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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

APPELLANT'S REPLY BRIEF AND RESPONSE BRIEF

Appeal From The Burleigh County District Court *Notice to Parties* dated August 12, 2020 (Dkt. #58); *Order on Respondent's Motion to Dismiss, Order on Respondent's Response and Objections to Notice to Parties and Partial Findings on Petition for Writ of Mandamus* dated September 15, 2020 (Dkt. #78); *Order on Amended Petition for Writ of Mandamus* dated February 10, 2021 (Dkt. #94); and *Judgment* dated April 7, 2021 (Dkt. #103)

South Central Judicial District
Burleigh County, North Dakota
The Honorable John Grinsteiner

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

NORTH DAKOTA STATUTES AND RULES

REPLY ARGUMENT

[¶1] Reversal of the district court's decision is appropriate for three independent and mutually exclusive reasons: 1) Hagen's petition is legally deficient, 2) NDIRF is not a public entity, or 3) attorney-client privilege and work product protections preclude disclosure. Prior arguments are incorporated here by reference.

A. Hagen's Deficient Petition Merited Dismissal as a Matter of Law.

[¶2] Hagen's original petition failed because he did not attach "a dated, written request for the requested record." N.D.C.C. § 44-04-21.2. He filed his amended petition after the statute of limitations under N.D.C.C. § 44-04-21.2 expired. The amended petition should have been dismissed. The *de novo* standard of review is used on a motion to dismiss.

[¶3] The district court held that the amendment to Hagen's petition related back to the original petition. This ignores plain statutory law requiring the inclusion of the "dated, written request for the requested record." N.D.C.C. § 44-04-21.2. It is not the job of anyone other than the requestor to ensure compliance with plain legislative requirements.

[¶4] None of the cases cited by Hagen support the finding an amended pleading relates back under N.D.R.Civ.P Rule 15(c)(1)(B) when the sole purpose of the amendment is to cure the failure to comply with a statutory mandate. One of the cited cases addresses whether the district court abused its discretion when determining whether to grant leave to amend under Rule 15**(a)**; it does not include any discussion of whether amendments related back under Rule 15**(c)**. *Perdue v. Knudson*, 179 N.W.2d 416, 418-20 (N.D. 1970). Hagen cites another case involving whether the addition of a party sought to be added after the limitations period expired related back to the original complaint. *Wayne-Juntunen Fertilizer Co. v. Lassonde*, 456 N.W.2d 519, 523-25 (N.D. 1990). This Court ultimately

affirmed a decision that an amendment as to a party did not relate back to the original pleading. *Wayne-Juntunen Fertilizer Co. v. Lassonde*, 474 N.W.2d 254, 257 (N.D. 1991).

[¶5] The Vermont Supreme Court squarely addressed the issue of whether a statutorily required attachment filed after the statutory deadline relates back in *McClellan v. Haddock*, 166 A.3d 579 (Vt. 2017), and concluded an amended pleading adding an attachment that was omitted from the original did not relate back. In *McClellan*, the statute at issue required a plaintiff bringing a wrongful death action to "file[] a certificate of merit simultaneously with the filing of the complaint." *Id*. at ¶¶ 2-3. The plaintiff filed the complaint within the applicable limitations period but failed to file a certificate of merit. *Id*. at ¶ 5. The plaintiff attempted to cure that deficiency by filing an amended pleading with a certificate of merit and argued the amendment related back. *Id*. at ¶ 6. The district court barred the claim for failure to file the certificate within the limitations period. *Id*. at ¶ 9.

[¶6] The *McClellan* Court explained that the plain language of the statute required filing the certificate of merit simultaneously with the complaint and that although "[t]he statute [said] nothing directly . . . about the possibility of later amending the complaint to add the required certificate . . . permitting such an amendment would be fundamentally inconsistent with the statutory purpose." *Id*. at ¶¶ 13-16. The Court explained that "[w]hile it is thus tempting for this or any court to apply its own rules allowing the liberal amendment of complaints, it is essential to resist that approach where, as here, it would undermine a clear and specific legislative mandate." *Id*. at ¶ 20. The Court noted several other jurisdictions had concluded amended pleadings adding statutorily required filings that were wholly omitted from the original pleading did not relate back to the original pleading. *Id*. at ¶¶ 21-24 (citing cases from Michigan, North Carolina, Georgia, Missouri, and Nevada).

