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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Traynor Law Firm, PC, Plaintiff, Appellant and Cross-Appellee, v. State of North Dakota, c/o Governor Doug Burgum; Defendant, Appellee and Cross-Appellant, and The Board of Ward County Commissioners, Defendant and Appellee.	**Supreme Ct. No. 20190310** **Civil No. 51-2019-CV-00532** **ORAL ARGUMENT WAIVED**

APPEAL FROM THE AUGUST 15, 2019
JUDGMENT OF THE DISTRICT COURT
WARD COUNTY, NORTH DAKOTA
NORTH CENTRAL JUDICIAL DISTRICT

HONORABLE GARY H. LEE

BRIEF OF APPELLEE AND CROSS-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Paragraph(s)**

Statutes

Other Authorities

STATEMENT OF ISSUES

[¶1] Whether the District Court erred in awarding the Traynor Law Firm any interest on the underlying bill for legal services.

[¶2] Whether the District Court erred in concluding that the State of North Dakota, rather than Ward County, was responsible for paying for the services of the Traynor Law Firm following an appointment as a special prosecutor in a Ward County removal proceeding.

STATEMENT OF CASE

[¶3] The State of North Dakota agrees with the Statement of the Case set forth in the Appellant's Brief, but adds the following details regarding the district court proceedings.

[¶4] In determining that the Traynor Law Firm was not entitled to interest at a rate of 1.5% per month, and awarding interest at a rate of 6% per annum, the district court applied N.D.C.C. § 47-14-05, a statute that was not relied upon by the Traynor Law Firm in its district court briefings or arguments. In addition, the district court did not give the defendants notice that it was considering an award of interest pursuant to Section 47-14-05 before issuing its decision.

[¶5] In its decision, the district court determined that the State of North Dakota, rather than Ward County, was responsible for paying for the Traynor Law Firm's services following its appointment as a special prosecutor in a Ward County removal proceeding. In doing so, the district court rejected the State's argument that N.D.C.C. § 54-12-03 should be read *in pari materia* with the removal statutes found at Chapter 44-11 in light of the latter's silence on who pays for the services

of a special prosecutor statutorily appointed by the Governor. Instead, the district court focused on whether an attorney-client relationship existed between the State or Ward County as being determinative of the separate issue regarding which governmental entity should pay.

STATEMENT OF FACTS

[¶6] The State of North Dakota agrees with the Statement of the Facts set forth in the Appellant's Brief, but adds the following detail regarding the factual background.

[¶7] The investigation into the care and treatment (or lack thereof) Dustin Irwin received while he was in the Ward County jail was an investigation conducted by the Attorney General through the Bureau of Criminal Investigation (BCI), specifically BCI Case No. 14-0621. See State v. Romanick, 2017 ND 42, ¶¶ 2-3, 890 N.W.2d 803 (setting forth the factual background giving rise to the BCI investigation involving Kukowski following Irwin's death); District Court Index # 15 at 2-3 (referring to the Attorney General's BCI investigation that resulted in both criminal charges and the removal proceeding being brought against Kukowski).

STANDARD OF REVIEW

[¶8] The issue whether the district court erred in awarding the Traynor Law Firm any interest is a question of law involving statutory interpretation. Issues of law involving statutory interpretation are reviewed *de novo*. Nelson v. McAlester Fuel Co., 2017 ND 49, ¶ 11, 891 N.W.2d 126.

[¶9] The issue as to which defendant – Ward County or the State – is responsible for paying for the services of a special prosecutor in a Ward County removal

proceeding is also a question of statutory interpretation, and should be reviewed *de novo*. Id. The State disputes that the issue regarding which defendant is responsible for paying for the services of a special prosecutor in a removal proceeding turns upon whether an attorney-client relationship or contract exists between either defendant, but agrees with the appellant that that issue would also be reviewed *de novo* if relevant.

LAW AND ARGUMENT

I. The District Court erred in awarding interest under N.D.C.C. § 47-14-05 *sua sponte*.

[¶10] The district court awarded interest pursuant to N.D.C.C. § 47-14-05 even though the Traynor Law Firm never requested an award of interest pursuant to that statute. In addition, the district court did so without giving the defendants notice that it was considering an award under that statute, and without giving the defendants an opportunity to respond. This was error.

[¶11] A court should not act as an advocate for one party over another. See, e.g., Kilzer v. Binstock, 339 N.W.2d 569, 572 (N.D. 1983) ("The court should not be put in a position of even appearing to be an advocate of one side or the other."); Fowler v. Fowler, 463 N.W.2d 370, 373 (Wis. Ct. App. 1990) ("The trial court is not an advocate."); Nieves v. Cirmo, 787 A.2d 650, 657 n.4 (Conn. App. Ct. 2002) ("The court is not an advocate and should not be placed in a position of making tactical decisions for the attorneys before it."); Lagrone v. John Robert Powers Sch., Inc., 841 S.W.2d 34, 37 (Tex. App. 1992) ("A court is not an advocate but must sit in impartial posture, guided by a neutral duty to the law and the rights of both litigants.").

