

NO.: 20080184

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Alfred Kappenman and Julie Kappenman
on behalf of their minor son, Brason
Kappenman, deceased, and Alfred
Kappenman and Julie Kappenman on
behalf of the heirs and next of kin of
Brason Kappenman, deceased,

Plaintiffs-Appellants,

vs.

Brent Klipfel, and Albion Township, a
political subdivision of the State of North
Dakota,

Defendants-Appellees.

ON APPEAL FROM ORDER GRANTING SUMMARY JUDGMENT
STATE OF NORTH DAKOTA
COUNTY OF DICKEY, SOUTHEAST JUDICIAL DISTRICT

BRIEF OF DEFENDANT – APPELLEE BRENT KLIPFEL

Carlton J. Hunke (#02855)
Robert B. Stock (#05919)
VOGEL LAW FIRM
218 NP Avenue
P.O. Box 1389
Fargo, ND 58107-1389
Telephone: 701-237-6983
ATTORNEYS FOR DEFENDANT-
APPELLEE, BRENT KLIPFEL

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
	<u>Paragraph</u>
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE.....	3
STATEMENT OF THE FACTS	5
LAW AND ARGUMENT	9
I. The Trial Court Properly Granted Brent Klipfel’s Motion for Summary Judgment	10
A. Klipfel did not have a duty to keep the section line trail safe or to warn section line travelers of a known hazard	13
B. North Dakota’s recreational use statute applies to an owner of land burdened by a right-of-way in favor of the public	22
C. The evidence is undisputed that Brason was on the section line for a recreational purpose	31
D. No evidence exists that Klipfel acted willfully and maliciously.....	37
E. Klipfel did not have a duty to abate a public nuisance	42
II. The Trial Court Properly Denied Plaintiffs’ Motion to Amend Complaint.....	46
CONCLUSION.....	51

TABLE OF AUTHORITIES

<u>NORTH DAKOTA CASES:</u>	<u>Paragraph</u>
<u>Bernabucci v. Huber</u> 2006 ND 71, 712 N.W.2d 323	48
<u>Burleigh County Water Res. Dist. v. Burleigh County</u> 510 N.W.2d 624 (N.D. 1994)	15, 17
<u>Delair v. County of LaMoure</u> 326 N.W.2d 55 (N.D. 1982)	20
<u>Farmers Alliance Mut. Ins. Co. v. Hulstrand Const., Inc.</u> 2001 ND 145, 632 N.W.2d 473	48
<u>First Interstate Bank of Fargo, N.A. v. Rebarchek</u> 511 N.W.2d 235 (N.D. 1994)	48
<u>Home of Econ. v. Burlington Northern Santa Fe R.R.</u> 2007 ND 127, 736 N.W.2d 780	41
<u>Jerry Harmon Motors, Inc. v. Farmers Union Grain Terminal Ass'n</u> 337 N.W.2d 427 (N.D. 1983)	44
<u>Leet v. City of Minot</u> 2006 ND 191, 721 N.W.2d 398	33
<u>Messiha v. State</u> 1998 ND 149, 583 N.W.2d 385	48
<u>Olson v. Bismarck Parks & Recreation Dist.</u> 2002 ND 61, 642 N.W.2d 864	25, 29, 33
<u>State v. Brossart</u> 1997 ND 119, 565 N.W.2d 752	17
<u>Stokka v. Cass County Elec. Coop.</u> 373 N.W.2d 911 (N.D. 1985)	25, 26, 27, 36, 38, 39

CASES FROM OTHER JURISDICTIONS:

Paragraph

Cooper v. Cooper
786 So. 2d 240 (La. Ct. App. 2001)36

Cudworth v. Midcontinent Communications
380 F.3d 375 (8th Cir. 2004)28, 29, 30, 36

