20110193

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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STATE OF NORTH DAKOTA

Bruce Roger Mills, individually and on behalf of those similarly situated,

Plaintiff, Appellant
and Cross-Appellee

vs.

City of Grand Forks,

Defendant, Appellee
and Cross-Appellant.

Case No. 20110193

Civil No. 18-10-C-01600

REPLY BRIEF OF DEFENDANT, APPELLEE AND CROSS-APPELLANT CITY OF GRAND FORKS

APPEAL FROM THE MEMORANDUM AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND THE RESULTING JUDGMENT ENTERED ON MAY 23, 2011

**GRAND FORKS COUNTY DISTRICT COURT,
NORTHEAST CENTRAL JUDICIAL DISTRICT
HONORABLE JOEL D. MEDD**

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LAW AND ARGUMENT

I. STANDARD OF REVIEW – N.D. R. Civ. P. 12(b)(vi) and 12(c)

(1.) Mills' assertion on page 3 of his reply brief this Court must accept as true legal conclusions contained in Mills' pleadings in deciding a Rule 12 motion for judgment on the pleadings is incorrect. As discussed in City's principal brief, North Dakota Rule of Civil Procedure 12(c) is substantively identical to Federal Rule of Civil Procedure 12(c) and (d) combined. In applying the federal rules to a motion for judgment on the pleadings, it has been noted a court is "free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Wiles v. Capitol Indemnity Corporation*, 280 F.3d 868, 870 (8th Cir. 2002). A court may also consider the pleadings themselves, matters of public record, materials embraced by the pleadings, and exhibits attached to the pleadings. *Porous Media Corporation v. Pall Corporation*, 186 F.3d 1077, 1079 (8th Cir. 1999).

II. CITY'S TRAFFIC FINE SCHEME WAS LEGAL PRIOR TO *SAUBY V. CITY OF FARGO*

(2.) At the heart of Mills' claims is his assertion City's traffic fine-scheme violated state law as it existed prior to this Court's decision in *Sauby v. City of Fargo*, 2008 ND 60, 747 N.W.2d 65 (March 25, 2008). Mills asserts as the traffic fine allegedly violated state law, the municipal court lacked the power and authority to convict him of the offense. The error in Mills' argument is City's traffic fine-scheme was legal prior to this Court's decision in *Sauby* as a result of City's reliance upon Attorney General opinions directly addressing the legality of City's traffic fine scheme. Therefore, the municipal court's judgment is not void.

(3.) The United States District Court of North Dakota, and the Eighth Circuit Court of

Appeals, courts of competent jurisdiction, specifically ruled on this issue finding City's careless driving fines imposed prior to the *Sauby* decision were not clearly in violation of state law, and noting prior to the decision in *Sauby*, City was justified in relying upon the opinions of the North Dakota Attorney General, which were "authoritative" and "serve[d] as controlling law until superseded by a judicial decision." *Mills v. City of Grand Forks*, 614 F.3d 495, 498-99 (8th Cir. 2010). The Eighth Circuit Court of Appeals also determined City's fine imposed upon Mills did not clearly violate state law. *Id*. at 501. In other words, traffic fines imposed by City prior to the *Sauby* decision were not illegal. This determination is dispositive of not only Mills' claims in this case (including his claim for money had and received), but also for claims of everyone else similarly situated to Mills who may challenge City's non-criminal traffic fines imposed prior to *Sauby*.

(4.) Mills asserts City's reliance upon the opinions of the North Dakota Attorney General directly addressing the legality of City's non-criminal traffic fine scheme at issue did not make City's fine scheme legal. Specifically, Mills asserts the Eighth Circuit Court of Appeals in *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 530 (8th Cir. 1994) misinterpreted this Court's decision in *State ex rel. Johnson v. Baker*, 74 N.D. 244, 21 N.W.2d 355, 364 (1945) as standing for the proposition "an Attorney General's opinion has the force and effect of law until a contrary ruling by a court." Mills asserts this Court has never determined an opinion of the North Dakota Attorney General has the force and effect of law until a contrary ruling by a court. City disagrees.

(5.) In *State ex rel. Johnson v. Baker*, this Court addressed the statutory role of the Attorney General in providing opinions to state officers and the obligation of such state officers to follow said opinions, in relevant part, as follows:

To hold that the state auditor or any other state officer must, at his peril, pass upon the question of the constitutional validity of every statute under which he acts, would be, as we have heretofore said, both most harsh and unconscionable and could not be otherwise than detrimental to the efficient conduct of the public business.

