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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

REPLY BRIEF OF APPELLEE AND CROSS-APPELLANT LANCE HAGEN

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[1] Cross-Appellant Lance Hagen ("Hagen") submits the following Reply Brief in support of his cross-appeal. NDIRF's Response to Hagen's cross-appeal is tantamount to an admission of merit. The district court erroneously created a new categorical exception to North Dakota's statutory open records law, which it called "hyper work product." The district court also abused its discretion by denying Hagen's request for costs and attorney's fees as a prevailing party to a public records request.

REPLY ARGUMENT

I. The District Court's creation of "hyper work product" was erroneous and NDIRF's response fails to demonstrate otherwise.

[2] NDIRF's one page response to Hagen's cross-appeal is lacking in substantive arguments and accuracy. NDIRF's response regarding "hyper work product" is, in essence, contained in only four sentences:

> "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 [sic]."

Appellant's Reply and Response Brief, at ¶ 20. First, Hagen never argued N.D.C.C. § 44-04-19.1(8) "provides no protection" as NDIRF erroneously asserts. Rather, the plain language of the statute demonstrates all protection provided to the work product of a public entity ceases once a case reaches finality, unless there is an affirmative showing the work product would result in potential liability to a public entity. Second, Hagen does not dispute that "[t]he City of Lincoln faced potential liability when the communication with its counsel occurred." However, all of the City of Lincoln's potential liability ended when the underlying case reached finality. There has been no showing that the City of Lincoln

or any other public entity would suffer additional liability if the work product were disclosed. NDIRF's response ignores the plain and unambiguous language of the statue.

a. The creation of "hyper work product" is irreconcilable with the plain language of N.D.C.C. 44-04-19.1(8).

[3] This Court has held the "primary goal in statutory construction is to ascertain the intent of the legislature, and we first look to the plain language of the statute and give each word of the statute its ordinary meaning." City of Lincoln v. Schuler, 2021 ND 123, ¶ 7, 962 N.W.2d 413, 415. Moreover, where the language of the statute is clear and unambiguous, such language cannot be disregarded under the pretext of pursuing its spirit. Kenmare Educ. Ass'n v. Kenmare Public School Dist. No. 28, 2006 ND 136, ¶ 28, 717 N.W.2d 603, 611. Ultimately, statutes must be read as a whole and be harmonized to give meaning to related provisions. Grand Prairie Agriculture LLP v. Pelican Township Board of Supervisors, 2021 ND 29, ¶ 7, 955 N.W.2d 87, 89.

[4] In our case, the language of N.D.C.C. § 44-04-19.1(8) provides that once litigation has ended, all work product of a public entity becomes public record and must be made available for public disclosure subject to limited exceptions. The statute sets forth a narrow exception for work product which "reflects mental impressions, opinions, conclusions, or legal theories regarding potential liability of a public entity." Id. (*emphasis added*). It was out of this exception which the district court created a so-called "hyper work product." Index # 78. However, the statutory language is clear. Either: A) potential liability exists and all the work product is protected from public disclosure; or B) the case has reached finality, there is no further liability of a public entity, and the work product becomes a public record available for public disclosure. There is no provision in the statute

to permit the district court to create a new exception to public disclosure for "hyper work product".

[5] The district court had no statutory basis for creation of a hyper work product exception to disclosure of public records. This Court has stated "we presume the legislature intended all that it said, said all that it intended to say, and meant what it has plainly expressed." State v. M.J.W., 2020 ND 183, ¶ 9, 947 N.W.2d 906, 908. If the Legislative Assembly wished to protect a special category of work product beyond the end of litigation, it would have stated so. Instead, the Legislative Assembly intentionally chose to use the qualifying language "regarding potential liability of a public entity." In this action, the documents requested are related to an inverse condemnation action which this Court ruled on over two years ago. See Lincoln Land Development, LLP v. City of Lincoln, 2019 ND 81, ¶4, 924 N.W.2d 426. In that case, the litigation concluded and all appeals were exhausted. The City of Lincoln faces no future liability regarding the inverse condemnation for a road it constructed in 2011. Simply put, the public records requested do not and cannot relate to any future potential liability because none exists. The district court appears to look beyond the statutory language in pursuit of what it believes is the spirit of the law. The district court's creation of "hyper work product" is the first of its kind in North Dakota and is irreconcilable with the plain language of the statute. If "hyper work product" was an intended exception to the public records law, the Legislative Assembly would have included the exception in the statute. The district court erred in creating a new exception to disclosure of public records.

b. NDIRF's arguments for preventing disclosure of public records are contrary to North Dakota law and the public policy supporting public records law.

