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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Lance Hagen, Petitioner, Appellee, and Cross-Appellant v. North Dakota Insurance Reserve Fund, Respondent, Appellant, Cross-Appellee	)	Supreme Court No. 20210111 Burleigh County No. 08-2019-CV-03559

APPEAL FROM JUDGMENT, ORDER FOR ENTRY OF JUDGMENT, AND ORDER ON AMENDED PETITION FOR WRIT OF MANDAMUS
SOUTH CENRAL JUDICIAL DISTRICT,
BURLEIGH COUNTY, NORTH DAKOTA,
THE HONORABLE JOHN GRINSTEINER

BRIEF OF APPELLEE AND CROSS-APPELLANT LANCE HAGEN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

[1] Whether the district court abused its discretion in granting Petitioner leave to file an amended writ?

[2] Whether the district court erred in determining that NDIRF is a public entity subject to open records laws?

[3] Whether the district court erred in determining that the plain language of N.D.C.C. § 44-04-19.1(8) requires public entities to make attorney work product available following the completion of civil litigation?

[4] Whether the district court's finding of potential future liability and its creation of "hyper work product" exception were erroneous under North Dakota law?

[5] Whether the district court abused its discretion in denying Petitioner costs and attorney's fees?

STATEMENT OF THE CASE

[6] On November 13, 2019, Petitioner-Appellee Lance Hagen ("Hagen") filed and served the North Dakota Insurance Reserve Fund ("NDIRF") with a Petition for a Writ of Mandamus regarding NDIRF's failure to produce public records requested by Hagen. Index #61. NDIRF filed its answer on November 19, 2019. Index #6. The district court issued a Notice to both parties ordering Hagen to file an Amended Petition. Index #58. NDIRF filed its Response and Objection to the Court's notice on August 20, 2020. Index #59. That same day, Hagen filed his Amended Petition. Index #61.

[7] On August 27, 2020, NDIRF moved to dismiss Hagen's Amended Petition. Index #67. On September 15, 2020, the district court denied NDIRF's Motion to Dismiss and entered partial findings in favor of Hagen's Amended Petition. Index #78. NDIRF then filed its answer to the Amended Petition on September 16, 2020. Index #79.

[8] Per the district court's September 15, 2020, order, NDIRF filed a memorandum regarding in camera documents submitted to the district court and NDIRF's corresponding privilege log for the same on December 11, 2020. Index #90. Hagen's Amended Petition was granted in part by the district court on February 10, 2021. Index #94. NDIRF was ordered to disclose certain documents, however the district court identified other documents as "hyper work product" that it concluded were protected from disclosure. Id. The district court also denied Hagen's request for costs and fees. Id. Disclosure of the documents was stayed pending this appeal. Index #101.

STATEMENT OF FACTS

[9] This case arises as a result of several open records requests made by Hagen to the NDIRF, a public entity. Specifically, Hagen seeks the disclosure of documents

related to the case Lincoln Land Development, LLP v. City of Lincoln. That case involved an inverse condemnation claim made against the City of Lincoln. City of Lincoln 2019 ND 81, ¶4, 924 N.W.2d 426. The City of Lincoln was defended by NDIRF pursuant to a risk coverage agreement. Id. Following the conclusion of that case, Hagen, a citizen of Lincoln, made the open records request giving rise to this action. Index #61.

[10] The records requested by Hagen concern specific documents and communications between the City of Lincoln and NDIRF, which are public records pursuant N.D.C.C. § 44-04-19.1(1). Index #61. Hagen mailed his records request to NDIRF on October 21, 2019. Index #61. Subsequently, NDIRF responded by asserting the documents requested were exempt from North Dakota's open records laws. Index #61. In a letter to NDIRF's CEO, dated November 1, 2019, Hagen again sought to clarify the public's right to access the litigation records of a public entity following the termination of a case. Index #61. After repeated failed attempts to resolve the issue, Hagen filed a Petition for a Writ of Mandamus seeking an Order requiring NDIRF to turn over the requested materials. Id.

[11] The district court held: 1) Hagen's Petition for a Writ of Mandamus was the correct remedy under North Dakota's open records laws; 2) NDIRF is a public entity subject to North Dakota's open records laws; and 3) Litigation records of a public entity must be made public following the termination of the case pursuant to N.D.C.C. § 44-04-19.1(1). Index #61. However, in doing so, the Court also created a new classification of protected attorney work product which it referred to as "hyper work product". Index #61. Under these conclusions, the district court issued a Writ ordering NDIRF to turn over the

vast majority of the requested records, while classifying others as "hyper work product" exempt from open record laws. Index #61.

STANDARD OF REVIEW

[12] The North Dakota Supreme Court applies a *de novo* standard for questions of law, a clearly erroneous standards for questions of fact, and an abuse of discretion standard for discretionary matters. Bertsch v. Bertsch, 2006 ND 31, ¶ 6, 710 N.W.2d 113. A district court has discretion in determining whether to grant leave to amend a pleading. Messiha v. State, 1998 ND 149, ¶ 7, 583 N.W.2d 385. Additionally, courts are provided significant discretion in deciding whether to award attorney's fees. Gratech Co. v. Wold Eng'g, P.C., 2007 ND 46, ¶ 18, 729 N.W.2d 326. Thus, the following issues are reviewed for abuse of discretion: a) whether the district court erred in denying NDIRF's motion to dismiss; and b) whether the district court erred in denying the Appellee's request for costs and attorney's fees.

