. Slaubaugh*, 466 N.W.2d 537 (ND 1991).

⁶ Error District Court concluding Sens is not County Defendant; not plead by County. Sens is County Employee per NDCC32-12.1-02(3). GF Co. carried liability insurance for coroner. [Ayling/Appellate/Brief/pg.36/¶65]

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

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Bruce Carroll, being first duly sworn on oath states that on May 17, 2019, he served electronically Ayling's Petition for Hearing on the following:

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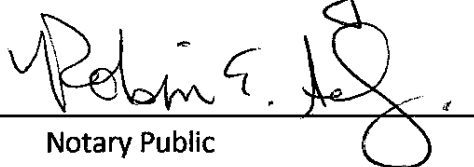
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Thomas H. Rieman swears that he is at least 18 years of age and he is not a party to this matter.



Bruce Carroll

Subscribed and sworn to before me
this 17th day of May, 2019.



Notary Public

