

IN THE SUPREME COURT

OCT 8 2007

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA

Stephanie Sauby, individually and)	
on behalf of those similarly situated,)	Supreme Court No: 20070202
)	
Plaintiff and Appellant,)	United States District Court,
)	Southeastern Division, District
v.)	of North Dakota, No: 3:07-cv-10
)	
City of Fargo,)	
)	
Defendant and Appellee.)	

**PROCEEDINGS ON CERTIFICATION FROM A JULY 10, 2007 ORDER OF
THE FEDERAL DISTRICT COURT CERTIFYING A QUESTION TO THE
NORTH DAKOTA SUPREME COURT.**

UNITED STATES DISTRICT COURT, SOUTHEASTERN DIVISION

THE HONORABLE RODNEY S. WEBB

REPLY BRIEF OF PLAINTIFF/APPELLANT

VOGEL LAW FIRM

**Robert B. Stock, ID #05919
Mark A. Friese, ID # 05646
218 NP Avenue
P.O. Box 1389
Fargo, ND 58107-1389
Facsimile (701) 237-0847
Attorneys for Plaintiff/Appellant**

VOGEL LAW FIRM

**Monte L. Rogneby, ID # 05029
Timothy Q. Purdon, ID # 05392
200 3rd Street North, Ste. 201
P.O. Box 2097
Telephone (701) 258-7899
Facsimile (701) 258-9705
Attorneys for Plaintiff/Appellant**

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Sutherland, Statutory Construction § 22.306

INTRODUCTION

Consistent with N.D.R.App.P. 28(d), the Plaintiff/Appellant, Stephanie Sauby, hereby submits this Reply Brief to the briefs of Defendant/Appellee City of Fargo (“City”) and the amicus curie.

LAW AND ARGUMENT

As previously outlined in Ms. Sauby's initial brief, the plain unambiguous language of the relevant statutes prohibit the City from imposing fees in excess of the limits established by state law. The City attempts to create an ambiguity as to its authority, notwithstanding the fact that ambiguity regarding the City's authority is strictly construed against the City. This Court should not adopt the City's interpretation because doing so would create absurd results beyond the legality of the City's excessive fees.

I. The City's Statutory Argument Fails.

Ms. Sauby again asserts there is no ambiguity in the controlling statutes. However, if the Court agrees with the City and concludes the statutes are ambiguous, then City of Fargo v. Malme, 2007 ND 137, ¶ 13, 737 N.W.2d 390, provides that “[t]he rule of strict construction applies in defining [the Cities] powers.” (citing GO Comm. ex. rel. Hale v. City of Minot, 2005 ND 136, ¶ 8, 701 N.W.2d 865.) “Any doubt as to the existence or extent of municipal powers must be resolved against the municipality.” Id. at ¶ 13. A home rule city's ability to supersede state law is limited because “[w]hatever powers a home rule city may have are based upon statutory provisions.” Id. at ¶ 10 (quoting Pelkey v. City of Fargo, 453 N.W.2d 801, 805 (N.D. 1990)). A home rule city may exercise broad plenary powers in those areas specified under N.D.C.C. § 40-05.1-06, “except where specifically provided that these powers may be exercised only by

conforming or complying with state law.” Id. at ¶ 11 (citing Litten v. City of Fargo, 294 N.W.2d 628, 630 (N.D. 1980)).

Here, in addition to the prohibitions in N.D.C.C. Ch. 40-05, the Legislature has in N.D.C.C. Ch. 39-06.1 specifically denied home rule cities the power to impose penalties for traffic violations greater than state law. Section 39-06.1-09, N.D.C.C., provides:

For the purposes of sections 39-06.1-06 and 39-06.1-13, a “moving violation” means a violation of section 39-04-22; subsection 1 of section 39-04-37; section 39-04-55; 39-06-01; 39-06-14; 39-06-16; 39-09-04.1; 39-09-09; subsection 1 of section 39-12-02; sections 39-12-04; 39-12-05; 39-12-06; 39-12-09; 39-24-02; or 39-24-09, except subdivisions b and c of subsection 5, or equivalent ordinances; or a violation of the provisions of chapter 39-10, 39-10.2, or 39-21, or equivalent ordinances, except subsection 4 of section 39-10-26, sections 39-21-44 and 39-21-45.1, subsections 2 and 3 of section 39-21-46, and those sections within those chapters which are specifically listed in subsection 1 of section 39-06.1-08.

