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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Susan Franciere Plaintiff-Appellant, vs. City of Mandan; Defendant-Appellee.	)	Supreme Court No. 20190122 Morton Co. No. 30-2017-cv-00914

APPEAL FROM JUDGMENT, DATED FEBRUARY 12, 2019.

THE DISTRICT COURT OF MORTON COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE JAMES S. HILL, PRESIDING

BRIEF OF APPELLEE

Scott K. Porsborg (ND Bar ID 04904)
sporsborg@smithporsborg.com
Austin T. Lafferty (ND Bar ID 07833)
alafferty@smithporsborg.com
Attorneys at Law
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

Attorneys for Defendant – Appellee,
City of Mandan

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STATEMENT OF THE ISSUES

1. Whether the District Court correctly found that the issues raised in Franciere's Complaint were moot.

2. Whether the District Court erred when it declined to rule whether the requested records were exempt from open records requests.

3. Whether the District Court erred when it declined to rule whether it had personal jurisdiction over the City.

I. STATEMENT OF THE CASE

[¶1] Susan Franciere (hereinafter "Franciere") brought suit against the City of Mandan (hereinafter "the City"), alleging she was the victim of a crime, and thus, was entitled to records she had previously requested of the Mandan Police Department (hereinafter "MPD"). In her *Complaint*, Franciere alleges three (3) causes of action: first, violations of Article I, § 25 of the Constitution of North Dakota (commonly known as "Marsy's law"); second, violations of Article XI, Section 6, of the Constitution of North Dakota (stating records of political subdivisions are public records); and third, Violations of N.D.C.C. § 44-04-18 ("Access to public records – Electronically stored information"). All three of Franciere's allegations relate to her records request to the MPD, and what Franciere alleges is MPD's refusal to release records she had a right to obtain. See Doc ID #1. Franciere sought declaratory relief, a writ of mandamus, costs and disbursements, and damages in the amount of $1,000. Franciere's *Summons* was dated October 24, 2017, and both the *Summons* and *Complaint* were filed with the District Court on October 24, 2017. See Doc ID #1, 13.

[¶2] On November 14, 2017, the City filed its *Answer and Jury Demand*, denying Franciere's allegations. See Doc ID #20.

[¶3] Both parties moved for summary judgment. Franciere made her motion on November 13, 2018. See Doc ID #16. The crux of Franciere's argument was that she believed it is undisputed that she is a "victim" under Marsy's law, and thus entitled to the information that was denied to her, her rights were violated, and she was "entitled to receive damages ordered by this Court under N.D.C.C. §44-04-21.2(1) for each violation of N.D.C.C. Chapter 44-04 that was committed by [the City]." Id. at ¶ 34.

[¶4] The City responded and filed its own *Motion* on December 6, 2018. In response to Franciere's motion, the City argued Franciere ignored its *Answer and Jury Demand*, and that Franciere made several factual statements that were either inaccurate or not asserted in her Complaint, several allegations with no evidence or factual basis to support them, and compared her own claim to another case, which had no bearing on her own. See Doc ID #25, ¶ 7. In support of its own motion, the City made three arguments: first, the open records were part of an active investigation and thus exempt from open records requests; second, it is an undisputed fact that the requested records were delivered to Franciere; and third, the District Court did not have personal jurisdiction over the City due to insufficient service of process.

[¶5] On January 11, 2019, the District Court issued its *Order on Motions for Summary Judgment*, addressing both party's motions. The Court found Franciere was provided with an unredacted copy of the requested report on January 12, 2018, making the case moot. Doc ID# 37 ¶9. The Court declined to rule on the City's arguments regarding personal jurisdiction and the records being exempt from requests. Doc ID# 37 ¶11. Appellee does not believe oral arguments are required, and this case may be decided on briefs.

