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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Elton Lovro, Petitioner and Appellant, vs. City of Finley, Respondent and Appellee,	Supreme Court No. 20210300 Steele County District Court No. 46-2021-CV-00010

Appeal from Memorandum Opinion and Order dated September 27, 2021

Issued by the Honorable Steven L. Marquart
Steele County District Court, East Central Judicial District

BRIEF OF APPELLEE – CITY OF FINLEY

Submitted by: Howard D. Swanson
N. D. Bar ID #04075
SWANSON & WARCUP, LTD.
1397 Library Circle #202
Grand Forks, N.D. 58201
Telephone #701-772-3407
hswanson@swlawltd.com

Attorney for: City of Finley
Respondent and Appellee

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[¶2] Whether claims of negligence in the operation and maintenance of a city's water system are barred by discretionary immunity.

[¶3] Whether claims of negligence in the operation and maintenance of a city's water system are barred by the public duty doctrine.

[¶4] Whether the City of Finley waived its statutory immunities granted by N.D.C.C. Chapter 32-12.1.

STATEMENT OF THE CASE

[¶5] Elton Lovro ("Lovro") initiated this litigation against the City of Finley ("City") by virtue of his Summons and Complaint dated August 5, 2020. Lovro alleged that the City was negligent and grossly negligent in the operation, maintenance, repair or inspection of its water distribution system. (App. 8-11). Lovro also alleged that the City breached a contractual relationship as a result of the water leak occurring in the City's water distribution system. (App. 11-13)[1]. Lovro sought damages in the amount of $73,293.07. (App. 13).

[¶6] The City answered Lovro's Complaint on September 8, 2020 denying Lovro's claims. (App. 15-18).

[¶7] The City served written discovery upon Lovro on September 8, 2020. Lovro provided

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[1] Lovro had not raised any issues with regard to the existence or application of any contract or warranty relating to the City's water distribution services in his appeal to this Court. (App. 51-52; Appellant's Brief).

answers and responses to the City's discovery on October 19, 2020. (R21).

[¶8] Lovro served written discovery upon the City on November 5, 2020. The City provided answers and responses to Lovro's discovery on December 9, 2020. The City supplemented its discovery responses on December 29, 2020. (R21).

[¶9] Lovro neither requested nor undertook any further discovery of any type. At no time was Lovro prevented from conducting additional discovery by any order, stay or objection.

[¶10] The City deposed Lovro and his son, Gerry Lovro, on December 14, 2020. Lovro took no depositions. (R22).

[¶11] Lovro filed his Summons and Complaint with the Court on May 5, 2021. (App. 1).

[¶12] On June 8, 2021 the City filed its Motion for Summary Judgment, along with its Brief and supporting declarations, Lovro's responses to Defendant's Interrogatories and Request for Production of Documents and the deposition transcript of Elton Lovro. (R12-R23).

[¶13] The City asserted in its Motion for Summary Judgment that Lovro's Complaint should be dismissed for the following reasons: (1) Lovro's claims are barred by discretionary immunity under N.D.C.C. § 32-12.1-03(3)(d); (2) Lovro's claims are barred by the public duty doctrine under N.D.C.C. § 32-12.1-03(3)(f); (3) Lovro cannot establish elements of a duty, breach of duty or proximate cause attributable to the City; (4) There is no contract imposing any terms or conditions breached by the City; (5) There are no express or implied warranties given by the City regarding damages caused by any leak or break in the City's waterworks facilities; and (6) Lovro's claims are barred by City Ordinance. (R12).

[¶14] Lovro opposed Defendant's Motion in his Brief dated June 21, 2021. Lovro did not submit any evidence in opposition to the Motion. (R24).

[¶15] A hearing on the City's Motion was held on September 23, 2021. The Court issued a Memorandum Opinion and Order granting the City's Motion on September 27, 2021. (App. 19-20). Judgment dismissing Lovro's Complaint and awarding the City costs in the amount of $531.00 was entered on September 30, 2021. (App. 21).

[¶16] Lovro filed this Appeal on October 29, 2021. (App. 50-52).

STATEMENT OF THE FACTS

[¶17] The essential facts presented to the trial court supporting the City's Motion for Summary Judgment were uncontested and undisputed. On March 2, 2020 Lovro's home, located in the City of Finley, was damaged as a result of a leak in the curb stop located under Lovro's driveway. (App. 4 at ¶5). The curb stop controls the flow of water from the City's water distribution system/main into Lovro's home. The leak occurred where the line from the water main connects to the curb stop, which is buried approximately eight feet below Lovro's concrete driveway. (R18:1: ¶5; R18:2:¶9). The curb stop was installed at the time the home was constructed, about 43 years ago (R22:17:3-20).

[¶18] Prior to the March, 2, 2020 incident, there were no warnings or indications of any defects or leaks in the City's water distribution system, including the curb stop serving Lovro's property. (R18:2:¶10; R21:10-11; R22:11:4-40; R22:16:20-25; R22:17:1-8; R22:68:5-17).

[¶19] There is no practical way to anticipate or predict when a water leak may occur in the City's water distribution system, including at any curb stop, or to prevent a water leak from occurring in the City's water distribution system. (R14:2: ¶¶8,9; R18:2:¶ ¶8,13). Curb stops do not fail very often. (R14:2: ¶12; R18:2:¶6). When curb stops do fail, there are typically

a variety of reasons including physical damage, natural deterioration, corrosion, soil movement and improper installation or repairs. (R14:2: ¶12; R18:1:¶4; R18:2:¶6). The cause of the leak in the curb stop which caused water to enter Lovro's basement is unknown. (R22:22:9-18; R22:25:24-25; R22:26:1-5). Lovro produced no evidence of any negligent acts or omissions on the part of the City which caused the leak. *Id.*

[¶20] In 2001, the City undertook a water main replacement project in select areas of the City, primarily older neighborhoods. (R14:1: ¶3,5). Lovro's property was not included in the 2001 water main replacement project. (R22:59: 20-24). During the course of the project it was determined that very few curb stops were in disrepair, and those that were not in good condition were replaced as they were located. (R14:1:¶6).

