

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

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Traynor Law Firm, PC,	)	
	)	
Plaintiff, Appellant, and Cross-Appellee,	)	<b>SUPREME COURT NO. 2019-0310</b>
	)	
vs.	)	
	)	<b>CIVIL NO. 51-2019-CV-00532</b>
State of North Dakota, c/o Governor	)	
Doug Burgum;	)	
	)	
Defendant, Appellee, and Cross-Appellant	)	<b>ORAL ARGUMENT WAIVED</b>
	)	
and	)	
	)	
The Board of Ward County Commissioners,	)	
	)	
Defendant and Appellee.	)	

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**Appeal from Judgment dated August 15, 2019  
Ward County District Court, North Central Judicial District  
The Honorable Gary H. Lee**

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**BRIEF OF DEFENDANT AND APPELLEE  
BOARD OF WARD COUNTY COMMISSIONERS**

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## **STATEMENT OF LEGAL ISSUES**

¶1 Whether NORTH DAKOTA CENTURY CODE Chapter 44-11 imposes an obligation upon a county to pay the fees of an attorney appointed by the Governor for prosecution of proceedings for the removal of a public official?

¶2 Whether NORTH DAKOTA CENTURY CODE Chapter 54-12 requires a county to pay the fees of an attorney appointed by the Governor for prosecution of proceedings for the removal of a public official pursuant to N.D.C.C. Ch. 44-11?

¶3 Whether Ward County is contractually obligated to pay for attorney's fees incurred by the Governor for the removal of the Ward County Sheriff?

## **STATEMENT OF THE CASE**

¶4 The Traynor Law Firm (hereinafter referred to as "Traynor") initiated this litigation against the State of North Dakota and Ward County seeking to recover unpaid attorney's fees which were incurred in proceedings by the Governor to remove Ward County Sheriff, Steven Kukowski, from office. The State of North Dakota responded to Traynor's Complaint by filing a Motion to Dismiss. Ward County filed an Answer to Traynor's Complaint and asserted a Cross-Claim against the State of North Dakota. Ward County denied that it had any obligation to make payment for the attorney's fees incurred at the direction of the Governor. Both Ward County and Traynor opposed the State's Motion to Dismiss. The State also moved to dismiss Ward County's Cross-Claim. Traynor filed a Motion for Judgment on the Pleadings. Following a hearing before the Honorable Gary Lee, the Court dismissed Traynor's claims against Ward County and ordered the entry of Judgment in favor

of Traynor and against the State of North Dakota in the amount of \$50,033.99. The Judgment also provided for an award of interest in the amount of 6% per annum from and after June 1, 2017.

¶5 Traynor appealed from the Judgment on the basis that the trial court's determination of applicable interest was in error. The State of North Dakota Cross-Appealed from the trial court's Order dismissing Traynor's claims against Ward County.

### **STATEMENT OF THE FACTS**

¶6 Following the death of an inmate in the custody of the Ward County Sheriff, the North Dakota BCI initiated an investigation into the inmate's treatment while in the custody of the Ward County Sheriff. (App. 46).

¶7 Divide County State's Attorney Seymour Jordan was appointed by Ward County State's Attorney Rozanna Larson to act as Special Assistant Ward County State's Attorney to prosecute criminal charges against Ward County Sheriff, Steven Kukowski. (App. 47, Appellee App. 3).

¶8 On February 16, 2016, Special Assistant Ward County State's Attorney Jordan filed criminal charges against Ward County Sheriff, Steven Kukowski in North Central Judicial District, Ward County. *State v. Romanick*, 2017 ND 42, 890 N.W.2d 903. (App. 47).

¶9 On February 26, 2016, Special Assistant Ward County State's Attorney Jordan filed a Petition (Complaint) for the removal of Sheriff Kukowski from office pursuant to N.D.C.C. §44-11-02. (App. 47, Appellee's App. 8).

¶10 On June 17, 2016, Attorney General Stenehjem recommended to Governor

Dalrymple that the Governor appoint a special commissioner to hear the case against Sheriff Kukowski, and to appoint attorney Jordan as Special Prosecutor in the removal proceedings. Stenehjem further recommended the suspension of Sheriff Kukowski while the removal proceedings moved forward. (App. 48, Appellee's App. 16).