[13] Issues regarding statutory interpretation are questions of law which are fully reviewable on appeal. Johnston Land Co., LLC v. Sorenson, 2018 ND 183, ¶ 10, 915 N.W.2d 664. Therefore, the following issues are reviewed *de novo*: a) whether the district court erred in determining NDIRF is a public entity; b) whether the district court erred in determining NDIRF must make attorney work product available following the completion of civil litigation; and c) whether the district court's creation of "hyper work product" was erroneous.

LAW AND ARGUMENT

I. The district court did not abuse its discretion by denying NDIRF's Motion to Dismiss Hagen's Petition for a Writ of Mandamus.

[14] NDIRF argues that the district court erred in denying its Motion to Dismiss Hagen's Petition for a Writ of Mandamus. Appellant's Brief ¶ 13. NDIRF's argument is incorrect.

[15] Section 44-04-18 of the North Dakota Century Code governs the public's access to records of all public entities. Section 44-04-21.2 provides that all records requests under Section 44-08-18 "must be accompanied by a dated, written request for the requested record" and "be commenced within sixty days of the date the person knew or should have known of the violation." However, even where a complainant may procedurally misstep on these requirements, Rule 15 of the N.D.R.Civ.P provides that a party may amend its pleadings with the court's leave. Section 5.2 (c)(3)(A), N.D.R.Ct., explicitly grant courts the authority to allow parties to amend a Petition.

[16] It is well established in North Dakota that an amendment to a pleading may be allowed where it "relates back" to the date of the original pleading. Wayne-Juntunen Fertilizer Co. v. Lassonade, 456 N.W.2d 519, 525 (N.D. 1990). Rule 15 provides that the amendment to a pleading relates back where "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out…in the original pleading." N.D.R.Civ.P 15(c)(1)(B). This Court has recognized that Rule 15 is to be construed liberally in order to allow cases to be decided on their merits rather than on minor procedural hiccups. Perdue v. Knutson, 179 N.W.2d 416, 419 (N.D. 1970).

[17] In this case, NDIRF argues that Hagen's Petition for a Writ of Mandamus should have been dismissed by the district court because he failed to attach copies of the open records request letter he sent NDIRF. Appellant's Brief ¶ 13. However, there is no dispute NDIRF received the written request from Hagen. Further, the written open records

request was referenced in Hagen's Petition. In order to correct this minor procedural oversight, the Court granted Hagen leave to amend his Petition to attach the letters. Index #61. Upon filing the Amended Petition, NDIRF argued it must be dismissed because sixty days had passed since the claim arose. Index #61. The district court properly rejected this argument holding that the Amended Petition relates back to Hagen's original pleading. In doing so, the court correctly asserted: "[d]ismissing the action for this irregularity serves no purpose other than to waste the time of the parties and the Court as a new petition could be immediately filed in a new proceeding." Index #58 at ¶ 6.

[18] NDIRF now asks this Court to find the district court abused its discretion by allowing Hagen to amend his Petition to attach the written open records request it had previously received and was referenced in the original Petition. Although NDIRF argues that "[t]he questions of whether NDIRF's motion to dismiss should have been granted…are reviewed *de novo*", it is mistaken. Appellant's Brief at ¶12. The North Dakota Supreme Court has been clear that "[a] trial court has discretion to grant or deny amendments to pleadings under N.D.R.Civ.P. 15(a), and we will not reverse the court's decision *absent an abuse of discretion.*" Messiha, 1998 ND 149, ¶7. (Emphasis added). A district court abuses its discretion only in cases where it acts in an "arbitrary, unreasonable, or unconscionable manner, when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process." J.B. v. R.B., 2018 ND 83, ¶5, 908 N.W.2d 687. The district court acted reasonably in granting Hagen leave to amend his Petition. NDIRF has failed to show the district court abused its discretion.

[19] NDIRF fails to cite a single case supporting its argument that Hagen's Petition should have been dismissed. In fact, in its Brief, NDIRF makes no attempt to even

argue that Hagen's Amended Petition doesn't relate back to the original filing date. This is because there is no rational argument to be made. The district court "has discretion to grant or deny amendments to pleadings under N.D.R.Civ.P. 15(a)." Messiha, 1998 ND 149. ¶7, 583 N.W.2d 285. Here, the district court correctly held "Hagen's Amended Petition relates back to the same conduct and transaction as alleged in his original Petition…" Index #58. Based on this, the Court allowed Hagen to simply attach the written letters NDIRF had received to his Amended Petition.

[20] NDIRF fails to make any showing that the district court abused its discretion by allowing Hagen to amend his Petition for a Writ of Mandamus. Hagen respectfully requests this Court reject NDIRF's argument and affirm the district court's decision on this issue.

II. The district court was correct in concluding NDIRF is a public entity subject to open record laws.

[21] NDIRF next argues that the district court erred in holding that it is a public entity and thus subject to North Dakota's open record laws. In its Brief, NDIRF engages in extensive semantics and narrowly-scoped arguments about statutory interpretation. However, NDIRF cannot escape the fact that it is a public entity because 1) it is a government self-insurance pool created by statute; 2) which performs a government function; and 3) is wholly supported by and expends only funds provided by political subdivisions.

