20190122
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JULY 2, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Susan Franciere, Plaintiff and Appellant, v. City of Mandan, City and Appellee.	)	Supreme Court No. 20190122 Civil No. 30-2017-CV-00914

ON APPEAL FROM JUDGMENT OF

MORTON COUNTY DISTRICT COURT

SOUTH CENTRAL JUDICIAL DISTRICT

JUDGMENT DATED 02/12/2019

THE HONORABLE JAMES S. HILL

REPLY BRIEF OF PLAINTIFF AND APPELLANT

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STATEMENT

[¶1.] As *Brief of Appellee* misrepresents facts, makes erroneous claims and raises issues not addressed in Appellant's Brief, Appellant submits this *Reply Brief*.

LAW AND ARGUMENT

[¶2.] The Appellee alleges Appellant's *Complaint* was filed in the District Court on October 24, 2017. See Appellee's Brief ¶¶ 1, 7.

[¶3.] A *Register of Actions* for Civil No. 30-2017-CV-00914 shows a "File Date 10/23/2017." See Appellant's Appendix (hereafter "Appellant's App.") p. 3, Appendix No. 1.

[¶4.] After filing Appellant's *Complaint* with the District Court on October 23, 2017, and paying $80.00" for a "Civil Filing Fee," "Receipt No. 30-2017-6612" was issued listing "Transaction Date 10/23/2017" along with "10/23/2017 02:46 PM" and "Cashier Station 30CC915" in addition to "Audit 12713432."

[¶5.] Ethically, after the Appellant filed a *Complaint* against the Appellee in District Court, the Appellee should have immediately requested Morton County State's Attorney to prosecute Mr. Ochlech because the Appellant was a victim of Mr. Ochlech and because the Appellee could influence the actions of City Prosecutor Daniel Nagle.

[¶6.] In prosecuting Mr. Ochlech, Mr. Nagle violated rights of the Appellant constitutionally mandated under North Dakota Constitution (hereafter "N.D. Const."), Article (hereafter "Art.") I, § 25(1)(a), (g), (i), (n) and (o).

[¶7.] Mandan Municipal Court (hereafter "Municipal Court") Judge DeNae Kautzmann found the *Plea Agreement* with Mr. Ochlech prepared by Mr. Nagle so poorly worded after it was allegedly signed by Mr. Ochlech on July 9, 2018, that Judge Kautzmann altered the content of that *Plea Agreement* on July 18, 2018, with her

handwritten additions. See Appellant's App. pp 60-62, App. No. 15, Doc. ID #76. It is alleged by the Appellant that actions of Mr. Nagle were meant as a way to harm the Appellant associated with the Appellant's civil action against the Appellee.

[¶8.] Written comments by an unidentified person allegedly at the Municipal Court added to the Appellant's letter to the Municipal Court dated November 19, 2018, stated the case would be reopened in a couple of months if a payment was not made. See Appellant's App. p 53, App. No. 10, Doc. ID #55. Appellant failed to receive any information from Mr. Nagle if the case was reopened or any action taken against Mr. Ochlech because the Appellant alleges the failure to reopen the case and take action against Mr. Ochlech is meant to harm the Appellant's civil action against the Appellee.

[¶9.] The Appellee states Municipal Court records on the prosecution of Mr. Ochlech are irrelevant to the Appellant's case. See Appellee's Brief ¶ 16.

[¶10.] Appellant states actions by City Administrator Jim Neubauer and the City Commission could influence the actions of the Municipal Court with the use of budgetary restrictions and the allotment of Municipal Court staff.

[¶11.] Appellant states repeated violations of Administrative Rule (AR) 41 on the unavailability of Municipal Court records online at both ndcourts.gov and a public computer terminal at the Morton County Courthouse on the Appellee's prosecution of Mr. Ochlech interfered with the Appellant's civil action against the Appellee.

[¶12.] The Appellant filed a *Motion for Summary Judgment* on November 14, 2018. See Doc. ID # 16. The Municipal Court records on Mr. Ochlech's prosecution were unavailable to the Appellant in violation of AR 41. A copy of the *Case Summary* was unavailable until a copy was received by U.S. mail from the Municipal Court on November 28, 2018. See Appellant's App. pp 54-55, App. No. 11, Doc. ID #56.

[¶13.] On or about December 6, 2018, a summary judgment motion was filed by the Appellee. See Appellee Brief ¶ 4, 12, Doc. ID #25. Certain Municipal Court records on Mr. Ochlech's prosecution were unavailable to the Appellant by December 6, 2018. This violated AR 41 and a copy of the Plea Agreement was unavailable to the Appellant until a copy from the Municipal Court was finally received by U.S. mail on December 13, 2018. See Appellant's App. pp 60-62, App. No. 15, Doc. ID #76.