* * *

It is clear the framers of our constitution intended that state officers should not be burdened with any such responsibility when they refused to require this court to render advisory opinions and provided for the office of attorney general. It is equally clear that the first legislature convened after the adoption of the constitution was moved by the same considerations when it enacted chapter 21, Session Laws of 1889-1890 providing the powers and duties of the attorney general and requiring among other things that he should 'consult with and advise the Governor and all other State officers, and give, when requested, written opinions upon all legal or constitutional questions relating to the duties of such officers respectively' (section 4, subsection 5) and 'keep in his office a book in which he shall record all the official opinions given by him during his term of office which shall be by him delivered to his successor in office' (section 4, subsection 10). These provisions have remained unchanged and are now found in section 54-1201, Rev.Codes 1943. While it would seem that a constitutional question is a legal question the legislature saw fit to specify not 'legal questions' but 'legal or constitutional questions.' It thus, inferentially at least, differentiated between the two with the evident purpose of making more plan [sic] the legislative intent that the attorney general's advice on constitutional questions should be taken and followed by all state officers just as on all other legal questions.

It is argued that to hold the attorney general's advice should control in the above respects, is to empower the attorney general to supplant the court in determining whether a statute conflicts with the constitution. We can see no merit to this contention. The attorney general, an officer required to be learned in the law (see, Enge v. Cass, 28 N.D. 219, 148 N.W. 607), no more supplants the court in passing upon the validity of a legislative enactment than the auditor or treasurer or any other officer not required to be a lawyer would in doing so. On the contrary, if such officers may disregard the provision made by the legislature for obtaining advice from the attorney general on constitutional questions and presume to pass upon such questions themselves, they will supplant that officer. **But the attorney general does not, and is not intended to, supplant the courts in such cases. He gives his opinions for the guidance of the state officers until such questions as concern them are passed upon by the courts. His opinions, if followed in good faith, relieve them from responsibility and protect them. If they fail or refuse to follow his opinions they do so at their peril**.

State ex rel. Johnson v. Baker, 74 N.D. at 276-77 (bold added). The Attorney General continues to have the statutory obligation to provide written opinions to the governor and all other state officers on all legal or constitutional questions relating to the duties of such officers pursuant to N.D.C.C. § 54-12-01(6). In addition, and more directly relevant to the question now before this Court, the Attorney General "shall . . . [g]ive written opinions, when requested by the governing body or city attorney of a city in the state of North Dakota"). N.D.C.C. § 54-12-01(17). The opinions of the North Dakota Attorney General relied upon by City in establishing and enforcing its non-criminal traffic regulations are discussed at paragraph 8 in City's principal brief, and are incorporated herein by reference.

(6.) Mills' position is directly at odds with this Court's decision in *Sate ex rel. Johnson v. Baker* and the intent of the legislature that state officials and the governmental entities they represent be insulated from liability should they rely upon the opinions of the Attorney General. Query the logic or equity of requiring state officials to follow the opinions of the Attorney General, while also holding the governmental entities they represent retro-actively financially liable should a court of competent jurisdiction later disagree with the Attorney General's opinion. Sound public policy underlies the legislature's intent to shield the government from liability where the government acts in reliance upon the sound opinions of the Attorney General.

(7.) Mills' assertion City's enactment and enforcement of its traffic fine scheme prior to *Sauby* contravened a "'clear and unambiguous' statutory limitation found within N.D.C.C. § 12.1-01-05 to not pass an ordinance that supersedes an 'offense'" is

discredited by the very fact the Attorney General reasonably interpreted the law differently.

(8.) As a practical matter, even assuming, arguendo, the federal courts did not address this legal issue, or lacked competent jurisdiction to do so, which is denied, this Court should none-the-less determine as a matter of law, the Attorney General's opinions relied upon by City (discussed at paragraph 8 of City's principal brief) had the force and effect of law until superseded by this Court's ruling in *Sauby*, and as a result, City's traffic fine scheme at issue was legal prior to *Sauby*, or the City is at the very least insulated from liability for following said opinions.

III. THE CLAIMS AND ISSUES RAISED BY MILLS ARE PRECLUDED BY RES JUDICATA AND COLLATERAL ESTOPPEL

(9.) As discussed, the sole legal issue underlying all of Mills claims either has been, or could have been raised in prior litigation between the parties. As a result, his claims are barred by res judicata as determined by Judge Medd in the present action. In addition, Mills claims are also barred by collateral estoppel. As discussed in City's principal brief at paragraph II, the critical legal issue underlying all of Mills claims was necessarily analyzed and decided by the federal courts in determining whether Mills federal constitutional rights had been violated which resulted in a final judgment on the merits in proceedings in which Mills was afforded a fair opportunity to be heard, and was in fact heard.

(10.) Mills' argument the issue decided by the federal courts was not the identical issue now before this Court is incorrect. Although Mills contends the issue now before the Court is upon his claim for money had and received, such claim is based solely upon Mills' assertion City is not in equity entitled to retain traffic fines it collected prior to the

Sauby decision, as such fines were allegedly illegal. The legality of City's traffic fines was precisely the issue the federal court's analyzed and decided, among other issues.

