

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

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

HONORABLE GARY H. LEE

REPLY BRIEF OF APPELLEE AND CROSS-APPELLANT

State of North Dakota
Wayne Stenehjem
Attorney General

By: James E. Nicolai
Deputy Solicitor General
State Bar ID No. 04789
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Email jnicolai@nd.gov

Attorneys for Appellee and Cross-Appellant.

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LAW AND ARGUMENT

I. **Chapter 44-11's silence on who pays the fees of a special prosecutor is not controlling, because the chapter also imposes no obligation to pay upon the Governor.**

[¶1] Cross-appellee Ward County contends it is not obligated to pay the fees of a special prosecutor in a Ward County removal proceeding because Chapter 44-11 is silent on the issue. But Chapter 44-11, likewise, says nothing to indicate the Governor is obligated to pay a special prosecutor's fees. The removal statutes are silent as to both the Governor and Ward County. Thus, Ward County's reliance on the line of cases regarding the Legislature's silence, see, e.g., Little v. Tracy, 497 N.W.2d 700, 705 (N.D. 1993), does not resolve the dispute about who must pay the fees. If the Legislature's silence controls, the State and Ward County could not be treated consistently; the silence would benefit one party but unfairly burden the other.

[¶2] Implicit in Ward County's argument is the premise that the Governor's appointment should be the controlling factor, rather than the fact that the removal proceeding involves a Ward County matter. But Ward County cites no provision in the Century Code that indicates a gubernatorial appointment, standing alone, triggers an obligation to pay. The State provided examples of legislative enactments where the power to appoint is distinct from the obligation to pay. See N.D.C.C. §§ 11-16-06, 11-16-07 (authorizing a district court judge to appoint an attorney or special counsel to perform a state's attorney's functions, but without imposing a corresponding obligation to pay upon the state courts). These statutes demonstrate that the Governor's authority to appoint does not, standing alone, impose an obligation to pay.

[¶3] Chapter 11-16 also demonstrates that counties are generally responsible for paying for another attorney's services when "it is necessary that some act be performed" under circumstances where "the state's attorney is . . . unable to attend to the state's attorney's duties[.]" N.D.C.C. § 11-16-06. In fact, when Chapter 11-16 and 44-11 are read together, three points are evident.

[¶4] The first is that a state's attorney acts on behalf of the state in performing duties outside the removal context, and yet is paid by the county. See N.D.C.C. § 11-16-01(1) ("The state's attorney is the public prosecutor, and shall . . . *conduct on behalf of the state* all prosecutions for public offenses.") (emphasis added). The second point is that a state's attorney can act on behalf of the state in performing duties within the removal context upon the governor's request, and yet is still paid by the county. See N.D.C.C. § 44-11-02(5)(a) ("When 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.*") (emphasis added). The third point, gleaned from the same statutory provision, is that a special prosecutor, upon the Governor's request, performs the same functions that a state's attorney would in a removal proceeding.

[¶5] Is it unreasonable, then, to conclude Ward County should pay Traynor for performing duties a state's attorney would have otherwise performed in a Ward County removal proceeding? The Governor's appointment simply serves as the means by which Traynor performed those same duties. Stated another way, in light of Chapter 44-11's silence, the controlling issue should be the fact that the special prosecutor performs duties that would otherwise be performed by a Ward

County employee acting on behalf of the state, but paid by the County.

II. Chapter 54-12's express language answers the question left unresolved by Chapter 44-11's silence.

[¶6] Although Chapter 44-11 is silent about who pays the fees of a special prosecutor appointed by the Governor, the express language of Chapter 54-12 is not. It is undisputed that the removal proceeding against Ward County Sheriff Kukowski arose out of an attorney general investigation conducted by the Bureau of Criminal Investigation (BCI). It is further undisputed that Section 54-12-03 states the “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's contingent fund.” (Emphasis added).¹

[¶7] Ward County argues this statutory provision does not apply because none of the three conditions set forth in subsections (1), (2), or (3) of the statute were satisfied. See Cross-Appellee Ward County's Br. at ¶ 37. Ward County's argument that “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,” id., is inaccurate. The action undertaken by the Attorney General was the investigation itself, to determine whether Sheriff Kukowski violated any laws of the state. Indeed, the statutory language clearly indicates that the investigation is the relevant event linked to the three conditions set forth therein, not a subsequent

¹ In its principal brief, the State argued about the significance of Section 54-12-03's use of the word “any” to indicate that *all* prosecutions are covered by that section, when contrasted with Section 54-12-04's language limiting its application to “criminal matters.” See Appellee and Cross-Appellant's Br. at ¶ 40. Ward County's brief did not respond to that argument.

criminal or removal prosecution. See N.D.C.C. § 54-12-03 (“The attorney general may make an investigation . . . when . . . [t]he attorney general deems it necessary for the successful enforcement of the laws of the state in such county[.]”). Thus, the fact that the subsequent criminal proceeding was initiated by someone other than the Attorney General is of no moment. Also irrelevant is the fact that the investigation was not requested by a majority of the members of the Board of County Commissioners, or petitioned by twenty-five taxpaying citizens of the county, because the three conditions that can trigger an investigation are expressed in the disjunctive.