A. NDIRF is a government self-insurance pool created under N.D.C.C. Ch. 26.1-23.1.

[22] NDIRF argues "it is not a public or government entity—it is a private nonprofit corporation." Appellant's Brief at ¶ 24. However, under the statute which permits the creation of government self-insurance pools, NDIRF is a public entity.

[23] Chapter 32-12.1 of the Century Code governs the legal liability of government entities in North Dakota. Section 32-12.1-07 authorizes political subdivisions to self-insure or unite with other political subdivisions to self-insure. Chapter 26.1-23.1-01, N.D.C.C., governs the formation government self-insurance pools and states:

> Any two or more entities that have united to self-insure against their legal liability under chapter 32-12.1 or any state agency that unites with another state agency or political subdivision, or both, to self-insure against their legal liabilities are subject to the provisions of this chapter.

In essence, any two or more government entities which seek to form a government self-insurance pool are only authorized to do so under the provisions laid out in the Century Code.

[24] NDIRF argues it is some sort of private non-profit corporation. This is simply not true. By definition, NDIRF is a government self-insurance pool created under N.D.C.C. Ch. 26.1-23.1. It is undisputed that NDIRF was formed by a group of political subdivisions as a government self-insurance pool. NDIRF's sole purpose is to manage the funds contributed to the government self-insurance pool by political subdivisions. 1999 N.D. Op. Atty. Gen. O-5. In fact, NDIRF is statutorily prohibited from serving private people or entities. N.D.C.C. § 26.1-23.1-02. NDIRF simply performs a duty delegated to it by the political subdivision members. It is undisputed that if any of NDIRF's members were to self-insure rather participate in a government self-insurance pool, all related records would be public documents. See Id. Any argument by NDIRF that it is a private non-profit corporation is defeated by N.D.C.C. Ch. 26.1-23.1, the statutes which govern it.

B. NDIRF is an agent of its political subdivision members.

[25] Article XI, Section 6 of the North Dakota Constitution states:

> Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.

N.D. Const. Art. XI, § 6. Section 44-04-18, N.D.C.C., codifies Article XI by providing that all records of a public entity are open to the public, unless specifically exempted by law. A public entity is defined in Section 44-04-17.1 as:

> b. Public or governmental bodies, boards, bureaus, commissions, or agencies of any political subdivision of the state and any entity created or recognized by the Constitution of North Dakota, state statute, executive order of the governor, resolution, ordinance, rule, bylaw, or executive order of the chief executive authority of a political subdivision of the state to exercise public authority or perform a governmental function; and
>
> c. Organizations or agencies supported in whole or in part by public funds, or expending public funds.

N.D.C.C. § 44-04-17.1(13) (emphasis added).

[26] This Court has been clear that the purpose of our State's open records law is "to provide the public with the right and the means of informing itself of the conduct of the business in which the public has an interest…". Northern States Power Co. v. North Dakota Pub. Serv. Comm'n, 502 N.W.2d 240, 247 (N.D. 1993). The Court held on multiple occasions that an agency relationship exists for the purposes of the open records law where a government entity has delegated a government duty to a third party. Forum Publishing v. City of Fargo, 391 N.W.2d at 169, 172 (N.D. 1994); see also Grand Forks Herald, Inc. v. Lyons, 101 N.W.2d 543, 546 (N.D. 1960) (noting that the word *agency* "denotes a relation created by

law or contract whereby one party delegates the transaction of some lawful business to another"). The North Dakota Supreme has plainly stated: "[w]e do not believe the open-record law can be circumvented by the delegation of a public duty to a third party." Id.

[27] As mentioned above, this Court has concluded on multiple occasions that where a political subdivision delegates a government duty to a third party, an agency relationship is formed. Lyons, 101 N.W.2d at 546. In Forum Publishing, this Court addressed a case with similar facts. There, Forum Publishing made an open records request for documents relating to the City of Fargo's hiring of a new chief of police. Id. The City hired a third-party to screen and evaluate applicants for the position. Id. at 172. The City argued the third-party was not a public entity, and therefore not subject to North Dakota's open records law. Id. This Court disagreed, finding the third-party to be an agent of the City, and therefore subject public disclosure of records on the matter. Id. The Court stated "the purpose of the open-record law would be thwarted if we were to hold that documents so closely connected with public business but in the possession of an agent or independent contractor of the public entity are not public records." Id.

[28] The Attorney General of North Dakota has repeatedly concluded the joint enterprise of political subdivisions is an "agency" of a "public entity" under N.D.C.C. § 44-04-17.1. See 1998 N.D. Op. Atty Gen. O-17 (opining that several counties jointly operating a correctional facility is a public entity); see also 1998 N.D. Op. A.G. O-104 (opining that a non-profit corporation formed by several soil conservation districts is an agent for open record purposes). Most notably however,

the Attorney General has found on two prior occasions that NDIRF is a public entity under North Dakota open records law. 1999 N.D. Op. Atty. Gen. O-5. In the opinion of the AG:

> "NDIRF's function is no different from that of the governing body of a political subdivision which elects to establish an individual self-insurance fund, except that NDIRF is the governing authority designated to administer pool funds on behalf of numerous participating members. Accordingly, NDIRF is subject to open meetings and open records laws."

Id. at 3.

