

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA**

Amy M. Wery,	)
	)
Plaintiff,	)
	)
vs.	)
	)
NDDOCR, DWCRC, SWMCC, Colby	)
Braun, LeeAnn Bertsch, Jo Rooks, Heather	)
Luchi, Sean Bowen, Gary Morel, Jessie	)
Hauschild, Don Hanel, Theresa Wunderluch,	)
DeeAnn Marsch, Sandra Sund, Angie	)
Wanzek, Barb McGillivary, and Terry	)
Enzminger, all in their individual and	)
official capacities,	)
	)
Defendants.	)

Case No. 1:11-cv-23

**REPORT AND  
RECOMMENDATION**

Plaintiff Amy M. Wery (“Wery”), who is proceeding *pro se* and *in forma pauperis*, filed an amended complaint pursuant to 42 U.S.C. § 1983. (Doc. #20). Upon initial review of the amended complaint, the court ordered service upon the defendants. (Doc. #25). Defendants DWCRC, SWMCC, Sean Bowen, Colby Braun, Don Hanel, Jessie Hauschild, Heather Luchi, DeeAnn Marsch, Gary Morel, Jo Rooks, Sandra Sund and Angie Wanek (hereinafter referred to collectively as “County Defendants”) filed a motion to dismiss, or in the alternative, for summary judgment.<sup>1</sup> (Doc. #50). Theresa Wunderluch was also one of the County Defendants, but Wery moved to voluntarily dismiss the action as to her (Doc. #56), and Wery’s motion was granted by the court (Doc. #94). Additionally, defendants NDDOCR, LeeAnn Bertsch, Terry Enzminger and Barb McGillivary (hereinafter referred to collectively as “State Defendants”)

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<sup>1</sup> DWCRC refers to the Dakota Women’s Correctional Rehab Center, SWMCC refers to the Southwest Multi-County Corrections Center, and Jessie Hauschild is now known as Jessie Sticka.

filed a motion for summary judgment.<sup>2</sup> (Doc. #77). The motions have been briefed, the court gave Wery notice that it intended to convert the County Defendants' motion to dismiss into a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the court allowed Wery an opportunity to supplement her response to the County Defendants' motion with appropriate evidentiary materials.<sup>3</sup> (Doc. #105). However, the court's order allowing Wery to supplement her response was returned as undeliverable to both addresses Wery had submitted to the court during the course of this action. (Doc. #107, Doc. #108). Wery failed to inform the court of an updated address until today, after the deadline to supplement her response.

### Claims

Wery alleges in her amended complaint claims of deliberate indifference to her serious medical needs, excessive force, invasion of privacy, harassment or retaliation, denial of access to the courts, and interference with legal mail. Additionally, Wery was granted leave to supplement her amended complaint, and in the supplement she raised additional privacy issues including those related to the Health Insurance Portability and Accountability Act ("HIPAA"). Wery seeks \$100,000 in compensatory and punitive damages for each alleged violation of her constitutional rights.

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<sup>2</sup> NDDOCR refers to the North Dakota Department of Corrections and Rehabilitation, the correct spelling of LeeAnn Bertsch's name is Leann Bertsch, and Terry Enzminger's actual name is Terry Eslinger.

<sup>3</sup> The court allowed Wery 45 days after service of the order to supplement her response. (Doc. #105). The court, noting it had been very generous with granting Wery extensions in this matter, ordered that no more extensions would be afforded to the parties as this matter had been pending for quite some time. *Id.*

### Summary of Recommendation

As a matter of law, Wery is not entitled to relief from the defendants. It is **RECOMMENDED** that the County Defendants' motion for summary judgment (Doc. #50) be **GRANTED**, the State Defendants' motion for summary judgment (Doc. #77) be **GRANTED**, the County Defendants' motion to dismiss (Doc. #50) be found as **MOOT**, and Wery's amended complaint (Doc. #20) be **DISMISSED** with prejudice.

