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STATE OF NORTH DAKOTA

In the Supreme Court
State Of North Dakota

Elton Lovro,	)	
	)	Supreme Court No. 20210300
Plaintiff and Appellant,	)	
	)	Dist. Ct. No.: 46-2021-CV-00010
vs.	)	
	)	
City of Finley,	)	
	)	
Defendant and Appellee,	)	

Appeal from the Memorandum Opinion and Order
dated September 27, 2021; and in the
District Court, East Central Judicial District,
Steele County, the Honorable Steven L. Marquart, Presiding

BRIEF OF APPELLANT ELTON LOVRO
ORAL ARUGMENT REQUESTED

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[¶3] STATEMENT OF THE ISSUES

1. The District Court abused its discretion when it granted the City's motion for summary as there were substantial questions of fact in dispute.

2. The District Court committed error when it ruled that Appellee could not waive immunity.

[¶4] STATEMENT OF THE CASE AND PROCEDURAL HISTORY

¶5. This case is an appeal following summary judgment ruling by the Steele County District Court on September 23, 2021. [App. at 21-25].

¶6. On September 30, 2021, the District Court granted the City of Finley's (City) motion for summary judgement and dismissed the case with prejudice, and also awarded the City its cost of $531.00. [App. at 23].

¶7. Appellant now appeals, seeking a reversal of the District Court's finding of summary judgement, and the determination regarding cost and disbursements.

[¶8] STATEMENT OF THE FACTS

¶9. Appellant is Mr. Elton Lovro, a resident of the City of Finley, Steele County, North Dakota (hereinafter be referred to as Mr. Lovro the sake of brevity); Appellant's home mailing address is PO Box 493, Finley, North Dakota, 58230. [App. at 5, Complaint ¶1].

¶10. Appellee is the City of Finley (Steele County), North Dakota. The City of Finley is hereinafter referred to as the City for the sake of brevity). [App. at 5, Complaint ¶2].

¶11. Lovro owns a house and property in the city of Finley, North Dakota. [App. at 5, Complaint ¶4].

¶12. On or about March 2, 2020, while Lovro was out of state, a third party checking on the Lovro's house in Finley, North Dakota, discovered significant water damage. [App. at 6, Complaint ¶5].

¶13. As of approximately March 2-3, 2020, there was 2 to 2.5 feet of standing water in the finished and furnished basement of Lovro's house; and water flowing under the driveway slab, under the garage, and back into the alley; and also bubbling up on the sides

of the driveway. Lovro returned to North Dakota after being informed of the water issues at his house. [App. at 6, Complaint ¶6-7].

¶14. It has been determined that all the damage was the result of a city water line that broke and/or leaked. Further inspections confirmed that there was a break and/or leak on the City's side of the water line leading to Lovro's home which caused the flooding and damage. [App. at 6, Complaint ¶8].

¶15. Lovro's basement is a wood floor covered with carpet; the basement contained a family room, two bedrooms, a bathroom, and a utility room; the walls are covered by sheetrock and drywall, and the family room (in the basement) walls were finished with high end knotty pine; the basement has baseboard heat; the basement was filled with other personal furniture and objects. Most items in the basement were damaged and/or destroyed by the flooding. [App. at 6, Complaint ¶9-10].

¶16. Lovro's driveway also suffered damage. The ground underneath the concrete drive was hollowed out by the flooding water. [App. at 6, Complaint ¶11].

¶17. Lovro's house's electrical was damaged by the flooding, which required replacing. [App. at 6, Complaint ¶12].

¶18. Lovro was forced to expend significant time, money and effort to inspect, investigate, and fix the damage done to his home, property, and belongings by the city's water leak. [App. at 7-10, Complaint ¶13-16].

¶19. Lovro states the damage and loss incurred upon his property remains totally and completely at the fault of the City.

¶20. The City agreed the damage was totally and completely their fault and the City agreed to pay for the damages incurred, to wit: the mayor and council members admitted

it was the City fault, and agreed to do the repairs, in fact the City completed the removal and replacement of the Plaintiff's entire driveway.