Jones v. State
570 So. 2d 775 (Ala. Crim. App. 1990)36

Moscato v. Frontier Distrib., Inc.
677 N.Y.S.2d 853 (N.Y. App. Div. 1998)36

Olson v. Brunner
689 N.Y.S.2d 833 (N.Y. App. Div. 1999)36

Reid v. Kawasaki Motors Corp.
592 N.Y.S.2d 496 (N.Y. App. Div. 1993)36

Schwartz v. Zent
448 N.E.2d 38 (Ind. Ct. App. 1983)36

Shipman v. Boething Treeland Farms, Inc.
92 Cal. Rptr. 2d 566 (Cal. Ct. App. 2000)36

Umpleby v. United States
806 F.2d 812 (8th Cir. 1986)36

STATUTES:

N.D.C.C. § 24-07-03 15

N.D.C.C. § 24-12-02 17

N.D.C.C. § 42-01-01 44

N.D.C.C. § 42-01-06 44

N.D.C.C. § 47-01-23 14, 16, 18, 45

N.D.C.C. § 53-08-01 25

N.D.C.C. § 53-08-01(4) 33, 36

STATUTES: **Paragraph**

N.D.C.C. § 53-08-02.....11, 23, 29, 30

N.D.C.C. § 53-08-05.....24

N.D.C.C. § 53-08-05(1)38

N.D.C.C. Ch. 53-0826, 30

RULES:

N.D.R.Civ.P. 15(a).....48

OTHER AUTHORITIES:

Restatement (Second) of Torts §349.....16, 18

38 Am. Jur. 2d, Highways, Streets, and Bridges § 40916

[¶1] **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

[¶2] Whether the district court properly ruled that Brent Klipfel did not have a duty to keep an unimproved section line trail safe or to warn section line travelers of a known hazard.

[¶3] **STATEMENT OF THE CASE**

[¶4] Al and Julie Kappenman brought this case against Brent Klipfel and Albion Township for damages resulting from the death of their son, Brason Kappenman. (Appellants' App. at 3.) Klipfel and Albion Township filed separate motions for summary judgment to the district court. (Appellants' App. at 18, 24.) In a Memorandum Decision and Order dated June 17, 2008, the Honorable John T. Paulson granted both Motions for Summary Judgment. (Appellants' App. at 111.) Judge Paulson dismissed plaintiffs' claims because neither Klipfel nor Albion Township had a duty to maintain the section line in question or warn of a washout upon the section line. (Id.)

[¶5] **STATEMENT OF THE FACTS**

[¶6] This case arises from a fatal ATV accident that occurred on an unimproved section line between Sections 5 and 6 in Albion Township, Dickey County, North Dakota. (Appellants' App. at 4.) On August 1, 2006, Brason Kappenman was mowing hay on one of his father's fields, specifically the Southeast Half of the Southeast Quarter of Section 27 in Hamburg Township. (Appellants' App. at 36.) The field Brason was working in was located two miles directly north of the Kappenman farmstead. (Id.) Alfred Kappenman had an appointment in Aberdeen, South Dakota, so Brason was mowing the field on his own. (Appellants' App. at 49.) Before Mr. Kappenman left for Aberdeen, Brason told his father that he wanted to look for a spot to place a deer stand

after he was done mowing hay. (Appellants' App. at 50.) Mr. Kappenman agreed and told Brason that if any of the farm equipment broke down, to shut the machinery off and go look for spots to put tree stands out for deer hunting. (Id.)

[¶7] The tractor quit while Brason was mowing hay, so he got on a 2006 Arctic Cat ATV and went to look for deer stands. (Appellants' App. at 51.) Brason left Section 27 and proceeded south between Sections 33 and 34. (Appellants' App. at 52-53; see also Appellee Klipfel's App. at 1.) He then turned west on the section line road between Hamburg and Albion Townships. (Appellants' App. at 53.) Brason then turned on the unimproved section line between Sections 5 and 6 of Albion Township and proceeded south until he hit a washout. (Id.)