[¶12] Consequently, a court's ability to take *sua sponte* action that favors one party over another should be limited to protecting important rights, such as the right to appeal or to address the court's own jurisdiction. See Trottier v. Bird, 2001 ND 177, ¶ 5, 635 N.W.2d 157 (indicating jurisdictional issues "can be raised sua sponte at any time"); Hurt v. Freeland, 1997 ND 194, ¶ 4, 569 N.W.2d 266 (same); see also Klundt v. Benjamin, 2019 ND 160, ¶ 29, 930 N.W.2d 116 (reversing a district court's "*sua sponte* action [that] was not done to protect an important right," citing Trottier and Hurt as examples of the limited circumstances where a court can act *sua sponte*).

[¶13] This Court has not identified an award of interest as an important right that justifies a district court's *sua sponte* action.[1] In addition, this Court has indicated that notice and an opportunity to respond should generally be given to an opposing party before a court acts *sua sponte*. Klundt, 2019 ND 160, ¶ 28, 930 N.W.2d 116 (citing Rath v. Rath, 2014 ND 171, ¶ 15, 852 N.W.2d 377; State v. Erickson, 2011 ND 49, ¶ 16, 795 N.W.2d 375). Here, the district court never gave the defendants notice that it was considering an award of interest under N.D.C.C. § 47-14-05. The

[1] In Dick v. Dick, this Court held that a district court's equitable powers in a divorce action included the right to award interest pursuant to N.D.C.C. § 47-14-05 even though the original divorce decree did not address interest. 434 N.W.2d 557, 558-59 (N.D. 1989). But this is not a divorce action. In addition, this Court's statement in Hirschkorn v. Severson, that "prejudgment interest *must* be calculated at the prescribed legal rate" under Section 47-14-05 in the absence of a specific contractual rate of interest, should be understood in the context that "[t]he question of the *allowability* of interest" was not before the Court in that case. 319 N.W.2d 475, 480 (N.D. 1982) (emphasis added). Here, there is a specific purported contractual rate of interest, but both defendants dispute that the Traynor Law Firm should be allowed any interest. Thus, neither Dick nor Hirschkorn should be interpreted as justifying the district court's *sua sponte* award of interest pursuant to N.D.C.C. § 47-14-05.

sua sponte award of interest under N.D.C.C. § 47-14-05 should be reversed.

II. Traynor Law Firm waived the right to claim interest pursuant to N.D.C.C. § 47-14-05.

[¶14] As stated above, the Traynor Law Firm never claimed the right to interest pursuant to N.D.C.C. § 47-14-05 in the district court. Indeed, on appeal, the Traynor Law Firm now argues the district court's award of interest under Chapter 47-14 of the North Dakota Century Code was erroneous. See Appellant's Br. at ¶¶ 27-35. The Traynor Law Firm expressly argues that "[f]or the trial court to base its decision upon the provisions stated in N.D.C.C. § [sic] 47-14 is in error and a misapplication of the North Dakota Century Code." Id. at ¶ 35.

[¶15] On appeal, the Traynor Law Firm argues solely for an award of interest at its claimed contract rate of 1.5% per month (18% per annum), or for an award of interest pursuant to the provisions of Chapter 13-01.1 of the North Dakota Century Code. Id. at ¶¶ 21-44. It does not argue, in the alternative, for this Court to affirm the district court's award of interest under Chapter 47-14.

[¶16] By failing to request interest pursuant to Chapter 47-14 in the district court, the Traynor Law Firm waived any claim that Chapter 47-14 applies. Even if not already waived in district court, on appeal the Traynor Law Firm waived the right to claim interest under Chapter 47-14 by not developing an argument to defend the district court's decision. See Farmers Union Mut. Ins. Co. v. Decker, 2005 ND 173, ¶ 11, 704 N.W.2d 857 ("Based on this record, we decline to address the argument because issues not timely raised or adequately briefed are deemed waived."); Bearce v. Yellowstone Energy Dev., LLC, 2019 ND 89, ¶ 29, 924 N.W.2d 791 (concluding an issue is waived on appeal where a party does not support an

argument with "supportive reasoning or citations to relevant authorities").

[¶17] Raising an argument for the application of Chapter 47-14 in the reply brief would be too late. Under principles of judicial estoppel, this Court should not allow the Traynor Law Firm to completely reverse its position in a reply brief by arguing the award of interest under Chapter 47-14 should be affirmed, after contending in its initial brief that the award of interest under Chapter 47-14 should be reversed. See, e.g., Dunn v. N.D. Dep't of Transp., 2010 ND 41, ¶ 11, 779 N.W.2d 628 ("Dunn's inconsistent and contradictory positions demonstrate the type of legal maneuvering detrimental to the integrity of the judicial process, and for which we apply the doctrine of judicial estoppel[.]").