II. STATEMENT OF THE FACTS

[¶6] Franciere alleges that she and her dog were attacked by a pit bull within the City of Mandan on August 14, 2017. Doc ID #25, ¶ 4. Franciere subsequently requested a copy of Police Report 17-3489, detailing the incident, from the MPD. Id. The MPD initially denied Franciere's request, explaining that Report 17-3849 concerned an "active" case, and thus, the records could not be released. Id.

[¶7] On approximately October 24, 2017, Franciere brought the underlying suit against the City. Doc ID #37 ¶ 3. Franciere attempted service upon the City with a *Summons* and *Complaint,* by sending a letter via certified mail to the following address:

> City of Mandan
> 205 2nd Ave NW
> Mandan, ND 58554

Doc ID #26 ¶ 7.

[¶8] On approximately October 30, 2017, Franciere received a redacted copy of the police report. Doc ID #37 ¶ 4.

[¶9] On approximately January 12, 2018, Franciere received an unredacted copy of the police report. Doc ID #37 ¶ 5.

[¶10] On approximately November 13, 2018, Franciere moved for summary judgment. Doc ID #16. Franciere argued she was a "victim" under the law due to the attack, and this entitled her to all records and information not considered confidential by law, including exempt information. Id. at ¶ 34. Franciere argued summary judgment was appropriate because the City violated her rights as a "victim" by failing to comply with open records law and thus, she is entitled to receive damages. Id.

[¶11] On approximately November 14, 2018, the City filed its *Answer and Jury Demand,* denying Franciere's claims. Doc ID #20.

[¶12] On approximately December 6, 2018, the City responded to Franciere's motion, and made its own motion for summary judgment. Doc ID #25. The City argued the summary judgment in favor of Franciere was inappropriate, as her motion made several incorrect allegations regarding the City's denials of Franciere's claims, as well as several statements that were not asserted in her Complaint, and allegations with no factual or

evidentiary basis. Id. at ¶ 7. The City argued summary judgment was appropriate in its favor for three reasons: 1) Records that are part of an active investigation are exempt from open records requests; 2) the issue is moot because it is undisputed Franciere has received the requested records; and 3) the District Court does not have personal jurisdiction over defendant due to invalid service of process. Id. at ¶¶ 9-19.

[¶13] On approximately January 11, 2019, the District Court issue an *Order on Motions for Summary Judgment*, where it found the issues raised by Franciere to be moot, as she was provided with an unredacted copy of the requested report. Doc ID #37, ¶ 9. The District Court "decline[d] to rule on whether personal jurisdiction over the City exists and whether the requested record was exempt from open records requests." Id. at ¶ 11.

III. LAW AND ARGUMENT

[¶14] Franciere raises twenty (20) issues on appeal. Appellant's Brief ¶¶ 1-20. The majority of these issues are not appealable, and appear to confuse the issues decided by the District Court's *Order*. At issue is the District Court's January 11, 2019 *Order on Motions for Summary Judgment*. Doc ID #37. In this order, the District Court denied Franciere's motion for summary judgment, and granted the City's motion, finding the issues raised by Franciere in her complaint to be moot as she received the requested documents. Id. at ¶ 10. The District Court also declined to rule on whether personal jurisdiction over the City exists and whether the requested record was exempt from open records requests. Id. at ¶ 11.

[¶15] Before delving into the issues decided by the District Court's Order, the City must point out that Franciere makes several unsubstantiated allegations in her "Statement of Case" and "Statement of Facts" in an attempt to relitigate this case in its

entirety, rather than focusing on the District Court's *Order* and her appeal of it. These extraneous allegations should be ignored when deciding this appeal.