**[¶11]** On June 17, 2016, Governor Dalrymple appointed H. Patrick Weir as Special Commissioner, and Seymour Jordan as Special Prosecutor in the removal proceedings. (App. 48, Appellee's App. 19). The Governor also sent a letter to Sheriff Kukowski informing him of the interim suspension from his position. (App. 48, Appellee's App. 17). A copy of the letter was also sent to Ward County. *Id.* The appointment of Seymour Jordan as Special Prosecutor to prosecute the removal proceedings on behalf of the office of the Governor was independent of and separate from Mr. Jordan's appointment to act as a Special Assistant Ward County State's Attorney. (Appellee's App. 18 and 20). All of the action taken by Governor Dalrymple was expressly based upon the provisions of N.D.C.C. Ch. 44-11. At no time was Jordan appointed as a Special Assistant Attorney General. (Appellee's App. 17, 18, 19, 20).

**[¶12]** On March 6, 2017, attorney Jordan submitted a request to Governor Burgum to withdraw as Special Prosecutor in the removal proceedings due to time constraints and his case load. Mr. Jordan continued to serve as Special Assistant Ward County State's Attorney prosecuting the criminal charges against Sheriff Kukowski. (App. 48, Appellee's App. 58),

**[¶13]** On March 10, 2017, Governor Burgum appointed Daniel Traynor to act as a Special Prosecutor in the removal proceedings, replacing Seymour Jordan. Governor Burgum expressly stated that such appointment was based upon the provisions of N.D.C.C. Ch. 44-

11. (App. 7 and 48). No copy of the appointment of Daniel Traynor as Special Prosecutor in the removal proceedings was sent to any representative of Ward County. Daniel Traynor was not appointed as a special attorney general. Ward County received no notice of the Governor's appointment of Daniel Traynor as Special Prosecutor in the removal proceedings. Ward County had no role in the selection of Mr. Traynor as the Governor's Special Prosecutor in the removal proceedings. There was no communication between the Governor and Ward County regarding the appointment of Mr. Traynor. There was no communication between Traynor Law Firm and Ward County regarding the appointment of Mr. Traynor as the Governor's Special Prosecutor for the removal proceedings or regarding any fees incurred in that capacity. Traynor was not appointed or designated as a special assistant state's attorney by the Ward County State's Attorney. The Ward County State's Attorney was not consulted with or involved in the appointment of Mr. Traynor as the Governor's Special Prosecutor for the removal proceedings, or with respect to any fees incurred in that capacity. (Appellee's App. 3 and 57).

**[¶14]** Ward County had no role in the discussion or negotiation of fees for Mr. Traynor's services as the Governor's Special Prosecutor. Ward County had no knowledge of any negotiation of fees between Governor Burgum and Mr. Traynor. Ward County had no contractual relationship with Mr. Traynor in his role as the Governor's Special Prosecutor. Any agreement regarding legal services for prosecution of the removal proceedings was reached between the Governor and Daniel Traynor. Ward County had no agreement with the Governor's office with respect to payment of Mr. Traynor's fees. (Appellee's App. 3 and 57).

**[¶15]** Ward County received no notice from the Governor, the Attorney General or Mr.



Traynor of any expectation or obligation of the County to pay for services of Mr. Traynor as the Governor's Special Prosecutor for the removal proceedings. (Appellee's App. 3 and 57).

¶16 Ward County never consented to or agreed that it would be responsible for the payment of fees to Daniel Traynor for services provided in the removal proceedings. (Appellee's App. 3 and 57).

¶17 Ward County was not a party to the Governor's removal proceedings. (Appellee's App. 3 and 57).

¶18 Daniel Traynor assumed the responsibility of prosecuting the Governor's action to remove Sheriff Kukowski from office and provided legal services through the conclusion of the removal proceeding under the express authority of N.D.C.C. Ch. 44-11. Traynor had no contact with Ward County regarding the removal process. Traynor had no role in the criminal prosecution. (Appellee's App. 57).

¶19 Traynor had no involvement with the criminal prosecution of Steven Kukowski. Ward County Special Assistant State's Attorney Jordan, acting under the special appointment by the Ward County State's Attorney, prosecuted the criminal charges. (Appellee's App. 57).

¶20 After the removal process was concluded Traynor submitted its bill for services and costs in the principal amount of \$50,033.99. (Appellee's App. 25). The statement was submitted by Traynor directly to the Governor's office, and not to Ward County. (Appellee's App. 25 and 56). The Governor subsequently sent the bill to Ward County for payment. (Appellee's App. 56). Ward County returned the bill to the Governor's office declining to pay the statement. (Appellee's App. 57).