[¶18] Finally, the Court should reject any argument made by the Traynor Law Firm for interest under Chapter 47-14, even if made in the reply brief. In Weeks v. Geiermann, 2012 ND 63, 814 N.W.2d 792, this Court concluded that prejudgment interest was available for collection of an unpaid bill for medical services under the more general statute found at N.D.C.C. § 47-14-05, even though not available under the more specific statute found at N.D.C.C. § 13-01-14.1 that applied to medical service providers. The Court reasoned that the general statute still applied because Section 47-14-05 used the term "interest," instead of the term "late payment charge" used under N.D.C.C. § 13-01-14.1. Id. at ¶¶ 18, 20.

[¶19] The State contends the statutory provisions governing an award of interest in this case are the more specific provisions found at Chapter 13-01.1 that apply to services provided to the State or political subdivisions, rather than the general provision for an award of interest found at N.D.C.C. § 47-14-05. See, e.g., St.

Alexius Med. Ctr. v. N.D. Dep't of Human Servs., 2018 ND 36, ¶ 22, 906 N.W.2d 343 ("[A] special provision prevails and must be construed as an exception to a general provision. . . . In construing statutes, specific provisions prevail over general provisions relating to the same subject matter, absent a manifestation of legislative intent to the contrary.") (internal citations and quotation marks omitted). The Traynor Law Firm agrees the more specific provisions found at Chapter 13-01.1 are the ones that govern this case. See Appellant's Br. at ¶¶ 28, 34-44.

[¶20] Chapter 13-01.1 uses the term "interest," the same term used in the general provisions found at Chapter 47-14. Thus, unlike in Weeks v. Geiermann, where a difference in the relevant statutory terms justified the application of the general statute over the more specific, here both the general and specific statute cover the same subject matter – interest. If an award of interest is governed by, but not available, under the specific provisions found at Chapter 13-01.1, an award of interest under Chapter 47-14 would conflict with the more specific statutory provisions governing services acquired by the State or political subdivisions. As explained below in Section III, Chapter 13-01.1 governs here, but simply precludes an award of interest on a claim for legal services rendered pursuant to a statutory appointment under Chapter 44-11.[2]

III. Interest is unavailable under Chapter 13-01.1 because the term "business" does not apply to legal services, and Chapter 44-11 itself does not authorize the payment of interest.

[¶21] The Traynor Law Firm argues the statutory basis for an award of interest in

[2] The Traynor Law Firm does not dispute that the reference to a "state agency" found at N.D.C.C. § 13-01.1-01 includes the named defendant in this case, the "State of North Dakota, c/o Governor Doug Burgum."

this case is governed by Chapter 13-01.1, which applies to services acquired by the State or political subdivisions. See Appellant's Br. at ¶¶ 21-26. As argued above, the State agrees that Chapter 13-01.1 governs this case. But the State disputes that interest is *permitted* under Chapter 13-01.1. The Traynor Law Firm performed its legal services pursuant to the removal statutes found at Chapter 44-11, and those statutory provisions do not authorize the payment of interest.

[¶22] In Johnson v. North Dakota Workers Compensation Bureau, 428 N.W.2d 514 (N.D. 1988), this Court addressed whether N.D.C.C. § 13-01.1-01 required the State to pay interest on a contract for legal services where a separate statute required the Workers Compensation Bureau to pay "a reasonable maximum hourly rate, and a maximum fee to compensate an injured employee's attorney for legal services following issuance of an administrative or judicial order reducing or denying benefits." N.D.C.C. § 65-02-08.

[¶23] In Johnson, the workers compensation statute itself did not authorize the payment of interest on the legal services covered by it. See N.D.C.C. § 65-02-08; see also Johnson, 428 N.W.2d at 520 ("[N]o provision in Title 65 authorizes the Bureau to pay interest on attorney's fees."). Similarly, here, the removal statutes found at Chapter 44-11 do not authorize the payment of interest for legal services performed by a special prosecutor appointed by the governor. See N.D.C.C. § 44-11-02(5)(a).

[¶24] "The public fisc is not a bottomless resource." Larimore Pub. Sch. Dist. No. 44 v. Aamodt, 2018 ND 71, ¶ 35, 908 N.W.2d 442. Consequently, state governmental entities generally need authorization via statute or specific

appropriation before making payments from the public fisc. See N.D. Const. art X, § 12(1) ("All public moneys . . . shall be paid out and disbursed only pursuant to appropriation first made by the legislature[.]"); Menz v. Coyle, 117 N.W.2d 290, 302 (N.D. 1962) ("[A]n 'appropriation' . . . is the setting apart of a definite sum for a specific object in such a way that the public officials can use the amount appropriated, and no more than the amount appropriated.").

[¶25] The claimant in Johnson nevertheless argued that Section 13-01.1-01 required the State to pay interest on bills for legal services governed by Section 65-02-08. See Johnson, 428 N.W.2d at 519. This Court rejected that argument, first noting "[o]n its face, Chapter 13-01.1 makes no reference to payment for legal services." Id.