[¶21] During the course of the project, the City Council determined that the benefits of reducing the costs of the project outweighed any need to unnecessarily replace curb stops. (R15; R16;R22:43:5-24). In arriving at its decision, the City Council considered the cost of additional work; the lack of history of leaks or other problems in the area where improvements were deleted; the existing service lines and curb stops were in good condition; the reduction of interference with the lives of the residents, commerce, disruption of traffic, unnecessary excavation and other tangible and intangible impacts upon the City, its residents and businesses. (R15- R16). The City Council also considered the cost of the project and the availability of funding, including state and federal funds, grants or other funding sources. *Id.*

[¶22] The City Council approved Change Order 2 which reduced the scope of the project by eliminating the replacement of approximately 150 curb stops from the project, thereby saving the City and its residents approximately $130,600.00. (R14:1:¶6). As a result of the

Change Order, the City's plan was to replace service lines or curb stops during the project as needed rather than replacing all service lines and curb stops. *Id.*

STANDARDS OF REVIEW

[¶23] Whether a trial court properly grants summary judgment is a question of law which is subject to de novo review on the entire record. *Wahl v. Country Mut. Ins. Co.,* 2002 ND 42, ¶6, 640 N.W.2d 689.

[¶24] Interpretation and application of statutes are questions of law, fully reviewable upon appeal. *Lund v. Swanson,* 2021 ND 38, ¶13, 956 N.W.2d 354.

[¶25] The appellate standard of review of a trial court's denial of a party's request for additional discovery in response to a Motion for Summary Judgment is an abuse of discretion standard. *Vicknair v. Phelps Dodge Indus., Inc.*, 2011 ND 39, ¶18.

LAW AND ARGUMENT

A. The Trial Court Properly Applied the Standards for Summary Judgment

[¶26] Summary judgment may be granted under N.D.R.Civ.P. 56 where "there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." *Ohio Farmers Ins. Co. v. Dakota Agency, Inc.,* 551 N.W.2d 564 (N.D. 1996). The moving party has the initial burden to demonstrate the absence of evidence to support an essential element of a plaintiff's claim. *Koehler v. County of Grand Forks,* 2003 ND 44, 7, 658 N.W.2d 741; *Klimple v. Bahl,* 2007 ND 13, 5, 727 N.W.2d 256.

[¶27] A party resisting a motion for summary judgment has the responsibility of identifying material issues of fact by presenting competent, admissible evidence which raises a disputed

issue of material fact. *Peterson v. Zerr,* 477 N.W.2d 230 (N.D. 1991). The opposing party may not rely upon the pleadings or upon unsupported, conclusory allegations. Affirmative evidence of a specific fact in opposition to the motion for summary judgment must be supplied by the non-moving party. *Kemp v. City of Grand Forks,* 523 N.W.2d 406 (N.D. 1994). The opposing party must specifically identify relevant evidence in the record and explain the connection between the factual assertions and the legal theories in the case. *Gowin v. Hazen Memorial Hosp. Ass'n,* 349 N.W.2d 4 (N.D. 1984); *A & H Services, Inc. v. City of Wahpeton,* 514 N.W.2d 855 (N.D. 1994). Mere speculation is not enough to defeat a motion for summary judgment, and a scintilla of evidence is not enough to support a claim. *Investors Real Estate Trust Properties, Inc. v. Terra Pacific Midwest, Inc*., 2004 ND 167 5, 686 N.W.2d 140. Even where there may be disputed issues of fact, summary judgment is appropriate when the disputed facts do not raise a genuine issue of material fact which would, upon resolution, change the result. *Russell v. Bank of Kirkwood Plaza*, 386 N.W.2d 892 (N.D. 1986); *Krank v. A. 0. Smith Harvestore Prod., Inc*., 456 N.W.2d 125 (N.D. 1990).

[¶28] The mere fact that injury or damage has occurred is not evidence of fault on the part of the defendant, fault must be affirmatively established. *Northwestern Equipment, Inc. v. Cudmore*, 312 N.W.2d 347, 352 (N.D. 1981); *Bismarck Baptist Church v. Wiedemann Industries, Inc.,* 201 N.W.2d 434, 440 (N.D. 1972). Summary judgment is proper against a party that fails to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Good Bird v. Twin Buttes School Dist*., 2007 ND 103 5, 733 N.W.2d 601; *Koehler v. County of Grand Forks, supra*; *Klimple v. Bahl*, *supra.* Where there is an absence of evidence of an essential element, the trial court

must presume that no such evidence exists. *Van Vulkenberg v. Paracelsus Health Care Corp*., 2000 ND 38 ¶ 27, 606 N.W.2d 908; *Miller v. Medcenter One*, 1997 ND 231 ¶ 15, 571 N.W.2d 358.

[¶29] Lovro has entirely failed to identify what disputed issues of fact exist and why any such dispute is material to the disposition of this matter. Lovro's only suggestion of disputed questions of fact relate to waiver of immunity. Lovro does not establish any facts showing that the City owed any duty to support Lovro's tort claims. Even if the City were deemed to have waived its discretionary immunity, Lovro cannot identify a duty on the part of the City nor can he demonstrate any breach of that duty through any act or omission on the part of the City which proximately caused the curb stop to fail. Lovro failed to present any competent, admissible evidence which raises a question of material fact that would alter the trial court's disposition of his claims. *Kummer v. City of Fargo,* 516 N.W.2d 294 (N.D. 1994). Rather, Lovro relies upon rhetoric and bravado.