[¶8] The washout was surrounded by tall grass and small rocks. (Appellants' App. at 101-02.) The traveled portion of the section line goes around the west end of the washout. (Appellee Klipfel's App. at 3.) Brason either hit the washout or swerved to avoid the washout and rolled the ATV, causing severe internal injuries and eventual death. (Appellants' App. at 4.) Brason would have avoided the accident if he had followed the traveled portion of the section line trail around the washout. (Appellee Klipfel's App. at 4.) Defendant Brent Klipfel owns the land on both sides of the section line on which the accident took place. (Appellants' App. at 4.)

[¶9] **LAW AND AGRUMENT**

[¶10] I. **The Trial Court Properly Granted Brent Klipfel's Motion for Summary Judgment.**

[¶11] The district court dismissed plaintiffs' claim against Brent Klipfel because plaintiffs' claims were barred by the North Dakota recreational use statute, N.D.C.C. § 53-08-02. The plaintiffs argue that the district court erred when it ruled that the

recreational use statute barred plaintiffs' claims against Klipfel, and that the district court erred when it ruled that Klipfel did not have a duty to abate a public nuisance on a section line road.

[¶12] As explained below, the Court should reject plaintiffs' arguments and affirm the decision of the district court because (1) Brent Klipfel did not have a duty to keep the section line trail safe or to warn section line travelers of a known hazard; (2) North Dakota's recreational use statute applies to an owner of land burdened by a right-of-way in favor of the public; (3) the evidence is undisputed that Brason was on the section line for a recreational purpose; (4) no evidence exists that Klipfel acted willfully and maliciously; (5) Klipfel did not have a duty to abate a public nuisance; and (6) the trial court properly denied plaintiffs' Motion to Amend Complaint. The plaintiffs' claims fail as a matter of law.

[¶13] A. **Brent Klipfel did not have a duty to keep the section line trail safe or to warn section line travelers of a known hazard.**

[¶14] Plaintiffs are asking this Court to rule that Klipfel had a duty to warn travelers of known hazards that existed on an unimproved but publically travelled section line road. Such a ruling by the Court would ignore the unambiguous terms of N.D.C.C. § 47-01-23 and make landowners the guarantors of safe travel on unimproved section lines. Plaintiffs confuse the general duty of a landowner under premise liability law with the duty of a landowner such as Brent Klipfel.

[¶15] All section lines outside incorporated cities are public roads and are open to travel to the width of thirty-three feet on each side of the section line, even if the section line has not been improved or surfaced. N.D.C.C. § 24-07-03. A landowner abutting an open section line retains ownership of the property within the easement, subject to the

public's right to travel. Burleigh County Water Res. Dist. v. Burleigh County, 510 N.W.2d 624, 628 (N.D. 1994).

[¶16] This ownership does not make the landowner a guarantor of safe travel. Section 47-01-23, N.D.C.C., provides that a landowner is immune from a claim resulting from the use or condition of a road across the landowner's property unless the landowner is primarily and directly responsible for the construction and maintenance of the road or an affirmative act of the landowner causes or contributed to the claim. In this same regard, Restatement (Second) of Torts § 349 provides the following:

A possessor of land over which there is a public highway or private right of way is not subject to liability for physical harm caused to travelers upon the highway or persons lawfully using the way by his failure to exercise reasonable care

- a. to maintain the highway or way in safe condition for their use, or
- b. to warn them of dangerous conditions in the way which, although not created by him, are known to him and which they neither know nor are likely to discover.

An owner of land abutting a highway does not owe the public a duty to keep the highway in a safe condition. 38 Am. Jur. 2d, Highways, Streets, and Bridges § 409.