[¶26] This Court then considered whether the legislature intended the word "business" as used within N.D.C.C. § 13-01.1-01 to include legal services covered by Section 65-02-08. This Court indicated the legislature intended Chapter 13-01.1 to protect "the small retail businesses which provide [governmental entities with] good and services." Id. at 519-20. This Court then held that the term "business" as used in Chapter 13-01.1 did not "include legal services rendered to Worker's Compensation claimants" that the State was required to pay pursuant to statute. Id. at 520.[3]

[3] This is not a case where there is no conflict because "the special statute is silent". Appellant's Br. at ¶ 28 (quoting Thorn v. Silver, 89 N.E. 943, 947 (Ind. 1909)). Section 13-01.1-01 (the more specific statute) used the term "business," and in Johnson this Court interpreted the word "business" in a manner that excluded the payment of interest on legal services. Allowing interest for legal services acquired by a state agency or political subdivision under the more general statute found at

[¶27] This Court's interpretation of the word "business" within Section 13-01.1-01, and its examination of the statute's legislative history, apply with equal force to the circumstances present in this case. Simply put, there is no reasoned basis why fees for legal services could be encompassed by the term "business" for legal services provided under Chapter 44-11, but fall outside the term "business" for legal services provided under Title 65.

[¶28] Absent legislative intent within Chapter 13-01.1 to pay interest on fees for legal services, and absent specific authorization within Chapter 44-11 to pay interest on fees for legal services, there is no statutory basis for awarding interest in this case.

IV. Without a written retainer agreement, the Traynor Law Firm should not be entitled to interest at its purported contract rate of 1.5% per month.

[¶29] As an alternative to its statutory claim for interest pursuant to Chapter 13-01.1, the Traynor Law Firm now makes a contract-based claim contending it is entitled to "at the very least, the 18% per annum as stated on [its] invoice." Appellant's Br. at ¶ 27. The State disagrees.

[¶30] Rule 1.5(a) of the North Dakota Rules of Professional Conduct requires that "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." Although this Court has not addressed the limits Rule 1.5(a) imposes on charging interest for delinquent payment of legal fees, other jurisdictions require an attorney to have an agreement reflecting a client's prior consent before charging interest. See N.Y. State Bar

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N.D.C.C. § 47-14-05 would therefore result in a conflict with the judicial interpretation this Court gave the more specific statute.

Ass'n Comm. on Prof'l Ethics, Op. 1165 (2019) (2019 WL 2117217 at *2) ("Absent a prior written agreement, the lawyer may not unilaterally charge interest on a delinquent client account."); Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 99-26 (1999) (1999 WL 958143 at *1-2) ("A Firm may *not* charge interest on the existing client's accounts receivable because it did not inform the client of this potential charge prior to taking the client's case . . . the firm may so charge interest upon the delinquent accounts arising out of the existing client's *new* matter provided that full disclosure of this factor is made to the client . . . and the client agrees."); Va. Legal Ethics Op. 642 (1985) (1985 WL 1096646 at *1) ("It is not improper for an attorney to charge interest to his client on earned but not paid fees . . . provided that . . . such interest is charged pursuant to prior agreement of the attorney and client [among other requirements]."); The Supreme Ct. of Tx. Prof'l Ethics Comm., Op. 409 (1984) (1984 WL 50127 at *1) ("There is nothing in the code of professional responsibility that prohibits the charging of interest. However, it is clear that there should be a definite understanding between the attorney and the client as to the fee."); Cal. State Bar Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 1980-53 (1980) (1980 WL 19390 at *3) ("[T]he attorney must advise the client in advance of any interest charge to be imposed on delinquent fees and the client must render an informed consent to such a charge."); Neb. Judicial Ethics Comm., Op. 77-4 (1977) (1977 WL 445098 at *1) ("It is not proper for an attorney to unilaterally notify a client he will be charged interest on a past due account after a date certain in the future. Interest may properly be charged only by agreement with the client."); Okla. Bar Ass'n Legal Ethics Comm.,

Op. 286 (1975) (1975 WL 40891 at *1) ("[I]t is ethical and proper for an attorney to charge interest on overdue accounts for professional services rendered . . . as long as there has been an agreement made with the client concerning these charges."); N.J. Supreme Ct. Advisory Comm. on Prof'l Ethics, Op. 293 (1974) (1974 WL 407798 at *2) ("[I]f a substantial delay in payment is likely, then a fair rate of interest must be agreed upon. It should not exceed the legal rate."); see also D.C. Ethics Op. 310 (2001), located at https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion310.cfm ("[A] client's unexcused failure to meet a fee obligation does not allow a lawyer to seek to collect interest on the unpaid portion of the debt unless that is specifically provided for in the existing fee arrangement.").[4]

[4] The question whether the Traynor Law Firm should be allowed *any* interest was raised in the district court, with both defendants disputing that issue. The State and this Court are therefore entitled to rely upon Rule 1.5(a) as additional authority relevant to the issue of the allowability of interest even though that rule was not briefed in the district court. See, e.g., Clark v. Feldman, 224 N.W. 167, 172 (N.D. 1929) (denying a petition for rehearing brought on the grounds that "the case has been decided on matters that were not . . . presented to the trial court" where the question of law at issue was "not raised for the first time in this court" but merely "additional authorities" had been cited on appeal/in the opinion relevant to the question raised in the trial court).

