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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

The City of Moorhead, a political subdivision of the State of Minnesota, Plaintiff and Appellee, vs. Bridge Company, Defendant and Appellant, and The City of Fargo, a political subdivision of the State of North Dakota, Defendant and Appellee.	Supreme Court No. 20140431

Appeal from the Judgment and Amended Judgment of the
Cass County District Court,
East Central Judicial District,
Honorable Frank L. Racek, Presiding

MOORHEAD'S APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES

[¶1] Did the trial court err when it ordered Bridge Company to donate the Bridge to the Cities under Section 6.1(a) of the Bridge Agreement after finding Bridge Company had no outstanding qualifying debt at the end of the 25-year term as extended 249 flood days by Section 6.4, the mandatory force majeure clause?

[¶2] Does the Bridge Agreement require the Cities to reimburse Bridge Company for any repairs or maintenance expenses already paid in full by Bridge Company over the 25-year term of the Bridge Agreement?

[¶3] Did Bridge Company's Counterclaim (including its prayer for relief) assert a claim for damages for attorney fees and other expenses it asserts were incurred in a failed mediation?

STATEMENT OF THE CASE

[¶4] This case concerns the ownership of a toll bridge connecting the Cities of Fargo, North Dakota, and Moorhead, Minnesota (the "Bridge"). In 1986, Moorhead and Fargo (collectively, the "Cities") entered into an agreement (governed by North Dakota law) with Bridge Company, for Bridge Company to construct, own and operate the Bridge (the "Bridge Agreement"). App. 72-90.[1] After expiration of the term provided for in the Bridge Agreement, the Bridge was to be conveyed to the Cities.

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[1]All references in Moorhead's Appellee's Brief to "App." are to the **Appellant's Appendix**. All references in Moorhead's Appellee's Brief to "FargoApp." are to the **City of Fargo's Appendix of Appellee**.

[¶5] Moorhead commenced this action against Bridge Company and Fargo in a Complaint dated May 29, 2013. App. 10-18. In an Amended Complaint filed on March 19, 2014, Moorhead asserted two claims for relief: a claim seeking a declaratory judgment to determine the rights, status, and legal responsibilities of the parties arising under the Bridge Agreement, and a claim for specific performance, requesting that the trial court order Bridge Company to donate the Bridge to the Cities. App. 35-42.

[¶6] After the trial court denied Moorhead's Motion for Summary Judgment, a one-day bench trial was held August 12, 2014. In the court's Findings of Fact, Conclusions of Law, and Order for Judgment entered September 17, 2014, the trial court ruled Bridge Company was required to donate the Bridge to the Cities after a term of 25 years and 249 days, which term ended on February 5, 2014. App. 53-55. The court found none of the original indebtedness for the construction of the Bridge remained outstanding after September 6, 2013. App. 55, at ¶ 18. The court further found $108,761 in alleged maintenance and repairs expenses paid by Bridge Company over the 25-year life of the Bridge Agreement had been paid in full by Bridge Company prior to February 5, 2014. Bridge Company's App. 55, at ¶ 19, and 59, at ¶ 32. Consequently, the court ordered Bridge Company to transfer the Bridge to the Cities. App. 60 at ¶ 33.

[¶7] The court entered Judgment on September 23, 2014. App. 61. On November 25, 2014, the court entered an Amended Judgment requiring the transfer

to take place within 10 days. App. 63 at ¶ 2. Bridge Company failed and refused to transfer the Bridge to the Cities within 10 days of November 25, 2014. Doc. #317, and instead Bridge Company filed a Notice of Appeal on the tenth day, December 5, 2014. App. 70.

[¶8] In an Order Amending Findings entered on December 12, 2014, the trial court amended its Finding of Fact ¶ 24 to state that Bridge Company owed approximately $75,000, rather than $57,000, in original debt on June 1, 2013. App. 67, at ¶ 4. Upon temporary remand from this Court, on December 30, 2014, the trial court entered an Order affirming its 12/12/14 Order Amending Findings. App. 69.

[¶9] Through proceedings under Rule 70(a), N.D.R.Civ.P., and by virtue of Bridge Company's decision to abandon efforts to obtain a stay of execution under Rule 62(h), N.D.R.Civ.P. (pending the instant appeal), conveyance of the Bridge to the Cities was effected on February 6, 2015, on behalf of Bridge Company, by persons appointed by the court under Rule 70(a), without the participation of Bridge Company. Doc. #296, #314, #317, and #320 through #327. As of February 6, 2015, the Cities assumed ownership and possession of the Bridge. Doc. #320.

STATEMENT OF THE FACTS

[¶10] In 1986, the Cities of Fargo and Moorhead entered into an agreement with Bridge Company to construct and operate a toll bridge over the Red River of the North, connecting 12th Avenue North in Fargo with 15th Avenue North in Moorhead.

App. 72. Bridge Company is a North Dakota corporation, whose stock is owned by two shareholders, Clifford Moore (owner of 2/3rds of the stock) and James Dixon (owner of 1/3rd of the stock) . Tr.47:3-13.