[¶17] The public's easement on a section line is limited to the right to travel and does not include an absolute right to an object-free zone for the complete length and width of the section line. Burleigh County Water Res. Dist., 510 N.W.2d at 628. For example, a landowner has the right to plow and cultivate an unimproved but traveled section line as long as he does not impede usual travel. State v. Brossart, 1997 ND 119, ¶ 22, 565 N.W.2d 752; see also N.D.C.C. § 24-12-02 (providing that no person may plow up a section line in a manner so as to obstruct usual travel). Only when an obstruction

effectively deprives the public of the ability to travel on an open section line is the right to travel violated. Burleigh County Water Res. Dist., 510 N.W.2d at 628.

[¶18] Klipfel is not responsible for maintenance of the section line; the facts are undisputed that Brent Klipfel owned the land that constituted the section line; and the plaintiffs' claim directly results from Brason's use or condition of an unimproved section line road across Klipfel's property. Accordingly, Brent Klipfel did not have a duty to keep the section line safe or to warn Brason or other travelers of the washout pursuant to both N.D.C.C. § 47-01-23 and Restatement (Second) of Torts § 349.

[¶19] In addition, the washout in question did not completely block the public from using the section line. See picture of the subject washout shortly after Brason's accident. (Appellee Klipfel's App. at 2.) As the Court can see from the picture, the washout does not extend the entire width of the section line. The section line trail actually jogs around the west end of the washout, well within the sixty-six feet of section line right-of-way. Mr. Kappenman admits that the accident would not have occurred if Brason had followed the traveled portion of the section line trail around the washout. Al Kappenman admits that the rocks and tall grass surrounding the washout were warnings to Brason that a hazard was approaching. (Appellee Klipfel's App. at 5.) Brason's ability to travel on the section line was not violated, and therefore, the plaintiffs' cause of action fails as a matter of law. Brason did not have an absolute right to an object-free zone for the complete width of the section line.

[¶20] The plaintiffs rely on Delair v. County of LaMoure, 326 N.W.2d 55 (N.D. 1982), for the proposition that a landowner has a duty to erect barriers around dangerous or unusually hazardous conditions on a public road crossing his property. The plaintiffs'

reading of Delair is completely misplaced. First, the holding of Delair is that a county or township cannot be held liable for injuries to persons using public roads that the county or township has not improved. Delair, 326 N.W.2d at 61. Second, the discussion regarding the duty to erect barriers around hazardous conditions is in the context of the duty of a government entity responsible for a controlled intersection on an improved highway. Id. at 63. The court made no indication that a private owner of land burdened by an unimproved section line road had a duty to erect barriers around every known hazard. Brent Klipfel had no such duty, and therefore, plaintiffs' claims fail as a matter of law.

[¶21] Accepting plaintiffs' position would make thousands of farmers throughout North Dakota guarantors of safe travel on their land. Each landowner would have to patrol their land day and night to make sure no "hazards" existed on unimproved section lines that crossed their property. Simply put, the public assumes the risk of traveling on unimproved section line trails.

[¶22] **B. North Dakota's recreational use statute applies to an owner of land burdened by a right-of-way in favor of the public.**

[¶23] The plaintiffs argue that North Dakota's recreational use statute does not apply in this case because Brason was traveling on a public road. Plaintiffs' position is contrary to the plain language of the recreational use statute and has been considered and squarely rejected by the North Dakota Supreme Court. Section 53-08-02, N.D.C.C., provides the following:

[¶24] **Duty of care of landowner.** Subject to the provisions of section 53-08-05, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

[¶25] Section 53-08-01 defines land as including “all public and private land, roads, water, watercourses, and ways and buildings, structures, and machinery or equipment thereon.” (emphasis added.) The statute could not be clearer; it explicitly limits the liability of landowners for injuries sustained by recreational users of roads and public land. Olson v. Bismarck Parks & Recreation Dist., 2002 ND 61, ¶ 8, 642 N.W.2d 864; Stokka v. Cass County Elec. Coop., 373 N.W.2d 911, 915 (N.D. 1985).