Moreover, the State is entitled to respond to the Traynor Law Firm's alternative contractual argument, raised on appeal, that it is entitled to interest at a rate of 1.5% per month (18% per annum). In the district court, the Traynor Law Firm relied upon a strictly statutory basis for its claim of interest, citing a combination of statutes from Chapters 13-01 and 13-01.1. See District Court Index # 50 at ¶¶ 17-19. On appeal, the Traynor Law Firm has abandoned its reliance on Chapter 13-01 in support of its statutory claim for interest (and instead relies exclusively upon Chapter 13-01.1), but makes an alternative argument that it is entitled to interest strictly on contractual grounds. The State is entitled to respond to that alternative argument, raised by the Traynor Law Firm for the first time in this appeal in response to the district court's *sua sponte* interest award pursuant to N.D.C.C. § 47-14-05, an action neither party anticipated.

[¶31] Here, the only document that memorializes the agreement the Traynor Law Firm reached to perform duties as a special prosecutor in removal proceedings is the letter Governor Burgum sent to Daniel Traynor on March 10, 2017. See Appellant's App. at 7. There was no retainer agreement reached with either the Governor or Ward County that reflects the consent of either governmental entity to pay interest on a delinquent account. Indeed, the Traynor Law Firm concedes there is no retainer agreement in this case. See Appellant's Br. at ¶ 36.

[¶32] In accordance with the reasonableness requirements of Rule 1.5(a), and consistent with the rule adopted by the jurisdictions referenced above,[5] the Traynor Law Firm should not be entitled to unilaterally charge interest at a rate of 18% per annum without any evidence of a pre-existing agreement to that effect.

[¶33] This Court's decision in Overboe v. Brodshaug, 2008 ND 112, 751 N.W.2d 177, does not compel a different result. That case never addressed the obligations imposed by Rule 1.5(a) with respect to whether interest can be charged on an

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[5] Some jurisdictions do permit an attorney to charge interest on unpaid legal fees in the absence of a written agreement, upon reasonable notice. See, e.g., Fla. State Bar Ass'n Comm. on Prof'l Ethics, Op. 86-2 (1986) (1986 WL 84406 at *1). However, even jurisdictions that allow interest on past due legal fees in the absence of a prior agreement indicate that a written agreement at the beginning of the representation is preferable. See, e.g., N.C. State Bar, Formal Ethics Op. 3 (1998) (1998 WL 609804 at *2) ("[I]t is preferable to put fee agreements with clients in writing at the beginning of the representation to resolve any misunderstanding about when the fees may be owed and to specify to a contractual certainty any finance charges that may be charged in the event that the client is delinquent in payments.").

The State respectfully submits that the better rule of law is reflected by those jurisdictions that require an attorney to have a pre-existing agreement that demonstrates a client's consent in order to charge interest on delinquent accounts.

unpaid bill for legal services. In addition, the attorney there had reached an agreement with his client to extend credit to her, and the 1.5% monthly service charge was part of that agreement. Id. at ¶ 5. Here, the Traynor Law Firm did not agree to extend credit to either the State or Ward County, and acknowledges that Overboe is distinguishable on that ground. See Appellant's Br. at ¶¶ 32-33.

[¶34] The Traynor Law Firm further relies on Oxbow Energy for the proposition that silence and inaction should operate as an acceptance of the contract rate stated on its itemized invoice. See Appellant's Br. at ¶¶ 40-43 (citing B.J. Kadrmas, Inc. v. Oxbow Energy, LLC, 2007 ND 12, 727 N.W.2d 270). That reliance is misplaced. The contract at issue in Oxbow Energy was not a bill for legal services subject to the reasonableness requirements of Rule 1.5(a) of the North Dakota Rules of Professional Conduct.

[¶35] The Traynor Law Firm's unilateral statement on its invoice that a "1.5% per month late payment charge may be assessed on any balance unpaid after 30 days from statement date" is exactly that, a unilateral statement purporting to charge interest absent a prior agreement with a client to do so. An attorney's unilateral attempt to charge a client interest on a delinquent account would not be permitted in other jurisdictions that have addressed the issue and, respectfully, should not be permitted in North Dakota.

V. The District Court erred in concluding the State of North Dakota, rather than Ward County, was responsible for paying for the Traynor Law Firm's services.