[¶11] Under the Bridge Agreement, Bridge Company was to own and operate the Bridge, subject to certain terms and conditions. App. 75, ¶ 2.2. Bridge Company was solely responsible for financing the construction, operation, and maintenance of the Bridge, including all costs of repair, and the Cities were to have no conditional liability in the event Bridge Company failed to meet its present or future financial commitments. Id. at ¶ 2.3, App. 78, ¶ 4.5.3; App. 80, ¶ 5.3. Bridge Company was permitted to charge a toll for vehicles crossing the Bridge. App. 80, ¶ 5.2.

[¶12] The Bridge Agreement set forth the term for Bridge Company's ownership and operation of the Bridge as follows:

> 6.1. Term. The term of this Agreement shall be for a period of twenty (20) years commencing with the day the Bridge commences operations. **At the expiration of 25 years from the day the Bridge commences operations one of the following shall occur**:
>
> **(a)** **In the event the original debt incurred for the construction of the Bridge, including any refinancing or renegotiation of such debt, and any debt incurred for major maintenance and repairs to the Bridge, have been fully paid, [Bridge] Company shall donate the Bridge to the Cities free and clear from any liens**, and the Cities shall accept the Bridge for public use to be operated by the Cities as they may determine. It is expressly understood and agreed by and between the parties that any refinancing or additional financing which constitutes a lien or encumbrances on the Bridge which may be obtained more than five years after the original financing for the construction of the Bridge, shall be subject to the approval of the Cities. The

amortization of any refinancing may not extend beyond 25 years from the commencement of the operation of the Bridge and [Bridge] Company agrees it will not default on any loan secured by the Bridge. It is further agreed [Bridge] Company will not permit or cause to be filed any lien or encumbrance on the Bridge other than a first lien for permanent financing and such liens or encumbrances as are necessary to secure interim construction financing.

(b) **In the event any portion of the original debt incurred for the construction of the Bridge, including any refinancing or renegotiation of such debt approved in advance by the Cities, or any portion of any debt incurred for major maintenance and repairs of the Bridge remains unpaid**, the Cities shall have the option to either:

1. To pay or assume such outstanding indebtedness and, in such event, [Bridge] Company shall convey the Bridge to the Cities; or

2. Grant [Bridge] Company the right to continue to operate the Bridge under the terms of this Agreement for an additional term of five (5) years, and upon the expiration of such extended term [Bridge] Company shall donate the Bridge to the Cities free and clear from any liens and the Cities shall accept the Bridge for public use to be operated by the Cities as they may determine.

App. 82-83, ¶ 6.1 (bracketed language and emphasis and double emphasis added). Accordingly, the Bridge Agreement expressly provided that, if no **qualifying** debt remained at the conclusion of the 25-year term, Bridge Company was required to donate the Bridge to the Cities. Id.

[¶13] The Bridge Agreement also contained a force majeure clause, which **automatically suspended** Bridge Company's obligations to perform and

automatically extended the 25-year term of the Bridge Agreement, under certain circumstances:

> 6.4. Suspension of Obligations to Perform. [Bridge] Company's obligation to construct, maintain, and operate the [B]ridge shall be **suspended** for reasons beyond the reasonable control of [Bridge] Company, or by reason or acts of God, or force majeure, strikes, lock outs, labor troubles, or unavailability of building materials and the time for performance shall be **extended** for a period equal to the delays so caused.

App. 84, ¶ 6.4 (bracketed language and emphasis added).

[¶14] The initial 25-year term of the Bridge Agreement--without any force majeure extension--would have ended June 1, 2013. App. 54, at ¶¶ 11-12, and App. 82, at Section 6.1. However, during that initial 25-year term, the Bridge was closed for 249 days due to flooding, which automatically extended the 25-year term for 249 days after June 1, 2013, pursuant to the Bridge Agreement's force majeure clause (quoted in full above in ¶ 13). Bridge Company affirmed this interpretation of the Bridge Agreement in its Rule 30(b)(6) deposition, taken on January 28, 2014:

> [MR. NELSON:]
>
> Q. Am I correct that you are the president of Bridge Company?
>
> A. That is correct.
>
> Q. You've been designated to testify on behalf of Bridge Company in this deposition. --
>
> A. Yes.
>
> Q. -- is that correct?

***

BY MR. NELSON:

Q. Okay Mr. Moore, [Deposition] Exhibit 1 is titled "Agreement Between City of Fargo, City of Moorhead, And Bridge Company." Do you see that on the front?

A. Yes, I do.

* * *

Q. And then it's dated the 19th day of May, 1986, correct?

A. That is correct.

* * *

Q. At the bottom of page 5, there's a paragraph, 4.8 commencement of operations. Do you see that?

A. Yes, I do.

Q. And am I correct that the bridge commenced business on June 1 of 1988?

A. That's correct.

* * *

Q. We just mentioned the last sentence of the introductory language at the top of that page [page 8 of the Bridge Agreement], 6.1, paragraph 6.1, that the expiration of 25 -- **the term ends at the expiration of 25 years from the day that Bridge Company commences operation** [of the Bridge] and then one of the following shall occur. **Do you see that**?

A. **I see that**.

Q. Then we have subparagraph A, which is the first option, and then subparagraph B. Do you see that?

A. Those two I see, yes.

Q. All right. **Am I correct that, in terms of the 25-year term, any time the bridge was closed, those days did not count for the 25 years, is that correct?**

A. **That's--that's addressed in the agreement here somewhere, yes.**

Q. **All right. And you have a figure for that, that you disclosed to us. Do you know how many days that was?**

A. **249.**

* * *

Q. **If you look at paragraph 6.4** [**the force majeure clause**], read it to yourself for just a moment and let me know when you're finished.