[¶26] In Stokka, the plaintiffs brought an action against Cass County Electric Cooperative (“CCEC”) seeking damages for the death of a snowmobiler who struck an unmarked guy wire owned by the CCEC. 373 N.W.2d at 912. The snowmobiler struck the guy wire on land owned by the CCEC but within the right-of-way of Cass County Road Number 17. Id. The plaintiffs argued that N.D.C.C. Ch. 53-08 did not apply because the accident happened within the right-of-way of a public road. Id. at 913-14. The court disagreed and held that chapter 53-08 applied, precluding liability of the CCEC for ordinary negligence. Id. at 915. The court reasoned that the language of chapter 53-08 was clearly broad enough to encompass an owner of land burdened with a right-of-way in favor of the public. Id.

[¶27] The plaintiffs in the present case are presenting the exact argument rejected by the court in Stokka. The accident in question happened on the section line between Sections 5 and 6, in Albion Township, Dickey County, North Dakota. Klipfel owned the land on both sides of the unimproved section line and, therefore, retained ownership of the land within the section line easement. The recreational use statute clearly limits the liability of landowners for injuries sustained by recreational users of roads and public land.

[¶28] The Eighth Circuit Court of Appeals has also rejected plaintiffs' argument that Klipfel must open his land or allow Brason to be on his land for recreational use immunity to apply. In Cudworth v. Midcontinent Communications, 380 F.3d 375, 377 (8th Cir. 2004), the plaintiff collided with a rope barrier strung across property owned by Midcontinent Communications. Midcontinent asserted that recreational use immunity barred plaintiff's claims. Id. The plaintiff argued that "opening" of property for public recreational use was a prerequisite for the North Dakota recreational use statute to apply, which plaintiff argued Midcontinent did not do when it roped off its land. Id. at 379.

[¶29] The Eighth Circuit disagreed, ruling that "The statute, does not, however, explicitly require that landowners open property to public use before receiving immunity, nor does it specify that immunity applies only where entrants are invitees or licensees." Id. (citing Olson, 642 N.W.2d at 870). The court reasoned that legislative intent was clear from the face of the statute; N.D.C.C. § 53-08-02 was a general grant of immunity, and later provisions only clarified immunity in those situations in which inviting someone onto land might have created a duty at common law. Id. at 380.

[¶30] Like in Cudworth, whether or not Klipfel allowed or invited Brason onto his land is irrelevant. Section 53-08-02 plainly states that Klipfel owes no duty to recreational users of his land, regardless of whether he opened his land in the first place. The function of this Court is to interpret the statute. The propriety of limiting a landowner's liability in such situations is a matter lying within the province of the legislature, not this Court. Chapter 53-08 applies and prevents liability on the part of Brent Klipfel.

[¶31] C. **The evidence is undisputed that Brason was on the section line for a recreational purpose.**

[¶32] Plaintiffs contend that whether Brason’s use of the section line was for a recreational purpose is a question of fact for the jury. Plaintiffs argue that a factual issue exists because Brason may have been on his way home at the time of the accident. The plaintiffs improperly use Brason’s ultimate intent of going home on the day of his accident. The undisputed facts of the present case conclusively show that Brason was on Klipfel’s property at the time of the accident for a recreational purpose.

[¶33] Section 53-08-01(4), N.D.C.C., defines “recreational purposes” as “any activity for the purpose of exercise, relaxation, pleasure, or education.” The definition of recreational purpose covers all use of property by others for their personal enjoyment. Olson v. Bismarck Parks & Recreation Dist., 2002 ND 61, ¶ 14, 642 N.W.2d 864. The North Dakota recreational use statutes create two classes of persons and treat them differently — recreational and nonrecreational users. Leet v. City of Minot, 2006 ND 191, ¶ 18, 721 N.W.2d 398 (citing Olson, 2002 ND 61, ¶¶ 14, 17, 642 N.W.2d 864). The class distinction is based on the location and nature of the injured person’s conduct when the injury occurs. Id. (emphasis added.) The analysis of whether or not someone is on land for a recreational purpose includes the user’s intent on the property. Id.