[29] NDIRF argues that the AG's opinions are erroneous because they "provide no basis for distinguishing NDIRF from a private entity." Appellant's Brief ¶ 36. However, N.D.C.C. Ch. 32-12.1, the statute under which NDIRF is organized, demonstrates a clear distinction. Section 32-12.1-02(6), N.D.C.C., defines "political subdivisions" as:

> "all counties, townships, park districts, school districts, cities, public nonprofit corporations, administrative or legal entities responsible for administration of joint powers agreements, and any other units of local government which are created either by statute or by the Constitution of North Dakota for local government or other public purposes…"

Id. (emphasis added). Section 32-12.1-02(8) goes on to define "public nonprofit corporation" as "a nonprofit corporation that performs a governmental function and is funded, entirely or partly, by the state, a city, county, park district, school district, or township." (emphasis added). In essence, the statute which authorizes the creation of government self-insurance pools clearly defines them as public entities. This definition provides a clear distinction between NDIRF and private insurance companies.

[30] NDIRF erroneously refers to itself as a "private" non-profit corporation throughout its brief. This claim is unsupported by the governing statutes, Supreme Court

precedent, and multiple Attorney General Opinions. NDIRF's sole duty is to manage public funds given to it by political subdivisions for the purpose of maintaining a joint government insurance pool. NDIRF is an agent of the political subdivisions it serves and is subject to North Dakota's open records law.

C. NDIRF is supported entirely by and expends only public funds.

[31] Aside from being an agent of the political subdivisions it serves, NDIRF is also subject to North Dakota's open records law because it is entirely supported by and expends only public funds.

[32] Section 44-04-17.1, N.D.C.C., defines a public entity to include "[o]rganizations or agencies supported in whole or in part by public funds, or expending public funds." Section 44-04-17.1(10), N.D.C.C., provides that an organization is supported by public funds if it "has received public funds exceeding the fair market value of any goods or services given in exchange for the public funds." Public funds are defined as "cash and other assets with more than minimal value received from the state or any political subdivision of the state." N.D.C.C. § 44-04-17.1(14). When read together, these statutory definitions make clear that NDIRF is supported entirely by public funds.

[33] NDIRF attempts to convince this Court that it is not a public entity because "it provides services to political subdivisions at their fair market value." Appellant's Brief at ¶ 38. This is incorrect. NDIRF does not provide services at a fair market value; rather, it solely manages taxpayer dollars provided in a government self-insurance pool by political subdivisions. NDIRF quite literally falls under the meaning of "supported in whole or in part by public funds." NDIRF offers no services to any private business or

person; its only members are political subdivisions. If those political subdivisions decided to no longer put funds into the pool, NDIRF would have no funds to manage.

[34] NDIRF spends a great deal of effort arguing its "services" for "fair market value" are like those of a private insurance company. Id. However, N.D.C.C. § 26.1-23.1-03, titled "Government self-insurance pools not insurers", plainly states:

> "Any government self-insurance pool organized under chapter 32-12.1 is not an insurance company or insurer. The coverages provided by such pools and the administration of such pools do not constitute the transaction of insurance business. Participation in a self-insurance pool under this chapter does not constitute a waiver of any existing immunities otherwise provided by the constitution or laws of this state."

(Emphasis added). Contrary to its argument, NDIRF is not a private business selling insurance policies, it is an entity created by statute to manage a government self-insurance pool. Political subdivisions pooling funds together is not a good or service. In Adams County v. Greater North Dakota Ass'n this Court stated that:

> "when a block of public funds is diverted en masse from a public body to a related organization, or when the related organization undertakes the management of the expenditure of public funds, the only way that the public can determine with specificity how those funds were spent is through access to the records and affairs of the organization receiving and spending the funds."

529 N.W.2d 830, 835 (N.D. 1995). NDIRF is not a private business providing services to the public, it manages a pool of funds provided by political subdivisions.

[35] Not only is NDIRF supported entirely by public funds, but it also expends only public funds. NDIRF argues it somehow does not expend public funds because the funds in the risk pool "lose their identity" when they transferred from the political subdivision. Appellant's Brief ¶ 39. To justify its point, NDIRF engages in a great deal of semantics and narrow statutory interpretation. Our State Legislature plainly defined

"public entity" to include "[o]rganizations or agencies…expending public funds." N.D.C.C. § 44-04-17.1. When a statute is unambiguous, Courts must apply the plain meaning of what is stated. N.D.C.C. § 1-02-05. Here, the statutory language could not be clearer. NDIRF does not expend a single dollar of private funds; its funds are entirely public funds received exclusively from political subdivisions.

[36] NDIRF is mistaken that the public funds contributed by its members "lose their identity." NDIRF bases this argument off the Court's holding in Adams County, 529 N.W.2d 830. In that case, this Court ultimately concluded that the Greater North Dakota Association ("GNDA") is not subject to North Dakota's open records law. Id. at 832. According to the Court, public funds received by GNDA were exchanged for specific goods and services. Id. However, efforts by NDIRF to compare itself to the GNDA are misleading. GNDA is the voice of business and political advocacy for a favorable business climate in North Dakota. Id. At the time of the Adams County decision, GNDA had approximately 1,000 members, of which only 10 were state agencies. Id. (noting memberships paid by government agencies amounted to less than 3% of total membership receipts of GNDA). To the contrary, NDIRF's membership is made up entirely of political subdivisions and all its funds are public.