¶21 The itemized billing statement of Mr. Traynor and Traynor Law Firm, PC for services

as the Governor's Special Prosecutor is in the name of Governor Doug Burgum and the State of North Dakota. (Appellee's App. 25).

¶22 Traynor initiated this action to recover payment of its fees and costs, plus interest at the rate of 1½% per month. (App. 41).

¶23 A hearing was held on June 7, 2019 on the State's Motion to Dismiss Traynor's Complaint and Traynor's Motion for Judgment upon the Pleadings. Judge Lee treated the Motions as summary judgment motions under N.D.R.Civ.P. 56. The parties agreed that there were no questions of disputed fact and that the matters before the court were questions of law only. (App. 45 and App. 67).

¶24 On August 12, 2019, Judge Lee entered an Order granting Judgment in favor of Traynor and against the State in the principal amount of \$50,033.00, plus interest at the rate of 6% per annum from and after June 1, 2017. Judge Lee dismissed Traynor's claims against Ward County. (App. 67).

¶25 Judgment in favor of Traynor and against the State of North Dakota, and dismissal of Traynor's claims against Ward County was entered on August 15, 2019. (App. 69).

¶26 Traynor's Appeal followed. (App. 75). The State of North Dakota filed a notice of Cross-Appeal. (App. 77).

#### **STANDARD OF REVIEW**

¶27 Whether a trial court properly grants summary judgment is a question of law which is subject to de novo review on the entire record. *Wahl v. Country Mut. Ins. Co.*, 2002 ND 42 ¶6, 640 N.W.2d 689.

## LAW AND ARGUMENT

**1. NORTH DAKOTA CENTURY CODE Chapter 44-11 does not impose an obligation upon a county to pay the fees of an attorney appointed by the Governor for prosecution of proceedings for the removal of a public official.**

[¶28] NORTH DAKOTA CENTURY CODE Chapter 44-11 vests the governor with the exclusive legal authority to remove any county commissioner, sheriff, coroner, county auditor, recorder, state's attorney, county treasurer, superintendent of schools, county commissioner, surveyor, public administrator, city auditor, city commissioner, mayor, township officer, rural fire protection district board member, school board member, or any custodian of public monies, except the state treasurer. (N.D.C.C. § 44-11-01). Removal can occur when the governor determines by a preponderance of the evidence that the public officer is blameworthy of misconduct, malfeasance, crime in office, neglect of duty in office, or of habitual substance abuse or gross incompetency. *Id.* Criminal prosecution is not required for the removal of a public official. No other official or public entity has the authority to order such removal from office. The attorney general has a limited role in a removal proceeding. (N.D.C.C. § 44-11-02(1) and (4)).

[¶29] N.D.C.C. § 44-11-10 expressly provides that certain fees and expenses incurred in a removal proceeding will be paid by a party other than the governor. These fees and expenses are limited to a special commissioner, stenographer and witnesses. N.D.C.C. § 44-11-10 does not impose any obligation upon the county or any other third party for the payment of attorney's fees for services rendered in the prosecution of a removal petition if the governor elects to utilize counsel outside of the state's attorney. Section 44-11-02(5)(a)

states that "[w]hen the officer sought to be removed is other than the state's attorney, the state's attorney or other competent attorney, upon request of the governor, shall appear and prosecute." Thus, it is clear that the legislature contemplated a situation where an attorney other than the state's attorney would engage in the prosecution of removal proceedings on appointment by the governor. However, unlike fees for the special commissioner, stenographer, and required witnesses, the legislature did not adopt any requirement obligating a third party to pay for the services of outside counsel procured by the governor. (*See* N.D.C.C. §44-11-10).

**¶30** In the course of the Kukowski removal proceedings under N.D.C.C. Ch. 44-11, the Governor's office was clearly aware of what "expenses" would be the responsibility of Ward County. In correspondence dated July 19, 2016 to Karen Klein, the Special Commissioner, the Governor's office specifically advised her that pursuant to N.D.C.C. § 44-11-10 she was to report the expenses for "daily pay, mileage, and the cost of a stenographer, so that the Governor's office may audit and allow those payments, and so that the cost may then be submitted to the Board of County Commissioners for payment." (Appellee's App. 22). This correspondence is limited to those expenses enumerated in N.D.C.C. § 44-11-10. There is no discussion or contemplation that the Governor would be submitting a bill for attorney's fees to the County Commissioners for payment.