A. I'm finished.

Q. **Is that the paragraph or the provision of this contract that you referenced earlier, when you said there was part of this agreement that said if it was closed because of flooding those days didn't count?**

A. **Yes. That's the way I understand it.**

Q. **That's what this paragraph means, correct?**

A. **Right.**

* * *

FargoApp. 1, 3-5 (FargoApp. 1, 3-5 consists of excerpts from a condensed (i.e., four pages on one page) version of Bridge Company's Rule 30(b)(6) deposition transcript, in evidence as Exhibit 4, and the condensed transcript references are p. 6, l. 12 through l. 18; p. 7, l. 20 through l. 25; p. 9, l. 5 through l. 7; p. 9, l. 25 through p. 10, l. 6; p. 11, l. 7 through p. 12, l. 2; and p. 16, l. 25 through p. 17, l. 10) (bracketed language and emphasis added). At trial, Moorhead and Fargo both stipulated (on the record) that the 25-year term of the Bridge Agreement, as modified by Section 6.4's force majeure clause, was extended by the number of days the Bridge was closed due to flooding. Tr.44:18 to 45:19. Accordingly, all parties in this case agreed the addition of the 249 flood days meant the 25-year term of the Bridge Agreement ended on February 5, 2014. App. 54, ¶¶ 11, 12.

[¶15] After the lender involved in remaining original construction debt (Alerus Financial) called for payment on the personal guarantees of Bridge Company's two shareholders, Clifford Moore and James Dixon, they, along with Bridge Company, "paid off the total balance on September 6th" of 2013, which amounted to about $57,000. Tr.58:15-22. This was accomplished by Bridge Company (through its president, Clifford Moore) writing checks to Moore and Dixon for $40,000 and $20,000, respectively, on September 1, 2013, which Moore and Dixon then promptly deposited into their respective personal checking accounts. Tr.69:12-16. Moore and Dixon then promptly paid off the Alerus loan through checks drawn on their personal checking accounts, which checks were personally delivered

to the lender (both at the same time) by shareholder Moore on September 6, 2013. Tr.71:13-20; 72:15-21. Therefore, Bridge Company agreed it had no outstanding original construction debt on February 5, 2014, when the term of the Bridge Agreement ended. Tr.58:15-22. This was confirmed in Bridge Company's Rule 30(b)(6) deposition on January 28, 2014, when its designee Clifford Moore testified as follows:

EXAMINATION

BY MR. MCLEAN:

* * *

Q. Are your only debts, presently with Bridge Company, then, real estate taxes to the two counties?

A. Basically, yes.

FargoApp. 19, 26 (Bridge Company's Rule 30(b)(6) deposition transcript, p. 71, l. 17-18, and p. 99, l. 14-17).

[¶16] In its Findings of Fact, Conclusions of Law, and Order for Judgment, the trial court found the Bridge was closed for 249 days during Bridge Company's operation of the Bridge. App. 54, ¶ 11. The court further found the "parties agree that this would extend the original 25-year term of the agreement an additional 249 days." Id. With the inclusion of those additional 249 days, the court concluded the 25-year term ended on February 5, 2014. Id. at ¶ 12. The court found Bridge Company had no outstanding original construction debt remaining at that time, as the

debt had been paid off on September 6, 2013. App. 55, ¶ 18. Moreover, the court found all of the $108,761 in Bridge Company's claimed repair and maintenance expenses had been paid in full by Bridge Company prior to February 5, 2014. App. 55, ¶ 19, and 59, ¶ 32. Under these circumstances, the court rejected Bridge Company's attempt to apply Section 6.1(b) of the Bridge Agreement, since all "qualifying debt" under Section 6.1(a) of the Bridge Agreement had been paid off prior to the end of the term of the Bridge Agreement on February 5, 2014. Id. The court therefore ordered Bridge Company to donate the Bridge to the Cities. App. 60, ¶ 33.

ARGUMENT

I. Standard of review.

[¶17] The trial court entered a Judgment and an Amended Judgment against Bridge Company after a bench trial. "In an appeal from a bench trial, the trial court's findings of fact are reviewed under the clearly erroneous standard of N.D.R.Civ.P. 52(a) and its conclusions of law are fully reviewable." (Internal quotation marks and citation omitted). "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after reviewing all the evidence, we are left with a definite and firm conviction a mistake has been made." Id.

[¶18] Regarding a trial court's interpretation of a contract, this Court will independently review the contract to determine whether the district court erred in its

interpretation of it. Bernabucci v. Huber, 2006 ND 71, ¶ 15, 712 N.W.2d 323 (citation omitted).

II. The trial court did not err when it ordered Bridge Company to donate the Bridge to the Cities under Section 6.1(a) of the Bridge Agreement after finding Bridge Company had no outstanding "qualifying" debt at the end of the 25-year term, as extended by 249 flood days under Section 6.4, the mandatory force majeure clause.