[37] In the 1999 Opinion, the North Dakota Attorney General addressed NDIRF's contention that it somehow offers goods and services in exchange for public funds. 1999 ND Op. Atty Gen. O-5. The AG stated that funds transferred to NDIRF "have not been transferred to a private organization for specific goods or services. Rather, the funds have been transferred to a joint enterprise and are administered by NDIRF." Id. The Attorney General went on to note that a risk pool is not a form of insurance at all, stating:

> "self insurance…is the antithesis of insurance. Because the members of the government self-insurance pool retain their own risk, rather than purchase insurance, the members' contributions to the pool do not lose their identity as public funds."

Id.

[38] NDIRF's interpretation of N.D.C.C. § 44-04-17.1 is incorrect. This Court has repeatedly held that statutes must be construed to avoid absurd results. Stutsman v. State Historical Soc'y, 371 N.W.2d 321, 325 (N.D. 1985). Section 44-04-17.1 is clear on its face: organizations which are supported by, or which expend public funds are public entities. NDIRF's construction of this statute would create an undoubtedly absurd result which directly conflicts with long-standing precedent in this State. NDIRF's interpretation of the definition of "public entity" would allow political subdivisions to avoid open records disclosures by simply delegating a public duty to a joint enterprise or nonprofit corporation. This Court rejected similar interpretations. Forum Publishing, 391 N.W.2d at 172. Neither NDIRF nor its members are immune from public accountability for the taxpayer dollars it receives and expends. Any attempt by NDIRF to argue otherwise is erroneous.

[39] Because NDIRF is an agent of its members and is supported entirely by and expends only public funds, the district court's decision on this matter should be upheld. NDIRF is a public entity and is subject to North Dakota's open records law.

III. The district court was correct in determining that N.D.C.C. § 44-04-19.1(8) requires NDIRF to make attorney work product available to the public at the conclusion of litigation.

[40] NDIRF argues, even if it is a public entity, Hagen's request seeks records that are privileged because: A) they constitute attorney work product; and B) they contain privileged attorney-client communications.

A. The records are not exempt under the attorney work product doctrine because the litigation has ended.

[41] There is no dispute that the records requested by Hagen include attorney work product. However, contrary to NDIRF's argument, North Dakota's open records law mandates public entities to make work product publicly available once litigation has ended.

[42] The open records statute defines "attorney work product" as any record that:

> a. Was prepared by an attorney representing a public entity or prepared at such an attorney's express direction;
> b. Reflects a mental impression, conclusion, litigation strategy, or legal theory of that attorney or the entity; and
> c. Was prepared exclusively for civil or criminal litigation, for adversarial administrative proceedings, in anticipation of reasonably predictable civil or criminal litigation or adversarial administrative proceedings, or for guidance on the legal risks, strengths, and weaknesses of an action of a public entity.

N.D.C.C. § 44-04-19.1(6). While it is true that attorney work product is typically privileged, there is a clear exemption for public entities under North Dakota law. Section 44-04-19.1(8) provides:

> Following the final completion of the civil or criminal litigation or the adversarial administrative proceeding, including the exhaustion of all appellate remedies, attorney work product must be made available for public disclosure by the public entity, unless another exception to section 44-04-18 applies or if disclosure would have an adverse fiscal effect on the conduct or settlement of other pending or reasonably predictable civil or criminal litigation or adversarial administrative proceedings, or the attorney work product reflects mental impressions, opinions, conclusions, or legal theories regarding potential liability of a public entity.

N.D.C.C. § 44-04-19.1(8) (emphasis added). The statute contains an exclusion if the attorney work product reflects mental impressions, opinions, conclusions, or legal theories regarding potential liability of a public entity. Id.

[43] NDIRF argues that all of the records requested by Hagen "contain mental impressions, opinions, conclusions, or legal theories concerning the potential liability", and are therefore exempt from disclosure. Appellant's Brief ¶ 50. However, NDIRF's reasoning is erroneous. As previously mentioned, Hagen does not dispute that the requested records are work product; rather, a clear statutory exception to the work product doctrine applies under N.D.C.C. § 44-04-19.1(8).

[44] The records Hagen requested involve civil litigation that has been completed following an appeal to this Court. City of Lincoln, 2019 ND 81, ¶ 4. Thus, the only issue for determination is whether the work product involves "potential liability of a public entity." N.D.C.C. § 44-04-19.1(8). NDIRF erroneously argues that "potential liability" means "at any point in time" and continues "forever." Id. ¶ 53. NDIRF does not cite any legal authority to support such a claim. Adoption of NDIRF's construction of "potential liability" would essentially repeal N.D.C.C. § 44-04-19.1(8) because it would apply to any possible unknown future litigation by any public entity which could arise from now until eternity.

[45] This Court has consistently interpreted statutory exceptions in a narrow manner to avoid the exception swallowing the rule. State v. Millner, 409 N.W.2d 642, 644 (N.D. 1987). This Court has been clear the Legislature would not intend for an exception to swallow a statute it passed. Olson v. City of Garrison, 539 N.W.2d 663, 664 (N.D. 1995). Here, NDIRF's broad interpretation of the exception created for "mental impressions, opinions, conclusions, or legal theories concerning the potential liability" would completely swallow the rest of the statute. In order for the exception to apply, NDIRF must be required to affirmatively show the requested records would have some

impact on the City of Lincoln regarding future litigation. If the Court were to adopt NDIRF's rationale, every public entity could avoid producing attorney work product by baselessly asserting some unknown potential liability that is possible to arise from now until the end of time. Such an interpretation of the statute would create an absurd result.