**¶31** This Court has repeatedly instructed that "the law is what the Legislature says, not what is unsaid." *Little v. Tracy*, 497 N.W.2d 700,705 (N.D. 1993)(citing *In re Tp. 143 North, Range 55 West in Cass County*, 183 N.W.2d 520 (N.D.1971)); *see also Sanderson v. Walsh County*, 2006 ND 83, ¶16, 712 N.W.2d 842,848 (citing *Zueger v. North Dakota*

*Workers Compensation Bureau*, 1998 ND 175, ¶11, 584 N.W.2d 530). In construing the meaning of a statute, this Court has also stated that the mention of one item implies exclusion of another. *Id.* In *City of Dickinson v. Thress*, this Court explained that:

It must be presumed that the Legislature intended all that it said, and that it said all that it intended to say. The Legislature must be presumed to have meant what it has plainly expressed. It must be presumed, also, that it made no mistake in expressing its purpose and intent. Where the language of a statute is plain and unambiguous, the "court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning, and cannot be extended beyond it.

69 N.D. 748, 290 N.W. 653, 657 (1940) (citations omitted). Where the legislature has remained silent, it must be presumed that the legislature said all that it intended to say. *Id.*

¶32] Where the legislature intended for the county to bear the fees of an individual appointed by the governor to aid in the execution of the removal proceedings, namely the special commissioner, stenographer, or witnesses, the legislature specifically expressed this intention. *See* N.D.C.C. §44-11-10. However, there is nothing contained within Chapter 44-11 that expressly imposes an obligation upon Ward County to pay the attorney's fees of the Traynor Law Firm which were incurred in the Governor's removal proceedings, nor is there anything contained within Chapter 44-11 that even suggests that the legislature intended that Ward County or any third party is responsible to pay the fees of a private attorney appointed by the Governor to prosecute a removal proceeding. Further, there is nothing contained within the provisions of Chapter 44-11 indicating that the legislature intended to rely upon the provisions of N.D.C.C. Ch. 54-12, or any other statutory provision, to impose an obligation upon a county to pay for such attorney's fees.

¶33] The State argues that the attorney's fees incurred in the course of the Governor's removal proceedings are not the responsibility of the Governor or the State of North Dakota, but rather are the obligation of Ward County. The State relies upon several statutory provisions that are completely unrelated to a removal proceeding under N.D.C.C. Ch. 44-11. The State relies upon a statute awarding attorney's fees to a prevailing party in a stockholder derivative action (N.D.C.C. § 10-15-56); the ability of the court to award attorney's fees to nonprofit members successfully challenging actions of a nonprofit corporation (N.D.C.C. § 10-33-81); the provision of an attorney for indigent habeas corpus applicants (N.D.C.C. § 29-32.1-05); and attorney's fees following an offer to correct a defamatory statement (N.D.C.C. § 32-43-08). The State also argues that the provisions of N.D.C.C. § 11-16-06 supports their conclusion. However, under the provisions of §§ 11-16-06, 11-16-07 and 11-16-08, the legislature expressly included specific requirements for a county to pay for fees of an attorney appointed to act on behalf of a state's attorney. An objective reading of these statutes make it clear that where the legislature intended for a county or another entity to pay the fees of an attorney appointed by a third party, or where attorney's fees are to be awarded as part of a successful prosecution, the legislature has expressly so provided. The statutory provisions relied upon by the State are inapplicable to the facts at hand or the interpretation of N.D.C.C. Ch. 44-11. When the legislature makes no express provision for payment of attorney's fees, such as in N.D.C.C. Ch. 44-11, it cannot be presumed that the legislature intended anything other than what was plainly stated in the statute. *City of Dickinson v. Thress*, 69 N.D. 748, 290 N.W. 653, 657 (1940).

[¶34] No provision of Chapter 44-11 requires a county to pay for the fees of an attorney appointed by the governor to act on the governor's behalf in the removal proceedings. Because the legislature did not adopt any provision requiring a county to bear responsibility for the payment of attorney fees incurred under the provisions of Chapter 44-11, it must be concluded that the legislature did not intend for such obligation to exist. *City of Dickinson v. Thress*, 69 N.D. 748, 290 N.W. 653, 657 (1940). In this case, the State of North Dakota, acting through the Governor, is responsible for the payment of Traynor's fees.