[¶36] The district court erred when it declined to apply the express statutory language found at N.D.C.C. § 54-12-03. That statute indicates that Ward County,

rather than the State, is responsible for the payment of the Traynor Law Firm's expenses in performing the services of a special prosecutor in Ward County removal proceedings.

[¶37] Section 54-12-03 broadly covers how expenses are to be paid when the Attorney General makes "an investigation in any county in this state to the end that the laws of the state shall be enforced therein and all violators thereof brought to trial[.]" That broad provision includes investigations in a county where "[t]he attorney general deems it necessary for the successful enforcement of the laws of the state in such county[.]" Id. at (1)

[¶38] Significantly, Section 54-12-03 expressly provides in relevant part that "[t]he necessary expenses incurred in making the investigation or in prosecuting ***any resulting case*** . . . must be paid by the county out of the state's attorney contingent fund." Id. (emphasis added).

[¶39] The BCI's investigation of Kukowki's role in the death of inmate Dustin Irwin falls squarely within Section 54-12-03's provision governing "an investigation in any county of this state to the end that the laws of the state shall be enforced therein." In addition, the BCI's investigation constitutes an attorney general investigation because the BCI is the Attorney General's investigatory arm. See N.D.C.C. § 12-60-01 ("A bureau of the state government, under the attorney general, is hereby created and is designated as the bureau of criminal investigation[.]"); see also N.D.C.C. § 12-60-05 (indicating the "attorney general . . . shall exercise absolute control and management of the bureau").

[¶40] It is also clear that the Kukowski removal proceeding falls within the phrase

"any resulting case." Significantly, the statute is not limited to criminal cases that arise following a BCI investigation, to cases prosecuted by the Attorney General, or to expenses incurred directly by the Attorney General. It expressly applies to all "necessary expenses incurred in . . . prosecuting any resulting case[.]" N.D.C.C. § 54-12-03. For example, N.D.C.C. § 54-12-04 expressly limits its application to "criminal matters." As the Special Commissioner in the Kukowski Removal noted, Special Prosecutor Jordan determined that both criminal charges and removal proceedings were justified as a result of the BCI investigation, and agreed with the Special Prosecutor's argument that he was authorized to bring the petition for removal because it was related to the BCI investigation into the death of Dustin Irwin. See District Court Index # 15 at 3-4.

[¶41] Moreover, it is clear that the fees of a special prosecutor appointed in removal proceedings fall within the term "expenses" as that term is used in Section 54-12-03. The Legislature frequently includes attorney's fees within the term "expenses." See, e.g., N.D.C.C. § 29-32.1-05(2) ("Costs and expenses incident to a proceeding under this chapter, including fees for counsel provided at public expense."); N.D.C.C. § 10-33-81 (permitting a court to grant equitable relief for violations of Chapter 10-33 by awarding "expenses, including reasonable attorney's fees and disbursement to the members"); N.D.C.C. § 32-43-08(5) ("The court shall determine the amount of reasonable expenses of litigation, including attorney's fees."); N.D.C.C. § 10-15-56(3) (indicating "the court may, out of the proceeds of the action, award the plaintiff the reasonable expenses of maintaining the action, including reasonable attorney's fees"); N.D.C.C. § 38-14.1-36(1)

("Whenever an order is issued as a result of any administrative proceeding under this chapter, at the request of any party, a sum equal to the aggregate amount of all costs and expenses, including attorney's fees.").

[¶42] If the term "expenses" did not include attorney's fees, the above legislative references to attorney's fees would have used the term "and" when used in conjunction with a reference to expenses, i.e., a court may award expenses ***and*** attorney's fees. Instead, the legislature has expressed time and again that the term "expenses" already ***includes*** attorney's fees by using the term "including" when referring to both expenses and fees.

[¶43] In the district court, the County disputed that Section 54-12-03's reference to "expenses" included attorney's fees, relying upon the rule of statutory construction indicating the express mention of one item implies the exclusion of another ("*inclusio unius est exclusio alterius*"). See District Court Index # 22 at ¶ 7 (citing City of Dickinson v. Thress, 290 N.W. 653, 657 (N.D. 1940)). That argument is misplaced, however, because the rule only applies when the "items" being discussed are separate and distinct to begin with. The rule does not apply here, where a broader term (expenses) is not separate and distinct from one of its subsets (attorney's fees).

[¶44] For example, if a statute recites a list of four separate fruits (apples, pears, strawberries, and bananas), it may imply the exclusion of a fifth one (grapes). But if a statute merely uses the broad term "fruit" without mentioning any specific fruits, it necessarily includes all of its subsets, including grapes. The mention of the one item (fruit) does not imply the exclusion of a more specific item (grapes) that is

already encompassed by the broader term.

[¶45] Similarly, the term "expenses" is a broad term that already encompasses "attorney's fees." Thus, the use of the term "expenses" alone does not imply the exclusion of attorney fees under the doctrine of *inclusio unius ext exclusio alterius* when the two terms are not distinct, separate items to begin with. See N.D.C.C. § 31-11-05(27) ("The greater contains the less."); cf. N.D.C.C. § 1-01-35 (generally indicating that "words used in the plural number include the singular," i.e., the whole includes a subset of the whole).

