

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Fred M. Hector, Individually and on behalf of
all Landowners specifically assessed for
Special Assessment Project 5314,

Plaintiff-Appellant,

Supreme Court No. 20130223

vs.

City of Fargo, a municipal corporation,

Defendant-Appellee.

BRIEF OF DEFENDANT-APPELLEE

APPEAL FROM THE MEMORANDUM OPINION AND ORDER DATED MAY 30,
2013 GRANTING THE CITY OF FARGO'S MOTION FOR SUMMARY JUDGMENT
AND THE RESULTING JUDGMENT OF THE DISTRICT COURT DATED
ON JUNE 13, 2013, CIVIL NO. 09-2009-CV-04474

CASS COUNTY DISTRICT COURT, EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE STEVEN L. MARQUART

Ronald H. McLean (ND# 03260)
Jane L. Dynes (ND# 04495)
SERKLAND LAW FIRM
10 Roberts Street
P.O. Box 6017
Fargo, ND 58108-6017
Telephone: (701) 232-8957
rmclean@serklandlaw.com
jdynes@serklandlaw.com
Attorneys for Defendant-Appellee

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ISSUE ON APPEAL

[1] Whether the District Court properly granted the City of Fargo's summary judgment motion for dismissal as to all claims brought against it in the Complaint.

STATEMENT OF THE CASE

[2] This action arises out of the City of Fargo's (hereinafter "City's") creation of Improvement District 5314 to improve infrastructure in south Fargo along 52nd Avenue South and Interstate 29 and the special assessments levied for those improvements. Special Improvement District 5314 was created in August 2007. See, Hector v. City of Fargo, 2012 ND 80, ¶ 2, 815 N.W.2d 240. After most of the construction was completed in August 2009, the City of Fargo's Special Assessment Commission reviewed the project and determined the benefits and assessment amounts for property in the District. Id. at 2012 ND 80, ¶ 5. Plaintiff/Appellant Fred Hector (hereinafter "Hector") objected to the special assessments against his property and appealed the Special Assessment Commission's decision to the Fargo City Commission in October of 2009. Id. ¶¶ 8-10. The City Commission approved the decision of the Special Assessment Commission. Id. ¶ 11.

A. Appeal to District Court

[3] On November 9, 2009, Hector filed an appeal, pursuant to N.D.C.C. § 28-34-01, from the Fargo City Commission decision approving the District 5314 special assessments. See, Hector v. City of Fargo, 2012 ND 80, 815 N.W.2d 240. In the Appeal from the City Commission's decision, Judge John Irby, determined that the City Commission had not acted arbitrarily, capriciously, unreasonably or contrary to law in assessing Hector's property. Appellant's Appendix (hereinafter "App.") pp. 52-62, May

13, 2011 Order on Appeal in Civ. No. 09-2009-00473. Hector appealed Judge Irby's decision to the North Dakota Supreme Court. See, Hector v. City of Fargo, 2012 ND 80, 815 N.W. 2d 240.

B. Class Action Filed

[4] In addition to pursuing an appeal of the City Commission's decision pursuant to N.D.C.C. § 28-34-01, Hector pursued the instant class action. Doc. ID #1, November 9, 2009 Complaint. Hector conducted voluminous written discovery in this matter. Appellant's Brief, p. 27. After Hector appealed Judge Irby's decision to the North Dakota Supreme Court, Hector and the City of Fargo entered into a Stipulation which states, "Judge Irby's Order affirming the decision of the Fargo Board of City Commissioners resolved issues of the propriety of the amounts assessed against Mr. Hector in Special Assessment District 5314 and adjudicated most, if not all, of the same issues involved in this class action." Doc. ID # 13, Stipulation to Continue Trial ¶ 2. The Stipulation further provided "The parties agree that the North Dakota Supreme Court's decision will have a significant impact on the continuation of this class action." Id. ¶ 5.

[5] On July 5, 2011, the District Court granted a continuance of this class action pending the Supreme Court's decision in case Civil No. 09-2009-CV-04473. Doc. ID #14.

C. Appeal to Supreme Court

[6] Hector appealed Judge Irby's decision in Civil No. 09-09-C-04473 to the Supreme Court. See, Hector v. City of Fargo, 2012 ND 80, 815 N.W.2d 240. The Supreme Court affirmed the District Court's decision and upheld the City of Fargo's special assessments in District 5314. Id.

D. The Complaint

[7] The Complaint herein contains claims brought by Hector, individually and on behalf of all similarly situated landowners specially assessed for Special Assessment District 5314. Doc. ID #1, Complaint with Exhibits. All of the class action and individual claims arise from the allegedly inappropriate special assessment procedures and assessments of Special Assessment District 5314.

1. Class Action Claims

[8] Section I entitled “Common Allegations” contains twenty five paragraphs (excluding subparts) of purported commonalities among Hector and the proposed class. Section II of the Complaint, entitled “The Proposed Class” contains two paragraphs. Appellant’s Appendix (hereinafter “App.”) pp. 5-20. The first paragraph describes the proposed class members. The second describes the allegedly common questions of law or fact. Id. pp. 21-22.

2. Statutory and Equitable Reassessment Claims

[9] Section III entitled “Statutory and Equitable Reassessment of Project Benefits” (paragraphs 28-36) alleges statutory improprieties in the special assessment process that call for an equitable reassessment under N.D.C.C. § 40-26-07. App. pp. 22-25.