[¶7] As in *McClellan*, the plain language of N.D.C.C. § 44-04-21.2 unambiguously requires a complaint alleging an open records violation be "accompanied by a dated, written request for the requested record." Allowing a party to submit a copy of the records request with an amended pleading after the statute of limitations expires would render the Legislature's statutory mandates requiring a copy of the records request and establishing the time limit for commencing an action under N.D.C.C. § 44-04-21.2 meaningless. Hagen's claims under N.D.C.C. § 44-04-21.2 were barred by the statute of limitations because the amended petition does not relate back. Reversal is appropriate.

B. NDIRF is a Private Non-Profit Corporation.

[¶8] Hagen is entitled to his opinion, but he is not entitled to his own facts. NDIRF was not created by statute. "NDIRF is a private nonprofit corporation duly organized and established in North Dakota as a government self-insurance pool that offers liability, automobile, and property risk coverage to North Dakota political subdivisions (e.g., cities, counties, townships." Appendix("App.") 17, at ¶ 2; *c.f. Estes v. Bd. of Trustees of Mo. Pub. Entity Risk Mgmt. Fund*, 623 S.W.3d 678, 687-688 (Mo. App. 2021) (highlighting a risk management entity created and governed by statute). Indeed, "[p]olitical subdivisions are not required to get coverage from NDIRF and can choose to be insured by an insurance company." App. 17, at ¶ 3. Our Century Code allows an entity such as NDIRF, but NDIRF was not created by statute. N.D.C.C. Ch. 26.1-23.1. Neither does our Century Code provide an entity such as NDIRF, if so created, *is* a public entity. Using Hagen's logic would mean all business entities permitted to be created by our Century Code are public entities because the Century Code *allows* for creation of corporations, LLCs, and partnerships. If NDIRF is a public entity, as Hagen argues, why is it incorporated as a non-

profit corporation registered to conduct business in North Dakota? Public entities do not incorporate (e.g., no NDDOT, Inc., NDDOL, Inc., etc.).

[¶9] NDIRF does not serve a public function. NDIRF does not operate multi-district city-county 911 emergency dispatch centers or coordinate multi-jurisdiction jails. There are no joint power agreements between NDIRF and its members. NDIRF operates separate from any governmental entity. While its members are political subdivisions with the choice to pay for risk coverage from NDIRF rather than with an insurance company, this does not make NDIRF a public entity. Hagen's guilt by association logic fails.

[¶10] NDIRF is not the City of Fargo in *Forum Publishing Co. v. City of Fargo*, 391 N.W.2d 169 (N.D. 1986). If NDIRF is anyone in that case, it is the third-party non-public entity that provided the services to the City of Fargo, PDI. PDI was not ordered to do anything—it was not even a party to the action. *Forum Publ'g*, 391 N.W.2d at 170. PDI was retained by the City to perform a service. *Id.* Here, it is no different: the City of Lincoln effectively "hired" NDIRF to provide liability coverage for claims. Using Hagen's logic, any association by a third-party retained to do work for a public entity causes that third-party to be a public entity subject to the open records statutes. PDI was not a public entity—it did not have to disclose the communication it had with the City. The Fargo Forum did not even claim that PDI was a necessary party. The City of Fargo had the sole obligation to comply with the open records law. Likewise, the City of Lincoln has the sole obligation to respond to open records requests, not NDIRF.