[¶34] Here, although Brason’s ultimate intent on the day of his accident was to arrive home, the undisputed facts show that his intent at the time of the injury was to look for deer stands. First, the location of the accident shows that Brason was not on his way back to the farm straight from working in the field. Prior to the accident, Brason was mowing hay in a field located at the Southeast Half of the Southeast Quarter of Section 27 in Hamburg Township. The field Brason was working in was located two miles

directly north of the Kappenman farmstead. Brason could have proceeded directly south two miles to return to the farmstead after mowing hay. Brason instead proceeded south between Sections 33 and 34, then turned west on the section line road between Hamburg and Albion Townships, traveling two miles in the opposite direction of his house. Brason then turned onto the unimproved section line between Sections 5 and 6 in Albion Township. The location of Brason's accident is four to five miles out of the way from returning directly "home."

[¶35] Second, the facts clearly show that Brason was looking for spots to place a deer stand at the time of the accident. Brason told his father that he wanted to look for a spot to place a deer stand after he was done mowing hay on the day of the accident. Al Kappenman specifically told Brason that he should go look at spots for a deer stand if the equipment broke down while Brason was mowing. The tractor broke down while Brason was mowing, so he left to look at deer stands. Al Kappenman stated in his deposition the following:

Q. So was the plan, had the accident not occurred, to actually put those deer stands up the weekend following the accident?

A. Correct.

Q. Okay. So within a week of the accident?

A. Correct.

...

Q. Okay. Is it your belief at the time of the accident that that's why he took this section line trail, is because he was looking for new locations for deer stands?

A. Correct.

(Appellants' App. at 43.) Brason even drove into an adjacent corn field, stopped, looked into the corn field, and backed out while he was traveling on the section line in question.

(Appellee Klipfel's App. at 6.)

[¶36] Even if Brason was “coming home” as contended in the Appellant’s Brief, he was admittedly driving the ATV for his personal enjoyment at the time of the accident and, therefore, was engaged in a “recreational purpose” under N.D.C.C. § 53-08-01(4). See, e.g., Stokka, 373 N.W.2d at 915 (applying Ch. 53-08 to snowmobiling); Cudworth v. Midcontinent Communications, 380 F.3d 375 (8th Cir. 2004) (applying North Dakota recreational use statute to snowmobiling); Umpleby v. United States, 806 F.2d 812 (8th Cir. 1986) (applying North Dakota recreational use statute to camping and pleasure driving); see also Cooper v. Cooper, 786 So. 2d 240 (La. Ct. App. 2001) (applying recreational use statute to erecting deer stands); Shipman v. Boething Treeland Farms, Inc., 92 Cal. Rptr. 2d 566 (Cal. Ct. App. 2000), as modified, (Mar. 2, 2000) (applying recreational use statute to driving ATV onto farm to look at a pond); Olson v. Brunner, 689 N.Y.S.2d 833 (N.Y. App. Div. 1999) (applying recreational use statute to hunting woodcock); Moscato v. Frontier Distrib., Inc., 677 N.Y.S.2d 853 (N.Y. App. Div. 1998) (applying recreational use statute to driving ATV on trails); Reid v. Kawasaki Motors Corp., 592 N.Y.S.2d 496 (N.Y. App. Div. 1993) (applying recreational use statute to recreational motor biking); Jones v. State, 570 So. 2d 775 (Ala. Crim. App. 1990) (applying recreational use statute to hunting out of deer stand); Schwartz v. Zent, 448 N.E.2d 38 (Ind. Ct. App. 1983) (applying recreational use statute to tending traps). The purpose of Brason’s travel is not an issue for the jury when the evidence is undisputed. Plaintiffs’ claims are therefore barred under the recreational use statutes and fail as a matter of law.