[¶16] It is also worth noting that Franciere raises several issues that either (1) the City has no control over, (2) are new issues that are being raised on appeal for the first time, or (3) outside of the scope of the Complaint. "This court will not usually consider a new issue for the first time on appeal because the trial court has not had the opportunity to consider and to decide it." Farm Credit Bank of St. Paul v. Stedman, 449 N.W.2d 562, 565 (N.D. 1989). The City has no control over the North Dakota Office of the Attorney General (hereinafter "OAG"), or the OAG's decision to issue or not issue advisory opinions. See Appellant's Brief ¶¶ 33, 94-99. The decisions regarding the prosecution of Mr. Ochlech (who owned the dog at question) and the actions of the Mandan Municipal Court are irrelevant to this case regarding the production of records, and were not briefed at the District Court level. See Appellant's Brief ¶¶ 38-41, 44-45. Franciere attempts (as she did at the District Court level) to compare the expediency of the prosecution of her dog bite case to other dog bite cases. See Appellant's Brief ¶ 79. This is inappropriate, and has no bearing on the issues at hand. Again, Franciere's brief ignores the purpose of the appeal, whether or not the District Court erred in its order, and instead, attempts to relitigate this matter, by adding new facts, arguments, and issues for this Court to decide.

A. Standard of Review

[¶17] North Dakota's standard for summary judgment is well established. "Under N.D.R.Civ.P. 56, summary judgment is a procedural device for promptly resolving a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be

resolved are questions of law." Erickson v. Brown, 2008 ND 57 ¶ 22, 747 N.W.2d 34 (internal citations omitted). "The nonmoving party cannot rely on the pleadings, brief, speculation, or unsupported conclusory allegations, but must present competent, admissible evidence on an essential element of the claim in the form of an affidavit or other comparable means that raises an issue of material fact; otherwise, it is presumed such evidence does not exist." Halvorson v. Sentry, 2008 ND 205, ¶ 5, 757 N.W.2d 398. "Factual assertions in a brief do not raise an issue of material fact satisfying Rule 56(e). Nor may a party merely reassert the allegations in his pleading in order to defeat a Summary Judgment motion." Riverside Park Condo Unit Owners Ass'n v. Lucas, 2005 ND 26, ¶ 8, 691 N.W.2d 862. "Mere speculation is not enough to defeat a motion for summary judgment, and a scintilla of evidence is not sufficient to support a claim." Zuger v. Smith, 2004 ND 16, ¶8, 676 N.W.2d 615 (internal citations omitted).

[¶18] "Summary judgment is appropriate against a party who fails to establish the existence of a factual dispute on an essential element of his claim and on which he will bear the burden of proof at trial." Collette v. Clausen, 2003 ND 129, ¶ 8, 667 N.W.2d 617 (internal citations omitted).

B. The District Court did not Err When it Correctly Found the Issues Raised in Franciere's Complaint are Moot

[¶19] The District Court granted summary judgment in the City's favor, finding the issues raised by Franciere in her complaint were moot, and thus, the Court could not rule, as any order would be advisory:

> It is well established that courts cannot give advisory opinions, and cases must be dismissed if the issues become moot, such that no actual controversy is left to be determined. *Gosbee v. Bendish*, 512 N.W.2d 450, 452 (N.D. 1994). "When the occurrence of related events makes it impossible for a court to render effective relief, or when the issue has been

> mooted by lapse of time, no 'actual controversy' exists." *Sposato v. Sposato*, 1997 ND 207, ¶ 8, 570 N.W.2d 212.
>
> Just because a case is brought as a declaratory judgment proceeding, it does not defeat the issue of mootness. *Gosbee*, 512 N.W.2d at 452. The case must still present an actual controversy. *Id.* In *Gosbee*, the plaintiff sought a copy of a lease that was in the possession of two Morton County officials. *Id.* The Supreme Court determined the case was moot, as the plaintiff has been provided a copy of the lease during the course of the lawsuit. *Id.*
>
> Similarly here, this Court determines this case to be moot. Franciere was provided with an unreacted copy of the requested report on January 12, 2018.
>
> Franciere seeks declaratory relief, which would require this Court to issue an advisory opinion. Furthermore, Franciere seeks a Writ of Mandamus ordering the City to turn over the report. As Franciere already has a copy of the requested report, there is nothing for this Court to do.

Doc ID #37 ¶¶7-10.