B. The Trial Court Did Not Abuse its Discretion in Denying a Request for Additional Time to Conduct Discovery

[¶30] Lovro argues that the district court erred in not granting him additional time to conduct further discovery. N.D.R.Civ.P. 56(f) provides:

> **(f) When Declarations Are Unavailable.** If a party opposing the motion shows by declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) deny the motion;
>
> (2) order a continuance to enable declarations to be obtained, depositions to be taken, or other discovery to be undertaken; or
>
> (3) issue any other just order.

A request for additional time for discovery under Rule 56(f) invokes the trial court's

discretion, and its decision will not be overturned on appeal absent an abuse of that discretion. *Perry Center, Inc. v. Heitkamp*, 1998 ND 78, ¶10-11. A court has a broad range of discretion to deny a Rule 56(f) request when the summary judgment motion is based upon governmental immunity. See *Perry Center, Inc*. 1998 ND 78, ¶10. *Aho v. Maragos,* 1998 ND 107, ¶7, fn. 2. The intent of the rule is to ensure that the non-moving party has been given a reasonable opportunity to make a record before the court issues a ruling on a motion for summary judgment.

[¶31] It is incumbent upon the party requesting additional discovery time to bring to the court's attention specific reasons justifying the request. The moving party must demonstrate that the facts likely to be produced by the additional discovery would preclude or defeat the motion. *Continental Casualty Company v. Kinsey,* 513 N.W.2d 66, 69 (N.D. 1994). The possibility that additional discovery may yield evidence favorable to a party opposing summary judgment is not a ground to deny summary judgment where the party opposing summary judgment has failed to submit affidavits required under N.D.R.Civ.P. 56(f) demonstrating a need for discovery. *Larson v. Baer,* 418 N.W.2d 282, 288-289 (N.D. 1988).

[¶32] This Court has cautioned:

> "It is not enough, however, for a party invoking N.D.R.Civ.P. 56(f) to merely recite conclusory, general allegations that additional discovery is needed. Rather, N.D.R.Civ.P. 56(f) requires that the party, preferably by affidavit, identify with specificity what particular information is sought, and explain how that information would preclude summary judgment and why it has not previously been obtained. *Vicknair v. Phelps Dodge Indus., Inc.* 2011 ND 39, ¶19, 794 N.W.2d 746. See also *Alerus Financial, N.A. v. The Marcil Group, Inc.* 2011 ND 205, ¶34&36."

[¶33] Lovro did not submit any declaration in support of a Rule 56(f) request for continuance to conduct further discovery. Lovro has not identified what evidence he was specifically seeking to obtain nor how it would affect the Court's disposition of the City's Motion. Lovro did not provide any explanation as to why the additional discovery had not been completed in the year in advance of the hearing on the Motion for Summary Judgment. Lovro advises this Court that the City's Summary Judgment Motion was filed approximately one month after the filing of the Complaint. While accurate, it is misleading. Suit was initiated by service of the Summons and Complaint on August 10, 2020, more than a year prior to the date the trial court held its hearing on the City's Motion for Summary Judgment on September 23, 2021. (R1-R4; App. 26).

[¶34] The fact that Lovro chose to not follow up its written discovery upon the City with any further discovery was purely the choice of Lovro and was not the result of insufficient time to undertake discovery. Lovro's assertion that Defendant's Motion was either premature or too fast is disingenuous and unsupported by the timeline of proceedings. Lovro has been provided more than "a full and fair opportunity to conduct necessary discovery." *Aho, supra*, ¶7. There has been no rush to summary judgment as the rule is intended to prevent. The District Court did not act in an arbitrary, unreasonable or unconscionable manner and did not abuse its discretion when it refused to allow additional time for discovery before ruling on the summary judgment motion.

C. Lovro's Claims are Barred by Statutory Immunities

[¶35] N.D.C.C. § 32-12.1-03(2) and (3) establish limits of liability and immunities for political subdivisions:

2. The liability of political subdivisions under this chapter is limited to a total of two hundred fifty thousand dollars per person and one million dollars for any number of claims arising from any single occurrence regardless of the number of political subdivisions, or employees of such political subdivisions, which are involved in that occurrence. A political subdivision may not be held liable, or be ordered to indemnify an employee held liable, for punitive or exemplary damages.
3. A political subdivision or a political subdivision employee may not be held liable under this chapter for any of the following claims:
   a. A claim based upon an act or omission of a political subdivision employee exercising due care in the execution of a valid or invalid statute or regulation.

      . . .

   d. The decision to perform or the refusal to exercise or perform a discretionary function or duty, whether or not such discretion is abused and whether or not the statute, charter, ordinance, order, resolution, regulation, or resolve under which the discretionary function or duty is performed is valid or invalid.

      . . .

   f. A claim relating to injury directly or indirectly caused by the performance or nonperformance of a public duty, including:
      (1) Inspecting, licensing, approving, mitigating, warning, abating, or failing to so act regarding compliance with or the violation of any law, rule, regulation, or any condition affecting health or safety.
      (2) Enforcing, monitoring, or failing to enforce or monitor conditions of sentencing, parole, probation, or juvenile supervision.
      (3) Providing or failing to provide law enforcement services in the ordinary course of a political subdivision's law enforcement operations.
      (4) Providing or failing to provide fire protection services in the ordinary course of a political subdivision's fire protection operations.
   g. "Public duty" does not include action of the political subdivision or a political subdivision employee under circumstances in which a special relationship can be established between the political subdivision and the injured party. A special relationship is demonstrated if all of the following elements exist:
      (1) Direct contact between the political subdivision and the injured party.
      (2) An assumption by the political subdivision, by means of promises or actions, of an affirmative duty to act on

behalf of the party who allegedly was injured.