[¶46] The district court declined to apply Section 54-12-03 for two reasons. First, it declined to read Section 54-12-03 *in pari materia* with the removal statutes found at Chapter 44-11. See Appellant's App. at 57. In doing so, however, the district court noted that both statutory provisions (Section 54-12-03 and Chapter 44-11) stand on their own. Id.

[¶47] The State maintained in the district court that reading the statutory provisions *in pari materia* could explain Chapter 44-11's silence on whether the fees of a special prosecutor should be paid by the county in a county removal proceeding. See District Court Index # 12 at ¶¶ 21-25. The State, however, also agrees with the district court that both statutory provisions stand on their own. The express language of Section 54-12-03 mandates that a county pay for the "necessary expenses incurred in making the [AG] investigation ***or in prosecuting any resulting case***[.]" (Emphasis added). This language compels the conclusion that Ward County is responsible for the expenses of prosecuting a Ward County removal proceeding (including attorney's fees) that followed from an investigation

by the Attorney General, irrespective of whether Section 54-12-03 is read in conjunction with Chapter 44-11 or not.

[¶48] The legislature used broad language in the form of a "catch-all" provision with respect to the expenses that should be paid by the county when incurred in prosecuting any case resulting from an attorney general investigation, indicating that Section 54-12-03 applies when no other provision of law addresses the issue. See N.D.C.C. § 54-12-03 (stating this provision governs the payment of expenses when such payment is "not otherwise specifically provided by law"). All words of a statute should "be construed to have meaning because the law neither does nor requires idle acts." Holen v. Hjelle, 396 N.W.2d 290, 292 (N.D. 1986) (citing N.D.C.C. § 31-11-05(23)). Due to Chapter 44-11's failure to address who should pay for the appointment of a special prosecutor appointed by the Governor in a county removal proceeding, the catch-all provision set forth in Section 54-12-03 is given meaning, standing on its own, by applying it to the special prosecutor expenses involved in this case.

[¶49] Second, the district court declined to apply Section 54-12-03 to this case because Chapter 44-11 "allows the Governor to remove not only county officials, but school board members, city officials, township officials, and other governmental officers" and "[t]here is no authority in Section 54-12-03 . . . to pass the costs of the Special Prosecutor on to other governmental entities such as school boards, cities, or townships." Appellant's App. at 59. This observation, however, speaks only to a deficiency in Chapter 44-11 that is not at issue in this case, that is, the Chapter's failure to provide who must pay for the services of a

special prosecutor appointed by the Governor in removal proceedings involving school boards, cities, or townships. It says nothing about the express language of Section 54-12-03 that governs this particular case involving a BCI investigation into wrongdoing by a county official. Section 54-12-03, simply applied on its own without being read *in pari materia* with Chapter 44-11, mandates that the expenses incurred in prosecuting any case resulting from such an investigation will be paid by the county.

[¶50] If another hypothetical situation was at issue (i.e., the removal of officials other than county officials, or the removal of other officials not resulting from an attorney general investigation), the courts would have to wrestle with Chapter 44-11's silence without having another statute that expressly governs the circumstances here. But that hypothetical dilemma is not at issue here. In other words, the district court's refusal to read Section 54-12-03 *in pari materia* with Chapter 44-11 did not justify the district court's refusal to apply Section 54-12-03's express terms, standing on its own, to the circumstances involved in this case.

[¶51] After declining to apply Section 54-12-03's express terms to this case, the district court went on to examine whether an attorney-client relationship existed between the State or Ward County, and based its decision that the State was responsible for the payment of the Traynor Law Firm's services upon its conclusion that the attorney-client relationship in the Kukowski removal action was between the Traynor Law Firm and North Dakota, not Ward County. See Appellant's App. at 60-64. Respectfully, it was error for the district court to conflate the mere existence of an attorney-client relationship into a corresponding obligation to pay.

[¶52] Even assuming that an attorney-client relationship existed between the Traynor Law Firm and North Dakota rather than Ward County, the presence of that relationship does not necessarily equate with the conclusion that North Dakota should be the entity responsible for payment of the bill. Indeed, there are frequently circumstances where one entity has an obligation to pay for the legal services rendered by an attorney on another entity's behalf. The most common example is where the terms of an insurance contract obligate the insurer to pay the costs of defending its insured from suit; in such situations the attorney-client relationship is between the insured and the defending attorney – not between the insurer and attorney – but the insurer is nevertheless the entity responsible for paying for the attorney's services.