[¶20] The District Court correctly found that the issues raised in Franciere's complaint were moot, because Franciere received a copy of the documents she requested, the central issue to all three causes of action brought against the City.

[¶21] Franciere alleges she and her dog were attacked on August 14, 2017, and that on approximately August 18, 2017, she requested, via letter, a copy of the police report from the MPD. See Appellant's Brief ¶¶ 21-22. The MPD initially denied this request, citing the fact that the requested records were part of an active investigation and thus, are exempt from open records requests. Doc ID #25, ¶ 10. Despite this denial, the City provided Franciere with a redacted copy of the requested police report on October 30, 2017, and an unredacted copy of the police report on January 12, 2018. Doc ID #37 ¶ 4.

> Our law is well established that courts cannot give advisory opinions, and appeals will be dismissed if the issues become moot or academic, such that no controversy is left to be determined. *Walker v. Schneider*, 477 N.W.2d 167, 169 (N.D. 1991); *Backes v. Byron*, 433 N.W.2d 621, 623 (N.W. 1989); *Williams v. State*, 405 N.W.2d 615, 620 (N.D. 1987); *Forum Publishing Co.*

> *v. City of Fargo*, 391 N.W.2d 169, 170 (N.D. 1986); *St. Onge v. Elkin*, 376 N.W.2d 41, 43 (N.D. 1985); *Gasser v. Dorgan*, 261 N.W.2d 386, 389 (N.D. 1977); *Peoples State Bank of Velva v. State Bank of Towner*, 258 N.W.2d 144, 145 (N.D. 1977); *Wiederanders v. Wiederanders*; 187 N.W.2d 74, 78 (N.D. 1971); *Wahpeton Pub. Sch. Dist. No. 37 v. North Dakota Educ. Ass'n*, 166 N.W.2d 389, 393 (N.D. 1969), *reh'g denied*; *State ex rel. Schafer v. Gussner et al.*, 92 N.W.2d 65, 66 (N.D. 1958); *Hart v. Bye*, 86 N.W.2d 635, 637 (N.D. 1957), *reh'g denied*; *Brace v. Steele County*, 77 N.D. 276, 42 N.W.2d 672, 676 (1950), *reh'g denied*.

Gosbee v. Bendish, 512 N.W.2d 450, 452 (N.D. 1994); see also Poochigian v. City of Grand Forks, 2018 ND 144, 912 N.W.2d 344 ("It is well established that . . . an action will be dismissed if there is no actual controversy left to be determined and the issues have become moot or academic."); see also Sposato v. Sposato, 1997 ND 207, 570 N.W.2d 212.

[¶22] Gosbee is of particular note, because it too began with a citizen requesting records from a political entity. Gosbee sought access to a draft of a lease that was still in preliminary rough draft form, that was in the possession of a Morton County Commissioner and the Morton County Auditor. Gosbee, 512 N.W.2d at 452. Gosbee was denied the lease, prompting him to bring a declaratory judgment action in district court. Id. While not identical to Franciere's situation, there are obvious similarities between Gosbee and Franciere.

[¶23] There are differences between Gosbee and this case. In Gosbee, Gosbee received the document through motion to the court, and the trial court subsequently ruled the issue was "not moot" and made several conclusions of law. Id. In this case, Franciere was provided the document by the MPD, and the district court found the issue to be moot, and declined to make conclusions of law beyond this finding.

[¶24] Gosbee appealed the District Court decision, raising two issues on appeal. Id. This Court held that "[b]efore we reach the issues raised by Gosbee, we need to address

whether we will exercise jurisdiction to consider this appeal. Of particular concern is the fact that Gosbee has already received a copy of the lease." Id. This Court found that "[b]ecause Gosbee had been provided with a copy of the lease, we are unable to render effective relief. His request for declaratory judgment is without merit because it would be advisory." Id. at 453.