3. Fraud, Deceit and Breach of Fiduciary Duty Claims

[10] Section IV entitled “Fraud and Deceit” alleges that City of Fargo officials made “false statements concerning construction costs and interest” the City incurred for District 5314. App. pp. 25-29, Complaint ¶¶ 37-45.

[11] Section IV (sic) alleges violations of fiduciary duties based on the City's calculation of the assessments and its method of payment. Id. pp. 29-31, Complaint ¶¶ 46-49.

4. Civil Rights Claims

[12] Section VI alleges denials of Federal Civil Rights based on the imposition of the special assessments. Id. App. pp. 31-33, Complaint ¶¶ 50-54.

E. Impact of Hector v. City of Fargo

[13] In response to the Court's inquiry to counsel regarding trial dates in November 2012, the City requested a conference pursuant to N.D. R. Civ. P. 16. Doc. ID #16. That conference was held on January 22, 2013. Doc. ID # 18 and January 22, 2013 Transcript. The City urged that the class action be dismissed, in its entirety, based on the Supreme Court's decision in Hector v. City of Fargo, 2012 ND 80, 815 N.W.2d 240. Hector argued that some causes of action pled in the class action remained viable. The Court entered a scheduling order. Doc. ID #19. The City timely filed a summary judgment motion seeking dismissal of all claims for which there was no genuine issue of material fact and on which judgment was appropriate as a matter of law. District Court Judge Steven Marquart granted the City's summary judgment motion determining that the claims raised in this class action Complaint were identical to those raised in Hector v. City of Fargo, 2012 ND 80, 815 N.W.2d 240 and App. pp. 293-298. The court determined that res judicata barred the claims asserted in the Complaint. Id.

[14] Hector acknowledges this action is about the 2009 City of Fargo special assessment for District 5314 which he claims is a "false assessment, a wrong assessment, an illegal assessment" and that subsequent events have nothing to do with the current

lawsuit. May 14, 2013 Tr. p. 5, lines 8-11 and lines 12-15. Through this lawsuit Hector seeks to prove that the 2009 certification was wrong. Id. p. 27 lines 14-20.

RELEVANT FACTS

A. Class Action Claims Dismissed (Complaint Sections I and II)

[15] Hector advised the district court that he did not intend to pursue class certification of this matter and that there was no need for a class action. See, January 22, 2013 Transcript p.2, lines 14-15; 18-19. The district court dismissed the class action claims/assertions. App. p. 294, Memorandum Opinion and Order, ¶ 4.

B. Special Assessment Procedures and Results (Complaint Section III)

[16] Hector acknowledged that the Supreme Court's decision in Hector v. City of Fargo, 2012 ND 80, 815 N.W.2d 240 eliminated "a lot of controversy about the extra areas" regarding the special assessments appealed, but did not identify those areas. January 22, 2013 Tr. p.3, lines 5-6. The remaining causes of action in the Complaint were based on claimed errors in the special assessment process specific to Hector's District 5314 special assessments.

[17] The district court determined that the allegations in Section III (Statutory and Equitable Reassessment) of the Complaint were identical to the assertions Hector made in Hector v. City of Fargo. See, Hector v City of Fargo, 2012 ND 80 ¶¶ 14-15 and ¶¶ 24, 26 and App. p. 294-296. As to Hector's claims of statutory errors, N.D.C.C. § 40-23-05 does not limit the amount a city may assess to the amount stated in the engineer's report in connection with the resolution of necessity. Hector v City of Fargo, 2012 ND 80 ¶¶ 34 and 35. As to Hector's allegations that the City failed to follow appropriate procedures in certifying the special assessment list and providing notification, the Special

Assessment Commission complied with statutory notice requirements. Id. ¶ 54. The City did not improperly calculate the total cost of the project and the total amount to be assessed. Id. ¶¶ 37 and 38. The City had the right to include interest expense in the special assessment and the City did not fail to correctly interpret the law. Id. ¶ 26. The Supreme Court affirmed the special assessments and found that there was no improper calculation. Id. ¶ 38.

C. Issues Remaining Before Judge Marquart

[18] Prior to the City filing the motion for summary judgment, Hector maintained that there was a “...question of how much federal funds were being paid and if those federal funds aren’t being properly credited ...” January 22, 2013 Tr. p. 3, lines 12-13. The remaining controversy before Judge Marquart therefore, as stated by Hector’s counsel on January 22, 2013 was Hector’s belief that “we aren’t getting credited with those 31 million Dollars worth of Federal Funds.” Id. p. 6, lines 10-11.

[19] Hector also asserted that, even after the decision in Hector v. City of Fargo, there was a question of whether the City complied with “federal statutes also applicable to the states and to the city.” January 22, 2013 Tr. p. 2 lines 23-24. Hector’s counsel referred to a 1983 claim and the Single Audit Act. Id. p. 6, lines 3, 4, 16.