[¶11] NDIRF receives funds from members to pay for risk management services. Hagen would have this Court believe that these members received nothing in return. But this ignores the fact the City of Lincoln received a full defense of claims against it well in

excess of what it paid for coverage. *See* Dkt. No. 16, at p. 3. Public entities pay (with tax dollars) for services or goods to private entities/persons (e.g., electricity, equipment). Hagen necessarily argues this causes a private insurer (e.g., Zurich, State Farm), that insures a public entity, to be transformed into a public entity and comply with the open records laws. This is not the law and must be rejected.

C. Attorney-Client Privilege and Attorney Work Product Protections[1]

[¶12] The Legislature carved out an exception for attorney work product that "reflects mental impressions, opinions, conclusions, or legal theories regarding potential liability of a public entity." N.D.C.C. § 44-04-19.1(8). The time stamp imposed for attorney work product disclosure is "[f]ollowing the final completion of the civil or criminal litigation . . . including the exhaustion of all appellate remedies. . . ." *Id*. The exception, however, does not contain a time stamp as to "potential liability." Indeed, any work product reflecting "mental impressions, opinions, conclusions, or legal theories regarding potential liability of a public entity" necessarily includes all points in time. Unless Hagen argues the Court should read a time requirement not stated in statute, or the provision is ambiguous (it is not), the Legislature stated what it stated. And that is what this Court should adhere to.

[¶13] Alternatively, if it is determined N.D.C.C. § 44-04-19.1(8) is ambiguous, legislative history supports NDIRF's position. The following written testimony from a North Dakota assistant attorney general provides:

> The second aspect of Section 9, found on page 10, concerns litigation files after they are closed. Currently, as a general rule, a closed litigation file is open to the public. The proposed amendment exempts from open records any attorney work product that reflects opinions regarding potential liability of a public entity. This exception is very narrow. It only applies to attorney work product, and only

[1] This section remains an alternative, mutually exclusive, argument.

> attorney work product that reflects opinions regarding potential liability of a public entity.

Dkt. No. 37, at pp. 7-8. Our Legislature acted to provide an additional exception for attorney work product after the close of litigation.

[¶14] The exception does not swallow the rule. The exception can be stated another way: all attorney work product that does not contain the mental impressions, opinions, conclusions, or legal theories regarding potential liability of a public entity must be disclosed by the public entity. The law is the law. That Hagen is dissatisfied does not give authority to any court to overrule what the Legislature has determined the law to be.

[¶15] Hagen seeks information from NDIRF that would also expose its members to potential liability. The attorney work product sought provides an inside avenue to the strategy, mindset, and analysis of NDIRF retained counsel. While no two cases are the same, many are similar and require similar strategy. Inverse condemnation cases are ultimately determined on whether the political subdivision has legal authority for a taking or not. The journey to the end result is required first. The playbook Hagen seeks would give parties a free trip on the journey. This threat is real. App. 18, at ¶ 7; *see also* NDIRF Mtn. Supplement the Record, N.D.S.C. Dkt. No. 13; N.D.S.C. Dkt. No. 14 (motion denied).

[¶16] The rules this Court promulgates are "law." *Lamb v. State Bd. of Law Exam'rs*, 2010 ND 11, ¶ 7, 777 N.W.2d 343. Hagen seeks rejection of the following mandate from our Legislature: "Except as otherwise specifically provided by law, all records of a public entity are public records. . . ." N.D.C.C. § 44-04-18(1). Confidential mediation statements are exempted from disclosure as a matter of law. N.D.R.Ct. 8.8(d)(1). Attorney work product is protected from disclosure as a matter of law. N.D.R.Civ.P. Rule 26(b)(3)(A) and (B) (providing exceptions, but no "end date" for the protection); *see FTC v. Grolier*

Inc., 462 U.S. 19, 28 (1983) (holding in the context of a Freedom of Information Request "attorney work-product is exempt . . . without regard to the status of the litigation for which it was prepared"); *Soter v. Cowles Pub. Co.*, 174 P.3d 60, 69 (Wash. 2007) (warning "the looming possibility of disclosure [of attorney work product], even disclosure after termination of the lawsuit, would cause clients and witnesses to hesitate to reveal details to the attorneys, and it would cause attorneys to hesitate to reduce their thoughts or understanding of the facts to writing"). NDIRF asks the Court to uphold the law it created.