A. Section 6.1(a) and Section 6.1(b) are mutually exclusive.

[¶19] The central issue presented in this appeal is whether the trial court erred by requiring Bridge Company to donate the Bridge to the Cities under Section 6.1(a) of the Bridge Agreement. Bridge Company argues the court should have applied Section 6.1(b) instead.

[¶20] "Contracts are construed to give effect to the parties' mutual intent as it existed at the time of contracting." Barrett v. Gilbertson, 2013 ND 35, ¶ 10, 827 N.W.2d 831 (citing N.D.C.C. § 9-07-03). "The parties' intent is ascertained from the writing alone whenever possible." Id. (citing N.D.C.C. § 9-07-04). "'The words of a contract are to be understood in their ordinary and popular sense rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.'" Id. (quoting N.D.C.C. § 9-07-09). "Interpretation of a contract is a question of law, if the parties' intent can be determined from the language of the contract alone." Langer v. Bartholomay, 2008 ND 40, ¶ 12, 745 N.W.2d 649.

[¶21] In this case, the trial court's interpretation of the Bridge Agreement centered on the mutually exclusive events addressed in Section 6.1. Under Section 6.1(a), if there was no original construction debt remaining at the end of the term, and no remaining debt for major maintenance and repairs, then Bridge Company was required to donate the Bridge to the Cities. App. 82, ¶ 6.1(a). If, on the other hand, any original construction debt, or any debt for "major maintenance and repairs," remained unpaid, the Cities then had an option under Section 6.1(b) to either pay off that debt, or grant a 5-year extension of the term. Id. at ¶ 6.1(b). Accordingly, whether Section 6.1(a) or Section 6.1(b) applied depended on whether there was any such "qualifying debt" remaining on February 5, 2014. Section 6.1(a) and Section 6.1(b) are mutually exclusive events, as is explicitly recognized in the introductory paragraph to Section 6.1, which states "*one* of the following shall occur" at the end of the term. Id. (italics added).

B. Section 6.4 automatically extended the 25-year term provided for in Section 6.1 when the Bridge was closed due to flooding.

[¶22] The only remaining question is when the term ended. Under the rules of contract interpretation, "A contract must be read and considered in its entirety so that all of its provisions are taken into consideration to determine the true intent of the parties." Abelmann v. Smartlease USA, L.L.C., 2014 ND 227, ¶ 13, 856 N.W.2d 747 (internal quotation marks and citation omitted). "Each clause is to help interpret the others." N.D.C.C. § 9-07-06.

[¶23] By virtue of Section 6.4, the end date (termination date) of the Bridge Agreement could change over time if the Bridge was closed due to flooding of the Red River. Again, Section 6.4--a force majeure clause--extended the 25-year term of the Bridge Agreement for the number of days the Bridge was, in fact, closed due to flooding:

> 6.4 Suspension of Obligations to Perform. **[Bridge] Company's obligation** to construct, maintain, and operate the [B]ridge shall be **suspended** for reasons beyond the reasonable control of [Bridge] Company, or by reason of acts of God, or force majeure, strikes, lock outs, labor troubles, or unavailability of building materials and **the time for performance shall be extended for a period equal to the delays so caused**.

(Emphasis and bracketed language added).

[¶24] This clause **(1) automatically suspended** all of Bridge Company's obligations to "**perform**" under the Bridge Agreement (including Bridge Company's obligation to amortize the remaining original construction debt within the 25-year term of the Bridge Agreement), and also **(2) automatically suspended** Bridge Company's operation of the Bridge, for the precise number of days the Bridge was closed due to flooding. And, as made clear in its ending phrase, this clause's effect was thus to **(1) automatically extend all of Bridge Company's obligations to perform** under the Bridge Agreement (including its debt service obligations), and **(2) automatically extend Bridge Company's 25-year term of operation of the Bridge**, for the precise number of days the Bridge was closed due to flooding. It remained a 25-year Agreement, but the days the Bridge was closed due to flooding

did not count against Bridge Company in the initial 25 years, and instead the number of days of Bridge closure were automatically **added back in at the end** of the initial 25 years, in order to give Bridge Company the full 25 years of operation of the Bridge--which is what it contracted to have under the Bridge Agreement. This is precisely how Bridge Company itself interpreted and applied the Bridge Agreement. See above excerpts from Bridge Company's Rule 30(b)(6) deposition transcript, at ¶ 14.

[¶25] Three clauses in Section 6 of the Bridge Agreement establish the correctness of the above analysis of the 25-year term of the Bridge Agreement: 6.1 ("At the expiration of 25 years from the day the Bridge commences operations one of the following shall occur:"), 6.1(a) and 6.4, all quoted in full above in ¶¶ 12-13. The suspension/extension language in Section 6.4 is **mandatory**; each of the two suspension/extension provisions is preceded by the phrase "**shall be**."

[¶26] If someone were to suggest that the 25-year term actually ended 25 years, to the day, after the day the Bridge Company commenced operation of the Bridge (which Bridge Company is arguing in the instant appeal), it would have required Bridge Company to vacate and hand over to the Cities (Moorhead and Fargo) ownership, control, and operation of the Bridge on that day--5/31/13--under either paragraph 6.1(a) or paragraph 6.1(b)(1) of the Bridge Agreement, **and would deprive Bridge Company of 249 days of toll cash flow--or over 2/3rds of a year of toll**

cash receipts. At $1,000+ in toll income per day, that would have cheated Bridge Company out of $249,000+ in toll income.