[46] NDIRF's only cite to any authority supporting its construction of the statute is an Attorney General's opinion from 2008. There, the question before the Attorney General was whether "a copy of any legal memoranda…relating to the availability of unavailability of severance pay to then-departing Executive Director Brent Edison" could be obtained through an open records request. 2008 N.D. Op. Atty. Gen. No. O-09. NDIRF is correct that the Attorney General found that the legal memoranda was exempt. However, that situation is clearly distinguishable from the facts in this case. There, the Attorney General specifically found that "the memo was prepared exclusively in anticipation of reasonably predictable civil litigation." Id. (emphasis added). The words "reasonably predictable" clearly do not mean litigation which could occur "at any point in time" until "forever" as NDIRF asserts. Appellant's Brief ¶ 53. In our case, there is no "reasonably predictable civil litigation. NDIRF fails to cite to any evidence in the record demonstrating "potential liability" of any public entity. Instead, NDIRF simply asks for eternal exemptions from disclosing any and all work product, based on hypothetical assumptions.

[47] Similarly unsupported is NDIRF's "secret playbook" argument. NDIRF offered evidence that is has been involved in other inverse condemnation cases like the City of Lincoln case. It therefore argues disclosing the requested documents would allow litigants to counter their legal defense, arguments, and strategies. Contrary to NDIRF's secret playbook argument, the determination of an inverse condemnation case is fact

specific. That is, inverse condemnation cases hinge on whether a political subdivision had an easement or other legal authority to take a landowner's property. See City of Lincoln, 2019 ND 81, at ¶ 6. There is no secret litigation strategy; the political subdivision either has legal authority for a taking or it does not.

[48] Finally, NDIRF argues that North Dakota Rules of Civil Procedure also exempt the records in dispute in this case. According to NDIRF, "Rule 26(b)(3)(A) and (B) specifically provide that attorney work product is protected." Appellant's Brief ¶ 59. However, as this Court knows, N.D.R.Civ.P Rule 26 applies exclusively to discovery during litigation. It has no bearing on a case such as this, where the litigation has concluded. Moreover, § 44-04-19.1(8) demands the release of work product at the close of litigation; the Rules of Civil Procedure do not supersede a clear legislative mandate.

[49] As a public entity, NDIRF is required by law to make work product available at the close of litigation. N.D.C.C. § 44-04-19.1(8). This Court should affirm the conclusion of the district court and reject NDIRF's argument that the documents requested are exempt from the open records law.

B. The requested records are not protected by lawyer-client privilege.

[50] NDIRF next argues that even if the requested records are not protected by the work product doctrine, they constitute privileged lawyer-client communications. However, NDIRF's assertion ignores the plain language of the Rule.

[51] Rule 502, N.D.R.Evid., governs the application of lawyer-client privilege in North Dakota. Subsection (b) of Rule 502 lays out the general provisions which protect confidential communications made for the purpose of facilitating legal services to a client. N.D.R.Evid. 502(b). However, subsection (d) of Rule 502 is clear:

(d) Exceptions. There is no privilege under this rule:

(7) as to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to act upon the claim or conduct a pending investigation, litigation, or proceeding in the public interest.

Id. (emphasis added). Thus, the plain language of Rule 502 provides that communications between "a public officer or agency and its lawyer" are not covered by lawyer-client privilege.

[52] NDIRF again spends a great deal of energy arguing semantics about the terms "public officer" and "public agency." Specifically, NDIRF claims that the City of Lincoln is neither a "public officer, nor a public agency." Appellant's Brief ¶ 62. This argument is unpersuasive. First, does NDIRF actually contend that employees of the City of Lincoln are not public officials? All communications from the City of Lincoln to its attorneys come from city employees, who are clearly public officers. Additionally, as established earlier, NDIRF itself is an agent of the City of Lincoln. NDIRF communicated with Lincoln's attorneys on behalf of the City in this case. The communications clearly fall within the exception to Rule 502. If NDIRF's interpretation of Rule 502 were to be adopted by this Court, all records held by political subdivisions relating to litigation would be exempt from public disclosure. The Court should reject this interpretation as it would create an absurd result.

[53] Additionally, § 44-04-19.1(8) require the release of work product at the close of litigation. The Rules of Evidence, including 502(d)(7), do not supersede a North Dakota statute. Any argument otherwise is erroneous.

C. Rule 502(d)(7) does not violate the Equal Protection Clause and is not void for vagueness.

[54] NDIRF next argues that "if it is determined to be a 'public agency' or 'public officer' under Rule 502(d)(7), such treatment violates the Equal Protection Clause." Appellant's Brief ¶ 66. According to NDIRF: "[a] private insurance company would be afforded the benefits of Rule 502(b). But not so for NDIRF…". Id. ¶ 67. The Court need not entertain such an argument because NDIRF is not similarly situated to private insurance companies.

[55] The United States Supreme Court has held that the Equal Protection Clause requires "that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). In our case, NDIRF's argument that it is similarly situated to private insurance companies is wrong. N.D.C.C. 26.1-23.1-03 plainly states:

> "Any government self-insurance pool organized under chapter 32-12.1 is not an insurance company or insurer. The coverages provided by such pools and the administration of such pools do not constitute the transaction of insurance business."

