20160166
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
OCTOBER 5, 2016
STATE OF NORTH DAKOTA

Case No.: 20160166
District Court No. 09-2013-CV-02762
IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Nandan, LLP

Plaintiff and Appellant,

and

Border States Paving, Inc.,

Plaintiff,

v.

City of Fargo, a municipal corporation,

Defendant/Appellee.

APPELLANT'S REPLY BRIEF

DISTRICT COURT OF THE EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE STEVEN L. MARQUART PRESIDING
DISTRICT COURT NO. 09-2013-CV-02762

APPEAL FROM THE JUDGMENT DATED 3/7/16 AND MEMORANDUM OPINION & ORDER DATED 4/13/16

JOSEPH A. TURMAN (# 03128)
Turman & Lang, Ltd.
505 N. Broadway, Suite 207
P.O. Box 110
Fargo, ND 58107-0110
(701) 293-5592
(701) 293-8837 Fax No.
jturman@turmanlaw.com
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

1. **Nandan has <u>not</u> urged the District Court or the Supreme Court to act contrary to the Supreme Court's original remand**.
2. The Supreme Court's original remand included direction to "consider *any additional evidence* offered by the parties in deciding whether the project constituted a sewer or water improvement." (Appellant's Appendix hereinafter referred to as App.) App. p. 117, ¶ 31 (emphasis added).[1]
3. Evidence is defined as "[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or nonexistence of a fact." BLACK'S LAW DICTIONARY (10th ed. 2014).
4. Showing that it would be a *violation of another statute(s)* if the repairs to Drain 10 were considered "a sewer or water improvement" under § 40-22-01 clearly constitutes "evidence." <u>See</u> <u>id.</u>*;* <u>see</u> <u>also</u> <u>Haider v. Finken</u>, 239

[1] The Court's remand went on to provide more specific instructions for the district court to "decide whether the other repairs funded by Improvement District No. 6327 were incidental to the water and sewer repairs or whether they were a type of improvement described in N.D. Cent. Code § 40-22-01(2) through (5)." <u>Id.</u> When you analyze the entire remand as a whole, it is clear that the Court intended for the district court to consider any additional evidence, including statutes other than N.D.C.C. § 40-22-01, in deciding whether the project constituted a sewer or water improvement.

N.W.2d 508, 516 (N.D. 1976) (The Supreme Court has "repeatedly held" that *violation of a statute* is "evidence" of negligence.).

5. The existence of these other statues and whether they would be violated is therefore "additional evidence" to help the Court decide whether the project constituted a sewer or water improvement.
6. As such, and contrary to the City's position, Nandan has not urged the District Court or this Court to act contrary to the Court's original remand.
7. **The Brief of Appellee City of Fargo (the "City's Brief") acknowledges that there is a genuine issue of material fact whether Drain 10 is part of the City's storm sewer system.**
8. While the City's Brief does not specifically address Nandan's argument that there is a genuine issue of material fact whether Drain 10 is part of the City's storm sewer system, the City acknowledged that Nandan did not agree or concede that Drain 10 is *part of* the City's storm sewer system. Indeed, the City's Brief states: "Nor did [Nandan's expert] recognize that Drain 10 is part of the City's storm sewer system." Appellate Brief ¶17.
9. This statement confirms that there is a genuine issue of material fact regarding Drain 10 and is further evidence in support of Nandan's contention that the record does not support the District Court statement that "[i]t is undisputed that Cass County Drain 10 is part of the City of Fargo's storm sewer system." App. p. 98, ¶5.

10. Based on the above, the City has acknowledged, at least implicitly, that there is a genuine issue of material fact whether Drain 10 is part of the City's storm sewer system. This issue alone proves that City was not entitled to summary judgment.

11. **Based on the meaning attached to the terms "outlet" and "drain," the term "outlet" does not include "drains."**

12. In response to Nandan's "plain language" argument,[2] the City argues that the term "outlet," as used in N.D.C.C. § 40-22-01(1), includes "drains." This argument is without merit.

13. Per the definitions supplied by the City, "an outlet is any discharge point . . . into a watercourse, pond, ditch or other body of surface or groundwater." Appellate Brief ¶ 39 (citation omitted). In contrast, a "drain is a natural or artificial watercourse for the purpose of drainage." Appellate Brief ¶ 41. As such, using the City's own definitions, an "outlet" is the discharge point *into a watercourse*, while a "drain" *is the watercourse itself* (which is used for the purpose of drainage). These are clearly different things, and contrary to the City's assertion, there *is* an

[2] Nandan contends that, based on the plain language of N.D.C.C. § 40-22-01(1), as well as the meaning attached to terms used therein, Drain No. 10 is neither part of a water supply or sewerage system, nor "incidental" to the improvement of such systems.

obvious statutory conflict in construing the term "outlet" to include "drains."

14. Additionally, insofar as the North Dakota Legislature has consistently defined and used the term "drain" to mean a "watercourse," see, e.g., N.D.C.C. §§ 61-16.1 and 61-21, and has *never* defined or used this term to mean an "outlet," the term "drain" must be treated as a "technical" word and construed "according to such peculiar and appropriate meaning or definition." See N.D.C.C. § 1-02-03.

15. Furthermore, as explained in City of Dickinson v. Thress:

> *It must be presumed that the Legislature intended all that it said, and that it said all that it intended to say*. The Legislature must be presumed to have meant what it has plainly expressed. It must be presumed, also, that it made no mistake in expressing its purpose and intent. Where the language of a statute is plain and unambiguous, the "court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning, and cannot be extended beyond it.