¶21. The City then stopped short of paying for the water damage in the Plaintiff's basement after the Insurance Reserve Fund refused further coverage. The remaining damages amounted to $73,293.07. [App. at 8-10, Complaint ¶16]. The City did not bill Lovro for the driveway.

¶22. The Insurance Reserve Fund representing the City, and has refused to allow the City to pay Lovro for $73,293.07; and took the legal position that the City is immune (in fact the Reserve Fund argues that the City was always immune) from further damage claims relating to this issue.

¶23. Before the completion of discovery, the City – via the City's insurance company not, it must be noted, by any action directly correlated to the elected City leadership – sought summary judgment against the Lovro complaint.

¶24. The City argued that it was immune from paying $73,293.07 and sought a legal dismissal of the case regardless of the facts. [App. at 3, at Docket Index 12-13]

¶25. No mention was made by the insurance company regarding the replaced driveway, nor the City leadership's admission of liability. The parties presented briefing and argument to the District Court [App at 3-4, Docket Index 12-27]; and the District Court ruled that the City was immune, in lieu of any law which would clearly permit a City to waive immunity, and thereafter granted the summary judgment in favor of the City. [App. at 21-25].

[¶26] ARGUMENT

A. The District Court erred when it granted summary judgment in favor of the Appellee City due to outstanding material questions of fact

¶27. There are two arguments on appeal: The first is that the District Court should not have granted summary judgment because there are outstanding material questions of fact. The second is the issue of the City's immunity, which is an issue of first impression for the North Dakota Supreme Court (although the Court has previously touched on waving immunity in other cases, there are no cases that directly correlate with the waiver issue at hand).

¶28. At the outset, this Court must determine the appropriateness of the District Court's granting of summary judgment considering that there are outstanding material facts. Under Rule 56, N.D.R.Civ.P., the party moving for summary judgment (in this instance, the City/Appellee) bears the burden of showing no outstanding genuine issue of material fact, and also that summary judgment is appropriate under applicable principles of substantive law. Heng v. Rotech Med. Corp., 2004 ND 204, ¶ 9, 688 N.W.2d 389.

¶29. "Summary judgment is a procedural device used to promptly resolve a controversy on the merits without a trial if either party is entitled to judgment as a matter of law and the material facts are undisputed or if resolving the disputed facts would not alter the result." Riedlinger v. Steam Bros., Inc., 2013 ND 14, ¶ 10, 826 N.W.2d 340 (quoting Burris Carpet Plus, Inc. v. Burris, 2010 ND 118, ¶ 10, 785 N.W.2d 164). The moving party bears the initial burden of showing there are no genuine issues of material fact in dispute and the case is appropriate for judgment as a matter of law. Riedlinger, at ¶ 10. If the motion is properly made and supported, the opposing party then must set forth specific facts by

affidavit or by directing the district court to other evidence showing a genuine issue of material fact. Hale v. Ward County, 2012 ND 144, ¶ 12, 818 N.W.2d 697. "Summary judgment is appropriate against parties who fail to establish the existence of a factual dispute on an essential element of a claim on which they will bear the burden of proof at trial." Riverside Park Condo. Unit Owners Ass'n v. Lucas, 2005 ND 26, ¶ 8, 691 N.W.2d 862.

¶30. Once the motion for summary judgment is made, and the responding party has replied, the matter then falls upon the district court for review and consideration. In deciding whether to grant summary judgment, the district court may consider the pleadings, depositions, admissions, affidavits, interrogatories, and inferences to be drawn from the evidence. Riedlinger, 2013 ND 14, ¶ 10, 826 N.W.2d 340, (Holding: "Summary judgment is inappropriate if neither party is entitled to judgment as a matter of law or if reasonable differences of opinion exist as to the inferences to be drawn from the undisputed facts.".

¶31. "[T]he district court's 'role is limited to determining whether the evidence and inferences to be drawn therefrom, when viewed in the light most favorable to the party opposing summary judgment, demonstrate that there are no genuine issues of material fact.'" Farmers Union Oil Co. of Garrison v. Smetana, 2009 ND 74, ¶ 10, 764 N.W.2d 665 (quoting, Heng v. Rotech Med. Corp., 2004 ND 204, ¶ 34, 688 N.W.2d 389).