[20] The City presented evidence of its compliance with the federal Single Audit Act reporting requirements for 2008, 2009, 2010 and 2011. Doc. ID #'s 32-33, Eide Bailly Reports in Accordance with OMB Circular A-133 and Doc. ID #34, Excellence in Financial Reporting from the Government Finance Officers Association of the United States and Canada for years 2008, 2009, 2010, 2011. Each Single Audit Act Report states the auditor’s opinion that the City complied, in all material respects, with

the requirements of the auditing standards generally accepted in the United States of America; the standards applicable to financial audits contained in Government Auditing Standards, issued by the Comptroller General of the United States; and OMB Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations. See, Doc. ID #30, pp. 3-4; Doc. ID #31, pp. 3-4; Doc ID #32 pp. 3-4; Doc ID #33 pp. 3-4. The Reports also reflect that the North Dakota Department of Transportation (NDDOT) was the pass through agency for indirect federal funds. Doc. ID #30 p. 6; Doc. IC #31, pp. 6-7; Doc. ID #32, p. 6-7; Doc. ID #33.

[21] The State of North Dakota was also required to comply with the Single Audit Act reporting requirements. Doc. ID #35, Excerpts of North Dakota Single Audit Report for fiscal years ending June 30, 2009 and 2010. (The complete report can be found at http://www.nd.gov/auditor/reports/sa_10.pdf).

[22] Three NDDOT Cost Participation and Maintenance Agreements with the City of Fargo (CPMA's) required NDDOT's application of federal funds on the City's behalf for Improvement District 5314. Doc. ID #1, Complaint Exhibits B-1, B-2 and B-3 and Doc. ID #42, 43, 44, Exhibits D3, D2, D1 to Affidavit of Mark Bittner.

D. The City Did Not Convert the Federal Funds

[23] Mark Bittner was the City Engineer during the construction related to Improvement District 5314. App. pp. 63-64, Affidavit of Mark Bittner ¶¶ 1-4. The City entered into CPMA's with NDDOT for parts of the work in Improvement District 5314. Id. pp. 65-68, ¶¶ 9, 12, 13, 15; App. pp. 70-78, attached Exhibit D1 –CPMA U-CMU-8-081(029)920; App. pp. 78-87, attached Exhibit D2 – CPMA SIM-8-029(108)060 and Doc. ID # 44, Exhibit D3 – CPMA IM-8-029(046)060. NDDOT was the controlling

agency in charge of construction payments for Improvement District 5314 work performed pursuant to the 3 CPMA's. App. p. 66, Bittner Affidavit ¶ 10. NDDOT acted as the "bank" on the CPMA projects. Id. ¶ 11. NDDOT wrote the checks to the contractors as work progressed. Id. NDDOT then sent invoices, and the most recent pay estimates, to the City of Fargo stating the amounts of federal, state or City responsibility for those payments. Id. After City engineers confirmed the pay estimates coincided with the bid tabulations, the invoices would be initialed, authorizing the City to write a check to the NDDOT to pay its share of the costs already paid by NDDOT. Id.

[24] The federal funds identified in the CPMA's to be applied to the costs of construction were never in the City's possession. App. pp. 66-68, Bittner Affidavit ¶¶ 12, 13, 16. NDDOT accessed these federal funds and paid the contractors with these federal funds. Id. ¶¶ 12, 13, 16. NDDOT then sent invoices to the City so the City could remit payment, from City funds, for its share of the costs NDDOT had already paid. App. p. 66-68, ¶¶ 12, 13, 16. NDDOT did not deliver the federal funds identified in the CPMA's for this project to the City for disbursement. Id. ¶¶ 12, 14, 16.

[25] The City also presented evidence to establish that, even though costs had changed between 2009 and 2012, the assessments for District 5314 remained the same. App. pp. 250-253, Affidavit of City Auditor Steve Sprague; App. p. 254, April 26, 2013 Certificate of Costs. The total project costs on October 13, 2009 were \$26,255,716.56 and the total amount to be assessed was \$16,343,400.03. App. p. 92 October 13, 2009 Amended Certification of Costs. In April 2013 the total costs were \$26,458,302.91 and the total assessments were \$16, 343,400.03. App. p. 254.

LAW AND ARGUMENT

A. Standard of Review

[26] The standard of review of a district court's order granting summary judgment is well established:

Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

Hamilton v. Woll, 2012 ND 238, ¶ 9, 823 N.W.2d 754 (quoting Wenco v. EEOG Resources, Inc., 2012 ND 219, ¶ 8, 822 N.W. 2d 701.

B. Separation of Powers

[27] The actions of the Special Assessment Commission are actions by a legislative tribunal created by the legislative authority. Hector v. City of Fargo, 2012 ND 80, ¶ 13, 815 N.W.2d 240. Enactment of municipal ordinances is a legislative function but interpreting those ordinances by a municipality's governing body are quasi-judicial acts. Bigwood v. City of Wahpeton, 1997 ND 124, ¶ 5, 565 N.W.2d 498, 501. Judicial review is limited to assuring that local authorities do not act arbitrarily, capriciously, or unreasonably during the review process. Hector v. City of Fargo, 2012 ND 80, ¶ 13, 815 N.W.2d 240 (citations omitted). Review by the courts begins with the presumption that

assessments for local improvements are valid and the burden is on the party challenging the assessments to prove that they are invalid. Id.