(3) Knowledge on the part of the political subdivision that inaction of the political subdivision could lead to harm.

(4) The injured party's justifiable reliance on the political subdivision's affirmative undertaking, occurrence of the injury while the injured party was under the direct control of the political subdivision, or the political subdivision action increases the risk of harm.

[¶36] Lovro's claims against the City are barred by the City's discretionary immunity under N.D.C.C. § 32-12.l-03. Further, with respect to its water distribution system, the City's duty is a public duty, not one supporting a claim of negligence or gross negligence.

[¶37] The operation and maintenance of a water system is a discretionary function immune from suit. *Olson v. City of Garrison,* 539 N.W.2d 663 (N.D. 1995); *Knutson v. City of Fargo,* 2006 ND 97, 714 N.W.2d 44. This Court has also held that the provision of water service by a municipality is for the public welfare and in so providing the city is immune from suit. *Taylor v, City of Devils Lake,* 87 N.W.2d 401 (N .D. 1958). Municipalities providing water service do so in a governmental capacity for the public welfare and are performing a public duty. *Id.*

[¶38] In *Olson v. City of Garrison, supra*, the plaintiffs suffered damages as a result of a water main break which flooded the basement of the Olsons' business, damaging inventory and equipment. The city had experienced one other water break in the vicinity a few months earlier. The trial court granted the city's Motion for Summary Judgment and dismissed plaintiffs' claims. Upon appeal, this Court specifically held that "the discretionary function exception to governmental liability provides immunity to the City of Garrison for the operation and maintenance of its water main system." 539 N.W.2d at 664. This Court

explained that discretionary immunity under N.D.C.C. § 32-12.1-03(3) is to "prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." (Citations omitted). *Id.* at 667.

[¶39] In *Knutson v. City of Fargo*, *supra*, this Court affirmed the trial court's granting of summary judgment in favor of the city and dismissed the plaintiffs' claims. In *Knutson*, a water main located under the street adjacent to the Knutsons' home broke. Water flowed onto their property damaging their house foundation, sidewalk and fence. Plaintiffs' alleged claims of inverse condemnation, intentional trespass and negligence against the City of Fargo. This Court acknowledged that the claims by the Knutsons were almost identical to the claims in *Olson v. City of Garrison*, *supra,* ¶20. This Court concluded that the decisions with regard to operation and maintenance of the city's water system are discretionary and that the city is immune to resulting claims of damages. *Id.*

[¶40] In *Taylor v. City of Devils Lake*, *supra,* a decision issued prior to the statutory enactment of discretionary immunity in N.D.C.C. § 32-12.1- 03, this Court held that municipalities providing water service are doing so in a governmental capacity and that damages resulting from the flooding of a basement are not recoverable. In *Taylor*, the plaintiffs suffered damages to inventory stored in a basement as a result of a water main break in front of the plaintiffs' place of business. The plaintiffs argued, in part, that the city failed to timely shut valves off to stop the flow of water into the basement thereby causing additional damage to stored inventory. The city admitted that a break occurred in the water main but denied that the break was due to any negligence on the part of the city. This Court recognized that the city was acting in a governmental capacity and was therefore immune

from liability. This Court also acknowledged the application of the public duty doctrine.

[¶41] This case at bar is remarkably similar to *Knutson v. City of Fargo, Olson v. City of Garrison*, and *Taylor v. City of Devils Lake*. In each of these cases, the plaintiffs failed to demonstrate a basis in fact or law that the city was liable for any damages. The city's judgment, discretion and decisions were protected by discretionary immunity.

[¶42] In *Kitto v. Minot Park District,* 224 N.W.2d 795, 797 (N.D. 1974) this Court judicially abolished the doctrine of governmental immunity. *Kitto* specifically recognized that the legislature could enact immunities and limitations upon political subdivision liability. After this Court's decision in *Kitto*, the Forty-Fourth Legislative Assembly enacted legislation addressing tort liability for political subdivisions. See 1975 N.D. Laws Ch. 295, Sections 2, 13 and 15. The legislature has subsequently amended the limitations and immunities for a political subdivision. 1977 N.D. Sess. Law Ch. 303, Section 3; 2015 N.D. Sess. Law Ch. 242, Section 1; 2021 N.D. Sess. Law Ch. 259, Section 1. The limitations and immunities contained in N.D.C.C. Ch. 32-12.1 recognize that political subdivisions provide essential and mandated governmental services and are unlike private citizens. *Larimore Public School v. Aamodt,* 2018 ND 71, ¶17 and 18. The statutory enactments advance a legitimate legislative goal and purpose to protect political subdivisions. *Id*. ¶45. There can be no legitimate debate that the limitations and immunities contained in N.D.C.C. Ch. 32-12.1 are legally sound. Lovro has not challenged the constitutionality or the applicability of N.D.C.C. Ch. 32-12.1. Lovro undertakes no analysis of the application of N.D.C.C. Ch. 32-12.1 to this matter.

[¶43] Lovro inexplicably discusses sovereign immunity at length in his Brief. The City has never claimed sovereign immunity in this case. Sovereign immunity has no application in this matter.