[¶27] Bridge Company would surely have howled mightily if Moorhead and/or Fargo had knocked on the door of Bridge Company's toll booth bright and early on 5/31/13, and demanded the keys to the toll booth.

[¶28] Of course, that did not happen. Why? Because under Section 6.4 of the Bridge Agreement (the force majeure clause) the 25-year clock did not tick on any days the Bridge was closed due to flooding. The running of that clock was "suspended"--which is precisely the word used, preceded by the phrase "shall be"--by the clear language of Section 6.4. Bridge Company thus enjoyed the toll income from those 249 "flood days," **from 5/31/13 to 2/5/14**, while it still performed under the Bridge Agreement for the balance of the 25-year term (as "extended"--which is precisely the word used, preceded by the phrase "shall be"-- under Section 6.4 of the Bridge Agreement), and still operated the Bridge for the **full 25 years**.

[¶29] The trial court interpreted the Bridge Agreement by reading Section 6.1, which provided for the 25-year term, with Section 6.4, which suspended the obligations to perform when "acts of God" occurred. Specifically, Section 6.4 suspended Bridge Company's obligation to maintain and operate the Bridge for reasons beyond Bridge Company's control, and it mandated "**the time for performance shall be extended for a period equal to the delays so caused**." App. 84, ¶ 6.4 (emphasis and double emphasis added). The trial court found the

Bridge was closed for 249 days due to flooding of the Red River during the initial 25 years of the operation of the Bridge, and therefore the 25-year term was extended by 249 days, such that the 25-year term ended on February 5, 2014. App. 54, ¶¶ 11-12.

[¶30] The trial court proceeded to determine whether any "qualifying debt" existed as of February 5, 2014. The court found Bridge Company wrote checks to shareholders Moore and Dixon on September 1, 2013, who then deposited those checks in their respective personal checking accounts and then wrote their own personal checks to Bridge Company's lender, which personal checks were then personally delivered to that lender by Moore to pay off the remaining construction debt on the Bridge. App. 55, ¶¶ 16-17. Accordingly, the court found no original construction debt remained outstanding after September 6, 2013. Id. The court further found all of Bridge Company's alleged $108,761 in maintenance and repair expenses, incurred over the 25-year life of the Bridge Agreement, had been fully paid by Bridge Company prior to February 5, 2014. App. 59, ¶ 32.[2] Therefore, because no "qualifying debt" remained when the 25-year term expired on February 5, 2014,

[2]The last expense paid by Bridge Company for which it asserted a right to reimbursement (as a part of its $108, 761.34 total) was a $6,966.13 expense it paid on 8/21/13 to Moorhead Electric. See App. 125. App. 125 is actually the third page of a 3-page document, the first two pages of which are App. 126 and 127. The first itemized expense Bridge Company paid which it included in its $108,761.34 total was a $5,764.00 expense paid to Moorhead Electric on **7/13/88**, some 26+ years ago, by check #1145. App. 126. All of the expenses included in App. 125, 126 and 127 were "**all paid before the end of the year 2013**." Tr.75:15 to 76:23.

Bridge Company was required to donate the Bridge to the Cities. App. 57, ¶ 25; App. 60, ¶ 33.

[¶31] Bridge Company does not challenge the trial court's factual finding that the Bridge was closed for 249 days due to flooding. Nor does it contend it had any original construction debt remaining on February 5, 2014, or that any part of its $108,761 in so-called repairs and maintenance expenses were owed on February 5, 2014. Rather, Bridge Company argues the trial court's interpretation was incorrect because Section 6.4 refers only to Bridge Company's obligations to "construct, maintain, and operate the bridge," not any obligation of the Cities, including any requirement for the Cities to exercise an option under Section 6.1(b) by June 1, 2013.

[¶32] Bridge Company's argument directly contradicts the position it took below. During Bridge Company's Rule 30(b)(6) deposition, Bridge Company's designee (Clifford Moore, its president and majority shareholder) testified Section 6.4 meant that any time the Bridge was closed for flooding, those days did not count toward the 25-year term. See ¶ 14 above. That Rule 30(b)(6) deposition, which is in evidence as Exhibit 4, conveyed Bridge Company's knowledge and position in this matter. See Great Am. Ins. Co. of N.Y. v. Vegas Const. Co., Inc., 251 F.R.D. 534, 538 (D. Nev. 2008) (noting Rule 30(b)(6) testimony "represents the knowledge of the corporation"); see also N.D.R.Civ.P. 30(b)(6) (stating persons designated under the Rule "must testify about information known or reasonably available to the organization"). In a Rule 30(b)(6) deposition, "[t]he designee testifies on behalf of

the corporation and thus holds it accountable." Sprint Comm. Co., L.P. v. Theglobe.com, Inc., 236 F.R.D. 524, 527 (D. Kan. 2006); see also Bank of N.Y. v. Meridien BIAO Bank Tanzania Ltd., 171 F.R.D. 135, 150 (S.D. N.Y. 1997) (recognizing "the deponent must be both knowledgeable about a given area and prepared to give complete and binding answers on behalf of the organization"). Consequently, Bridge Company's Rule 30(b)(6) deposition testimony bound the corporation, which supports the trial court's finding that "the parties agreed the 25-year term was extended by 249 days." App. 54, ¶ 11.