(emphasis added). Section 39-06.1-01(2), N.D.C.C., defines “equivalent ordinance” or “equivalent ordinances” as “city, state, or other jurisdiction ordinances which are comparable to the cited statute, and define essentially the same offense, despite the fact that the language of the ordinance may differ, or differing procedural points or methods of proof may be provided.” Accordingly, the fee limits set forth in N.D.C.C. § 39-06.1-06 apply to any city ordinances that are comparable to the cited statute.

The City contends that these statutes do not limit a home rule city’s power because the words “home rule city” are not included in the text. This argument fails because the City’s interpretation would create absurd results far beyond the issue of traffic violation fees. Applying the City’s rationale, the definition of “equivalent ordinance” does not include an ordinance of a “home rule city.” Under such a construction, enhanced penalties for driving under the influence, implied consent laws,

driver's license demerit points, and numerous other provisions of North Dakota law would be inapplicable to those who violate the ordinance of a "home rule city."

For example, N.D.C.C. § 39-06.1-10(3) governs the entry of demerit points on someone's driving record for violation of state statute or "equivalent ordinances." If the Court accepts the City's position, drivers who violate a home rule city ordinance cannot have demerit points entered on their driving record. Rather, this penalty would apply only to drivers who violate non-home rule city ordinances. Likewise, under N.D.C.C. § 39-20-01, when a person under the age of eighteen years is taken into custody for violating section 39-08-01 (driving under the influence) or an equivalent ordinance, a law enforcement officer must attempt to contact the person's parent or legal guardian to explain the cause for the custody. Under the City's interpretation, a law enforcement officer does not have to contact the parent of a child who has violated a home rule city ordinance, only the parent of a child who has violated a "city" ordinance. These results are ridiculous and clearly against the intent of the Legislature. See also N.D.C.C. § 39-08-01.1 (stating that "a previous conviction does not include any prior violation of section 39-08-01 or equivalent ordinance if the offense occurred prior to July 1, 1981"); N.D.C.C. § 39-20-04 (providing authority to revoke a drivers license for refusing to submit to a chemical test for driving under the influence or equivalent ordinance); N.D.C.C. § 39-20-04.1(1) (providing administrative suspension of drivers license privileges for violations of N.D.C.C. § 39-08-01 or equivalent ordinance).

Furthermore, the City's argument would allow supercession of any statute that does not say "home rule city." For example, under N.D.C.C. § 39-06-01, "Any person licensed as an operator hereunder may exercise the privilege thereby granted upon all

streets and highways in this state and may not be required to obtain any other license to exercise such privilege by any county, municipal or local board, or body having authority to adopt local police regulations." Consistent with the City's argument, the City--under "home rule" authority--could require local licensing of drivers, notwithstanding N.D.C.C. § 39-06-01. Likewise, N.D.C.C. § 39-01-09 prohibits "the state of North Dakota, its political subdivisions, counties, cities, and the state department of transportation to establish and maintain any mechanical device or devices known as 'parking meters.'" The provision does not specifically list "home rule cities." If the City's position is true, then the City could lawfully use parking meters, which it cannot.¹ See City of Fargo v. Sathre, 36 N.W.2d 39, 50-51 (N.D. 1949) (holding that the City of Fargo could not install parking meters). The practical implications of accepting the City's absurd position are enormous.

The only logical conclusion is that by limiting the amount of statutory fees for "equivalent ordinance" violations in N.D.C.C. § 39-06.1-06, the Legislature has specifically limited both "cities" and "home rule cities." This position is consistent with the current state of the law and the clear intent of the Legislature.

II. The City Impermissibly Asks This Court to Legislate by Judicial Determination.

The City's brief does not address the subsequent legislative history argument raised by Sauby in her initial brief. See Appellant's Br. 10-12 . This is because the City is now asking this Court to do what it, and presumably the amicus curie, could not

¹ The City attempted to change N.D.C.C. § 39-01-09 in the 1999 Legislative Session but was unsuccessful. S.B. 2226, 57th Leg. (N.D. 1999).

accomplish during the 2007 legislative session: amend N.D.C.C. § 40-05-06 to allow the City to impose fees in excess of those allowed under N.D.C.C. § 39-06.1-06.

During the 2007 session, the North Dakota Legislative Assembly rejected legislation that would have changed North Dakota law to allow the City to charge excessive fees. This subsequent legislative history shows that the Legislative Assembly did not intend to allow home rule cities to impose fees in excess of those allowed under N.D.C.C. § 39-06.1-06. Having failed to get its way with the Legislative Assembly, the City is now asking this Court to overrule the clear intent of the legislature by judicial determination.