C. Administrative Res Judicata

[28] The district court determined that the issues in Hector's class action were identical to the issues in Hector's appeal of Judge Irby's decision affirming the Fargo City Commission's approval of the assessments for District 5314 and were therefore barred by res judicata. App. pp. 296-297. The law of res judicata, or claim preclusion, prevents re-litigation of claims that were raised, or could have been raised, in prior actions between the same parties or their privies. When a final judgment exists from a court of competent jurisdiction, it is conclusive with regard to claims raised, or those that could have been raised and determined as to their parties and their privies in all other actions. Skogen v. Hemen Township, 2010 ND 92, ¶ 17, 782 N.W.2d 638. Administrative res judicata is the judicial doctrine of res judicata applied to an administrative proceeding to prevent collateral attacks on administrative agency decisions. State of North Dakota Workforce Safety Insurance v. JFK Raingutters, 2007 ND 80, ¶ 22, 733 N.W.2d 248.

[29] Hector fully exercised his right to appeal the assessment decision. See, Hector v. City of Fargo, 2012 ND 80, 815 N.W.2d 240. Each of the issues raised in this action arose from the Special Assessment Commission's legislative act of levying special assessments and the quasi-judicial act of the City Commission interpreting its ordinances and policies regarding those assessments reviewed in Hector v. City of Fargo. Hector should not be allowed to pursue this additional proceeding.

[30] A county equalization board can be an “administrative agency.” Shark Brothers, Inc. v. Cass County, 256 N.W.2d 701 (N.D. 1977). The Court docket refers to Hector’s appeal of Judge Irby’s Order affirming the City Commission decision regarding the District 5314 assessments as an “administrative appeal.” This Court has stated that it does not condone, nor can it sustain, bifurcated self-induced or self-initiated procedures, one in the administrative process and one in the judicial process covering the same legal questions. Id. at 705.

Where the law provides an appeal from an order or determination from a board or commission whereby the correctness and validity of the order or decision may be reviewed the remedy so provided, if adequate, must be pursued and a party having the right of appeal may not disregard such remedy and obtain injunctive relief against the enforcement of the order or decision.

Shark v. Cass County, 256 N.W.2d at 704.

[31] Hector commenced his administrative appeal to the district court and this action at the same time. See, Hector v. City of Fargo, 2012 ND 80, ¶ 12, 815 N.W.2d 240 and Doc. ID #1, Complaint. The issues in both proceedings are identical because all arise from the costs and assessments of Special Assessment District 5314. The district court’s dismissal of this action was properly based on the rationale set forth in Shark.

If such bifurcated procedures were encouraged or sustained, it would create duplication, and uncertainty, and waste manpower and money, with no appreciable result, and all without improving the administration of justice. If one side of a proceeding were permitted to proceed both in the administrative channels and the judicial channels at the same time the other side could also resort to the same procedure. The result would be endless confusion which we can ill afford.

Shark v. Cass County, 256 N.W.2d at 705-706.

[32] The district court’s grant of the City’s motion for summary judgment based on res judicata should be upheld.

D. The Grant of Summary Judgment Was Proper Because Hector Failed to Present Evidence of a Material Issue of Fact as to His Claims

[33] The district court based its decision to grant the City of Fargo's summary judgment motion on res judicata. However, summary judgment was also properly granted because Hector failed to present any evidence to create a genuine issue of material fact as to the claims raised in the Complaint.

1. Summary Judgment Was Proper as to the Class Action Allegations

[34] Hector has admitted that he has no intent to pursue a class action. January 22, 2013 Tr. p. 2. Therefore, summary judgment was proper as to Sections I and II of the Complaint.

2. Summary Judgment Was Proper as to the Claims Based on the Special Assessment Procedure for 5314

[35] The district court decision granting summary judgment to the City was appropriate because "the pleadings, the discovery and disclosure materials on file, and any affidavits" showed that there is no genuine issue as to any material fact and that the City was entitled to judgment as a matter of law. See, N.D. R. Civ. P. 56(c). Hector was required to resist the motion by doing more than relying "upon the pleadings or upon unsupported, conclusory allegations." Grandbois v. City of Watford City, 2004 ND 162, ¶ 17, 685 N.W.2d 129. Hector was required to "present competent, admissible evidence by affidavit or other comparable means, which raises an issue of material fact." Id.

[36] Section III of the Complaint is entitled "Statutory and Equitable Reassessment of Project Benefits." Hector objected to the assessment procedure at every opportunity at the various city levels. Hector v City of Fargo, 2012 ND 80 ¶¶ 8, 54, 57. Hector then appealed to the District Court and then this Court. This Court reviewed all

the alleged statutory violations Hector raised as to the special assessment levied against his property. Hector v. City of Fargo, 2012 ND 80, 815 N.W.2d 240. The District Court reviewed Hector's 34 alleged special assessment procedure errors. App. pp. 52-62. The Supreme Court reviewed the 16 issues and sub-issues Hector raised on appeal. Both courts affirmed the special assessment decision of Fargo's City Commission. Hector v. City of Fargo, 2012 ND 80, 815 N.W.2d 240.

[37] Each of the claims asserted in Complaint paragraphs 28-36 stem from the special assessment process and could have been or were considered by the district and Supreme Courts in rendering the decisions on Hector's appeals. App. pp. 52-62 and Hector v. City of Fargo, 2012 ND 80, 815 N.W.2d 240. Hector acknowledged many, if not all, of these issues were finally resolved. Doc. ID #13 ¶¶ 2 and 5, Stipulation and January 22, 2013 Tr. pp. 2-3.