### Summary Judgment Standard

Summary judgment is appropriate if there is not a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Rule 56 of the Federal Rules of Civil Procedure "mandates the entry of summary judgment . . . against a party failing to make a showing sufficient to establish the existence of an element essential to that party's case." Celotex, 477 U.S. at 322. The burden is on the moving party to establish the basis for its motion. Donovan v. Harrah's Md. Heights Corp., 289 F.3d 527, 529 (8th Cir. 2002). If the moving party has supported its motion for summary judgment, the nonmoving party has an affirmative burden placed on it to go beyond the pleadings and show a genuine triable issue of fact. Commercial Union Ins. Co. v. Schmidt, 967 F.2d 270, 271 (8th Cir. 1992). The court views the facts in the light most favorable to the nonmoving party, who enjoys "the benefit of all reasonable inferences to be drawn from the facts." Vacca v. Viacom Broadcasting of Missouri, Inc., 875 F.2d 1337, 1339 (8th Cir. 1989) (citation omitted).

### Deliberate Indifference to Serious Medical Needs

Wery contends she was denied needed medical treatment by staff for a period of

approximately five months. Specifically, Wery alleges that in August of 2008, she began suffering from gallstone attacks. (Doc. #20, p. 2). At that time she was put on a low fat diet and was given hot packs. Id. In late September of 2008, Wery states she again began suffering from gallstone attacks, which caused nausea and the vomiting of blood. Id. In November of 2008, Wery was placed in the infirmary for two days for observation. Id. at 3. While in the infirmary, Wery had an altercation with prison staff regarding whether there was blood in her vomit, and at that time she states she was offered pain medication, but was unable to take the medication due to her vomiting. Id. Wery claims she wrote to Dr. Hostetter, a physician at the Department of Corrections, requesting that he intervene. Id. Wery states she had been complaining of gallbladder pain and had been requesting an ultrasound for three months. Eventually, Wery had an ultrasound that confirmed she had gallstones.<sup>4</sup> Id. at 4.

Wery alleges defendant Sandra Sund (“Sund”), who was employed as a part-time nurse at the DWCRC, and defendant DeeAnn Marsch (“Marsch”), who was the Medical Services Director for DWCRC, lied by saying there was no blood in Wery’s vomit, knew Wery was having gallbladder attacks, failed to timely order an ultrasound, failed to refer Wery to a doctor even though she had been vomiting for months, and lied about the number of gallstones discovered by the ultrasound. Id. at 4-5. Wery states the actions of Sund and Marsch placed her in severe pain and could have caused the blockage of a bile duct resulting in Wery’s death. Id. at 5.

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<sup>4</sup> Wery’s ultrasound was on December 29, 2008. (Doc. #52-1, p. 14).

Wery filed a complaint against Sund with the North Dakota Board of Nursing.<sup>5</sup> (Doc. #52-1, pp. 1-3). In response to the complaint, defendant Sund provided a time line of events. The time line does not begin until October 25, 2008, about two months after Wery alleges she began suffering from gallstone attacks. Id. at 11. According to the time line, on October 25, 2008, Wery complained of pain between her shoulder blades. Id. This is consistent with Wery's complaint to the North Dakota Board of Nursing. In her complaint Wery challenged the care provided to her beginning in approximately September or October of 2008, at which time Wery said she presented with serious pain underneath her right shoulder blade. Id. at 1-2. The time line indicates Wery was given a hot pack and biofreeze treatments. Id. at 11.

On November 4, 2008, the time line reflects that Wery again complained of pain between her shoulder blades, and she stated she was concerned she had Barrett's esophagus.<sup>6</sup> Id. Wery was diagnosed with possible gastroesophageal reflux disease ("GERD") and was prescribed Prevacid. Id. On November 12, 2008, Wery complained of upper back pain, she was diagnosed with possible upper back spasms, and was prescribed Flexeril. Id.

On November 14, 2008, the time line indicates Wery complained of nausea along with chest pain. Id. at 12. Wery also stated she vomited, but it was noted in the time line that the vomiting was not witnessed. Id. Wery was admitted to the infirmary for observation, and was released the next morning as she was feeling better. Id. While in the infirmary Wery's vital

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<sup>5</sup> Wery's complaint against Sund filed with the North Dakota Board of Nursing was dismissed because there was insufficient evidence to support a violation of the law. (Doc. #52-2).

<sup>6</sup> Barrett's esophagus is a condition in which the cells of the lower esophagus become damaged, and it is generally a complication of gastroesophageal reflux disease ("GERD"). <http://www.mayoclinic.com/health/barretts-esophagus/HQ00312>.

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