[¶25] The undisputed facts show that Franciere obtained a copy of the requested report. Doc ID# 16 ¶ 24, see Appellant's Brief ¶ 37. Viewing the facts in the light most favorable to Franciere, summary judgment is appropriate. Franciere's claims for violations of Article I, § 25 of the Constitution of North Dakota, violations of Article XI, Section 6, of the Constitution of North Dakota, and violations of N.D.C.C. § 44-04-18 due to the City's failure to produce the report no longer have basis. Like in Gosbee, the requested documents are in the hands of the Plaintiff, and this Court is unable to render effective relief.

[¶26] Franciere's critiques of Gosbee are without merit. Franciere focuses on the fact that Gosbee was decided before the SB 2228's passage in 1997, defining record in Century Code, and providing civil remedies under N.D.C.C. § 44-04-21.2. The fact that the definition of a record may have been tweaked between the Gosbee Court's decision and this case does not alter the pertinent facts – that both Gosbee and Franciere requested a record, and both Gosbee and Franciere received that record, rendering their civil suits moot. As to N.D.C.C. § 44-04-21.2, there is no requirement that the District Court issue relief, and that is discussed at length the subsequent paragraphs. Franciere's critique focuses on the superficial, because the substantive facts of Gosbee support the District

Court's decision to award summary judgment in favor of the City. The District Court's order should be affirmed.

[¶27] In an effort to save her case, Franciere attempts to create an issue or controversy, arguing that "[t]he District Court erred by not addressing a failure of the City to comply with a statutory mandate in N.D.C.C. § 44-04-18(7) and (8)," by triggering a second error in "not addressing the available 'effective relief' under statutory law in N.D.C.C. § 44-04-21.2(1) and N.D.Const., Art. I, § 25(l)(n)." See Appellant's Brief ¶ 66.

> A denial of a request for records made under this section must describe the legal authority for the denial, or a statement that a record does not exist, and must be in writing if requested.

N.D.C.C. § 44-04-18(7)

> This section is violated when a person's right to review or receive a copy of a record that is not exempt or confidential is denied or unreasonably delayed or when a fee is charged in excess of the amount authorized in subsections 2 and 3.

N.D.C.C. § 44-04-18(8).

[¶28] Franciere argues because of these alleged violations, she is "entitled under N.D.C.C. §44-04-21.2(1)" to "costs, disbursements, and damages" when read in conjunction with N.D. Const., Art. I, § 25(l)(n). See Appellant's Brief ¶ 73.

> [T]he same way that N.D.C.C. § 44-04-18 should be read in conjunction with N.D. Const., Art. I, § 25(1)(l), because the cost of preparing legal documents, making copies, the cost of postage, and the filing cost Franciere incurred to initiate the civil action against the City under N.D.C.C. § 44-04-21.2 after the City acted in violation of N.D.C.C. § 44-04-18 in conjunction with violating N.D. Const., Art. I, § 25(1)(l), resulted in Franciere incurring a minimum in financial losses of $105.00. . . .

See Appellant's Brief ¶ 73.

[¶29] But Franciere's misinterprets § 44-04-21.2, as it does not require the Court to award costs, disbursements, or damages. N.D.C.C. § 44-04-21.2(1) states, in pertinent part:

> A violation of section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21 . . . . If a court finds that any of these sections have been violated by a public entity, the court **may** award declaratory relief, an injunction, a writ of prohibition or mandamus, costs, disbursements, and reasonable attorney's fees against the entity. For an intentional or knowing violation of section 44-04-18, 44-04-19, 44-04-19.2, 44-04-20, or 44-04-21, the court **may** also award damages in an amount equal to one thousand dollars or actual damages caused by the violation, whichever is greater.

N.D.C.C. § 44-04-21.2(1) (emphasis added).

[¶30] The District Court did not find that N.D.C.C. § 44-04-18 was violated. The District Court's order ruled only on the City's mootness argument, specifically declining to rule on any other issue. Doc ID #37 ¶¶ 10-11. "When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." N.D.C.C. § 1-02-05. "Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears." Zajac v. Traill County Water Resource Dist., 2016 ND 134 ¶ 6, 881 N.W.2d 666.