(emphasis added). Thus, NDIRF is not similarly situated to any private insurance company and the Equal Protection Clause is inapplicable here.

[56] However, even under an Equal Protection analysis, NDIRF's argument fails. NDIRF is a public entity who works as an agent on behalf of the political subdivisions who created it. Therefore, it is only similarly situated to other public entities. Because the exception in Rule 502(d)(7) applies equally to all "public officers" and "public agents", NDIRF will not be treated any differently than other similarly situated public entities.

[57] Finally, NDIRF's argument that Rule 502 is "void for vagueness" should be rejected by the Court. This Court has found that a law is void for vagueness only "if it either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Maedche v. Maedche, 2010 N.D. 171, ¶ 14, 788 N.W.2d 331. The Court uses a two-part test to determine whether a law is void for vagueness: 1) the statute must create minimum guidelines for the reasonable enforcement of the law; and 2) the law must provide adequate and fair warning of the proscribed conduct. Id. Rule 502 unquestionably meets this standard.

[58] NDIRF claims that because the terms "public officer" and "public agency" are not defined in the rule, a reasonable person would not understand that subsection (d)(7) of the Rule applies to NDIRF. Appellant's Brief ¶ 70. This argument is unpersuasive. There is little question that a reasonable person would understand employees of the City of Lincoln to be public officers. Moreover, this Court has repeatedly defined "public agency." See Lyons,101 N.W.2d 543, 546 (noting that the word agency "denotes a relation created by law or contract whereby one party delegates the transaction of some lawful business to another"). Lastly, this state's Attorney General has found on two prior occasions that NDIRF falls within the definition of a public agency. 1999 N.D. Op. Atty. Gen. O-5. A reasonable person would clearly understand that NDIRF is a public agency. Rule 502 is not void for vagueness.

IV. The district court's conclusion that there was potential liability and its creation of a "hyper work product" exception were erroneous under North Dakota law.

[59] The district court erred in finding NDIRF had established potential liability of a public entity existed and in creating and applying a new categorical exception to the disclosure requirements of N.D.C.C. § 44-04-18 which it called "hyper work product". Index #78.

A. There are no facts contained in the record supporting the district court's conclusion of reasonably anticipated potential liability of a public entity in this case.

[60] In its Order, the district court found that NDIRF is a public entity and subject to North Dakota's open records law and is required to make its attorney work product available at the close of litigation pursuant to N.D.C.C. § 44-04-19.1(8). However, § 44-04-19.1(8) provides an exception for work product which "reflects mental impressions, opinions, conclusions, or legal theories regarding potential liability of a public entity." Id. (emphasis added). Thus, for the statutory exception to apply, NDIRF must make an affirmative showing that reasonably anticipated future liability of a public entity exists if the requested public records are disclosed.

[61] The district court's conclusion that "potential liability of a public entity existed" is clearly erroneous here. The district court ordered a review of all requested documents so that it could determine which ones "reflect mental impressions, opinions, conclusions, or legal theories regarding potential liability." Index #78. However, such an action was unnecessary because the plain language of the exception in the statute excludes its application here, as no future potential liability of any public entity exists in this case. Neither the court's Order, nor Appellant's Brief, cite any future "potential liability" of any public entity in this matter. Hagen seeks the public release of documents related to the City of Lincoln, which was an inverse condemnation action arising from 2011 construction of

a road in the City and was subsequently decided by this Court on March 15, 2019. That case ended over two years ago and all appellate remedies have been exhausted. The City of Lincoln faces no potential future litigation on this matter and, therefore, N.D.C.C. § 44-04-19.1(8) requires public disclosure of the withheld documents. Nor is there any evidence in the record that would support the finding that some public entity other than the City of Lincoln would face potential liability if the public records from the City of Lincoln's inverse condemnation regarding a road constructed in 2011 were provided to the public. The record is void of any competent evidence that any public entity faces potential liability if the requested records are disclosed.

[62] Moreover, this Court should reject NDIRF's argument that "potential liability" as used in the statute means "at any point in time" and continues "forever." Appellant's Brief ¶ 53. As previously discussed, future potential liability must be reasonably foreseeable or certain. Any contrary interpretation would allow this exception to swallow the general rule of disclosure at the close of litigation. Under such an interpretation, any public entity could avoid disclosure by arguing hypothetical "potential liability" exists because some unknown similar litigation could arise at any time in the future.

[63] There is no evidence in the record demonstrating that any public entity would face any potential liability if the records from the City of Lincoln's prior litigation are disclosed to the public. Because no future potential liability exists in this case, the district court erred in exempting certain documents in NDIRF's possession from public disclosure.

B. There is no "hyper work product" exception under North Dakota open records law.

[64] The district court's creation of "hyper work product" exception is clearly erroneous. According to the district court, following the completion of litigation, N.D.C.C. § 44-04-19.1(8) "continues to protect…**hyper work product** that reflects mental impressions, opinions, conclusions, or legal theories regarding potential liability." Index #78 (emphasis added). However, no such creation was necessary because the statute is clear on its face. If there is reasonably certain future liability, such as if a case is still being litigated, or an appeal is imminent, all work product is protected and the statute does not require disclosure.