[¶33] In any event, Bridge Company's contract interpretation argument misses the point. Under multiple contract provisions, Bridge Company had the obligation to operate and maintain the Bridge. See App. 75, ¶ 2.2; 76, ¶ 4.2; 78, ¶ 4.5.3. Section 6.1 established the term of the Bridge Agreement, *i.e.*, the period in which Bridge Company was obligated to operate and maintain the Bridge. App. 82, ¶ 6.1. Section 6.4 operated automatically to extend the term of the Bridge Agreement when "acts of God" occurred, as it (Section 6.4) clearly mandated Bridge Company's obligations to operate and maintain the Bridge **"shall" be suspended** during this time, "and the time for performance **"shall" be extended** for a period equal to the delays so caused." (Emphasis and quotation marks added.) Accordingly, because the Bridge was closed for 249 days due to flooding, Bridge Company's obligation to operate and maintain the Bridge was "extended for a period equal to [these] delays[.]" App. 84,

¶ 8.4. Therefore, the trial court correctly concluded the 25-year term provided for in Section 6.1 was extended 249 days by virtue of Section 6.4.

[¶34] Again, there are two questions at issue: (1) when did the term end? and (2) was there "qualifying debt" remaining at that snapshot in time? Section 6.4 impacts the first question, because it extended the term 249 days to February 5, 2014. On that date, no "qualifying debt" remained, and therefore the trial court correctly ordered Bridge Company to donate the Bridge to the Cities under Section 6.1(a).

C. Section 7.8 did not control over Section 6.1(a) and Section 6.4.

[¶35] Bridge Company next urges this Court to apply a tortured construction of the force majeure language in Section 7.8, the Bridge Agreement's "Events of Default" clause, in lieu of Section 6.4, such that Bridge Company could not be determined to be in default due to flood-related closures. Section 7.8 provided the Cities and Bridge Company could not be deemed in default if they were unable to perform their obligations by reason of acts of God. App. 88, ¶ 7.8.

[¶36] Nothing in Section 7.8 granted Bridge Company the ability to unilaterally refinance its loan, which formed the basis for the trial court's finding on default. Section 6.1(a) explicitly required Bridge Company to obtain approval from the Cities before refinancing, and it further prohibited Bridge Company from amortizing any refinancing beyond the 25-year term or defaulting on any loan secured by the Bridge. App. 82, ¶ 6.1(a). Accordingly, the trial court gave these provisions

effect and correctly concluded that, if Bridge Company unilaterally refinanced the loan, it would be in default. App. 58, ¶ 30.

[¶37] Moreover, Section 7.8 only protected Bridge Company from being "deemed in default *during the continuance of such inability*." App. 82, ¶ 7.8 (italics added). There is nothing in the record to suggest that flooding or some other act of God took place on or around May 1, 2014, when Moorhead provided written notice of default, which would have protected Bridge Company from being deemed in default during that time. Therefore, Section 7.8 simply does not apply.

[¶38] In sum, the trial court correctly applied the force majeure clause in Section 6.4, which, unlike Section 7.8, **extended** the 25-year term for 249 days. Bridge Company received what it bargained for, because it was given an additional 249 days to operate the Bridge--and collect tolls of $1,000+ per day--to make up for the time and toll income that was lost during flood-related closures.

III. Bridge Company is not entitled to be reimbursed for maintenance and repair costs which Bridge Company already paid in full over the 25-year term of the Bridge Agreement.

[¶39] Bridge Company argues it should be reimbursed $108,000 for repair and maintenance costs it paid over the 25-year term of the Bridge Agreement. Citing Section 6.1(b), Bridge Company asserts the Cities were required to reimburse it for major maintenance and repair expenses that had **already been paid in full by Bridge Company**, in order for the Cities to "exercise the option to take over the Bridge."

[¶40] Bridge Company's argument fails on several fronts. First, as discussed above and as determined by the trial court, Section 6.1(b) never took effect, and therefore the Cities were never tasked with exercising either option under that provision.

[¶41] More importantly, Bridge Company cannot cite a single provision of the Bridge Agreement that required the Cities to **reimburse** it (Bridge Company) for maintenance and repair expenses **previously paid by Bridge Company**. To the contrary, several provisions declared it was Bridge Company's sole responsibility to pay the costs of maintaining and repairing the Bridge. Section 2.3, for instance, states, "[a]ny and all financing necessary for the construction, operation, and maintenance of the bridge is the responsibility of [Bridge Company]," and the Cities had "no conditional or contingent liability in the event of any failure on the part of [Bridge Company] to meet its present or future financial commitments." App. 75, ¶ 2.3. Section 4.5.3 obligated Bridge Company to "pay *all costs and expenses* for the design, construction, maintenance and repair of the Bridge." App. 78, ¶ 4.5.3 (italics added). Moreover, as Bridge Company concedes, Section 5.3 states the Bridge was to be "maintained and repaired at the sole cost and expense of [Bridge Company]." App. 80, ¶ 5.3. Simply put, the plain language of the Bridge Agreement could not be clearer in requiring Bridge Company to pay all costs and expenses for maintaining and repairing the Bridge. See Barrett, 2013 ND 35 at ¶ 10.