[38] Hector's claim that the costs associated with Special Assessment District 5314 have never been challenged and that he has a right to challenge them through the instant proceeding is simply not supported by law. The legislature empowered the City and its Special Assessment Commission to make the assessments. See, N.D.C.C. §§ 40-22-01 to 40-22-46. The procedures the City followed were approved by this Court. Hector v City of Fargo, 2012 ND 80, ¶¶ 14-15, 24, 35. This Court concluded that the City did not improperly calculate the total cost of the project and the total amount to be assessed. Id. ¶ 38. As such, the doctrines of res judicata and collateral estoppel bar re-litigation of these claims and issues. See, Skogen v. Hemen Township, 2010 ND 92, ¶ 17, 782 N.W.2d 638. As a matter of law, the City is entitled to summary judgment as to Section III of the Complaint.

[39] This Court had already determined that there was no evidence of conversion of federal funds. Hector v. City of Fargo, 2012 ND 80, ¶¶ 27-28, 815 N.W.2d 240. Hector presented no evidence to support his claim in response to the motion for summary judgment.

[40] The City supported its summary judgment motion with the Affidavit of Mark Bittner explaining that the North Dakota Department of Transportation acted as the “banker” on the project, accessed and applied federal funds the City was entitled to, then billed the City of its share of the costs. App. 65-69 ¶¶ 9-18. The City also presented Audit reports for the project years 2008-2011. Doc ID #'s 31-33, Audit Reports. The City also submitted evidence that it had received awards for excellence in financial reporting for those same years. Doc. ID #34.

[41] The City also provided the district court with the Affidavit of City Auditor Steve Sprague. App. pp. 250-253. Mr. Sprague prepared an updated cost certification. App. p. 250-252, ¶¶ 1-8, 9-10 and App. p. 254. The certification shows that as of April 2013, the City's costs were \$26,456,302.91. App. p. 254. In October 2009 the City's costs were \$26,255,716.56. App. p. 92. While the City's costs changed over time, the amount of the special assessments stayed the same at \$16,343,400.03. App. p. 92 and 254. The City could have assessed the full amount of its costs. N.D.C.C. § 40-22-06. Following its infrastructure policy, however, the assessments were capped at \$16,343,400.43. App. pp. 92 and 254.

[42] In opposition to the motion for summary judgment, Hector submitted documents the City provided in discovery, including, among other others, progressive payment No. 28 for the frontage roads from the Department of transportation. App. p.

162. This document shows that the amount of federal funding was exactly what was specified in the 2007 contract, \$990,000. App. p. 79, ¶ 1(a). Progressive Payment No. 28 shows that in September 2012 the City's share for the frontage road project was \$5,558,401, as opposed to the contract estimate of \$5,725,933.20. This reduction, however, cannot negate the validity of the assessments for 5314.

[43] Hector also continues to claim that the City failed to assess based on its true costs. Hector claims that N.D.C.C. § 40-26-07 provides him with a cause of action to obtain relief in the district court from the District 5314 special assessments. Appellant's Brief p. 20. That statute may provide relief only *if* "such assessments shall be held to be void by reason of non-compliance with any provision of the laws of this state." N.D.C.C. § 40-26-07. No court has held the District 5314 assessments void. The decision of the City of Fargo regarding the District 5314 assessment has been upheld. See, Hector v City of Fargo, 2012 ND 80, 815 N.W.2d 240. Therefore, N.D.C.C. § 40-26-07 does not provide Hector with a second chance to challenge the City of Fargo's special assessment process.

[44] Hector also continues to claim the frontage roads were paid for entirely by federal funds and that a jury could decide various fact issues regarding the assessment process in his favor. See, Appellant's Brief p. 28. Assessments may be invalid to the extent they exceed the cost of the improvement. Hector v. City of Fargo, 2012 ND 80, ¶ 37, 815, N.W.2d 240 (citations omitted). As shown above, however, the assessments for District 5314 are significantly less than the City's costs. App. p. 254. Further, this Court reviewed the assessment process and determined that the City did not improperly

calculate the total cost of the project or the amount to be assessed. See, Hector v. City of Fargo, 2012 ND 80, ¶ 38, 815, N.W. 2d 240.

[45] There simply is no evidence which can create a genuine issue of material fact as to whether the assessments for District 5314 exceeded the City's costs. Summary judgment was properly granted as to Section III of the Complaint.

3. Summary Judgment Was Proper as to Claims of Fraud, Deceit and Fiduciary Duty

[46] Complaint paragraphs 37-47 contain Hector's allegations of fraud and deceit against the City of Fargo. App. pp. 25-29. Complaint paragraphs 46-49 contain Hector's allegations of breach of fiduciary duty. App. pp. 29-31. To the extent these claims allege the City failed to properly specially assess Hector properly, those claims were dismissed because this Court has already determined the City of Fargo acted appropriately. Hector v. City of Fargo, 2012 ND 80, 815 N.W.2d 240. In making its summary judgment motion, the City of Fargo presented evidence in the form of affidavits and audit reports. App. pp. 63-68, Bittner Affidavit ¶¶ 12-16; Doc. ID #'s 30-35; and Sprague Affidavit, App. pp. 250-253. Hector presented no evidence to support his allegations of fraud, deceit and breach of fiduciary duty regarding federal, or other, funds.