¶32. Granting summary judgment is not appropriate if the district court must draw inferences and/or make findings on disputed facts. Smetana, 2009 ND at ¶ 10. The district court may not "weigh the evidence, determine credibility, or attempt to discern the truth of the matter . . . ." Id. In considering a motion for summary judgment, the district court must view the evidence in the light most favorable to the party opposing the motion, and that

party must be given the benefit of all favorable inferences which can reasonably be drawn from the evidence. Groleau v. Bjornson Oil Co., 2004 ND 55, ¶ 5, 676 N.W.2d 763; see, Muhammed v. Welch, 2004 ND 46, ¶ 8, 675 N.W.2d 402.

¶33. Undisputed facts do not automatically or de facto justify summary judgment if reasonable differences of opinion exist as to the inferences to be drawn from those facts. Id. "[D]eciding an issue on summary judgment is not appropriate if the court must draw inferences or make findings on disputed facts." Northern Oil & Gas, Inc. v. Creighton, 2013 ND 73, ¶ 20, 830 N.W.2d 556.

¶34. Summary judgment may be a tool that the court uses in the interest of efficiency, but this does not mean that it should be granted prematurely and without an interest of justice. The matter at hand is no different.

¶35. Whether the district court has properly ruled on a motion for summary judgment is a question of law, which the Supreme Court will review de novo upon appeal. Riedlinger, 2013 ND 14, ¶ 10, 826 N.W.2d 340. In reviewing the district court's decision, the Supreme Court will view the evidence in a light most favorable to the party opposing the motion and give the opposing party all favorable inferences. Id.

¶36. Instructive, though not controlling, are the federal rulings which provide that summary judgment is only appropriate after the nonmovant has had adequate time for discovery. Jackson v. Riebold, 815 F.3d 1114, 1121 (8th Cir. 2016); see also, Livingston v. Warren Cty., 2016 U.S. Dist. LEXIS 69541 (E.D. Mo. May 27, 2016). Pursuant to Rule 56(d) of the Federal Rules, a party opposing summary judgment may move for a continuance "[u]ntil adequate discovery has been completed if they otherwise cannot present facts sufficient to justify their opposition" to a summary-judgment motion. Id. The

purpose of this rule is to prevent a party from being unfairly thrown out of court by a premature motion for summary judgment. Id.

¶37. This Federal rule dovetails with the North Dakota legal position which generally directs the district court to avoid making factual determinations when considering a summary judgment motion. See, Riedlinger, 2013 ND 14.

¶38. In this case, what facts were in controversy, or otherwise in question, at the time the district court ruled upon the summary judgment? Lovro asserted to the court that discovery was still ongoing and pending – which is true. Discovery was still open and ongoing when the summary judgment motion was filed; and discovery was still open and ongoing at the time the district court made its summary judgment ruling.

¶39. In both briefing and at the summary judgment hearing, Lovro informed the Court that the matter was still young considering how recently the case was filed with the court, and considering the limited amount of time to complete discovery. The summons and complaint had only been filed a month prior to the summary judgment motion.

¶40. Lovro argued that he had a right to conduct depositions and future discovery. [App. at 39-40]. Lovro argued that depositions take time to arrange and conduct if they are to be done properly. Beyond that, the interrogatory and deposition answers often open new doors needing exploration. In the end, discovery was still open and Lovro should have been provided time by the district court to complete discovery. [App. at 33, Transcript p. 6, lines 3-5].

¶41. Instead, the district court made a ruling on a legal question of immunity and potential waiver of immunity, prior to the close of discovery. The court's ruling was therefore premature and materially prejudicial to Lovro.

¶42. Lovro concedes that the ability for a City to waive immunity may indeed be a question of law. But the alleged wavier made by the City (at least as alleged by Lovro) is in part also a factual matter. To wit: The actions of the City are factual actions, not abstract legal concepts. Actions of a party are facts; and Lovro was prevented from discovering the full depth and breadth of those actions in discovery, because the district court *sua sponte* cut off discovery. Lovro argued to the Court that no scheduling order was ever set for this matter, nor have either party yet appeared in front of the court. Nevertheless, the district court declared discovery closed by default when the court granted the summary judgment on allegedly legal terms concerning this immunity question.