**2. NORTH DAKOTA CENTURY CODE Chapter 54-12 does not require a county to pay the fees of an attorney appointed by the Governor for prosecution of proceedings for the removal of a public official pursuant to N.D.C.C. Ch. 44-11.**

[¶35] The State appears to concede that N.D.C.C. Ch. 44-11 does not impose an obligation upon Ward County to pay for the Traynor fees incurred in the removal proceeding, however, it argues that N.D.C.C. §54-12-03 requires the county to pay for such fees.

[¶36] N.D.C.C. §54-12-03 states as follows:

The attorney general may make an investigation in any county in this state to the end that the laws of the state shall be enforced therein and all violations thereof brought to trial, when:

1. The attorney general deems it necessary for the successful enforcement of the laws of the state in such county;
2. Requested by a majority of the members of the board of county commissioners of the county; or
3. Petitioned by twenty-five taxpaying citizens of the county.

The necessary expenses incurred in making the investigation or in prosecuting any resulting case, as determined by the attorney general and not otherwise specifically provided by law, must be paid by the county out of the state's attorney's contingent fund. All such expenses paid from the state's attorney's contingent fund must be paid by the county treasurer upon the

warrant of the county auditor. The warrant must be executed and delivered by the auditor in an amount and to the person designated therein upon the written order of the attorney general.

This statute simply does not apply to a removal proceeding under N.D.C.C. Ch. 44-11.

**[¶37]** First, there was no action undertaken by the Attorney General for the enforcement of any statutory violation or for the enforcement of the laws of the state. The criminal proceeding was actually initiated under the authority of the Ward County State's Attorney by the Special Assistant State's Attorney, Seymour Jordan. There was no request by a majority of the members of the Board of County Commissioners of Ward County for the Attorney General to act, nor was there any petition submitted by twenty-five tax paying citizens of the county seeking involvement of the Attorney General.

**[¶38]** It is also uncontroverted that the Attorney General did not initiate, conduct or direct the Governor's removal proceedings under N.D.C.C. Ch. 44-11. At most, the BCI's criminal investigation report was relied upon by Special Assistant State's Attorney Seymour Jordan to initiate the criminal proceedings. The record does not demonstrate that the BCI's criminal investigation report was provided to the Governor at any time during the removal proceedings. (Appellee's App. 11 and 16). The attorney general has no authority under either N.D.C.C. Ch. 44-11 or N.D.C.C. Ch. 54-12 to remove a sheriff, or other public official, from office. Furthermore, the removal proceedings do not involve a "trial" as required by N.D.C.C. § 54-12-03.

**[¶39]** N.D.C.C. §54-12-03 requires a "written order of the attorney general" for the county auditor to pay expenses incurred by the attorney general. No such written order by the



Attorney General was ever issued. The request to Ward County for the payment of the legal services came from Governor Burgum, not the Attorney General. (Appellee App. 56). The legal services provided by Traynor were arranged by the Governor under the authority of N.D.C.C. Ch. 44-11. Such services were not provided for or on behalf of the Attorney General, and clearly were not obtained under the authority of N.D.C.C. Ch. 54-12. (App. 7).

**[¶40]** While N.D.C.C. § 54-12-03 provides for the payment of “expenses” related to an investigation or prosecution by the attorney general, that simply did not occur in this matter. The Attorney General did not initiate the proceedings, nor did he order the removal of the sheriff. All such actions were undertaken by the Governor pursuant to N.D.C.C. Ch. 44-11. The Attorney General did not prosecute the removal proceedings, nor did the Attorney General appoint the Traynor Law Firm to pursue any form of proceedings. Daniel Traynor was appointed as a “Special Prosecutor” by Governor Burgum. The appointment of Daniel Traynor as “Special Prosecutor” was expressly limited to the removal proceeding against Ward County Sheriff Steven Kukowski and was expressly made “pursuant to North Dakota Century Code Section 44-11.” (App. 7). If Traynor was in fact acting under the authority of N.D.C.C. Ch. 54-12, any such action was undertaken without legal authority as he was not appointed as a special assistant attorney general by Attorney General Stenehjem as required by N.D.C.C. §54-12-08. The appointment as a “Special Prosecutor” is not the same appointment as a “special assistant attorney general”.