[¶8] Ward County argues that the Attorney General did not initiate, conduct, or direct the removal proceedings. See Cross-Appellee Ward County’s Br. at ¶ 38. But the event that triggers application of Section 54-12-03’s expense-paying provisions is the Attorney General’s investigation; the statute does not require that the Attorney General initiate, conduct, or direct the prosecution of any resulting case. Nor does the statute require that the BCI’s report be provided to the Governor, or that the Legislature have cloaked the Attorney General with authority to remove a sheriff, or other public official, from office. And finally, the Court should reject the County’s argument that there must be an actual “trial” to trigger the expense-paying provisions of Section 54-12-03. Although the Legislature expressed a desire (i.e., “to the end”) that “all violators thereof [be] brought to trial” when describing the purpose of the Attorney General’s investigation, it used the broader phrase “any resulting case” to describe the event that would trigger the county’s obligation to pay the necessary expenses arising from an investigation.

N.D.C.C. § 54-12-03.

[¶9] Ward County also argues that Section 54-12-03 requires a “written order of the attorney general.” See Cross-Appellee Ward County’s Br. at ¶ 39. But the purpose of that provision seems to be limited to notifying a county of the identity of the person owed the expenses. Here, it is undisputed that the Governor sent Traynor’s bill to Ward County for payment, see Appellant’s Br. at ¶ 14, and thus Ward County already knew the identity of the person who had incurred expenses.

[¶10] Ward County next argues that Traynor was not appointed as a special assistant attorney general (SAAG) under Section 54-12-08, and that the removal proceeding was not conducted under the authority of the Attorney General. See Cross-Appellee Ward County’s Br. at ¶¶ 40-41. But Section 54-12-03 does not require a SAAG appointment to trigger its expense-paying provisions. Nor does the state require the removal proceeding to be conducted by the Attorney General. It is undisputed that the Chapter 44-11 removal proceeding was triggered by an investigation conducted pursuant to Chapter 54-12, and the removal proceeding clearly constitutes a “resulting case” that was prosecuted as a result of that investigation into Ward County Sheriff Kukowski’s wrongdoing.²

III. Ward County’s obligation to pay the special prosecutor’s fees is statutory, and therefore does not require a contract.

[¶11] Finally, Ward County contends there was no contract between itself and the

² At paragraphs 49 and 50 of its principal brief, the State already addressed the arguments advanced by Ward County in paragraphs 44 and 45 of its responsive brief, and therefore does not repeat them here.

Traynor Law Firm for the payment of the special prosecutor's expenses.³ But if Ward County has a statutory obligation to pay the fees under Section 54-12-03, it is irrelevant that no contract existed between itself and the Traynor Law Firm. The district court's contractual analysis is immaterial if the Court determines Ward County has a statutory obligation to pay.

CONCLUSION

[¶12] 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 20th day of March, 2020.

State of North Dakota
Wayne Stenehjem
Attorney General

By: /s/ James E. Nicolai
James E. Nicolai
Deputy Solicitor General
State Bar ID No. 04789
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Email jnicolai@nd.gov

Attorneys for Appellee and Cross-Appellant.

³ In its principal brief, the State argued that the word "expenses" in Section 54-12-03 includes attorney's fees because the Legislature frequently describes the term "attorney's fees" as a subset "included" within the broader term "expenses," instead of using the conjunctive term "and" to distinguish between the two. See Appellee and Cross-Appellant's Br. at ¶¶ 41-45. Ward County's brief did not directly respond to that argument.

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CERTIFICATE OF COMPLIANCE

Supreme Ct. No. 20190310

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[¶1] The undersigned certifies pursuant to N.D.R.App.P. 32(a)(8)(A), that the Reply Brief of Appellee and Cross-Appellant contains 9 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 20th day of March, 2020.

State of North Dakota
Wayne Stenehjem
Attorney General

By: /s/ James E. Nicolai
James E. Nicolai
Deputy Solicitor General
State Bar ID No. 04789
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Email jnicolai@nd.gov

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CERTIFICATE OF SERVICE

Supreme Ct. No. 20190310

Civil No. 51-2019-CV-00532

[¶1] I hereby certify that on March 20, 2020, a **REPLY 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 Howard Swanson at hswanson@swlawltd.com, Jason Sayler at jasonsayer@traynorlaw.com, and Jonathon Yunker at jackyunker@traynorlaw.com.

State of North Dakota
Wayne Stenehjem
Attorney General

By: /s/ James E. Nicolai
James E. Nicolai
Deputy Solicitor General
State Bar ID No. 04789
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Email jnicolai@nd.gov

Attorneys for Appellee and Cross-Appellant.