¶43. Therefore: The district court erred in granting summary judgment to the City, because the factual discovery period was still open.

B. Appellee waived their immunity by words and actions and therefore Appellee is liable for all the damages caused to the Appellant's home, garage, and driveway.

¶44. The City sought summary judgment asserting that the City was immune from Lovro's litigation claims. The City cited N.D.C.C. §32-12.1-03(3) and Knutson v. City of Fargo, 2006 ND 97, 714 N.W.2d 44; asserting that the City is protected by its discretionary immunity and the public utility doctrine.

¶45. The City argued that the City could not be found liable for the water damage to Lovro's home under these above-cited legal standards. The City argued that no factual situation could or would be presented which would allow the City to waive the immunity.

¶46. The district court's memorandum opinion and order is succinct: "There is nothing in N.D.C.C. §32-12.1-03 that says these immunities can be waived." [App. at 21-22]. Accordingly, the district court granted the City's motion for summary judgment.

¶47. Lovro appeals, asking that this Court review the district court's ruling (and, by extension, the City's argument) that the City cannot legally waive immunity in this factual situation. There are two facets to this portion of the appeal:

1. Lovro asserts that City never rejected its liability, and rather it was the insurance company (North Dakota Insurance Reserve Fund) which asserted immunity on behalf of the City. For this portion of the appeal, Lovro questions whether an insurance company which is merely providing a defense to an insured party (in this case the Insurance Reserve Fund defending the City) has standing to replace its own position vis-à-vis liability in place of the City government's own decisions.
2. Lovro also asserts that the City indeed waived immunity; and that the City having so waived its immunity cannot retreat back into the law for *ex post facto* statutory protection from litigation.

C. The Insurance Reserve Fund Does Not Have Standing to Replace the City Government's Decisions:

¶48. Lovro argues that the insurance company does not have standing to assert a legal position that is contrary to the City's own legal and factual position. In this case, the Insurance Reserve Fund is only acting as an insurance company providing a defense (and potentially paying coverage) to the City for potential liability.

¶49. Lovro questions the extent an insurance company can overrule and entirely replace its opinions and decisions for those of the elected and legally authorized Government. [App. at 43, lines 19-22; and App. at 46, lines 6-9]. To wit: The City accepted liability through multiple confessions and admissions of City leaders. [App. at 44, lines 16-17 and 23-25]. As far as Lovro is aware the City never democratically formally voted to reject Lovro's damages, nor did it vote on any immunity. Prior to the Insurance Reserve Fund getting involved, the City not only formally accepted liability, but the City then proceeded to replace Lovro's driveway; replace the water lines; complete all outside repairs and construction on Lovro's property and home, all using the City's time, management, and expenses. [App. at 45, lines 1-19; and App. at 43, lines 7-9].

¶50. All this work done by the City, and all of the admissions of liability by the actual City leaders (e.g., not the third-party employee engineers but the Mayor and Council member), was done before the City submitted the basement damage claim to the Insurance Reserve for coverage.

¶51. Despite the City's admissions, both in word and deed, the insurance company nonetheless took the *ex post facto* position that the City was not liable for any other damages to Lovro. This decision by the insurance company was/is contrary to the City's legal and factual actions, and appears to create a situation in which the insurance company is replacing the City's elected official's decisions with its own. Lovro therefore argues that the insurance company, merely by virtue of being an insurance carrier providing coverage to an elected Governmental body, does not have legal standing to act as a supernumerary entity to enact legislation nor to overturn legislative actions and decisions by the democratically elected City leadership.

¶52. There was no confusion by the insurance company about the City's admissions and actions. For example, the City asked of Lovro in their discovery interrogatories: "If it will be claimed that at any time the defendant, City of Finley, their agents or employees, or any other person, have made any statements or admissions concerning the cause of or the fault for the damages and events set out in the complaint, state the substance of each such statement or admission, the time and place when made, the person who made it, the person to whom it was made, and state whom was present."

