

20070202

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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Stephanie Sauby, individually and)
on behalf of those similarly situated,)
)
Plaintiff.)
v.)
)
City of Fargo.)
)
Defendant.)

STATE OF NORTH DAKOTA

North Dakota Supreme Court
No. 20070202

U.S. District Court,
Southwestern Division.
District of North Dakota.
No. 3:07-cv-10

Proceedings on certification from a July 10, 2007, order of the Federal District Court certifying a question to the North Dakota Supreme Court.

U.S. District Court, Southwestern Division
The Honorable Rodney S. Webb

**BRIEF OF AMICUS CURIAE
IN SUPPORT OF THE CITY OF FARGO**

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[¶ 2] INTEREST OF AMICUS CURIAE

[¶ 3] The North Dakota Association of Counties (NDACo) has an interest in this appeal as an amicus curiae. NDACo is a voluntary membership organization which includes all of North Dakota's 53 counties as members. Seven of North Dakota's counties have adopted home rule charters after local elections. North Dakota's home rule counties include Cass, Grand Forks, Richland, Stutsman, Walsh, Ward and Williams.

[¶ 4] These home rule counties all have enacted various ordinances designed to protect the health and safety of everyone within their boundaries. Currently, no home rule county has its own court system. Instead, home rule counties have negotiated a partnership with the State court system, housed in county facilities, which allows home rule counties to enforce their ordinances in State court.

[¶ 5] Although home rule counties have not created the same type traffic fee structure as the City of Fargo, any decision which would allow a plaintiff to bring an action against a home rule entity by applying general non-home rule provisions has the potential to swallow the "home rule" rule. The purpose of home rule was to allow local self-government on the basis of elections by the people to be governed. Any attempt to limit home rule based on perceived conflicts of state law would contradict the plain language of the home rule chapter.

[¶ 6] ARGUMENT

[¶ 7] I. The city of Fargo's enactment of ordinances which provided for higher fines for non-criminal traffic offenses is within the supersession power granted by the North Dakota State Legislature.

[¶ 8] The plain language of home rule authority appears quite broad when it states, "The statutes of the state of North Dakota, so far as applicable, shall continue to apply to home rule cities, **except insofar as superseded by the charters of such cities or by ordinance passed pursuant to such charters.**" See N.D. CENT CODE § 40-05.1-06 (emphasis added) (Home rule counties have similar language. See N.D. CENT CODE § 11-09.1-05(9)). However, home rule authority certainly has its limits. See Litten v. City of Fargo, 294 N.W.2d 628, 631 (N.D. 1980) (stating "the supersession provision set out in § 40-05.1-05, NDCC, has limited and qualified application"). The question then becomes how to balance the rules of statutory construction which state 1) words are to be understood in their ordinary sense and 2) legislation is presumed to be effective; against the limitations as expressed in Litten. See N.D. CENT CODE §§ 1-02-02 & 1-02-38; 294 N.W.2d at 632 (stating home rule charters were not intended to mean any and every ordinance the city may pass would supersede state law).

[¶ 9] In Litten, the North Dakota Supreme Court laid out the frame work of how to determine when the supersession provision applies to home rule ordinances. 294 N.W.2d at 632. The North Dakota Supreme Court has stated "[i]f the authority or power to enact an ordinance on a specific subject is not found in § 40-05.1-06 or in Ch. 40-05.1. or some other comparable statute, then a strong presumption exists that the city will be governed by the laws generally applicable to cities." Id. Therefore, to answer whether

home rule cities can enact traffic fines higher than the State's fines, the question must be answered whether home rule cities have been granted "specific subject" matter authority. Id.

[¶ 10] The North Dakota legislature has granted home rule cities the specific power to define offenses for the people's "public health, **safety**, morals, and welfare." See N.D. CENT CODE § 40-05.1-06(9) (emphasis added). Even more importantly, the legislature specifically granted home rule cities the power to set the "penalties for a violation thereof." Id. Plaintiff concedes the legislature has granted home rule cities the "general authority to provide penalties for the violation of the traffic ordinances." See Plaintiff's Brief page 7. Therefore, under Litten and the rules of statutory construction, since home rule cities have indeed been granted specific subject matter authority in the area of traffic offenses and setting the penalties thereof, the supersession provision applies and any conflict should be resolved in favor of the home rule city. 294 N.W.2d at 632.

[¶ 11] **II. Plaintiff's statutory authority for limiting home rule charters is based on authority either superseded by home rule authority or was not intended to apply to home rule charters.**

[¶ 12] Plaintiff asserts there are numerous State statutes that should prohibit the city of Fargo from enacting higher traffic fines than listed in State law. See Plaintiff's brief page 8 -21. (citing N.D. CENT CODE §§ 40-05-01, 40-05-02, 40-05-06, 39-06.1-02, 39-06.1-03, 39-06.1-06, 39-06.1-09, 12.1-01-05). Plaintiff first cites N.D. CENT CODE §§ 40-05-01, 40-05-02, & 40-05-06, for the proposition that rules governing the power of municipalities limit municipalities from exceeding "the limits, for equivalent categories

of violations, set for in section 39-06.1-06.” See Plaintiff’s brief page 8. Indeed, if a municipality has not adopted a home rule charter specifically allowing traffic ordinances under N.D. CENT CODE § 40-05.1 then their traffic fine structure cannot supersede the fine structure listed in N.D. CENT CODE § 39-06.1-06. However, the present case does not deal with municipalities in general but instead is focused on home rule authority. See N.D. CENT CODE § 40-05.1. General municipality law will not apply to a home rule charter unless the home rule entity lacks the specific subject matter authority. See Litten 294 N.W.2d at 632.