IV. THE FEDERAL DISTRICT COURT PROPERLY EXERCISED SUBJECT MATTER JURISDICTION AND SUPPLEMENTAL JURISDICTION

(11.) Mills' assertion the federal courts did not exercise subject matter jurisdiction as Mills' complaint failed to plead a viable federal cause of action is incorrect. "A federal court does not lack jurisdiction merely because a complaint fails to state a cause of action." *Reeve v. Oliver*, 41 F.3d 381, 383 n.2 (8th Cir. 1994)(determining district court erred when it found it lacked subject matter jurisdiction over section 1983 claims where complaint failed to state a viable cause of action). In addition, Mills assertion the federal courts could not exercise supplemental jurisdiction to consider his state law based claims once all of his pending federal causes of action were dismissed is simply wrong. Whether to exercise supplemental jurisdiction over remaining state law claims is purely discretionary with a federal district court. *See e.g. Williams v. Hobbs*, 658 F.3d 842, 853 (8th Cir. 2011)("A federal district court has discretionary power to decline jurisdiction where it has "dismissed all claims over which it has original jurisdiction"; citing 28 U.S.C. § 1367(c)(3) (providing federal district court discretion to exercise supplemental jurisdiction over state law claims once all claims under federal law have been dismissed). By analyzing and determining City was justified in relying upon the opinions of the North Dakota Attorney General in imposing its non-criminal traffic fine upon Mills, and determining City did not violate North Dakota law by doing so prior to this Court's decision in *Sauby*, the federal courts exercised supplemental jurisdiction over that issue.

V. ARGUMENTS RAISED BY MILLS FOR THE FIRST TIME ON APPEAL SHOULD NOT BE CONSIDERED, AND EVEN IF CONSIDERED, WOULD NOT CHANGE THE RESULT

(12.) Mills does not dispute he did not raise any challenge to the validity of City's traffic fine scheme to the municipal trial judge, during his appeal of the municipal court conviction to District Judge Jahnke, or in Mills' initial attempted appeal to this Court of Judge Jahnke's affirmance of the municipal court conviction. Instead, Mills asserts he raised the issue via his *Petition for Rehearing* submitted to this Court following this Court's summary dismissal of his appeal from Judge Jahnke's affirmance of the municipal court conviction of Mills. Mills asserts he afforded Judge Medd an opportunity to consider Mills' prior appeal to this Court (i.e. *Petition for Rehearing*), despite not providing a copy of same to Judge Medd. (Mills Reply Brief at p. 8.)

(13.) As discussed in City's principal brief, it is well settled law this Court will not consider issues raised for the first time on appeal. *Spratt v. MDU Resources Group, Inc.*, 2011 ND 94, ¶ 14, 797 N.W.2d 328. Mills' arguments stemming from the *Petition for Rehearing* should not be considered by this Court as Mills never realistically afforded Judge Medd an opportunity to consider the matter in this action, and more importantly, Mills never afforded the municipal court, or District Judge Jahnke on appeal, an opportunity to address the issue.

VI. MILLS' ARGUMENTS PERTAINING TO THE CONTENT OF CITY'S MOTION ARE WITHOUT MERIT

(14.) Mills concedes he does not challenge the content of City's motion for judgment on the pleadings. Therefore, this is not an issue before this Court.

VII. CONCLUSION

(15.) For the foregoing reasons, City of Grand Forks requests the District Court's dismissal of Mills' claims against City be affirmed on the basis his claims are barred by

res judicata. In the alternative, City requests this Court determine Mills' claims are none-the-less barred by res judicata and/or collateral estoppel as the issue of law underlying all of Mills' claims was necessarily decided by the federal district court, and affirmed by the Eighth Circuit Court of Appeals. Specifically, it has already been determined by the federal courts City justifiably relied upon the opinions of the North Dakota Attorney General in imposing non-criminal traffic fines in excess of fines for violation of similar offenses under state law, prior to this Court's holding in *Sauby v. City of Fargo*, and City's imposition of such fines was not in violation of state law. In addition, Mills' claims are barred by res judicata and/or collateral etoppel on the basis he could have raised his claims for a remedy under state law in prior litigation between the parties in federal court.

Dated this 18th day of November, 2011.

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CERTIFICATE OF COMPLIANCE

(16.) The undersigned, as attorneys for the Defendant/Appellee/Cross-Appellant City of Grand Forks in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 2,468.

Dated this 18th day of November, 2011.

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CERTIFICATE OF SERVICE

(17.) I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF OF DEFENDANT, APPELLEE AND CROSS-APPELLANT CITY OF GRAND FORKS** was on the 18th day of November, 2011, was served via electronic means and via U.S. Mail on the individuals listed below at the addresses listed below:

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