¶53. Lovro's Answer under oath: (Which was submitted to the district Court by the City in their own summary judgment motion as an exhibit): "March 2, 2020, when the water break was discovered by my son Gerry Lovro, Gerry called city maintenance man George Braun about a water leak. Braun came to my house, along with Mayor Larry Amundson and City Councilman Tyler Midstokke. These people (one of them) called Richard Strand at Strand Construction to come to my home and cut out a large hole in my driveway and dig out to water break, which was the city line on the city side of the curb stop. Mayor Larry Amundson told my son Gerry Lovro that when he (the Mayor) called me in Arizona about damages to tell me not to worry about it and that it was the city line that was broken and so it was the city's problem and their insurance would pay for damages. Present for this incident at this time was George Braun, Tyler Midstokke and a few employees of Strand Construction – I know one of the Strand people was Jacob Hagen. When I got home on March 5, 2020, I talked to councilman Merle Terry. He also said the whole issue (the flooding, the damage, the water, and the broken water line) was the city's fault and their (the City's) insurance would pay for damages."

¶54. This evidence is not refuted, and shows that the city accepted both liability and the cost of repair. Accordingly, a third-party insurance company cannot (or at least should not) replace government decisions without any proof that the City formally changed its position. The legal filing is illegal because it does not represent the pretrial position of the client (City).

D. The City waived immunity; and that the City having so waived its immunity cannot retreat back into the law for ex post facto statutory protection from litigation.

¶55. Sovereign immunity was derived from British common law doctrine based on the idea that the King could do no wrong. In the United States, sovereign immunity typically applied to the federal government and state government, but not to municipalities. See, Nevada v. Hall, 440 U.S. 410, 415 (1979).

¶56. Federal and state governments, however, have the ability to waive their sovereign immunity. The federal government did this when it passed the Federal Tort Claims Act, 28 U.S.C. § 2674, which waived federal immunity for numerous types of torts claims.

¶57. As a general rule throughout the United States, if the actor was performing a proprietary function (i.e. acting for financial gain for itself or its citizens; doing something that is not historically a governmental function; doing something that can be performed by a private corporation/contractor), then the actor is subject to liability. But if the actor was performing a governmental function (i.e. acting for the general public; doing something ordained by legislature; performing a historic gov function), then the actor is not subject to liability, e.g., immune.

¶58. Under the doctrine of "state sovereign immunity," a state cannot be sued in federal or state court without its consent. Many academics and judges have often struggled to make sense of modern U.S. Supreme Court jurisprudence on sovereign immunity. See, Alfred Hill, In Defense of our Law of Sovereign Immunity, 42 B.C.L. Rev. 485, 485 n.2 (2001), (providing a general historical overview of the topic).

¶59. While the Eleventh Amendment limits immunity to two specific situations in federal court, the U.S. Supreme Court held that immunity derives not from the Amendment, but "from the structure of the original Constitution itself." Alden v. Maine, 527 U.S. 706, 728 (1999).

¶60. The Supreme Court has expanded federal immunity from suit beyond the Eleventh Amendment's directives, but also has enshrined state sovereign immunity in state courts. As a result, in its own courts a state can invoke immunity even when sued under an otherwise valid federal law, and the state has full authority to define the scope of immunity based on its own law. Alden, 527 U.S. at 754. This has prompted the creation of a variety of sovereign immunity regimes among the states. Bradford R. Clark, The Eleventh Amendment and the Nature of the Union, 123 Harv. L. Rev. 1817 (2010).

¶61. Under the doctrine of state sovereign immunity, nonconsenting states are immune from suit unless there was "a surrender of this immunity in the plan of the [Constitutional] convention." Hans v. Louisiana, 134 U.S. 1, 11 (1890).

¶62. To determine whether there was a surrender of immunity in a specific situation, courts examine "history and experience and the established order of things" as well as the "fundamental postulates implicit in the constitutional design." Alden, 527 U.S. at 727 (citing Hans, 134 U.S. at 14), 729.

¶63. In matters wherein a state and/or local government are sued in Federal Court, the state must nevertheless assert immunity, because immunity: ["d]oes not automatically destroy original jurisdiction. Rather, [it] grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 389 (1998). Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it. Id.