[¶44] Summary Judgment in favor of the city was appropriate in this case because Lovro's complaint against the city is based upon his argument that the city should have made a different decision during the 2001 water main replacement project, and replaced all curb stops, including Lovro's. Lovro's Answers to Defendant's Interrogatories explain the basis for his claims in his Complaint:

> 12. If you claim that the flooding event resulted in whole or part from negligent acts or omissions on the part of Defendant or any agent or employee of Defendant, describe the negligent act or omission.
> **ANSWER: The city was replacing water lines and curb stops in 2001. The original bid was for 248 to be changed. The City did 119 and they seemed to be OK so they didn't do the rest to save $173,000.00. After that I know of at least 3 failures but they were caught at once and replaced before any water got into basements.**
> **The City is paid to transport water properly, and safely, to my home. I paid my bill accordingly. The City did not transport water properly or safely. In fact, the City's transportation of the water was a violation of its contract with me: I agreed to pay my water bill; the City agreed to provide water properly and safely. The City did NOT provide the water properly or safely.**
> **Therefore, I would also note that the City was not only negligent - the City also breached its contract with me for the proper and safe delivery of water to my home.**
>
> 13. Do you claim that the City's water system, water lines and/or water mains were defective and such defect(s) caused the flooding event? If so state:
> a. A complete description of the defective condition; and
> b. Date and time when you first observed the defective condition prior to the alleged occurrence.
> c. Describe in detail what you refer to as the City's water system.
> **ANSWER: In general, please see my response to question #12. But in direct answer: Yes, the City's water system, water lines and/or water-mains were indeed defective and such defect(s) did indeed cause**

the flooding event. The City leadership, and each and every contractor brought to the site by the City; as well as my own view, and the view of my son; as well as everything told to me by anyone who has looked at the situation have ALL confirmed that this was a failure of the City system. Therefore, I think we can pinpoint the date of the knowledge of the defective system back to 2001 - when the City knew there were issues and instead saved money rather than fix the issues. Directly linked to this incident, the date of revelation of the defect is March 2, 2020. My son discovered the problem. The City was informed right away. The City inspected the problem immediately - either on March 2 or a day or two shortly after that date. The City concluded - following their own inspection - that this was a failure of the City's system.
(R21:8-9).

[¶45] During Lovro's deposition, Lovro similarly testified that his claims are based upon the City's decision regarding the scope of the 2001 water main replacement project:

> Q. Now you talked a little bit about 2001, and maybe we can go to Exhibit No. 14. Can you tell me what Exhibit No. 14 is? And there are several pages to it.
> A. Well, that's about what the City - and this is what someone told me. Now whether or not it's true, I can't swear up or down, but that they were advised by their engineer to replace all these curb stops and that's why they were going to do it.
> And they dug out a certain amount of them, and they didn't find any bad ones, so in order to save money, they saved a hundred and, I don't know, it's written down here, someplace in there, but 175,000, or something, by not doing it, so they didn't do it.
> **(R22:42:7-22)**.

> Q. In 2001 were you having any trouble with your curb stop that you were aware of?
> A. No.
> Q. And, in fact, it was almost 19 years later that you did ultimately have a leak?
> A. Yep.
> Q. And during those 19 years you didn't have any reason to believe there was a problem with the city's water service to your property?
> A. Well, I had never heard of these other three with the curb stops that failed, the pipes had broken on these other guys, I hadn't heard of that. I don't know everything that goes on, obviously I don't.
> Q. I appreciate that. But my question to you was during those 19 years you

had no reason to believe there was any problem with the curb stop or the waterline serving your home with water?

A. No.

(R22:45: 17- R22:46:11).

Q. Are you aware of anything that the City could have done to have prevented this damage to your home?

A. Well, if they would have replaced, probably would have replaced those curb stops when they were supposed to in 2001, I'm sure I would have been in better shape. But I don't know.

Q. And what do you base that on? Do you think this curb stop was damaged prior to 2019?

A. Well, I don't know. They had three other failures I'm aware of in town and it was later than 2001.

(R22:59:17 - R22:60:5).

Q. In your complaint, in paragraph 26, you, and I'm paraphrasing, but you say the City did not, quote, properly operate, maintain, repair, inspect or otherwise prevent the water system from flooding your home. What knowledge or information do you have that the City didn't properly operate their water enterprise?

A. Well, maybe if they'd replaced, had replaced more of these curb stops when they were advised to in 2001 instead of saving the money, I wouldn't have flooded my house. It wouldn't have flooded.

Q. Do you have any knowledge of anything other than the decision made in 2001 not to replace all curb stops?

A. Not really.

Q. How about, you say they didn't maintain it. Do you have any knowledge of how the City failed to maintain their system that caused the damage to your home?

A. Well, they didn't replace the curb stops that they were advised to replace.

Q. And who advised them, who advised them to replace the curb stops?

A. Their engineer is what I was told one time, it was their engineer that advised them, when they had part, part of it done, and they hadn't found any bad ones, they decided to take the money.

Q. And the engineer was recommending that they could save the money by not replacing all these curb stops?

A. I don't know if the engineer recommended or if the city council asked the engineer if it was necessary to continue, that I don't know.

Q. In your complaint you say the City did not properly repair their system. What repairs did they not properly make?

A. It's just, what I just said. If they would have replaced those curb stops

> and mine, when they were advised to do it, my house probably wouldn't have flooded. That's my complaint right there.
>
> **(R22:61:11-R22:63:6).**

Lovro has never produced any evidence of any fault, negligence or gross negligence on the part of the City.

[¶46] The City submitted the Unsworn Declaration of Andrew Aakre, a professional engineer with Moore Engineering, one of the City Engineers, in support of its Motion for Summary Judgment. (R14). His testimony explains that the 2001 project was changed upon the City Council's approval of Change Order 2 to eliminate the replacement of service lines and curb stops that did not show damage or deterioration. (R14:1:¶6). As a result, the project costs were reduced by approximately $130,600. (R14:1:¶6). Aakre's testimony also establishes that the decisions made by the Finley City Council regarding the 2001 water replacement project were based upon practical, economic, political and social reasons including the ability to reduce the anticipated costs of the project, and to avoid replacing service lines and curb stops that did not need to be replaced. (R14:1:¶6). His testimony is uncontroverted that there is no reliable way to predict or forecast when a water main, service line or curb stop may suffer a leak nor is there a practical method for the City to prevent such events. (R14:2:¶¶8-9). There is no normal procedure or maintenance that can prevent or predict such leaks. (R14:2: ¶¶10-11). He further testified in his Declaration that service lines and curb stops don't fail very often but when they do there are typically a variety of reasons for such failure including physical damage, natural deterioration, corrosion, soil movement, and improper installation or repairs. (R14:2:¶12). This testimony supports the conclusion that Lovro's claims are barred by discretionary immunity contained in N.D.C.C. Ch. 32-12.1.