**[¶41]** To further demonstrate that the Governor’s actions were not based upon N.D.C.C. Ch. 54-12 or the authority of the Attorney General, Mr. Traynor was advised by Governor Burgum to consult with the Governor’s legal counsel, Leslie Bakken Oliver, in the event he

should have any questions or concerns, not the Attorney General. (App. 7). Similarly, prior to the action taken by Governor Burgum, Governor Dalrymple appointed Seymour Jordan as Special Prosecutor. Notice of his appointment was given to the Ward County Board of County Commissioners and they were advised to contact the Governor's legal counsel, Bonnie Storbakken, if they had any questions or concerns, not the Attorney General. (Appellee's App. 20). These actions by both Governors demonstrate that the removal proceedings were being undertaken by the Governor pursuant to N.D.C.C. Ch. 44-11 and not the Attorney General. Furthermore, these actions by the Governors demonstrate that N.D.C.C. Ch. 54-12 was not contemplated and does not apply.

**[¶42]** Not a single pleading, document, or correspondence generated in the removal proceedings included any reference to N.D.C.C. Ch. 54-12, including those created or produced by the attorney general. The application of N.D.C.C. Ch. 54-12 was not raised until the State sought to defend against Traynor's Complaint. There is no basis to conclude that the State even believed N.D.C.C. Ch. 54-12 applied until the State sought to avoid paying Traynor's legal fees. N.D.C.C. Ch. 54-12 governs the action of the North Dakota Attorney General. N.D.C.C. Ch. 44-11 governs the exclusive authority of the governor to remove a public official. Neither Ch. 54-12 nor Ch. 44-11 refer to the other. The provisions of N.D.C.C. Ch. 54-12 are inapplicable and are both legally and factually irrelevant to the issues which underlie the Plaintiff's claims in this matter.

**[¶43]** The trial court appropriately analyzed whether N.D.C.C. Ch. 44-11 is subject to or must be read in conjunction with N.D.C.C. § 54-12-03. (App. 45). The trial court clearly explained that there is no legislative, legal, or practical reason why the statutes must be read

together. Each statutory scheme is independent of the other. These two statutory schemes were not passed by the same legislature or in the same session, nor do they deal with the same subject matter. There is nothing to support an argument that the legislature intended these statutes to be read together to impose an obligation upon a county to pay for attorney's fees of an attorney selected by the governor to act in removal proceedings conducted pursuant to N.D.C.C. Ch. 44-11. (App. 56-59).

**[¶44]** The State's argument, if adopted, would lead to absurd results. The provisions of N.D.C.C. Ch. 44-11 allow a governor to remove public officials from a county, school board, city, township, or other governmental entities. Yet, however, the State's argument that N.D.C.C. Ch. 54-12 applies to a removal proceeding would require the county to be responsible for attorney's fees in any removal proceeding involving a school board, municipality, township, rural fire protection district, or other governmental entity. It is simply absurd to argue that the county is liable to pay for attorney's fees in the event of a removal of an official from a city, school district, or township. There is nothing contained within N.D.C.C. Ch. 44-11 that would suggest that the legislature intended such a result. As the trial court noted, "all other governmental entities would get a free pass." (App. pg. 59).

**[¶45]** In addition to leading to an absurd result, the acceptance of the State's argument concerning the application of N.D.C.C. Ch. 54-12 would create a direct conflict between the provisions of N.D.C.C. § 44-11-10 and N.D.C.C. Ch. 54-12. Under N.D.C.C. § 44-11-10, the respective governmental unit is expressly obligated to pay such expenses, not the county. However, the State's argument that N.D.C.C. Ch. 54-12 requires the County to pay such expenses alters the ultimate responsibility and creates a direct conflict in the application of

N.D.C.C. § 44-11-10.

¶46] The State has failed to identify any statutory provision obligating Ward County to pay for the attorney fees incurred by the Governor for the removal of Sheriff Kukowski pursuant to the Governor's official acts under N.D.C.C. Ch. 44-11. Any argument by the State that the provisions of N.D.C.C. Ch. 54-12 remove any liability of the State for the payment of attorney's fees incurred in a governor's removal proceeding is unpersuasive. The State's reliance upon Chapter 54-12 in this matter is misplaced.