¶64. States always have had the option to voluntarily waive state sovereign immunity, which is a "personal privilege" that a state may waive "at [its] pleasure," either by state statute (which, in some cases, gives a state official the authority to make the decision), by the state Constitution, or other matters. Clark v. Barnard, 108 U.S. 436, 447-48 (1883).

¶65. Many states have chosen to codify some level or mechanism of immunity. The largest portion of states maintain the status quo and establish internal immunity as a jurisdictional bar from suit. Of this larger group of states, nearly all gave their legislature the authority to consent or waive immunity by legislation, extended to most political subdivisions. The second smaller camp of states chose to give their legislature the authority to create immunity by legislation. See generally, Ark. Const. art. V, § 20 (the state "shall never be made a defendant in any of her courts"); W. Va. Const. art. VI, § 35; Ala. Const. art. I, § 14; Fla Const. art. X, § 13; La. Const. art. XII, §10; Ill. Const. art. XIII, §4; Neb. Const. art. V, § 22.

¶66. Lovro is well aware that immunity provides governmental entities within North Dakota immunity from suit and ample discretion to decide which narrow situations warrant any possible waiver. Only in limited instances can the state itself be sued against its will, and even the doctrine's many legal developments over the past centuries generally tend to

favor the state as a "mostly" protected sovereign. For a thorough review of the history of the law of general governmental immunity in North Dakota, see: Tracy Laaveg, Constitutional Law - State Sovereign Immunity: Limiting Federal Power to Abrogate State Immunity, 77 North Dakota L. Rev. 3, Article 5 (2001).

¶67. Sovereign immunity was abolished in North Dakota in lieu of statutory immunity provisions, a process that started with the North Dakota Supreme Court abolishing sovereign immunity in Bulman v. Hulstrand Const., 521 N.W.2d 632 (N.D. 1994); and the subsequent North Dakota Legislative action passing into law N.D.C.C. 32-12-02.

¶68. North Dakota Century Code § 32-12.1 et. seq, generally states that an action respecting the title to property, or arising upon contract, may be brought in the district court against the state the same as against a private person. Such actions shall be brought in the county in which the property is situated, or the county in which the plaintiff resides. Id.

¶69. The Supreme Court has steadily held that immunities are to be applied to situations in which a city water pipe causes damage to a private landowner. Knutson v. City of Fargo, 2006 ND 97, 714 N.W.2d 44 (relying upon: Olson v. City of Garrison, 539 N.W.2d 663 (N.D. 1995).

¶70. It must be noted that Lovro sued in part under the legal theory of breach of contract. Lovro alleged (in part) that the City cannot claim immunity under N.D.C.C. § 32-12.1 and Knutson because there was contract between the City and Lovro; and the City (allegedly, according to Lovro) breached that contract and caused damages.

¶71. But regardless of whatever negligence or breach of contract, Lovro asserts that the City waived its protections of immunity under Knutson and N.D.C.C. § 32-12.1 et. seq. The crucial question Lovro therefore puts before the Court is not whether or not immunity

exists for the City in this case. The question is: May the City waive its immunity protection under these laws? And: May a City waive immunity, but then declare immunity at a later date?

¶72. Lovro believes there may be some merit to reviewing other instances of waivers, both in North Dakota and elsewhere. In Fastow v. Burleigh County Water Resource District, 415 N.W. 2d 505 (1987), this Court held: "[i]mmunity under N.D. Cent. Code §53-08 was waived when a political subdivision purchased liability insurance pursuant to §32-12.1-05." Membership in the Insurance Reserve Fund program is not Lovro's point. Instead, Lovro only points out that this Court has, at least in one instance, found that immunity may not be entirely sacrosanct, and that governmental bodies might make a decision which legally operates to waive immunity.

¶73. Other state's statues enforce the doctrine of government immunity, but still maintain that a county or city may waive this immunity by engaging in certain actions.

¶74. North Carolina statute provides that a city can waive its immunity from civil liability in a tort by purchasing liability insurance. N.C. Gen. Stat. § 160A-485.

¶75. Texas law states "a local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract." Tex. Local Gov't Code § 271.152.

¶76. In Missouri immunity is "waived only to the maximum amount of and only for the purposes covered by such policy of insurance purchased pursuant to the provisions of this section and in such amount and for such purposes provided in any self-insurance plan duly

adopted by the governing body of any political subdivision of the state." Missouri Code § 537.610 R.S. Mo.