[¶ 13] Plaintiff next asserts the provisions in N.D. CENT CODE 39-06.1 limit home rule charters from enacting higher traffic fees. See Plaintiff’s brief page 8. Specifically, Plaintiff asserts the language in N.D.C.C. § 39-06.1-02 which requires the “bond required to secure appearance must be identical to the statutory fee established by section 39-06.1-06” as an example of a “legislative command that fees for traffic violations cannot exceed state law” and “is a specific direction from the Legislature.” Id. Even assuming for the moment N.D. CENT CODE §39-06.1-02 applies not only to municipalities in general but home rule municipalities, N.D. CENT CODE § 39-06.1-02 list no prohibition on traffic fines imposed. See N.D. CENT CODE § 39-06.1-02. The only specific direction the statute provides is posted **bonds** be identical to the State statutory fine. Id. Additionally, home rule authority specifically allows home rule cities to “provide for city courts, their jurisdiction and power over ordinance violations, duties, administration”. See N.D. CENT CODE § 40-05.1-06(5). Inherent, in that authority is the home rule court system can create their own framework for ordinance violations which could also include the types of bonds required, therefore making the administrative requirements of N.D. CENT CODE

§ 39-06.1-02 inapplicable. Id. Of course any home rule city court's administration and structure would still have to comply with Constitutional standards such as due process. See U.S. CONST. art. VI, cl. 2; and N.D. CONST. art. I, § 23.

[¶ 14] Finally, Plaintiff asserts N.D. CENT CODE §12.1-01-05 prohibits the city's fine structure because "No offense defined in this title or elsewhere by law shall be superseded by any city or county ordinance, or city of county home rule charter, or by an ordinance adopted pursuant to such a charter". See Plaintiff's brief page 17 (quoting N.D. CENT CODE §12.1-01-05). This statute makes clear, in the realm of **criminal law**, home rule entities cannot supersede State law. N.D. CENT CODE §12.1-01-05. In this particular case, the city of Fargo is completely consistent with State law in the context of traffic offenses because both consider traffic offenses non-criminal. See N.D. CENT CODE §39-06.1-02; and Fargo Municipal Ordinance § 1-0306.

[¶ 15] The question then becomes does N.D. CENT CODE §12.1-01-05, prohibit higher fines than state law. The plain language of the statute also indicates, "This section shall not preclude any city or county from enacting any ordinance containing penal language when otherwise authorized to do so by law." N.D. CENT CODE §12.1-01-05. The word "penal" is defined as "having to do with punishment or penalties." See Gilbert Law Dictionary, 1997. The North Dakota Supreme Court has also reviewed this concept where a city has a replicate statute with State law but differs in regard to the penalty. See City of Fargo v. Little Brown Jug, 468 N.W.2d 392 (N.D. 1991) (upholding a city's penalty less than the State's penalty).

[¶ 16] This case does raise an issue that was not addressed in Little Brown Jug which is the City enacting a higher fine than the State. 468 N.W.2d at 396. (stating "our

decision in this case is limited to those situations in which the municipality authorizes imposition of up to the maximum allowable municipal penalty which is lesser than the state law penalty for an equivalent statute.”). However, Little Brown Jug is distinguishable in that in this case the city is not regulating a criminal matter; it is only imposing civil fine which as previously discussed is allowed by home rule authority. Id. at 394. (analyzing the city’s power under the general authority of municipalities under N.D. CENT CODE § 40-05-01 as opposed to home rule authority under N.D. CENT CODE § 40-05.1). As stated in Little Brown Jug, “[s]tatutes relating to the same subject matter shall be construed together and should be harmonized, if possible, to give meaningful effect to each, without rendering one or the other useless.” Id. at 395. Given the presumption against implicitly repealing the language in N.D. CENT CODE § 40-05.1-06, this Court could find home rule cities have been granted limited authority to set fees in **non-criminal traffic offenses.**

[¶ 17] **CONCLUSION**

[¶ 18] For the reason home rule entities have been granted authority to supersede State law in certain circumstances and State law does not specifically direct home rule counties to adopt the State’s non-criminal traffic fees the question of whether home rule cities can set their own fines should be answered in the affirmative.

Respectfully submitted this 19th day of September, 2007.

Aaron G. Birst, NDID #05820

[¶ 19] CERTIFICATE OF SERVICE

A copy of this document was e-filed, pursuant to Administrative Order 14, to the North Dakota Supreme Court, Tim Purdon and Mike Miller on the 19th of September 2007, served electronically upon:

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