The function of the courts is to interpret the law, not to make law. CybrCollect, Inc. v. North Dakota Dept. of Fin. Institutions, 2005 ND 146, ¶ 23, 703 N.W.2d 285. As the City aptly notes, “The justice, wisdom, necessity, utility and expediency of legislation are questions for legislative, and not for judicial determination.” Haney v. North Dakota Workers Comp. Bureau, 518 N.W.2d 195, 197 (N.D. 1994) (citing Manikowske v. North Dakota Workmen's Comp. Bureau, 338 N.W.2d 823, 825 (N.D. 1983)).

The principles of statutory construction permit a court to look to subsequent enactments and amendments as an aid in arriving at the correct meaning of a prior statute. “[I]t is very common for a court, in construing a statute, to refer to subsequent legislation as impliedly confirming the view which the court has decided to adopt.” State v. Novak, 338 N.W.2d 637, 640 (N.D. 1983) (citing 73 Am.Jur.2d Statutes § 178 (1974)). “When the Legislature amends an existing statute, it indicates its intent to change the statute’s meaning in accord with its new terms.” State v. Beilke, 489 N.W.2d 589, 592 (N.D. 1992).

As explained in Ms. Sauby's initial brief, the City sought a legislative amendment to provide a specific grant of authority to impose fines in excess of those permitted by state law after Sauby initiated this action. See Appellant's Br. 11; S.B. 2392, 60th Leg. (N.D. 2007). This proposed legislation was soundly defeated 88 to 5. See H.J. 1781, 60th Leg. (N.D. 2007). Add. 12.² The City also sought legislative amendment of N.D.C.C. § 40-18-15 to permit a home rule city to "establish, by ordinance, a procedure through which an alleged violation of city ordinance may be tried and determined." S.B. 2286, 60th Leg. (N.D. 2007). The House of Representatives defeated the Bill 91 to 1. See H.J. 974, 60th Leg. (N.D. 2007). The Legislature chose to leave intact the requirement of posting a bond "identical" to state law.³

In Heck v. Reed, 529 N.W.2d 155 (N.D. 1995), citing Sutherland, Statutory Construction § 22.30, this Court explained:

The legislature is presumed to know the prior construction of terms in the original act, and an amendment substituting a new term or phrase for one previously construed indicates that the judicial . . . construction of the former term or phrase did not correspond with the legislative intent and a different interpretation should be given the new term or phrase.

Heck, 529 N.W.2d at 161. Therefore, when the 2007 Legislature declined to amend both N.D.C.C. §§ 40-05-06 (S.B. 2392) and 40-18-15 (S.B. 2286) it did so with full awareness that three District Court Judges had interpreted N.D.C.C. § 40-05-06 to prohibit the City

² The legislative journey of S.B. 2392 is explained in footnote 1 of Ms. Sauby's initial brief.

³ Senate Bill 2286 was an attempt to circumvent the command of N.D.C.C. § 39-06.1-02, requiring that bond posted for traffic violations must be identical to the statutory fee established by N.D.C.C. § 39-06.1-06.

of Fargo from imposing traffic violation fees in excess of state law.⁴ By rejecting the City's attempt to legislatively overrule the three District Court decisions, the Legislature confirmed the three District Courts' statutory interpretation prohibiting the City from imposing traffic violation fees in excess of state law. If these courts' interpretation of the law did not correspond with the Legislative Assembly's intent, the Assembly would have adopted the amendments of N.D.C.C. §§ 40-05-06 (S.B. 2392) and 40-18-15 (S.B. 2286) proposed by the City. The justice, wisdom, necessity, utility and expediency of N.D.C.C. §§ 40-05-06 and 39-06.1-02 are for the Legislative Assembly to decide, not this Court. The intent of the Assembly is clear, and the City is asking this Court to overrule this intent by judicial determination.

III. Section 12.1-01-05, N.D.C.C., Applies to the City's Fee Schedule.

The City argues that reference to N.D.C.C. § 12.1-01-05 has no relevance in this case because Title 12.1 is the criminal code. Both the text of N.D.C.C. § 12.1-01-05 and the legislative history concerning home rule powers show that the Legislative Assembly intended to limit a home rule city's ability to impose penalties in excess of state law.

In ascertaining legislative intent, the Court looks first to the language of the statute as a whole, and construes the statute's words in their plain, ordinary, and commonly understood sense. Chamley v. Khoka, 2007 ND 69, ¶ 12, 730 N.W.2d 864. No headnote, source note, or cross-reference note, whether designating an entire title, chapter, section, subsection, or subdivision, constitutes any part of a statute. A headnote may not be used to determine legislative intent or the legislative history for any statute."