[¶17] In the same way, the attorney-client privilege is law. N.D.R.Evid. Rule 502; *Lamb*, 2010 ND 11 at ¶ 7. The exception to the rule has not been established. Privileged communications took place when the underlying condemnation action was pending. There is no time stamp placed by Rule 502 as to when the privilege expires—even for communication that is not excepted. This could have been included in the Rule, it was not.

[¶18] Ultimately, the Court has to decide whether the protections afforded citizens in North Dakota for communicating with their attorneys is protected or not. Hagen proposes establishing a paradigm for North Dakota attorneys and public entities to develop a method for ensuring confidential communication remains confidential—phone calls, not e-mails. Stated another way, ensuring communication remains privileged by not documenting the communication will be the *requirement*. This will be the ethical and professional standard required for attorney's representing public entities in North Dakota if this Court does not reverse the district court's decision. Hagen advocates for the *de facto* establishment of a system that provides public entity clients and attorneys less protection, and, in the end, the public less protection (as exceptions for the disclosure of work product and privileged communication will be irrelevant when such documentation is never created in the first

place). NDIRF advocates for fidelity to the law, as written, to ensure North Dakota public entity clients and North Dakota attorneys can trust each other to provide legal representation at an equal level, as is afforded to private clients without question.

RESPONSE ARGUMENT

[¶19] The district court's insertion of a "hyper" attorney work product analysis into N.D.C.C. § 44-04-19.1(8) fails to provide the protection afforded by the Legislature. In the alternative, and only in the event this Court rejects NDIRF's above arguments, the decision of the district court to afford some protection is consistent with the statute.

[¶20] The treatment of "hyper" work product provides some protection. Hagen's position that the statute provides no protection cannot be reconciled by the plain language of N.D.C.C. § 44-04-19.1(8). The City of Lincoln faced potential liability when the communication with its counsel occurred. Inserting "future" into the statute contradicts what was enacted. The Court knows it is not super-legislature.

[¶21] Courts "may award declaratory relief, an injunction, a writ of prohibition or mandamus, costs, disbursements, and reasonable attorney's fees against the entity." N.D.C.C. § 44-04-21.2. The district court can read the law and it knows the discretionary standard of review. The district court and NDIRF respectfully disagree on much of what was decided. But NDIRF agrees with the district court's discretionary finding that NDIRF made "reasonable, non-frivolous arguments resisting disclosure" of the disputed documents. App. 62, at ¶ 11. Stated another way, the district court concluded there was no knowing or intentional violation of the open records law. Even if this Court reverses the district court's decision on its "hyper" work product decision, the district court's

finding that NDIRF's arguments were reasonable and non-frivolous is sufficient to affirm the district court's decision denying Hagen's request for attorney's fees and costs.

CONCLUSION AND CERTIFICATE OF COMPLIANCE

[¶22] The granting of the writ of mandamus should be reversed for all the reasons argued by NDIRF to the district court and on appeal. This twelve page brief satisfies N.D.R.App.P. Rule 32(a)(8).

Dated this 17th day of September, 2021.

/ s / Zachary E. Pelham

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	)	
Petitioner and Appellee,	)	Burleigh County No. 08-2019-CV-03559
	)	
vs.	)	
	)	**DECLARATION OF SERVICE**
North Dakota Insurance Reserve Fund,	)	
	)	
Respondent and Appellant.	)	

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

Annette Kirschenheiter declares under penalty of perjury that on the 17th day of September, 2021, she served a true and correct copy of the following:

1. Appellant's Reply Brief and Response Brief

along with this service document, via electronic mail submission through the Supreme Court filing portal to the following:

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/s/ Annette Kirschenheiter
Annette Kirschenheiter