[¶14.] The Appellee alleged as having "no control" over the OAG "or on the OAG's decision to issue or not issue advisory opinions." See Appellee Brief ¶ 16.

[¶15.] Appellant received a letter by U.S. mail dated October 31, 2017, from the OAG Executive Assistant, Liz Brocker, stating the following:

> I am responding on behalf of the Attorney General as a follow up to your September 5, 2017, requesting assistance from this office….Upon receipt of your letter, we contacted the City of Mandan and the Mandan Police Department regarding the records….We understand that the records were released to you shortly thereafter. I apologize that I did not immediately send a follow up to you.

[¶16.] A record released by Ms. Brocker on November 8, 2017, listed that the OAG received a letter from the Appellant on September 7, 2017. That was the Open Records and Meetings Opinion (hereafter "Opinion") request by the Appellant against the Appellee dated September 5, 2017. See Appellant's App. p 27, App. No. 6, Doc. ID #8. The OAG record listed a phone call on September 11, 2017, when the OAG contacted the Appellee and Ms. Brocker stated the Appellee released records to the Appellant "shortly thereafter" but that was false. Either the Appellee lied to the OAG or Ms. Brocker lied to the Appellant, which is criminal under N.D.C.C. § 12.1-11-02.

[¶17.] The Appellee stated the redacted copy of the police report was received by the Appellant on approximately October 30, 2017. See Appellee's Brief ¶ 8. That

is at least six (6) weeks after the OAG's contact with the Appellee on September 11, 2017, which is clearly not "shortly thereafter" as stated by Ms. Brocker.

[¶18.] In Saefke v. Stenehjem, 2003 ND 202, ¶ 13, 673 N.W.2d 41, this Court addressed Opinions issued by the state attorney general when this Court stated:

> Although courts are not bound by attorney general's opinions, courts will give respectful attention to and follow those opinions if they are persuasive. Werlinger v. Champion Healthcare Corp., 1999 ND 173, ¶ 47, 598 N.W.2d 820. An attorney general's opinion guides officials until superseded by judicial opinion. Id. at ¶ 47.

[¶19.] Riemers v. City of Grand Forks, 2006 ND 224, ¶ 11, 723 N.W.2d 518, was also used by this Court to address Opinions when this Court stated:

> An Attorney General's opinion is not binding authority upon the courts; however, "opinions of the Attorney General are entitled to respect, and courts should follow them if they are persuasive." Edinger v. Governing Auth. of Stutsman County Corr. Ctr. & Law Enf. Ctr., 2005 ND 79, ¶ 13, 695 N.W.2d 447.

[¶20.] Appellant alleges the Appellee lied to the OAG to mislead the OAG so the state attorney general would not issue the Opinion the Appellant requested against the Appellee on September 5, 2017. See Appellant's App. p 27, App. No. 6, Doc. ID #8. Appellant alleges Appellee misrepresented facts to the OAG in attempt to deprive the Appellant from having an Opinion issued to avoid having the state attorney general issue an Opinion under N.D.C.C. §§ 44-04-21.1(1) and 54-12-01(19) on the right of a victim to records under N.D. Const., Art. I, § 25(1)(l), despite N.D.C.C. § 44-04-18.7.

[¶21.] The Appellant previously sent the Appellee the *Petitioner's First Set of Interrogatories and Requests for Production of Documents*. Included was this:

> INTERROGATORY NO. 15: Identify all individual(s) with the City who had contact with the OAG on September 11, 2017, in response to the opinion request the Petitioner sent to AG Stenehjem dated September 5, 2017, and who

each individual spoke to at the OAG.

[¶22.] Appellee sent Appellant by U.S. mail on March 2, 2017, the *Answers To Petitioner's First Set of Interrogatories and Requests for Production of Documents* signed by Mr. Neubauer on March 2, 2018, and notarized on March 2, 2017. Included was this response to INTERROGATORY NO. 15:

> **Defendant is unaware of any contact with the OAG on September 11, 2017 in response to this opinion request the petitioner set.**

With Ms. Brocker stating in her letter to the Appellant dated October 31, 2017, that the OAG contacted "City of Mandan and the Mandan Police Department" and where one OAG record showed one phone call occurred in September of 2017, and it was listed for September 11, 2017, either the OAG falsified records or Mr. Neubauer lied to hide the identities of those who had contact with the OAG on September 11, 2017.