[47] Chapter 40-26 of the North Dakota Century Code is entitled "Corrections of Errors and Special Assessments, Reassessments and Levies for Fund Deficiencies." N.D.C.C. §§ 40-26-01 to 40-26-08. The legislature created a procedure for levying special assessments and then gave Courts the power to review the levy and apportion special assessments in actions and proceedings involving the validity or apportionment of any special assessment for a local or special improvement. N.D.C.C. § 40-26-01. The action taken pursuant to N.D.C.C. § 40-26-01 must be an appeal made in accordance with

the procedure provided in N.D.C.C. § 28-34-01. Hector followed both N.D.C.C. § 40-26-01 and N.D.C.C. § 28-34-01 in his appeal of the City Commission's decision in which Judge Irby and then this Court determined that the City Commission did not act arbitrarily, capriciously or unreasonably. See, Hector v. City of Fargo, Civil No. 09-2009-CV-04473; Hector v. City of Fargo, 2012 ND 80, 815 N.W.2d 240. Hector failed to obtain a declaration that the assessments were void and so cannot rely on N.D.C.C. § 40-26-07.

a. There is No Viable Fraud Claim

[48] Hector claims he is entitled to maintain this action for equitable relief based on fraud “or other grounds.” Appellant's Brief, p. 20. He relies on Foss Methodist Church v. City of Wahpeton, 157 N.W.2d 347 (N.D. 1968). That decision, however, came prior to the requirement in N.D.C.C. § 40-26-01 that an action be brought as an appeal. Additionally, even under a plea for equitable relief, there must be some showing of fraud, mistake or that the City's decision was arbitrary. This Court has determined that the City of Fargo's Special Assessment decision was not capricious, unreasonable or arbitrary. Hector has not set forth any facts which support a claim of equitable relief.

[49] There is no contract between the City of Fargo and Mr. Hector sufficient for a fraud claim. Fraud, within the meaning of N.D.C.C. § 9-03-08, exists between parties to a contract. See, WFND, LLC v. Fargo Marc, LLC, 2007 ND 67, ¶ 25, 730 N.W.2d 841, 853. Hector cannot present evidence to support at least one element of a fraud claim. Summary judgment of dismissal as to the Fraud claim alleged in Section III of the Complaint was appropriate as a matter of law.

[50] Furthermore, in Section IV of his Complaint, Hector asserts that the City made false statements regarding construction costs and interest in its newspaper publications of August 31, 2009, September 7, 2009 and in its auditor's letters of August 5, 2009, September 9, 2009, and an auditor's amended letter dated October 13, 2009. See, Complaint ¶ 38 (a), (b),(c). The varying numbers in the publications, documents and auditors letters reflect the best information known at the time or a "snapshot" of information. As to the cost outlays, the City has provided the progressive payment information from the Department of Transportation. App. pp. 63-69, Bittner Affidavit and Exhibits App. pp. 70-79; Doc. ID # 39-46. At Judge Irby's request, the City copied all invoices and checks it had written paying the NDDOT and contractors (when no CPMA existed on a project). All those checks can be found on the Court's website at Docket #'s 23 through 38 in Hector v City of Fargo, Civil No. 09-2009-CV-04473. As of October 2009 the documents show that the City had already spent \$22,827,081. See, Docket ID# 23 p. 3 of Hector v. City of Fargo, Civil No. 09-2009-CV-04473. Hector has not presented any evidence to create a genuine issue of fact as to the existence of fraud.

b. There is No Viable Claim for Deceit

[51] Deceit under N.D.C.C. §§ 9-10-02 and 9-10-03 is a tort based claim and only applies when there is no contract between the parties. WFND, LLC v. Fargo Marc, LLC, 2007 ND 67, ¶ 25, 730 N.W.2d 841, 853. A claim of deceit is where one willfully deceives another with the intent to induce that person to alter that person's position to that persons' injury or risk. N.D.C.C. § 9-10-03; Grandbois v. City of Watford City, 2004 ND 162, ¶ 20, 685 N.W.2d 129. If one has suffered damage as a result of altering one's

position due to a willful deception, the injured person may sue for deceit damages. N.D.C.C. § 9-10-03.

[52] Nowhere in the Complaint or in his brief does Hector allege that the City intentionally and willfully made “deceitful” statements with the intent to induce Hector to alter his position. Hector did not present evidence to support his deceit allegations in response to the motion for summary judgment. Hector did not alter his position in response to the City’s financial representations. Hector cannot prove an essential element of a claim for deceit against the City. Summary judgment was properly entered in the City’s favor on the deceit claim as a matter of law.

c. There is No Viable Claim for Breach of Fiduciary Duties

[53] Hector alleges that in making its District 5314 assessments the City diverted federal funds and thereby breached fiduciary duties it owed to Hector. Appellants Brief p. 26. An examination of each of the allegations contained in Section IV (sic) of the Complaint establishes that all of the alleged breaches stem from the special assessment process upheld by this Court in Civil No. 09-2009-CV-04473 and the Supreme Court in Hector v. City of Fargo, 2012 ND 80, 815 N.W.2d 240.

[54] No North Dakota case addressing the existence of a fiduciary duty between a municipality and one of its residents was found. However, a Connecticut court, reviewing a lower court’s finding that former board members of a taxing district breached their fiduciary duties to the people of the district, determined that municipal officers do not owe a fiduciary duty to the public whom they serve except as may be imposed by statute under specific circumstances. Candlewood Hills Tax District v. Medina, 74 A.3d

421, 430-431. (Appellate Ct. Conn. 2013). The court determined that the parties were not engaged in a fiduciary relationship. Id. p. 430. The Court stated:

. . . while the defendants stood in their official capacity as representatives of the taxing district, they did not have a relationship with the general public of the taxing district characterized by a unique degree of trust and confidence associated with a fiduciary.