[6] Under North Dakota law, "all records of a public entity are public records". See N.D. Const. Art. XI, § 6; and N.D.C.C. § 44-04-18(1). The purpose 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, in order that the citizen and taxpayer might examine public records to determine whether public money is being properly spent, or for the purpose of bringing to the attention of the public irregularities in the handling of public matters." Adams Cty. Record v. Greater N. Dakota Ass'n, 529 N.W.2d 830, 839 (N.D. 1995) (citing Grand Forks Herald v. Lyons, 101 N.W.2d 543, 546 (N.D.1960)).

[7] NDIRF's arguments that the public is not entitled to attorney work product in litigation involving public entities is both concerning and contrary to North Dakota law. According to NDIRF, "[t]he City of Lincoln faced potential liability when the communication with its counsel occurred." Based on this, NDIRF asks this Court to ensure such communications with a public entity remain hidden from the public forever. Under NDIRF's rationale, citizens and taxpayers would have no right to access public records involving litigation with a public entity to determine how and why taxpayer dollars were spent in litigation.

[8] Contrary to NDIRF's arguments, the Legislative Assembly only protected communications with counsel for ongoing litigation related to potential liability. Section 44-04-19.1(8), N.D.C.C., 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 . . . . . (*emphasis added*).

Thus, both the plain language and legislative intent specifically provide such work product must be made available.

[9] NDIRF's "secret playbook" argument regarding potential liability would allow public entities to avoid disclosure of any and all work product which arises from litigation by simply suggesting some unknown political subdivision could face some hypothetical potential liability at some indefinite point in the future. It is a well-established rule of statutory construction that a party seeking to claim the benefit of an exception to a statute has the burden to show the exception applies. See N.L.R.B v. Kentucky River Community Care, Inc., 532 U.S. 706, 711 (2001); see also Markegard v. Willoughby, 2019 ND 170, ¶ 16, 930 N.W.2d 108; D.E. v. K.F., 2012 ND 253, ¶ 11, 825 N.W.2d 832. NDIRF failed to present any evidence that any political subdivision would face potential liability in any action if the work product requested was disclosed. Further, the district court failed to set forth any potential liability of any political subdivision if the requested work product was disclosed. NDIRF's secret playbook argument contravenes the purpose of North Dakota's public records law and would allow the narrow potential liability exception to swallow the rule of public disclosure of work product at the conclusion of litigation. Taxpayers have a right to know why taxpayer money were expended in litigation and public entities should not be able to hide behind a hypothetical liability argument to shield them from public scrutiny of their decisions.

[10] The district court's creation of "hyper work product" is erroneous. North Dakota law permits disclosure of work product at the conclusion of litigation. There has been no showing that any public entity faces any potential liability if the requested public records are produced. Therefore, the district court's order preventing disclosure of public

records should be reversed and remanded to permit disclosure of all remaining public records.

II. The district court abused its discretion in denying Hagen's request for costs and attorney's fees in this case.

[11] The district court abused its discretion in denying Hagen's request for costs and attorney's fees. Section 44-04-21.1, N.D.C.C. states "[i]f 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." NDIRF violated the open records law, and as such, Hagen should be awarded his reasonable costs and fees.

[12] NDIRF argues that it made "reasonable, non-frivolous arguments resisting disclosure." Appellant's Reply and Response Brief ¶ 21. However, the purpose of the open records law is to provide the public access to records and documents of public entities. If public entities are allowed to resist records disclosures without the repercussions of costs and attorney fees as set out by statute, such entities will be encouraged to do so. North Dakota citizens should not incur attorney's fees because a public entity erroneously withheld documents in violation of North Dakota law. Not only will this discourage citizens from challenging denials of open records requests because of the costs associated with doing so, it will also incentivize public entities to weaponize such costs as a way of avoiding disclosure. When a citizen prevails in a suit to secure disclosure of public records, they should be entitled to reasonable attorney's fees and costs.

[13] Hagen has been forced to incur substantial out-of-pocket costs in order to receive public records that are required to be produced under the law. NDIRF has previously been instructed by the North Dakota Attorney General to disclose these requested records. The district court agreed NDIRF violated the open records law and

ordered NDIRF to turn over 80% of the documents requested by Hagen. Forcing the public to incur significant attorney's fees in order to receive records they are entitled to will do nothing more than deter access to those records. Such deterrence has the potential to render N.D.C.C. § 44-04-18 moot.

[14] For these reasons the district court abused its discretion. The district court's decision should be reversed and remanded for a determination of Hagen's costs and fees.

CONCLUSION

[15] For the foregoing reasons, Appellee Hagen respectfully requests this Court reverse the district court's findings on the issues of "hyper work product" and costs and attorney's fees and remand the case for a determination of fees and costs.

Dated this 1st day of October 2021.

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CERTIFICATE OF SERVICE

I, Paul Sanderson, a license attorney in the State of North Dakota and officer of the Court, certify that on the 1st day of October, 2021, a true and correct copy of the Reply Brief of Appellant 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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