[¶23.] In an effort by the Appellee to overcome obvious deficiencies in what the Appellee stated and in positions taken by the Appellee, the Appellee has attempted to create an issue or controversy by arguing N.D.R.Civ.P. 4 to have the case looked at as moot by using unsubstantiated claims that the District Court ignored.

[¶24.] In a letter dated November 9, 2017, an attorney for the Appellee, Scott Porsborg, invoked N.D.C.C. § 44-04-18(6). See Doc. ID #41. Mr. Porsborg did not alleged any lack of personal jurisdiction when requiring the Appellee to use discovery to obtain records the Appellant was entitled to under N.D.C.C. § 44-04-18 and N.D. Const., Art. I, § 25(1)(ı), unrelated to the Appellant's civil action against the Appellee.

[¶25.] In a letter to the Appellant dated December 11, 2017, Mr. Porsborg also invoked N.D.C.C. § 44-04-18(6). See Doc. ID #42. Mr. Porsborg did not allege any lack of personal jurisdiction at that time in his letter or to the District Court.

[¶26.] In a letter to the Appellant dated January 3, 2018, Mr. Porsborg again invoked N.D.C.C. § 44-04-18(6). However, Mr. Porsborg still did not allege any lack of personal jurisdiction at that time in his letter or to the District Court.

[¶27.] The Appellee knew that personal jurisdiction was not an issue because the Appellee answered the Appellant's the *Petitioner's First Set of Interrogatories and Requests for Production of Documents* rather than object under N.D.R.Civ.P. 33.

[¶28.] Appellee stated that on approximately November 14, 2018, it had filed its *Answer and Jury Demand*. See Appellee's Brief ¶ 11, Doc ID #20. That was more than a year after Appellant filed the *Complaint* on October 23, 2017. See Appellant's App. pp 6-21, App. No. 2, Doc. ID #1. A jury trial would not be needed if an issue of personal jurisdiction existed and yet the Appellee did not raise the issue at that time.

[¶29.] In the letter dated November 27, 2018, by Austin Lafferty, an attorney for the Appellee, Mr. Lafferty stated "Attached is proposed scheduling order regarding the above-captioned matter" for Rule 16. See Doc. ID # 35, 47. Also stated was this:

> **We believe this is the most efficient and timely schedule, and the earliest trial may be scheduled, given the discovery that is still required, and your ongoing summary judgment motion.**

Appellant alleges a alleged lack of personal jurisdiction claim by the Appellee was the Appellee grasping at straws in response to the Appellant's summary judgment motion.

[¶30.] Appellee erred when stating any District Court error was harmless, by not addressing if the police report was a public record. Appellee's Brief ¶¶ 40-41.

[¶31.] As N.D.R.Civ.P. 61 directs, when "**justice requires**" and when any "**substantial rights**" of a party are impacted by the actions of a court, that action is to be set aside just as the dismissal of the Appellant's case should be set aside.

[¶32.] Violations of N.D.C.C. § 44-04-18(8) do not become moot if records

are released. Opinion 2018-O-13 states "**Records must be provided to a requestor within a reasonable time.[4]….[4] N.D.C.C. § 44-04-18(8)**." Opinion 2014-O-07 states:

> It was not until May 22, 2014, five months after Mr. Port's initial request, and only after numerous interventions from this office, that the NDSU Development Foundation produced any sort of expenditure records to the requester.... The NDSU Development Foundation violated the open records law when it denied a request for expenditure records on incorrect legal grounds and when it delayed its response by months, even after acknowledging that it had responsive records.

Opinion 2014-O-07 confirmed releasing records did not negate violations of N.D.C.C. § 44-04-18(8), just as releasing records five (5) months late by the Appellee did not.

[¶33.] Violations of N.D.C.C. § 44-04-18(7) do not become moot if records are released. Opinion 2018-O-13 states:

> **A denial of a request for records …must describe the legal authority….or a statement that a record does not exist, and must be in writing if requested."[5]….[5] N.D.C.C. § 44-04-18(7).**

The District Court erred by failing to address where the Appellee violated N.D.C.C. § 44-04-18(7) by not providing the required written notification to the Appellant and the failure to do so harmed the Appellant. Acknowledging the violation would have both confirmed that the Appellee committed the violation and represented evidence that the Appellant should receive compensation permitted under N.D.C.C. § 44-04-21.2.