¶77. In Georgia, under O.C.G.A § 36-33-1: "The public policy of the State of Georgia that there is no waiver of the sovereign immunity of municipal corporations of the state and such municipal corporations shall be immune from liability for damages. A municipal corporation shall not waive its immunity by the purchase of liability insurance, except as provided in Code Section 33-24-51 or 36-92-2, or unless the policy of insurance issued covers an occurrence for which the defense of sovereign immunity is available, and then only to the extent of the limits of such insurance policy."

¶78. In Nevada at Nev. Rev. Stat. Ann. § 41.031: "The State of Nevada hereby waives its immunity from liability and action and hereby consents to have its liability determined in accordance with the same rules of law as are applied to civil actions against natural persons and corporations, except as otherwise provided in NRS 41.032 to 41.038, inclusive, 485.318, subsection 3 and any statute which expressly provides for governmental immunity, if the claimant complies with the limitations of NRS 41.010 or the limitations of NRS 41.032 to 41.036, inclusive. The State of Nevada further waives the immunity from liability and action of all political subdivisions of the State, and their liability must be determined in the same manner, except as otherwise provided in NRS 41.032 to 41.038, inclusive, subsection 3 and any statute which expressly provides for governmental immunity, if the claimant complies with the limitations of NRS 41.032 to 41.036, inclusive."

¶79. In Utah at the Utah Code Ann. § 63G-7-301, Utah Code Ann § 63G-7-201: Under the Utah statute, immunity is waived if there was any contractual obligation. Immunity can

also be waived: as to any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment unless injury arises out of connection with or results from: a failure to make an inspection or making an inadequate or negligent inspection, or a misrepresentation by an employee whether the misrepresentation is negligent or intentional.

¶80. These various matters from others states all indicate instances in which immunity is altered and/or outright waived by the otherwise-immune governmental entity – either expressly or by actions and deeds of the entity. Lovro asserts that the above examples are usable reference points.

¶81. Lovro's Complaint asserts the following causes of action against the City: Negligence, Gross Negligence, and Breach of Contract. [App. at 5-16].

¶82. Lovro argues that the City is not immune: first from a breach of contract claim, and the district court erred in granting summary judgment on the question of a breach of contract. As to the claim of breach of contract, for purposes of this Appeal, Lovro asserts that the City waived any immunity regardless.

¶83. Second: Lovro also argues that the City waived its immunity to all claims upon which both contractual and the negligence claims.

¶84. There is no case law nor statute in North Dakota which provides that the City is forbidden, or prevented, or prohibited, from waiving immunity. The City, naturally, argued that without a law allowing the waiver, no waiver can occur. Lovro asserts that this factual scenario de facto shows the City may, and did, already waive immunity.

¶85. These two conflicting arguments create a classic glass-is-half-full/half-empty conundrum for the district court. The district court ruled that in absence of a law allowing a waiver, no waiver can occur.

¶86. The above noted law, both nationally and in North Dakota, show that waivers are to be found in ready if limited supply.

¶87. The Court may well ask: "Lovro, what is your proof that a waiver was given?" And in answer, Lovro directs the Court's attention to the statements of the City's Mayor at the scene of the flooding; as well as the statement of at least one council member at the flood – both admitting fault by the City and promising payment of damages by the City.

¶88. These statements alone are compelling. But the actions of the City when mated with the comments of the City leaders shows the City's **intent** to admit liability, accept liability, and accept a duty to pay for all of the flood damage.

¶89. The City excavated the flooded area, replaced the broken line and curb stop including significant work on Lovro's land, replaced Lovro's driveway from the curb all the way up to the lip of the garage slab, and all of this was contracted by, managed by, and paid for by: The City.

¶90. These actions dovetail exactly with the words of the City leaders, showing the City taking responsibility for the exploration, damage repair, and replacement due to the water line flood.

¶91. All this information was provided to the district court in briefing and argument to the district court. The District Court was well-provided with proof of the City's de facto waiver.