D. Participation in the North Dakota Insurance Reserve Fund (NDIRF) Does Not Waive Statutory Immunities

[¶47] Lovro relies upon this Court's decision in *Fastow v. Burleigh County Water Resource District,* 415 N.W.2d 505 (N.D. 1987) to argue that the City's participation in NDIRF waives all immunities provided by N.D.C.C. Ch. 32-12.1. Lovro also cites various statutes from other jurisdictions to argue that the purchase of insurance waives statutory immunity. However, such arguments and reliance are misplaced.

[¶48] Following this Court's decision in *Fastow*, the N.D. legislature specifically adopted legislation declaring that participation by a political subdivision in a self-insurance pool, such as NDIRF, does not constitute a waiver of immunity provided by state constitution or statutes. See N.D.C.C. § 26.1-23.1-02. The N.D. legislature has specifically declared that the limitations and immunities provided by statute are not waived when a city participates in the NDIRF. N.D.C.C. § 26.1-23.1-02 clearly establishes that a government self-insurance pool is not an insurance company or insurer:

> 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.

[¶49] In *Larimore School* this Court rejected the assertion that a memorandum of coverage from the NDIRF waived the statutory immunities and limitations of liability or otherwise made them inapplicable. *Supra,* at ¶48 and 49.

[¶50] The City's participation in the NDIRF cannot be used to prove negligence or any other wrongful act or conduct on the part of the City (N.D. Rule of Evidence 411) nor does

it waive the protections of N.D.C.C. Ch. 32-12.1. Thus, *Fastow* does not apply to the issues presented in this appeal. Lovro's arguments to the contrary are without merit.

E. Lovro Cannot Establish the Elements of Negligence

[¶51] Even if the City was not immune from Lovro's claims under N.D.C.C. Ch. 32.1-12, Lovro cannot establish the elements of negligence or gross negligence. Actionable negligence consists of a duty, breach, and an injury that was proximately caused by the breach. *Diegel v. City of West Fargo,* 546 N.W.2d 367, 370 (N.D. 1996); *Beckler v. Bismarck Public School Dist*., 2006 ND 58, ¶8, 711 N. W.2d 172. The existence of a duty is a preliminary question of law. *Id*. If a defendant does not owe a duty to the plaintiff, then summary judgment dismissing the complaint is proper. *Delair v. LaMoure Co.,* 326 N.W.2d 55, 58 (N.D. 1982). In this case, the duty owed by the City is a public duty. A municipality is not an insurer of its public works system nor is it strictly liable for damages resulting from its water distribution system. *Olson, Knutson and Taylor*, *supra*.

[¶52] In this appeal, Lovro is unable to establish what actually caused the curb stop to leak. Lovro is also unable to establish that the City owed him a specific duty. Further, Lovro cannot produce any admissible, competent evidence showing a breach of a duty on the part of the City, other than a public duty. Similar to the *Olson* case, Lovro cannot provide any evidence demonstrating negligent acts or omissions on the part of the City causing the water leak that damaged Lovro's property. Lovro cannot show what the City could have done to anticipate or prevent the water leak. Lovro cannot demonstrate that had the City replaced service lines and curb stops in 2001, the damage he now complains of would have been prevented. Lovro has produced no evidence that the City failed to perform normal

maintenance or that a normal maintenance procedure would have prevented the water leak that damaged Lovro's property. Even assuming the City owed Lovro a personal duty, Lovro cannot produce evidence of a breach of that duty on the part of the City.

[¶53] Furthermore, Lovro cannot establish that the City had any actual or constructive notice of any defects in its water distribution system or Lovro's curb stop:

> 15. Do you contend that there were any leaks existing in the City's water system serving the property described in your Complaint prior to March, 2020? If so, please:
>
> a. State the date or dates of the previous leaks;
>
> b. State the factors or events causing the previous leaks;
>
> c. State the location of such leaks.
>
> d. Describe in detail the damage, if any, resulting from the previous leaks;
>
> e. State the date(s) and time(s) you, or anyone on your behalf, notified the City of the previous leaks and identify the City employee with whom you spoke or corresponded with each time; and
>
> f. Describe in detail any repairs made as a result of the leaks.
>
> **ANSWER: The leak probably started a few days prior to March. The water pressure had to work out under my driveway and garage slab to get into the basement. As I have noted, I was in Arizona with my wife. It may have been leaking before March 2, 2020. I only know that the leak and flooding and damage did NOT exist when we left for Arizona earlier in the Winter; and it was not discovered until March 2, 2020.**
> **Furthermore, I know that there was never, and has never, been any discovery of blockages or problems with my home's or property's water lines. The damage was caused by the break in the system on the City side; on City pipes; for City reasons.**
>
> 16. Was your property damaged by any flooding, back-up or seepage prior to March 2, 2020? If yes, please:
>
> a. State the date or dates of previous flooding, back-up or seepage;
>
> b. State the factors or events causing or contributing to the flooding, back-up or seepage;
>
> c. Describe in detail the damage, if any, resulting from the flooding, back-up or seepage; and
>
> **ANSWER: No.**

17. Were any repairs or actions taken after any flooding, back-up or seepage referenced in Answer to Interrogatory No. 16? If yes, please state:

a. The nature of any repairs or actions;
b. The date or dates of repairs or actions;
c. The name and address of the person or firm making the repairs; and
d. Total charges for the repairs and whether they have been paid and, if so, by whom.