[65] The key distinction between the exception in the statute and the district court's creation of "hyper work product" is the scope of the exception. Under the plain language of N.D.C.C. § 44-04-19.1(8), either all work product in a case relates to future liability, or all work product becomes public because no future liability exists. That is, if a case is ongoing, appellate remedies still exist, or a public entity can reasonably demonstrate potential future liability, the statute exempts public disclosure. However, if a case has reached complete finality and there is no showing that future liability exists, all work product must be disclosed to the public. The plain language of N.D.C.C. § 44-04-19.1(8) contradicts the district court's novel creation of a "hyper work product" exception to disclosure of open records.

[66] The district court failed to cite any binding authority which supports its creation of a "hyper-work product" exception. The court cited only one case supporting its decision. That case, Baker v. GMC, 209 F. 3d 1051 (8th Cir. 2000), is a federal case involving a discovery dispute regarding attorney work product. However, that case is clearly distinguishable from the issues present here. First, Baker involved a privately

owned company, not a government self-insurance pool. Id. at 2. Further, Baker did not involve public records or a statute mandating the availability of work product from public entities. In the present case, we have an unambiguous statute requiring public entities such as NDIRF to release work-product at the close of litigation. Neither the court, nor NDIRF, cite any binding authority on point in this matter because none exist. No other court in North Dakota has created or recognized a special category of work product like the district court in this case.

[67] The "hyper work product" exception created by the district court sets a concerning precedent in our State. The heart of North Dakota's open records law is "to provide the public with the right and the means of informing itself of the conduct of the business in which the public has an interest…". Northern States Power Co., 502 N.W.2d at 247. This guiding principle applies equally to a public entity's decisions made in litigation. The novel "hyper work product" exception created by the district court would prevent members of the public from ever seeing documents related to a public entity's litigation and which are clearly of public interest.

[68] The district court's creation of a new hyper work product exception not recognized by North Dakota statute is erroneous and should be reversed by this Court.

V. The district court erred in denying Appellee's requests for costs and attorney's fees under N.D.C.C. § 44-04-21.2.

[69] The district court erred in denying Hagen's request that NDIRF pay for his reasonable attorney's fees and costs in bringing the Petition. Section 44-04-21.2, N.D.C.C., provides that:

> A violation of Section 44-04-18…may be subject to a civil action brought by an interested person or entity… If a court finds that any of these sections have been violated by a public entity, the court may award…costs,

> disbursements, and reasonable attorney's fees against the entity. For an intentional or knowing violation… the court may also award damages in an amount equal to one thousand dollars or actual damages caused by the violation, whichever is greater.

In this case, NDIRF knowingly and intentionally violated N.D.C.C. § 44-04-21.2.

[70] As discussed above, and previously held by the district court, NDIRF is a public entity subject to North Dakota's open records law. Moreover, the Attorney General has previously opined twice that NDIRF is a public entity as defined by Section 44-04-17.1 of the Century Code and is required to disclose records from litigation at its conclusion. NDIRF was fully aware of its status as public entity and the Attorney General's prior rulings when Hagen made requests for disclosure of open records and NDIRF flatly refused. Because of this, NDIRF committed an intentional and knowing violation of N.D.C.C. § 44-04-21.2 and Hagen should be entitled to his costs, attorney's fees, and damages.

[71] Hagen's initial records request to NDIRF sought documents involving a case with the City of Lincoln and an easement dispute. Index #91. As a resident of Lincoln, Hagen had a clear interest in reviewing those documents and the basis for the litigation. Even after its erroneous ruling on hyper-work product, the district court largely agreed NDIRF must produce a significant amount of public records. Its Order, the district court concluded NDIRF must produce 783 pages of claimed privileged documents, but it was not required to produce 157 pages were protected under "hyper work product." Index #94. Per the district court's order, NDIRF was required to disclose 80% of the public records requested. These facts further support awarding costs, attorney's fees, and damages in this case. NDIRF withheld hundreds of pages of lawful, public documents pursuant to a valid open records request, and forced Hagen to incur significant costs to obtain a vast majority

of those public documents. The facts of this case warrant an award of attorney fees and costs against NDIRF for its knowing violation of North Dakota's open records law. Failure to award costs and fees in a case like this would only encourage public entities to refuse to comply with North Dakota open records law and act as a deterrent for members of the public from seeking public records.

[72] Appellee Hagen respectfully requests this Court remand this case for consideration of the costs, attorney's fees, and damages to be awarded.

CONCLUSION

[73] For the foregoing reasons, Appellee Hagen respectfully requests the Court uphold the district court's Order granting the Writ of Mandamus. Appellee Hagen further requests this Court reverse the district court's findings on the issues of "hyper work product" and costs and attorney's fees.

Dated this 3rd day of September 2021.

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CERTIFICATE OF COMPLIANCE

The undersigned as attorneys for the Petitioner, Appellee, and Cross-Appellant in the above matter, and as authors of the above brief, hereby certify, in compliance with Rule 32(e) of the North Dakota Rules of Appellate Procedure, that the above brief hereby certify in compliance with Rule 32(e) of the North Dakota Rules of Appellate Procedure, that the above brief complies with the page limitations set forth in Rule 32(a)(8).

CERTIFICATE OF SERVICE

I, Paul Sanderson, a license attorney in the State of North Dakota and officer of the Court, certify that on the 3rd day of September, 2021, a true and correct copy of the Brief Of Appellee And Cross-Appellant Lance Hagen was e-mailed to opposing counsel via electronic mail submission through the Supreme Court filing portal to the following:

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