[¶42] To be sure, Bridge Company correctly notes "major maintenance and repairs" were addressed in Section 6.1. App. 82, ¶ 6.1. Specifically, Section 6.1(a) states, "[i]n the event the original debt incurred for the construction of the Bridge, including any refinancing or renegotiation of such debt, and any debt incurred for major maintenance and repairs to the Bridge, have been fully paid, [Bridge Company] shall donate the Bridge to the Cities free and clear from any liens[.]" Id. Accordingly, "major maintenance and repairs" are simply one delineated category of debt, along with original debt and refinanced debt. The only issue concerning these categories of debt was whether the debt had been paid at the expiration of the term.

[¶43] The trial court found Bridge Company paid **all** of the repair and maintenance expenses, including the full amount of the $108,761 in alleged repair and maintenance expenses it paid during the term of the Bridge Agreement. App. 58, ¶ 28. Bridge Company agrees with this factual finding. Because Bridge Company had no debt remaining on February 5, 2014, including **(1)** a lack of debt for the original construction of the Bridge, and **(2)** a lack of debt for **any** maintenance and repairs--"major" or otherwise--to the Bridge, Bridge Company was required to donate the Bridge to the Cities under Section 6.1(a). There is nothing in the Bridge Agreement requiring the Cities to now reimburse Bridge Company, after the fact, for maintenance and repair costs Bridge Company incurred **and paid** over the 25 year term of the Bridge Agreement.

IV. Bridge Company's groundless and unlawful argument for attorney fees and other expenses it asserts were incurred in a failed mediation.

[¶44] Finally, Bridge Company argues it should be allowed to recover $10,000 in mediation expenses (including attorney's fees) it claims it incurred in attending a mediation session in May of 2013, before this case was sued out. Bridge Company argues to this Court that Moorhead breached the "good faith" provision in the Mediation Agreement entered into between the parties, which states, in part, "The parties will send representatives to attend the mediation who have full authority to settle all issues." App. 115. Bridge Company apparently thinks it can walk into a mediation, demand any amount of money or other considerations it wants to demand, and then seek attorney fees (and other mediation expenses) if its adverse party rejects the demand--all because the adverse party agreed to "send representatives to attend the mediation who have full authority to settle all issues." Not surprisingly, Bridge Company fails to cite a single case or statute allowing the payment of attorney fees (or other mediation expenses) to one party in such a case.

[¶45] Responding to Bridge Company's argument in ¶¶ 54-56 of its Brief of Appellant, **first**, Bridge Company never asserted a damages claim for breach of the mediation contract, in its Counterclaim (which it called a "Counter Complaint for Declaratory Judgment"). App. 23-25. That Counterclaim (including its prayer for relief) was strictly for declaratory relief regarding the Bridge Agreement, and did **not** seek damages to be awarded for any breach of the agreement to mediate. Bridge

Company's failure to plead a damage claim against Moorhead for breach of the mediation agreement no doubt explains why the trial court did not address **any** such claim, whatsoever, in its rulings. See App. 52-60, 61, 63, 67-68 and 69. There is thus no action of the trial court for this Court to review, only **inaction**, by reason of Bridge Company's failure to plead a breach of contract claim for damages regarding the contract to mediate.

[¶46] **Second**, in Bridge Company's initial Answer in the trial court, App. 19-23, under the heading "**AFFIRMATIVE AND OTHER DEFENSES**," Bridge Company at App. 22, ¶ 16, made unlawful use of the parties' mediation efforts in the same fashion it has now done in ¶¶ 54-56 of its Brief of Appellant in the instant appeal. Since Moorhead would be hard-pressed to improve on what it said to the trial court about Bridge Company's unlawful use of the parties' mediation efforts, it is repeated below:

* * *

> **7. Bridge Company's unlawful attempted use of the parties' mediation efforts.**
>
> In ¶ 16 of Bridge Company's Answer (Odyssey Doc. #17), it asserts, apparently as some sort of "defense," its version of what transpired in the course of an ADR effort of the parties--a mediation session that occurred in Moorhead in or about early May of 2013, shortly before this case was sued out.
>
> First, while irrelevant and inadmissible in this case, representatives of the City of Moorhead who attended the mediation made it clear they were there to negotiate and convey any proposed settlement to the City of Moorhead, upon a completion of the mediation. Any settlement would have to be approved by the

Moorhead City Council in order to be binding, and that was made clear at the outset of the mediation session. The City of Moorhead is empowered to act **only** in compliance with the terms of the Moorhead City Charter and Minnesota statutes.

The Moorhead City Charter requires that all action of the City be by ordinance or resolution, passed by its City Council. See Moorhead City Charter [Doc. #77], at Section 3.04. Resolutions may be adopted by an affirmative vote of the majority of a quorum, except that:

> every ordinance or resolution involving the . . . expenditure of public money, . . . shall require a three-fourths vote of all members of the council. . . .

Id.

Second, an agreement was **not** reached between the parties. The representatives for the City of Moorhead made it clear that the City Council had final approval, as would be the case for any issue involving the City, but any proposed resolution would be conveyed to the City Council for its consideration.