[¶53] To the extent a contract existed between the State and the Traynor Law Firm, there is no dispute that it existed as the result of the Governor's authority to make a statutory appointment pursuant to N.D.C.C. § 44-11-02(5)(a). In the absence of the appointment of such "other competent attorney," it would normally have been the Ward County state's attorney performing the services of a special prosecutor in the removal proceeding, that is, an employee paid by Ward County. State's attorneys act on the State's behalf even though paid by counties. Thus, it is not unusual that a county would pay for the services of a special prosecutor, even if acting on the State's behalf, following a gubernatorial appointment in a removal proceeding.

[¶54] In conflating the existence of an attorney-client relationship into an obligation to pay, the district court focused on the lack of Ward County's consent

to the Traynor Law Firm's statutory appointment and the lack of communication Ward County had with the Traynor Law Firm. See App. at 61-64. Section 54-12-03 does not, however, indicate that the County is entitled to a role in the selection of a special prosecutor, notice of the appointment, or that payment of expenses/fees is subject to the County's consent or consultation. Instead, Section 54-12-03 unequivocally requires a county to pay the "necessary expenses . . . in prosecuting any resulting case" in which the "attorney general may make an investigation in any county of this state to the end that the laws of the state shall be enforced therein[.]" It is undisputed that those statutory provisions apply to the circumstances present in this case, where the Attorney General's BCI investigation into inmate Irwin's death triggered both a criminal prosecution and a removal proceeding.

[¶55] The statutory authority to appoint does not necessarily trigger a corresponding obligation to pay. There are other circumstances where the legislature requires counties to pay for attorneys to prosecute cases without conditioning the payment obligation upon a county having a role in the selection of the attorney, advance notice of the appointment, a role in the negotiation of the fees, a contractual relationship with the attorney, or a county's agreement or consent to perform the services. See N.D.C.C. § 11-16-06(2) (permitting a judge of the district court to appoint an attorney "to take charge of [a] prosecution or [other] proceeding and fix the attorney's fee therefor" and requiring that "[t]he fee specified in the order shall be allowed by the board of county commissioners" without first requiring county consent or consultation); N.D.C.C. § 11-16-07

(similarly permitting a judge of the district court to "appoint special counsel to assist the state's attorney in any important case" and requiring "[t]he county for which the services were rendered" to "pay such special counsel a reasonable fee therefor to be approved by the court" without first requiring county consent or consultation). The State brought these statutes to the district court's attention, but the district court did not address them in its decision.

[¶56] Moreover, the legislature knows how to make the amount paid to an attorney employed by a county contingent upon a contractual relationship with the county when it sees fit. See N.D.C.C. § 11-16-08 (authorizing the "board of county commissioners, in cases of public importance" to "employ additional counsel to assist the state's attorney" and providing that "[s]uch counsel shall receive such compensation as may be agreed upon between the parties"). The State brought this statute to the district court's attention as well, but the district court did not address it in its decision.

[¶57] In the absence of any direction from the Legislature within Chapter 44-11 about who pays for the services of a special prosecutor in removal proceedings governed therein, Section 54-12-03 stands on its own in requiring counties to pay for all necessary expenses, including the attorney's fees of a special prosecutor appointed by the Governor.

CONCLUSION

[¶58] The State respectfully requests the Court to reverse the district court's *sua sponte* award of interest pursuant to N.D.C.C. § 47-14-05. In addition, in the absence of statutory authority to pay interest under Chapter 44-11, and consistent

with this Court's decision in Johnson that legal services do not fall within Section 13-01.1-01's reference to "business," the State respectfully requests that the Court decline to award interest pursuant to Chapter 13-01.1; the State also respectfully requests that the Court decline to award the contract interest rate unilaterally set forth on the Traynor Law Firm's invoice absent a pre-existing retainer agreement authorizing such interest. Finally, the State respectfully requests the Court to reverse the district court's judgment against the State and direct that judgment be entered against Ward County instead.

Dated this 22nd day of January, 2020.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Traynor Law Firm, PC, Plaintiff, Appellant and Cross-Appellee, v. State of North Dakota, c/o Governor Doug Burgum; Defendant, Appellee and Cross-Appellant, and The Board of Ward County Commissioners, Defendant and Appellee.	**CERTIFICATE OF COMPLIANCE** **Supreme Ct. No. 20190310** **Civil No. 51-2019-CV-00532**

[¶1] The undersigned certifies pursuant to N.D.R.App.P. 32(a)(8)(A), that the Brief of Appellee and Cross-Appellant contains 30 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 word processing software in Arial 12 point font.

Dated this 22nd day of January, 2020.

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[¶1] I hereby certify that on January 29, 2020, a **MOTION FOR EXTENSION OF TIME TO FILE BRIEF OF APPELLEE AND CROSS-APPELLANT, BRIEF OF APPELLEE AND CROSS-APPELLANT and CERTIFICATE OF COMPLIANCE** were filed electronically with the Supreme Court through the E-Filing Portal and served on David A. Owens at davidowens@traynorlaw.com, Howard Swanson at hswanson@swlawltd.com and Jonathon Yunker at jackyunker@traynorlaw.com.

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