**3. Ward County has no contractual obligation to pay for attorney's fees incurred by the Governor for the removal of the Ward County Sheriff.**

¶47] A contract is an agreement, either written or oral, to do or not to do a certain thing. N.D.C.C. §9-01-01. The elements of a contract include the consent of the parties and sufficient consideration. N.D.C.C. §9-01-02. An obligation or legal duty to perform either arises from a contract of the parties or by operation of law. N.D.C.C. §9-01-05. The absence of consent or consideration is fatal to any contract obligation. In other words, without a "meeting of the minds," no contract exists upon which an obligation may be enforced. Consent must be free, mutual and communicated by each party to the agreement to the other. N.D.C.C. §9-03-01. Mutual consent requires the parties to all agree upon the same thing in the same sense. N.D.C.C. §9-03-16. Consent must be communicated and accepted by the parties. N.D.C.C. §9-03-17 and §9-03-18. Without communication and acceptance, no contract is created.

**[¶48]** Judge Lee properly analyzed whether any contractual arrangement existed between the State, by and through the Governor, and Ward County. (App. 60-64) Judge Lee correctly determined that there were no facts supporting any contract relationship or obligation under which Ward County was required to pay for the attorney's fees incurred by the Governor during the course of the proceedings to remove Sheriff Kukowski from office. Ward County expressly denied that it had entered into any contractual relationship with the State to pay for legal services for the removal proceedings relating to Sheriff Kukowski.

**[¶49]** Judge Lee also properly analyzed whether there was any contractual arrangement existing between Ward County and the Traynor Law Firm. Judge Lee correctly determined that there were no facts supporting any contractual relationship or obligation under which Ward County was required to make payment to the Traynor Law Firm for services provided following appointment by the Governor. Ward County expressly denied that it had entered into any contractual relationship with the Traynor Law Firm to provide legal services for the removal proceedings relating to Sheriff Kukowski or for the payment of any such attorney's fees.

**[¶50]** Judge Lee not only determined that there was no basis to conclude that there was a contractual relationship between Ward County and the Traynor Law Firm or Ward County and the State of North Dakota, Judge Lee also analyzed whether a contract or quasi contract may have existed as a result of an attorney/client relationship having been created between Ward County and the Traynor Law Firm. (App. 45). Judge Lee properly concluded that not only was there no basis supporting a conclusion that there was a contractual obligation imposed upon Ward County to pay the attorney's fees of the Traynor Law Firm, Judge Lee

also properly concluded that there was no attorney/client relationship between Ward County and the Traynor Law Firm. Consequently, Ward County was not obligated, contractually, statutorily or otherwise to pay the attorney's fees sought by the Traynor Law Firm.<sup>1</sup>

### **CONCLUSION**

¶51 For the reasons set forth above, Board of Ward County Commissioners respectfully requests that this Court affirm the Trial Court Judgment dismissing the claims by the Traynor Law Firm, P.C. against the Board of Ward County Commissioners.

Dated: February 19, 2020

*/s/ Howard D. Swanson*

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<sup>1</sup>The State argues that under an insurance policy an insurance company has an obligation to pay for attorney's fees incurred in the defense of an insured even though the insurance company is not part of the attorney/client relationship. ("The most common example is where the terms of an insurance contract obligate the insurer to pay . . ." (Emphasis added). Brief of Appellee and Cross-Appellant ¶52) This argument has no relevance and is not analogous to the facts in this case. The relationship among the insurance company, the insured, and the attorney is based upon an expressed contract of insurance. The contractual obligation imposed by a policy of insurance does not exist in the situation at hand. The insurance scenario is simply not applicable nor persuasive. There is no basis to conclude that there was any form of a contractual relationship or obligation imposed upon the County to pay Traynor's fees.

**CERTIFICATE OF COMPLIANCE**

[¶52] The undersigned hereby certifies, in compliance with N.D.R.App.P. 32(e) that the above Brief of Defendant and Appellee Board of Ward County Commissioners complies with the page limitation set forth in Rule 32(a)(8)(A) N.D.R.App.P. I further certify that the total number of pages in the Brief of Defendant and Appellee Board of Ward County Commissioners, excluding the Certificate of Service, totals 23 pages.

Dated: February 19, 2020

/s/ Howard D. Swanson

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**STATEMENT ON REQUEST FOR ORAL ARGUMENT**

[¶53] Defendant and Appellee, Board of Ward County Commissioners, waives oral argument in this matter.

**CERTIFICATE OF SERVICE**

[¶54] I hereby certify that on the 19<sup>th</sup> day of February, 2020, a true and correct copy of the **BRIEF OF DEFENDANT AND APPELLEE BOARD OF WARD COUNTY COMMISSIONERS** was filed electronically with the Supreme Court through the E-Filing Portal and served on the following:

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