[¶31] The language of N.D.C.C. § 44-04-21.2(1) is clear and unambiguous. First, the District Court is not required to award costs, disbursements, reasonable attorney's fees, or damages. The plain language of N.D.C.C. § 44-04-21.2(1) gives the Court the option, through the use of "may." If the legislature intended for an individual in Franciere's position to be entitled to costs, disbursements, or damages under N.D.C.C. § 44-04-21.2(1), it would have used language such as "must" or "is required to." Second, a plain reading of N.D.C.C. § 44-04-21.2(1) indicates that the District Court must find a violation of

N.D.C.C. §§ 44-04-18, -19, -19.2, -20, or -21 before it decides whether or not it will award relief. As previously argued, the District Court declined to rule whether a violation of N.D.C.C. § 44-04-18 occurred. Without a finding of violation, costs, disbursements, fees or damages cannot be awarded, according to the plain language of N.D.C.C. § 44-04-21.2. Thus, no controversy exists, and the District Court's order should be affirmed.

[¶32] Further, Franciere's reliance on State v. Strom, 2019 ND 9, 921 N.W.2d 660 and State v. Jelliff, 251 N.W.2d 1 (N.D. 1977) is misplaced, and confuses criminal restitution with civil damages. Franciere relies on cases that are not applicable to the case at hand.

[¶33] The term restitution, as utilized in State v. Strom and State v. Jelliff, refers to a *criminal* remedy, not a civil remedy. See United States v. Frazier, 651 F.3d 899, 911 (8th Cir. 2011 ("But the criminal restitution process is not intended to compensate a victim for damages it may otherwise be entitled to in a civil proceeding."); see also State v. Carson, 2017 ND 196, ¶ 6, 900 N.W.2d 41 ("In analyzing whether to order restitution, N.D.C.C. § 12.1-32-08(1)(a) requires the district court to consider 'the reasonable damages sustained by the victim.' These damages 'are **limited to those directly related to the criminal offense** and expenses actually incurred **as a direct result of the defendant's criminal action.**'" (emphasis added)).

[¶34] Franciere's attempted application of State v Strom to this case is misguided. Strom analyzes restitution under N.D.C.C. Title 12.1, North Dakota's Criminal Code. This Court's analysis in Strom applies to *criminal* restitution, and has no bearing here. "In *Strom*, this Court was presented with the question of 'whether article I, § 25(l)(n) abrogates the required consideration of the defendant's ability to pay restitution under factor (b) of

N.D.C.C. § 12.1-32-08(1)." State v. Hunt. Franciere's reliance on State v. Jelliff is misplaced for similar reasons. Again, that case interprets and deals with North Dakota's Criminal Code (N.D.C.C. Title 12.1).

[¶35] "The plain meaning of 'restitution' is an amount calculated to make the victim whole." State v. Strom. In contrast, "damages" is defined as "money claimed by, or ordered to be paid to, a person as compensation for loss or injury." Damages, Blacks Law Dictionary (11th ed. 2019). Franciere is requesting damages from the City, not restitution to make her whole. See, Appellant's Brief ¶ 21 ("Franciere requested costs, disbursements, and damages . . ."). Thus, Franciere's analysis under Strom is not applicable in her civil action against the City. Franciere was "made whole" from the City's actions when she was provided with the requested documents. Franciere's arguments regarding restitution apply to the owner of the dog that allegedly bit her, not to the City. Thus, summary judgment in the City's favor was appropriate, and should be affirmed.

[¶36] Finally, this is not an issue of great public interest or capable of repetition yet evading review. This Court will address moot issues "when they are of great public interest and involve the authority and power of public officials, or when the matter is 'capable of repetition, yet evading review.'" Gosbee, 512 N.W.2d 450, 453 (N.D. 1994).

As used in this context, "public interest" means

> "'more than mere curiosity; it means something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as the interest of the particular localities which may be affected by the matter in question.'"