¶92. Factually and legally, therefore, the district court's summary judgment ruling creates a logical paradox: Can the City accept liability at one point in time, and pay for a portion of the cost of the liability up to a random point in time; and then having accepted liability and acted accordingly – "pull the plug" so to speak and declare "immunity" half way through the repairs?

¶93. It appears that this is the result of the City's position and the District Court's ruling:

(a) A government entity may accept some, all, or none of the liability in any given negligence and/or contract breach situation.

(b) Having accepted liability and duty to cover damages, a government entity may, at any time of choosing, declare immunity all the way up to the very last dollar yet to be paid and/or spent on the very last repair and/or damage payment.

(c) A government entity is not required to provide any reason for accepting liability, nor for invoking immunity, nor shall the government entity be required to provide any notice or reason to any private entity for stopping repairs and/or damage payments.

¶94. It does not take much of an imagination to foresee the hobgoblins springing forth from this potential carte blanche approach to government liability questions. The citizen who is dealing with the government in repairing or receiving damages from the government after the government has accepted liability may be left with half a repair; costs the citizen cannot afford; unpaid costs to contractors; and a host of other problems likely to be realized by a half-done project abandoned by the City at the City's whim. For example, what if the City in this instance tore up Lovro's driveway, tore up the curb stop and under-cement water lines; and then declared "immunity"? Once the City undertook responsibility for

liability and undertook corrective repairs and replacement, can the city subsequently surrender to immunity at a whim? Worse, can an insurance company surrender mid-repair on behalf of a City government?

¶95. Therefore, while Lovro understands that the district court was without any guidance expressly allowing the City to waive immunity. But the result of the district court's summary judgment creates a new and logically absurd rule.

¶96. Lovro submits that his proposed remedy is legally logical, fair, and correct, to-wit: Once the City accepts liability, the City cannot later declare itself immune. Ergo, words plus actions equal waiver of immunity.

¶97. It is then for the district court to determine if, factually, a governmental entity did or did not accept liability. This allows for the court to examine choices, statements, and actions to determine a government's true position.

¶98. This remedy would allow a citizen the opportunity to pursue relief in a case such as Lovro's; while also providing the city an opportunity to defend itself; and allows the district court the legal basis to do its fact-finding job.

[¶99] CONCLUSION

¶100. This is what Lovro argues the Court must find. The district court erred in as much as the absence of any law one way or the other, and therefore the district court was faced with one of two choices. Lovro submits that the district court made the wrong decision.

¶101. Appellant requests oral argument.

Dated this 26th day of January, 2022.

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[¶102.] **CERTIFICATE OF SERVICE**

[¶103.] I hereby certify that on January 31, 2022, the following documents:

1. **Corrected Brief of Appellant Elton Lovro and Oral Argument Requested; and**

2. **Corrected Appendix**

Were filed with the Clerk of Court, with like service of the above listed documents to the following:

Howard Swanson
hswanson@swlawltd.com

Dated this 31th day of January, 2022.

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[¶104.] CERTIFICATE OF COMPLAINCE

[¶105.] The undersigned, as attorney for Plaintiff/Appellant in the above-captioned matter, and as the author of the above brief, hereby certifies, in compliance with Rule 32 N.D.R.App.P., that the above brief was prepared with proportional typeface and that the brief, excluding the table of contents and table of authorities, totals less than 28 pages, which is within the allowed page limit.

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In the Supreme Court
State Of North Dakota

Elton Lovro,	)	
	)	Supreme Court No.
Appellant,	)	
	)	Dist. Ct. No.: 46-2021-CV-00010
vs.	)	
	)	
City of Finley,	)	
	)	
Appellee,	)	

Appeal from the Memorandum Opinion and Order
dated September 27, 2021; and in the
District Court, East Central Judicial District,
Steele County, the Honorable Steven L. Marquart, Presiding

CERTIFICATE OF SERVICE

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[¶1.] **CERTIFICATE OF SERVICE**

[¶2.] I hereby certify that on February 1, 2022, the following documents:

1. **Corrected Brief of Appellant Elton Lovro and Oral Argument Requested ; and**

2. **Corrected Appendix**

Were filed with the Clerk of Court, with like service of the above listed documents to the following:

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Dated this 1st day of February, 2022

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