Id. The Court concluded that not applying a fiduciary duty made:

. . . sense because the majority of activities conducted by a government are for the benefit of the public as a whole as opposed to certain individuals. Without a close relationship based on trust and a specific duty to act for another, there cannot be a fiduciary relationship.

Id. The claim based on breach of fiduciary duty must be dismissed.

[55] Additionally, even if such a duty existed, Hector has failed to present evidence sufficient to create a genuine issue of material fact as to the existence of any wrongdoing by the City of Fargo in connection with the special assessment process for District 5314. Hector acknowledges that there have been “volumes of discovery to date.” Appellants Brief p. 27. Hector also had the opportunity to take depositions in this action, both before the order for stay and after the Rule 16 conference in January 2013. He failed to do so and so has no evidence to support his breach of fiduciary duty claim.

[56] There is no applicable fiduciary duty. The district court properly granted the City of Fargo’s motion for summary judgment as to the Section IV (sic) of the Complaint.

4. Summary Judgment Was Proper as to Denial of Federal Civil Rights Claims

[57] Hector alleges that he was denied his Federal Civil Rights because of how the special assessment was created. He asserts both substantive and procedural due process claims in violation of 42 U.S.C. § 1983 and the Fourteenth Amendment. This

Court determined previously that the City of Fargo did not misinterpret the law or violate statutory requirements. Hector v. City of Fargo, 2012 ND 80, 815 N.W.2d 240.

[58] In supporting its motion for summary judgment, the City presented evidence that there was no violation of the Single Audit Act Hector raised at the Rule 16 Conference. At oral argument on the City of Fargo's summary judgment motion, counsel for Hector stated that Hector had never asserted that the Single Audit Act was the basis for his federal claim and that he "had never once asserted" that the Federal Highway Apportions Act" was the basis for the federal claim. May 14, 2013 Tr. p. 24, lines 20-25. Hector now asserts for the first time that he was an intended beneficiary of "the federal highway program" in support of his civil rights claims. Appellant's Brief, p. 22. Hector is precluded from raising this issue or argument for the first time in this appeal. Rutherford v. BNSF Railway, 2009 ND 88, ¶ 28, 765 N.W.2d 705.

[59] Furthermore, 42 U.S.C. § 1983 creates no substantive rights but provides a procedure for redressing rights established elsewhere. Sykes v. James, 13 F.3d 515, 519 (2d Cir. 1993). A federal statute may create a claim against a state actor under § 1983. Blessing v. Freestone, 520 U.S. 329, 340-41 (1997). Congress must have intended that the provision in question benefit the plaintiff. Id. The Federal Aid Highway Act (FAHA) 23 U.S.C. was enacted to improve the nation's highway system by providing federal financial aid for state and local highway construction. Balf v. Gatta, 637 F. Supp. 370, 378 (D. Conn. 1986). Balf, a commercial user of streets, brought action alleging that the city violated FAHA by closing a street to through traffic. Id. In a prior decision, it was determined that Balf's ability to transport goods in interstate commerce was significantly

affected by the City's action and found that Balf may have been deprived of a "right" secured by FAHA. Balf v. Gaitor, 534 F. Supp. 300, 605 (D. Conn. 1982).

[60] In the circumstances presented here, Hector is not an intended beneficiary of the FAHA. He did not claim he has been deprived of highway access. He did not identify the provision of the FAHA that was allegedly violated nor did he identify how that alleged violation deprived him of a benefit the act was intended to afford him. The City has shown that it complied with the Single Audit Act and that it did not control any federal funds. Hector does not specify any facts sufficient to create a genuine issue of material fact which would preclude entry of summary judgment on behalf of the City as to Complaint Section VI. Finally, as a result of the 10 year deferral agreements, Hector has suffered no injury, harm or deprivation of right. Doc. ID #'s 70-71.

E. There is No Procedural Due Process Violation

[61] Hector has received the requisite due process. He received notice and a right to be heard on the assessments. See, Fisher v. City of Minot, 188 N.W.2d 745,752 (N.D. 1977). The City Commission complied with the statutory requirements for notice and review of the assessments by the Special Assessment Commission. Hector v. City of Fargo, 2012 ND 80, ¶¶ 52-53 and 57, 815 N.W.2d 240. Hector appeared before the Special Assessment Commission through his attorney and made his objections. Hector v. City of Fargo, 2012 ND 80, ¶ 54, 815 N.W.2d 240; See October 15, 2009 Special Assessment Hearing Transcript, App. pp. 206-249. Hector also appeared before the City Commission which considered his objections. Hector v. City of Fargo, 2012 ND 80, ¶ 57, 815 N.W.2d 240. There was no evidence presented to create a genuine issue of material fact as to the adequacy of the procedural due process Hector had been afforded. The

district court properly granted summary judgment to the City of Fargo on any procedural due process claim as a matter of law.