Third, any allegation made by defendant Bridge Company related to what any other party to the mediation said or did is inadmissible. Both North Dakota and Minnesota law prohibit the admission of evidence from a mediation proceeding in later litigation. In North Dakota, our statute reads:

> **31-04-11. Mediation - Inadmissibility of evidence - Exception.** When persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute, **evidence of anything said or of any admission made in the course of the mediation is inadmissible as evidence and disclosure may not be compelled in any subsequent civil proceeding** except as provided in this section. This section does not limit the compulsion nor the admissibility of evidence if:

1. The evidence relates to a crime, civil fraud, or a violation under the Uniform Juvenile Court Act;
2. The evidence relates to a breach of duty by the mediator;
3. The validity of the mediated agreement is in issue; or
4. All persons who conducted or otherwise participated in the mediation consent to disclosure.

(Emphasis added.) In Minnesota, a similar prohibition is established by rule (Rule 114.08, Minn.Gen.R.Prac.) and by statute (Minn. Stat. § 595.02, subd. 1a.).

None of the exceptions in North Dakota law or Minnesota law apply to this case.

Further, the Mediation Agreement of the parties contains a confidentiality clause, in paragraph 7, which provides in part as follows:

> All discussions, representations, and statements made during mediation will be privileged as settlement negotiations. . . .
>
> * * *
>
> The parties shall maintain the confidentiality of the mediation and shall not rely on or introduce into evidence, in any arbitral, judicial, or other proceedings:
>
> (a) views expressed or suggestions made by another party with respect to a possible settlement of the dispute;
> (b) admissions made by any party in the course of the mediation proceedings;
> (c) proposals made or views expressed by the mediator; or
> (d) the fact that another party had or had not indicated a willingness to accept any settlement proposals made by either party.

> The obligation to keep communications confidential will remain in effect after the completion of the mediation process, regardless of whether or not the parties reach an agreement or settlement.

See Mediation Agreement [Doc. #78], at p. 2.

> Any reference whatsoever to anything having to do with the mediation held prior to commencement of this case is irrelevant and inadmissible in this action. Bridge Company's alleged "defense" relating to what did or did not transpire at the mediation is completely without merit.

* * *

Doc. #86, at ¶¶ 45-52 (footnote omitted, bracketed language added, and ¶ numbers in original omitted).

[¶47] One of the ironies in this case is watching Bridge Company press its frivolous appellate argument (which Moorhead must, of course, respond to) that it "should be allowed" by this Court "to recover" from Moorhead $10,000 in attorney fees and other mediation expenses, which it alleges in ¶¶ 54-56 of its Brief of Appellant, all the while Bridge Company remains silent as to the $399,623± in tolls ($1,000± per day) it wrongfully collected from the citizens of Moorhead and Fargo from 2/5/14 to 2/6/15, by virtue of Bridge Company's failure and refusal to convey the Bridge to the Cities on 2/5/14, the date on which it was contractually obligated to do so.

CONCLUSION

[¶48] This case presents a clear question of contract interpretation. Under Section 6.1(a) of the Bridge Agreement, Bridge Company was required to donate the Bridge to the Cities if it had no qualifying debt remaining at the end of the term of the agreement. Section 6.4 suspended Bridge Company's obligation to operate and maintain the Bridge during days of flood-related closures, and it extended Bridge Company's operation of the Bridge for an equal number of days. Accordingly, the 25-year term of the Bridge Agreement was extended by 249 days, to February 5, 2014, to account for the time the Bridge was closed due to flooding.

[¶49] As of that date, Bridge Company had no outstanding qualifying debt, including **(1)** no remaining debt for original construction of the Bridge, and **(2)** no remaining debt for maintenance and repair costs, whether deemed "major" maintenance and repair costs or not. Consequently, under the plain language of Section 6.1(a), Bridge Company was required to donate the Bridge to the Cities on February 5, 2014. Nothing obligated the Cities to reimburse Bridge Company for maintenance, repair, or any other expenses that had already been paid by Bridge Company during the previous 25 years. Lastly, Bridge Company's groundless and unlawful argument for attorney fees and other expenses it asserts were incurred in the parties' failed mediation should be rejected out of hand. The trial court did not clearly err in its factual findings, nor did it err as a matter of law in its contract interpretation.

Under these circumstances, the trial court's Judgment and Amended Judgment ordering Bridge Company to transfer the Bridge to the Cities should be affirmed.

Dated: March 9, 2015.

/s/ Michael D. Nelson
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CERTIFICATE OF COMPLIANCE

The undersigned attorney for Appellee The City of Moorhead in the above-entitled matter hereby certifies, in compliance with Rule 32(a)(8)(A), N.D.R.App.P., that the above brief contains 7,374 words (excluding words contained in **(1)** the table of contents, **(2)** the table of authorities, and **(3)** this certificate), which is within the limit of 8,000 words.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

The City of Moorhead, a political subdivision of the State of Minnesota, Plaintiff and Appellee, vs. Bridge Company, Defendant and Appellant, and The City of Fargo, a political subdivision of the State of North Dakota, Defendant and Appellee.	)	Supreme Court No. 20140431 **CERTIFICATE OF SERVICE**

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

I hereby certify that on March 6, 2015, I caused to be electronically filed **Moorhead's Appellee's Brief** with the Clerk of the North Dakota Supreme Court (at **supclerkofcourt@ndcourts.gov**) and served the same electronically as follows:

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Dated: March 6, 2015.

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