ANSWER: N/A. No prior flooding other than the March 2, 2020 incident.

18. State the date(s) and time(s) you, or anyone on your behalf, notified or complained to the City regarding any issues with flooding, back-up or seepage identified in Answer to Interrogatory No. 16 and identify the City employee with whom you spoke or corresponded with each time.

ANSWER: N/A. No prior flooding other than the March 2, 2020 incident. (R21:10-11).

[¶54] Lovro testified that there was no notice of any potential leak:

Q. In the 43 years that you lived in this house, had you ever noticed anything that would indicate that there was a problem with the waterline running to your home?
A. No.
Q. Had you ever had any interruptions of water service to your home?
A. Not that I can remember, no.
Q. Had you ever noticed water coming up from your driveway or around your driveway?
A. No.
Q. Ever notice water in your garage?
A. No.
Q. And you've already told me you've never had water in your basement. Is that correct?
A. That's correct.

(R22:11: 4-20).

Q. In the years that you lived at this home, had the City ever had to do any repairs to any portion of the waterline serving your home, that you're aware of?
A. Not that I'm aware of.
Q. At any time prior to March of 2020, had you ever made any complaints or requests to the City to do any service or maintenance or repairs on your water service?
A. No.
Q. Were you aware, at any time prior to March of 2020, that there was a

problem with the water service to your home?
A. No.
(R22:16: 20-R22:17:8).

Q. Are you aware of any defects in the water pipe or curb stop that existed before the water escaped into your home?
A. There's no way for me to know anything like that.
Q. Had you ever experienced any loss of water pressure in your home before you left for Arizona in January of 2020?
A. No. We left the first part of, the very last days of December, and got there -
Q. Okay.
A. -- the first days of January. We had never noticed anything, no.
(R22:68:5-17).

[¶55] Lovro does not have any knowledge and no evidence to demonstrate that the City was negligent in its maintenance of its water distribution system:

Q. Do you have any knowledge as to what caused the break at the end of that curb stop?
A. The, the pipe broke and then I, all I know is, about the same thing Larry Amundson told me, about the same thing he had told my son. Larry is the mayor, he was up there, and he said the pipe had broke and the water probably washed in some sand. That's -- (no further response.)
(R22:22: 9-18).

Q. And do you know of anything that the City did wrong that caused the break in the pipe or the water damage to your home?
A. I don't know. I wasn't, I was in Arizona, I had been for close to two months, seven weeks, when I got the phone call.
Q. But anything even prior to the time you left for Arizona, are you aware of anything they did wrong?
A. Well, not that I know of. I don't stick my nose in any city business, I've never been on the city council or anything like that. I've lived there for 43 years, almost 44 years.
Q. Are you aware of anything the City didn't do, that they should have done, that prevented the water into your home?
A. No.
(R22:25:24-R:22:26:15).

[¶56] Lovro has failed to produce any reliable, competent or admissible evidence from which a reasonable person could conclude that the City owed Lovro any duty or was negligent in its operation or maintenance of its water distribution system, including the buried curb stop serving Lovro's home. Lovro cannot prove what caused the leak or establish what the City could have done to prevent the leak. Lovro has provided no evidence demonstrating negligent acts or omissions on the part of the City causing the water leak that damaged Lovro's property. Consequently, Lovro's claims for negligence and gross negligence must be dismissed due to the lack of evidence in the record.

F. Lovro's Claims are Barred by the Public Duty Doctrine

[¶57] In order for Lovro to establish a viable claim of negligence or gross negligence, he must establish the existence of a duty owed by the City to him. *Diegel v. City of West Fargo, supra*. Lovro cannot establish that the City owed him a duty. Any duty imposed upon the City is a public duty barring Lovro's claims. See N.D.C.C. § 32-12.1-03(3)(f) and (g).

[¶58] In *Ficek v. Morken,* 2004 ND 158, 685 N.W.2d 98, the North Dakota Supreme Court concluded that the public duty doctrine no longer applied in the State of North Dakota as a result of the Court's decision in *Kitto v. Minot Park Dist*., *supra*. In response, the North Dakota Legislature statutorily enacted the public duty doctrine in 2005 and specifically created immunity for claims involving public duties. See *Tangedal v. Mertens*, 2016 ND 170, 883 N.W.2d 871. See also, 2005 North Dakota Session Laws Ch. 299; Senate Bill 2265, testimony of Senator Thomas Trenbeath before the Senate Judiciary Committee, 59th North Dakota Legislative Session (January 25, 2005). The N.D. Legislature statutorily reinstated the "public duty" doctrine and reestablished immunity for political subdivisions from claims

involving public duties in N.D.C.C. § 32-12.1-03(3).

[¶59] This Court has applied N.D.C.C. § 32-12.1-03 in concluding that political subdivisions may not be held liable for a claim caused by the performance or nonperformance of a public duty. *Tangedal v. Mertens*, *Id.,* ¶23. As a result, a political subdivision may not be held liable for claims relating to injury or damages directly or indirectly caused by a breach of a public duty. N.D.C.C. § 32-12.1-03(3).

[¶60] Lovro's action seeking damages for property damage may not be pursued because his claim is based upon a breach of a public duty. The failure to perform or an inadequate or erroneous performance of a public duty resulting in injuries or damages does not provide a basis for claims seeking recovery of damages. Lovro's claims are barred by the public duty doctrine and the City was properly awarded summary judgment by the trial court.