Id.

[¶37] In Gosbee, this Court found that "[a]lthough the issue of defining a public record may arise in the future, that alone does not empower us to render a purely advisory

opinion." Id. at 454. Indeed, as Franciere herself points out, the legislature, years after Gosbee, acted and defined "record" in the Century Code, through the legislative process, rather than the Courts acting through the judicial process. This is not an issue of great public interest. Further, the nature of this subject matter does not inherently evade review. There is a process in place, through the Courts, granted by the legislature, and through the attorney general's office.

[¶38] Furthermore, Franciere's argument that the alleged inaction of the Attorney General and his office to issue opinions is of "great public interest" and "capable of repetition, yet evading review" is grossly misplaced. The attorney general is not a party to this matter. The City has no power over the attorney general's office. The City cannot direct the OAG to issue an opinion. And thus, the City cannot be held liable for the OAG's alleged inaction.

C. The District Court did not Err When it Declined to Rule Whether the Requested Records Were Exempt from Open Records Requests

[¶39] The District Court did not err in refusing to address whether the police report was a public record, because it was unnecessary for the Court to do so. Once Franciere was provided with the documents she requested, the issue was moot, pursuant to Gosbee and Sposato. Once the issue was moot, the District Court was no longer required to determine if Franciere was a victim. In addition, as previously argued, N.D.C.C. § 44-04-21.2 does not require that costs, fees, disbursements, or damages be awarded. Even if the District Court chose to find that Franciere was a "victim" it was not required to award Franciere with her requested damages, costs, fees or disbursements. It was unnecessary, and the District Court recognized that.

[¶40] However, records that a part of an active investigation are exempt from open records requests, and any such "error" by the District Court was harmless.

> Unless justice requires otherwise, no error in admitting or excluding evidence, **or any other error by the court** or a party, is grounds for granting a new trial, for setting aside a verdict, **or for vacating, modifying, or otherwise disturbing a judgment or order**. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

N.D.R.Civ.P. 61 (emphasis added).

[¶41] Any error is harmless because the same result would occur – the District Court would find summary judgment was appropriate, because the City correctly denied Franciere's request based on the fact that the records are part of an active investigation and because Franciere was given the requested documents. In Riemers v. City of Grand Forks, the North Dakota Supreme Court, citing both N.D.C.C. § 44-04-18.7(3) and an Attorney General's opinion, found law enforcement records that are involved in an active investigation are exempt from open records requests. Riemers v. City of Grand Forks, 2006 ND 224 ¶¶ 16-18, 723 N.W.2d 518. Franciere's request was for documents involved in an open investigation. Thus, the City correctly denied Franciere's request, due to the active status of the investigation. If the District Court did err in declining to rule whether the requested records were exempt from open records requests, said error was harmless, and the District Court's order should not be overturned.

D. Summary Judgment was Appropriate Because the District Court did not Have Personal Jurisdiction over the City

[¶42] Finally, summary judgment was appropriate, because, as argued at the district court level, the District Court did not have personal jurisdiction over the City. "Valid service of process, as directed by N.D.R.Civ.P. 4, is necessary for a court to acquire

personal jurisdiction over a defendant. Frith v. Park Dist. Of City of Fargo, 2016 ND 213, ¶ 12, 886 N.W.2d 836.

[¶43] N.D.R.Civ.P. 4(d)(2)(E) governs "Serving a Municipal or Public Corporation." It provides:

> Service must be made on a city, township, school district, park district, county, or any other municipal or public corporation, by delivering a copy of the summons to any member of its governing board.

N.D.R.Civ.P. 4(d)(2)(E).

[¶44] "Specific requirements for service of process must be strictly complied with." Gessner v. City of Minot, 1998 ND 157, ¶ 5, 583 N.W.2d 90. "Absent valid service of process, even actual knowledge of the existence of a lawsuit is insufficient to effectuate personal jurisdiction over a defendant." Monster Heavy Haulers, LLC v. Goliath Energy Services, LLC, 2016 ND 917, ¶ 13, 883 N.W.2d 917.