[¶34.] The District Court's error was not harmless to the Appellant because, in that the District Court's failure to address that the Appellee violated N.D.C.C. § 44-04-18 denied the Appellant of financial remedies permitted under both N.D.C.C. § 44-04-21.2 and N.D. Const., Art. I, § 25(1)(n) despite that the violations represented criminal acts under N.D.C.C. §§§ 12.1-11-02, 05, 06 and N.D.C.C. § 44-04-21.3.

[¶35.] The District Court's error was not harmless to the Appellant because, in not addressing if the police report the Appellant request was a public record avoided that the Appellant was deprived of the right to have an Opinion issued under N.D.C.C. § 54-12-01(19) despite correctly requesting one under N.D.C.C. § 44-04-21.1(1). This Court has recognized the "**statutory dut**y" stated in N.D.C.C. § 54-12-01(19). Saefke v. Stenehjem, 2003 ND 202, ¶13, 673 N.W.2d 41. In Riemers v. City of Grand Forks, 2006 ND-224, ¶15, 723 N.W.2d 518, this Court recognized Opinion 2005-O-13 was issued by request, after records were withheld under N.D.C.C. § 44-04-18.7, by stating:

> **Riemers specifically asked the Attorney General to address this issue. N.D. Att'y Gen. 2005-O-13, at 2.** The Attorney General determined the GFPD did not violate North Dakota's open records law. Id. at 5. We agree.

Riemers v. City of Grand Forks, was issued prior to N.D. Const., Art. I, § 25. Absent in Opinion 2005-O-13, as with Opinions 2014-O-16, 2017-O-05, 2018-O-03 and 2019 -O-01, is the right of the "victim" to records under N.D. Const., Art. I, § 25(1)(ı) and if N.D.C.C. § 44-04-18.7 would overrule that constitutional mandate.

[¶36.] The District Court's error was not harmless to the Appellant because, in dismissing the Appellant's case, the Appellee and any other public entity can violate N.D.C.C. § 44-04-18 by withholding public records, even by not responding, yet not be held accountable if Opinions are not issued and if courts dismiss lawsuits brought under N.D.C.C. § 44-04-21.2 if public records are released after lawsuits are brought. This would create financial losses, if not economic barriers, to obtain public records.

[¶37.] The Appellee erred by relying on Riemers v. City of Grand Forks, and Gosbee v. Bendish, 512 N.W.2d 450 (N.D. 1994), as both were issued prior to N.D. Const., Art. I, § 25, and neither addressed "victim" rights to records under N.D. Const.,

Art. I, § 25(1)(l), regarding N.D.C.C. § 44-04-18.7 or restitution under N.D. Const., Art. I, § 25(1)(n) affirmed by State v. Strom, 2019 ND 9, 921 N.W.2d 660.

[¶38.] The Appellee erred by continuing to interpret and misapply what both N.D.C.C. § 44-04-21.2 allows for and N.D. Const., Art. I, § 25(1)(o), mandates to compensate for violations of open records and criminal acts that are committed.

CONCLUSION

[¶39.] The *Brief of Appellee* has no substantive value and should not interfere with this Court addressing errors made by the District Court or affirming, as did Letter Opinion 2016-L-04, that N.D.C.C. Chapter 44-04 **"must be read in conjunction with**" N.D. Const., Art. I, § 25, to protect constitutional and statutory rights a "victim" has. Even though the Appellee recognizes that N.D. Const., Art. I, § 25 exists, it continues to ignore it in principle. The District Court could have, and should have, addressed it. As the District Court did not, this Court can affirm the police report requested by the Appellant should have been released upon request under N.D. Const., Art.I, § 25(1)(l), that it should not have been withheld under N.D.C.C. § 44-04-18.7, that the Appellee invoking open records law to withhold the police report entitled the Appellant to have an Opinion issued to address it and the Appellant's case was never moot. Legal costs to address when criminal acts were committed by withholding public records should be no different than costs for medical treatment caused by injuries from criminal acts.

Respectfully submitted July 2nd, 2019.

By: /s/ Susan Franciere

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CERTIFICATE OF COMPLIANCE

The undersigned Plaintiff and Appellant, Susan Franciere, in this matter hereby certifies that the Reply Brief of the Plaintiff and Appellant is in compliance with Rule 32(a)(8)(A) of the North Dakota Rules of Appellant Procedure as the Reply Brief of the Plaintiff and Appellant contains 12 total pages.

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CERTIFICATE OF SERVICE

I hereby certify that on July 2nd, 2019, the following documents

1) Appellant Reply Brief
2) Certificate of Compliance
3) Certificate of Service

were served and filed by electronic delivery to:

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