290 N.W. 653, 657 (N.D. 1940) (emphasis added). As such, if the Legislature intended to include "drains" in N.D.C.C. § 40-22-01(1), it would have simply included the term "drain" in this statute and not left it up to those interpreting the statute to arbitrarily conclude that the term "outlet" includes *for the legislatively first and unannounced time* the "technical" term "drains."

16. **A storm sewer outlet is not a drain.**

17. Like its argument regarding the terms “outlet” and “drain,” the City also contends that a storm sewer outlet can be a drain. Once again, however, the City’s argument is contrary to the rules of statutory interpretation.

18. As noted above, the term "drain" must be treated as a "technical" word that is construed "according to such peculiar and appropriate meaning or definition" see N.D. Cent. Code § 1-02-03, and “[i]t must be presumed that the Legislature intended all that it said, and that it said all that it intended to say,” City of Dickinson, 290 N.W. at 657. Accordingly, based on the Legislature’s use of the term “sanitary and storm sewer mains and outlets,” and its omission of the term “drain,” the Court cannot now “indulge in speculation” to conclude that the Legislature intended a storm sewer outlet to be a drain although the Legislature did not say that. Id.

19. Moreover, while the City is correct that N.D.C.C. §§ 40-05-01 (12) and (23) give the City power to repair sewers, tunnels, *and drains*, the City’s Brief ignores the fact that the City can only defray the expense of such repairs by special assessment if they are of a type described in N.D.C.C. § 40-22-01. It is therefore neither ludicrous nor absurd to conclude, based on the meaning attached to the terms used in N.D.C.C. § 40-22-01(1), that a drain has nothing to do with a "water supply system" or a "sewerage system." To the contrary, by properly concluding that a drain is neither

part of a water supply or sewerage system, nor "incidental" to the improvement of such systems, the City still has the power per N.D.C.C. §§ 40-05-01 (12) and (23) to repair a drain within its limits. The City's only constraint is the fact that it is not permitted to defray the expense of such drain repairs by special assessment.

20. **Even if Drain 10 is governed by N.D.C.C. § 61-16.1, this statute, like N.D.C.C. § 61-21, provides certain rights and obligations with regard to special assessments for drains.**

21. The City contends that Drain 10 is within the authority of Southeast Cass Water Resource District, which is governed by N.D.C.C. § 61-16.1, not N.D.C.C. § 61-21. This argument does nothing to counter or invalidate Nandan's underlying argument that statutes must be read "in context" and "in relation to others on the same subject in order to give meaning to each statute without rendering one or the other useless." Ebach v. Ralston, 469 N.W.2d 801, 803-04 (N.D. 1991).

22. Like N.D.C.C. § 61-21, N.D.C.C. § 61-16.1 provides *statutorily-guaranteed obligations* and *rights* with regard to the repair and construction of assessment drains generally, and Drain 10 specifically. Indeed, this statute provides an *obligation* for water resource boards to, among other obligations, properly authorize drain construction (N.D.C.C. § 61-16.1-17) and hold public hearings on the proposed construction

(N.D.C.C. § 61-16.1-18). Thereafter, this statute provides affected landowners with various *rights* with regard to the proposed drain construction, including but not limited to voting rights (N.D.C.C. §§ 61-16.1-19; 61-16.1-20), the right to object to an assessment (N.D.C.C. § 61-16.1-22), and the right to appeal an assessment (N.D.C.C. § 61-16.1-23).

23. Based on the above, Drain 10 cannot be considered a water or sewer improvement as described in N.D.C.C. § 40-22-01(1). To do so would render the above provisions of N.D.C.C. § 61-16.1 meaningless. And, such an interpretation plainly conflicts with the well-established rule that the Court interpret a statute "in relation to others on the same subject in order to give meaning to each statute without rendering one or the other useless." See Ebach, 469 N.W.2d at 803-04.

24. **CONCLUSION**

25. For the reasons stated above, Nandan requests this Court determine as a matter of law: (1) that the repairs made to Drain 10 do not qualify as a water or sewer improvement under N.D. Cent. Code § 40-22-01(1); and/or (2) there is a genuine issue of material fact as to whether Drain 10 is part of the City's storm sewer system. Nandan respectfully requests this Court reverse the decision of the district court and remand with specific instructions to enter judgment consistent with its opinion.

Dated this 5 October 2016.

TURMAN & LANG, LTD.
/s/ Joseph A. Turman
JOSEPH A. TURMAN (#03128)
505 Broadway, Suite 207
P.O. Box 110
Fargo, ND 58107-0110
(701) 293-5592
jturman@turmanlaw.com
Attorneys for Appellants

26. **CERTIFICATE OF COMPLIANCE**

27. The undersigned, as attorney for Appellant, Nandan, LLP, and as the author of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the brief was prepared with proportional typeface (Times New Roman) and the reply brief, excluding the table of contents, the table citations, and certificate of compliance, does not exceed 2,000 words.

TURMAN & LANG, LTD.
/s/ Joseph A. Turman
JOSEPH A. TURMAN (#03128)
505 Broadway, Suite 207
P.O. Box 110
Fargo, ND 58107-0110
(701) 293-5592
jturman@turmanlaw.com
Attorneys for Appellants

28. **CERTIFICATE OF SERVICE**

29. I hereby certify that on October 5, 2016, true and correct copies of the Appellant's Reply Brief was served electronically upon the following:

Ronald H. McLean
rmclean@serklandlaw.com

Jane L. Dynes
jdynes@serklandlaw.com

/s/ Joseph A. Turman
Joseph A. Turman (#03128)