[¶45] The requirements for service of process were not complied with in this case. Franciere "served" the summons, complaint, and supporting documents via certified mail addressed as follows:

> City of Mandan
> 205 2nd Ave NW
> Mandan, ND 58554

[¶46] This does not comply with the requirements of N.D.R.Civ.P. 4(d)(2)(E). For proper service to be effectuated, the summons must be delivered to any member of Mandan's governing board, in this instance, the City Commission. Franciere's attempt at service does not satisfy the strict requirements set forth by the rules. This Court has previously held that strict compliance with N.D.R.Civ.P. 4(d)(2)(E) is required for a case to move forward. See Nissen v. City of Fargo, 338 N.W.2d 655 (1983) (the governing body

of a city operating under the commission system is the board of city commissioners composed of the president and four city commissioners.); see also Gessner v. City of Minot, (service on the city manager was not sufficient, because the city manager was not a member of the city's governing body); see also Farrington v. Swenson, 210 N.W.2d 82, 85 (1973) (service on the county auditor was not sufficient, because the governing board of the county is the board of county commissioners, and the auditor is not a member of the board of county commissioners, but merely serves as the clerk of the governing board.).

[¶47] There is no factual dispute as to how Franciere served the City – the record is clear. Franciere sent the summons and complaint to "City of Mandan" and the letter was delivered to the reception area, where it would have been signed for by the receptionist. Doc ID #26, ¶ 6. This service is not properly effectuated, and thus, the District Court lacked personal jurisdiction over the City. The District Court had no choice but to dismiss Franciere's claims against the City.

IV. CONCLUSION

[¶48] Franciere argues the District Court's decision to grant summary judgment in the City's favor because the issue was moot was inappropriate, due to her allegation that approximately twenty controversies still exist. But each of the controversies was resolved the moment Franciere was provided with the requested documentation. Franciere does not dispute that she was provided a copy of the requested report. The undisputed facts show this issue was moot when the District Court issued its order, and it remains moot before this Court. This Court should not issue an advisory opinion, and Defendant City of Mandan respectfully requests this Court affirm the District Court's order.

Dated this 19th day of June, 2019.

By */s/ Scott K. Porsborg*
Scott K. Porsborg (ND Bar ID 04904)
sporsborg@smithporsborg.com
Austin T. Lafferty (ND Bar ID 07833)
alafferty@smithporsborg.com
Attorneys at Law
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

Attorneys for Defendant – Appellee,
City of Mandan

CERTIFICATE OF COMPLIANCE

[¶49] The undersigned certifies the above brief is in compliance with N.D.R.App. P. 32(a)(7)(A) and the total number of pages of the brief is 26 pages.

Dated this 21st day of June, 2019.

By */s/ Scott K. Porsborg*
Scott K. Porsborg (ND Bar ID 04904)
sporsborg@smithporsborg.com
Austin T. Lafferty (ND Bar ID 07833)
alafferty@smithporsborg.com
Attorneys at Law
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

Attorneys for Defendant – Appellee,
City of Mandan

CERTIFICATE OF SERVICE

[¶50] I hereby certify that on the 21st day of June, 2019, a true and correct copy of the foregoing **BRIEF OF APPELLEE** was served via Electronic Filing and mailed and emailed as follows:

Susan Franciere
205 5th Avenue NW
Mandan, ND 58554

susan.franciere@gmail.com

By */s/ Scott K. Porsborg*
SCOTT K. PORSBORG

CERTIFICATE OF SERVICE

[¶50] I hereby certify that on the 19th day of June, 2019, a true and correct copy of the foregoing **BRIEF OF APPELLEE** was served via Electronic Filing and mailed and emailed as follows:

Susan Franciere
205 5th Avenue NW
Mandan, ND 58554

susan.franciere@gmail.com

By */s/ Scott K. Porsborg*
SCOTT K. PORSBORG