G. The City Has Not Waived its Immunity

[¶61] Lovro alleges that comments made by the Mayor and a City Council member, outside of any formal action taken by the City and outside of any City meeting, constitute a waiver of the City's immunities and protections under N.D.C.C. Ch. 32-12.1. Lovro relies upon his answers to interrogatories as evidence of the City's waiver:

> 2. 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.
> **ANSWER: 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 Ferry. 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.**
> (R21:4-5)(Emphasis added).

Lovro also claims that the City waived its statutory immunities and created a duty upon which damages can be awarded because the City paid for materials and labor to repair his driveway where the excavation of the curb stop occurred.

[¶62] Lovro provided no law to the trial court nor to this Court that supports his argument of waiver. An appellant bears the responsibility and burden to provide supporting argument, reasoning and citations to relevant authorities. Failure to support an issue with reasoning and citations with relevant authority renders such arguments meritless. *Kautzman v. Kautzman*, 2003 ND 140, ¶15; *Olander Contracting Company v. Gail Wachter Investments,* 2002 ND 65, ¶27; *Riemers v. O'Halloran*, 2004 ND 79, ¶6; *Eggl v. Letvin Equipment Co.*, 2001 ND 144, ¶23. Furthermore, the statements allegedly made by the Mayor and one of the Council members both refer to their expectation that the City's "insurance" would pay for damages. (R21:4-5). Neither the Mayor nor the City Council member stated that the City was responsible to make payments or that the City would make payment if NDIRF did not. These statements do not waive any statutory immunities.

[¶63] An individual member of a political subdivision governing board is not empowered to act alone and the governing body is not bound by any individual action or statement made by a member of such board. *Rollette State Bank v. Rollette County*, 56 ND 571, 218 N.W.637 (1928). In order to bind the political subdivision, there must be formal action on the part of the governing body. *Id.* There is no evidence that the statements or action taken by the Mayor or one of the Council members was authorized by a majority vote of the governing body.

[¶64] Lovro also argues that because the City paid invoices related to the replacement of the curb stop and repair of the excavated driveway, the City has waived its immunities. Again, Lovro provides no analysis and no legal authority supporting his argument.

H. Lovro Has Abandoned Any Claims of Breach of Contract or Breach of Warranty

[¶65] Lovro alleged in his Complaint that the City breached a contract and warranties resulting in damages. However, Lovro's Notice of Appeal herein only identifies specific issues on appeal which are related to the application of discretionary immunity and the public duty doctrine under N.D.C.C. § 32-12.1-03(3) as well as waiver of immunity. (App. 51-52). Lovro similarly made no argument in his Appellant's Brief relating to any breach of contract or warranty issues. Issues not briefed by an appellant in their appellant brief are deemed abandoned. *Olander Contracting Company v. Gail Wachter Investments,* 2002 ND 65, ¶32; *Olmstead v. First Interstate Bank,* 449 N.W.2d 804, 807 (N.D. 1989). A party waives issues upon appeal when they do not provide supporting argument, reasoning or citations to relevant authority and this Court will not consider such matters on appeal. *Olander, supra*, ¶27; *Quamme v. Bellino*, 540 N.W.2d 142, 148 (N.D. 1995); *Geck v. Wentz,* 133 N.W.2d 849, 851

(N.D. 1964). An appellant may not raise issues in its reply brief that do not appear in its appellant's brief. *Hendrickson v. Hendrickson,* 2001 ND 1, ¶20.

[¶66] As a result of Lovro's failure to include any issues relating to contracts or warranties in the notice of appeal and further upon his failure to include any argument, reasoning or legal support in his Appellant Brief, such issues have been abandoned and are not properly before this Court.

CONCLUSION

[¶67] Judge Marquart considered the undisputed facts and applied appropriate law to conclude that the City was entitled to Judgment in its favor. For the reasons set forth above, the City respectfully requests that this Court affirm the trial court's Judgment dismissing the claims by Lovro against the City.

Dated: February 23, 2022

/s/ Howard Swanson
Howard D. Swanson
N.D. Bar ID #04075
SWANSON & WARCUP, LTD.
1397 Library Circle #202
Grand Forks, N.D. 58201
Telephone #701-772-3407
hswanson@swlawltd.com

Attorney for: City of Finley
Respondent and Appellee

CERTIFICATE OF COMPLIANCE

[¶68] The undersigned hereby certifies that the Brief of Appellee - City of Finley was prepared in compliance with N.D.R.App.P. 32 and consists of 33 pages.

Dated: February 23, 2022

/s/ Howard Swanson

Howard D. Swanson
N.D. Bar ID #04075
SWANSON & WARCUP, LTD.
1397 Library Circle #202
Grand Forks, N.D. 58201
Telephone #701-772-3407
hswanson@swlawltd.com

Attorney for: City of Finley
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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Elton Lovro,	)	
Petitioner and Appellant,	)	Supreme Court No. 20210300
vs.	)	
City of Finley,	)	Steele County District Court No. 46-2021-CV-00010
Respondent and Appellee,	)	

Appeal from Memorandum Opinion and Order dated September 27, 2021

Issued by the Honorable Steven L. Marquart
Steele County District Court, East Central Judicial District

CERTIFICATE OF SERVICE

[¶1] I hereby certify that on the 23rd day of February, 2022, a true and correct copy of the **BRIEF OF APPELLEE – CITY OF FINLEY** was served via email upon counsel for the Petitioner/Appellant as follows:

Theodore T. Sandberg
tsandberg@ojs-law.com

/s/ Howard Swanson
Howard D. Swanson
N.D. Bar ID #04075
SWANSON & WARCUP, LTD.
1397 Library Circle #202
Grand Forks, N.D. 58201
Telephone #701-772-3407
hswanson@swlawltd.com

Attorney for: City of Finley
Respondent and Appellee