F. There is No Substantive Due Process Violation

[62] Hector also claims a substantive due process violation. This claim was also properly dismissed. In a substantive due process claim, the task is to consider whether a right exists under the Fourteen Amendment and, secondly, whether the City's conduct deprived Hector of that right within the meaning of the due process clause. Hector's burden is to demonstrate that the government action complained of is truly irrational, that it is something more than arbitrary, capricious, or in violation of state law. Creason v. City of Washington, 435 F.3d 820, 825 (8th Cir. 2006). In light of this Court's decision affirming the decision of the City Commission regarding the District 5314 assessments, Hector cannot demonstrate this second element. See, Hector v. City of Fargo, 2012 ND 80, 815 N.W.2d 240.

[63] Hector also alleges that the act of specially assessing his property led to an assessment that exceeded the City's cash outlay. The facts do not support this. Doc. ID #23 in Hector v. City of Fargo, Civil No. 09-2009-CV-04473. The City showed cash outlays for construction costs of over \$20 million. Id. and App. p. 254. The assessments remain at \$16 million. App. p. 254.

[64] Hector also alleges that the City's act of imposing a special assessment on his property for the frontage roads amounts to invidious discrimination in violation of the equal protection clause of the 14th Amendment to the Constitution of the United States. App. p. Complaint ¶¶ 54(a) and (b) and Appellant's Brief p. 25-26. He also alleges that it deprives him of property without due process of law. App. p. 32, Complaint, ¶ 54(c).

[65] To support a claim under the equal protection clause, Hector must establish that he was treated differently from other landowners similarly situated. Creason v. City of Washington, 435 F.3d 820, 823. A classification that does not burden a fundamental right or target a suspect class will be upheld if it bears a rational relationship to a legitimate end. Romer v. Evans, 517 US 620, 631 (1996). The City's special assessment process was reviewed by this Court and upheld. The City had a rational basis for any dissimilar treatment Hector may have received based on the amount and location of land he owned. When there is a rational basis for any dissimilar treatment, an equal protection claim fails. See, Wyler v. Purkett, 137 F.3d 1047, 1051 (8th Cir. 1998). State actors may treat dissimilarly situated people dissimilarly without running afoul of the protections afforded by the equal protection clause. Ganley v. Minneapolis Park and Recreation Board, 491 F.3d 743, 747. Indeed, even unequal application of the regulations may not violate equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. Id. Hector has not, and cannot, make any showing of the element of intentional or purposeful discrimination on the part of the City.

G. The Decision of the District Court Should Be Affirmed

[66] As has been shown above, the claims arising from the Complaint herein were identical to those this Court considered in Hector v City of Fargo, 2012 ND 80, 815 N.W.2d 240. As such, Judge Marquart properly granted the City's motion for summary judgment as the claims herein are barred by res judicata. Alternatively, there was no evidence presented to create a genuine issue of material fact to preclude the grant of the City's summary judgment motion as to the class allegations (Sections I and II); the claims

based on the statutory process for special assessments (Section III); the claims based on fraud and deceit (Section IV); the claims based on fiduciary duty (Section IV(sic)) and the claims based on the alleged denial of Federal Civil Rights (Section VI). Summary judgment was properly granted as a matter of law.

CONCLUSION

[67] Based on the foregoing, the City of Fargo respectfully requests that this Court affirm the district court's Memorandum Opinion and Order and Judgment granting the City's summary judgment motion as to each claim in the Complaint herein.

Dated this 13th day of November, 2013.

/s/ Jane L. Dynes

Ronald H. McLean (ID #03260)
Jane L. Dynes (ID #04495)
SERKLAND LAW FIRM
10 Roberts Street
P.O. Box 6017
Fargo, ND 58108-6017
Telephone: (701) 232-8957
rmclean@serklandlaw.com
jdynes@serklandlaw.com
ATTORNEYS FOR
DEFENDANT-APPELLEE

CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for the Appellee in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and 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 this certificate of compliance, totals 7,234.

Ronald H. McLean (ID # 03260)

Jane L. Dynes (ID # 04495)

SERKLAND LAW FIRM

10 Roberts Street

P.O. Box 6017

Fargo, ND 58108-6017

Phone: (701) 232-8957

rmclean@serklandlaw.com

jdynes@serklandlaw.com

ATTORNEYS FOR DEFENDANT-APPELLEE

By: /s/ Jane L. Dynes _____

Jane L. Dynes

AFFIDAVIT OF SERVICE BY EMAIL

**Fred M. Hector, Individually and on behalf of all Landowners
specifically assessed for Special Assessment Project 5314**

v.

City of Fargo

Supreme Court No. 20130223

District Court No.: 09-2009-CV-04474

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

Katie Rudnick, being duly sworn, deposes and says that she is a resident of the City of Moorhead, State of Minnesota, is of legal age; and that she served the within:

BRIEF OF DEFENDANT-APPELLEE

on November 13, 2013, by email as follows, to-wit:

Jonathan T. Garaas
DeMores Office Park
1314 – 23rd Street South
Fargo, ND 58103-3796
Email: garaaslawfirm@ideaone.net

To the best of affiant's knowledge, the email address above given is the actual email address of the party intended to be so served. The above document was emailed in accordance with the provisions of the Rules of Civil Procedure.

/s/ Katie Rudnick

Katie Rudnick

Subscribed and sworn to before me this 13th day of November, 2013.

/s/ Lacey A. Hruby

Lacey A. Hruby, Notary Public
Cass County, North Dakota
Commission Expires: 9-21-16

(SEAL)