⁴ The City suggests that the Court should adopt the rationale of a 1982 Attorney General's Opinion because it is "persuasive." This Opinion, which supports the City's argument, is not persuasive, and has been overruled by four separate District Court decisions.

N.D.C.C. § 1-02-12; see also Jorgenson v. Agway, Inc., 2001 ND 104, ¶ 8, 627 N.W.2d 391.

Although N.D.C.C. § 12.1-01-05 is entitled “crimes defined by state law shall not be superseded by city or county ordinance or by home rule city’s or county’s charge or ordinance,” the word “crime” does not appear anywhere else in the text of N.D.C.C. 12.1-01-05. The text of N.D.C.C. § 12.1-01-05 specifically states that “[n]o offense defined in this title or elsewhere by law shall be superseded by any city or county ordinance, or city or county home rule charter, or by an ordinance adopted pursuant to such a charter, and all such offense definitions shall have full force and effect within the territorial limits and other jurisdiction of home rule cities or counties.” N.D.C.C. § 12.1-01-05 (emphasis added). The plain and unambiguous language of N.D.C.C. § 12.1-01-05 states that the City cannot provide penalties for “offenses” defined elsewhere “by law” greater than penalties provided by state statute.

The definition of “offense” includes a traffic violation under state law or municipal ordinance. N.D.C.C. § 39-06.1-02. In addition, the City relies on N.D.C.C. § 40-05.1-06(9) for the authority to impose traffic violation fees. Section 40-05.1-06, N.D.C.C., only grants the City the authority to “define offenses against private persons . . . and provide penalties for violations thereof.” (emphasis added). The City cannot logically argue on one hand that it has the power to define “offenses” and then on the other hand claim its enacted violations do not constitute “offenses.” The plain and unambiguous language of N.D.C.C. § 12.1-01-05 demonstrates the Legislature’s intent to limit a home rule city’s ability to impose penalties in excess of state law. The City’s traffic violation fee scheme violates this clear statement of law.

CONCLUSION

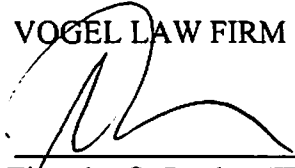
For the foregoing reasons, Ms. Sauby respectfully requests that this Court answer “NO” to the certified question in this case by declaring that the City cannot lawfully impose traffic fees in excess of those authorized by state law.

Word Count: 2,424

Respectfully submitted this 8 day of October, 2007.

VOGEL LAW FIRM

By



Timothy Q. Purdon (ID #05392)
Monte L. Rogneby (ID #05029)
200 3rd Street North, Ste. 201
P.O. Box 2097
Bismarck, ND 58502-2097
Telephone (701) 258-7899
Facsimile (701) 258-9705

Robert B. Stock (ID #05919)
Mark A. Friese (ID #05646)
218 NP Avenue
P.O. Box 1389
Fargo, ND 58107
Telephone (701) 237-6983
Facsimile (701) 237-0847

Attorneys for Plaintiff /Appellant

577300

20070202

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AFFIDAVIT OF SERVICE BY MAIL

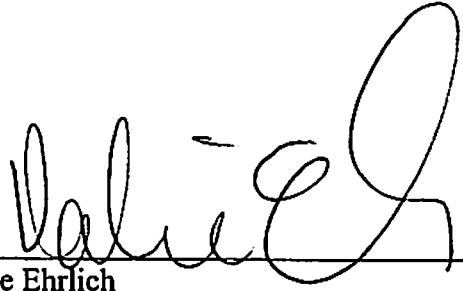
STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

The undersigned, being duly sworn, deposes and says that I am a citizen of the United States over the age of 18 years and not a party to the above-entitled matter; that on the 8 day of October, 2007, I served a copy of the following:

1. Reply Brief of Plaintiff/Appellant.

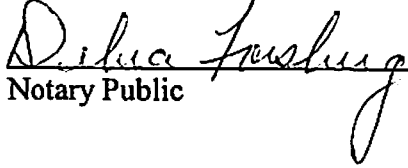
by placing a true copy in a postage paid envelope or envelopes addressed to each person named below, at the address stated below, which is the last known address of the addressee, and by depositing said envelope in the United States mail at Bismarck, North Dakota:

Stacey E. Tjon
Mike Miller
Attorneys at Law
PO Box 1897
Fargo ND 58107-1897



Valerie Ehrlich

Subscribed and sworn to before me this 8 day of October, 2007.



Notary Public

51329