[¶37] **D. No evidence exists that Klipfel acted willfully and maliciously.**

[¶38] Plaintiffs contend that whether Klipfel acted willfully and maliciously is a jury question and inappropriate for summary judgment. The plaintiffs, however, use the wrong standard. The plaintiffs rely on Stokka, 373 N.W.2d at 916, for the suggestion that willful misconduct may be proved by mere knowledge of a situation requiring the exercise of ordinary care to avert injury to another. In 1993, after Stokka, the Legislature changed the language of N.D.C.C. § 53-08-05(1) from “willful or malicious” to “willful and malicious.” (emphasis added.) The definition of willful found in Stokka no longer applies.

[¶39] In Cudworth, 380 F.3d at 381, the plaintiffs argued that malicious conduct under the North Dakota recreational use statute only required reckless disregard or “presumed malice,” the same standard announced in Stokka. The Eighth Circuit Court of Appeals rejected the plaintiffs’ argument and held that the terms “willful and malicious” require a specific intention or desire to harm another. Id. The terms do not include reckless disregard or “presumed malice.” Id. at 382. Accordingly, the plaintiffs in the present case must produce evidence that Klipfel failed to warn of the washout on the section line because he intended to injure someone.

[¶40] The plaintiffs cannot produce such evidence. The plaintiffs’ bald statements that Klipfel “acted willfully and maliciously” are not enough. All the evidence cited by the plaintiffs is either a misstatement of testimony or based on inadmissible hearsay. The plaintiffs’ claim in the fact section of the Appellants’ Brief that Klipfel cleaned out waterways on Sections 5 and 6 that had filled up with tillage. Klipfel actually testified that he never maintained the waterways themselves. Klipfel legally maintained drainage

ditches from potholes to the natural waterways. (Appellants' App. at 67.) In fact, Klipfel testified that he has never done any trenching or cleaning on the section line between Sections 5 and 6. Klipfel specifically testified to the following:

Q. Have you had any scraping activity, be it cleaning a waterway, cleaning trench, any of those things, on the section line between Sections 5 and 6 but south of where Brason was killed?

A. Upon the section line?

Q. Somewhere on the section line?

A. No.

(Appellants' App. at 68.) The only time Klipfel dug a runway across a section line road was in 1990 between Sections 19 and 20. (Id.) Klipfel filled the runway back in and clearly never did it again. (Id.)

[¶41] Plaintiffs also state that “numerous adults who traveled that very spot had succumbed to the section line’s trap for the unwary.” (Appellant Br. 33-34.) Plaintiffs’ characterization is a misstatement of the facts. Only two previous alleged incidents of vehicles running into the washout exist, one in 1980 and one in 2005. (Appellants’ App. at 90-92.) The plaintiffs have not provided any factual support for these statements. The evidence is hearsay statements set out in plaintiffs’ Answers to Interrogatories, not testimony under oath. Such statements are inadmissible and cannot be used to defeat a motion for summary judgment. See Home of Econ. v. Burlington Northern Santa Fe R.R., 2007 ND 127, ¶ 7, 736 N.W.2d 780 (holding, “A party resisting a motion for summary judgment cannot merely rely on the pleadings or unsupported conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means that raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record by setting out the page and line in depositions or other comparable documents containing testimony or evidence raising an

issue of material fact.”). These statements are insufficient to prove that Klipfel intended to injure someone on the section line road, even if true. In sum, the plaintiffs cannot present any competent evidence that Brent Klipfel intended to injure someone in not warning of the washout in question. The plaintiffs’ claims fail as a matter of law.

[¶42] **E. Klipfel did not have a duty to abate a public nuisance.**

[¶43] Plaintiffs argue that the trial court erred when it ruled that Klipfel did not have a duty to abate a public nuisance on the section line road. Plaintiffs specifically argue that Klipfel failed to abate a public nuisance by not warning of the washout. Plaintiffs’ claim for nuisance fails as a matter of law; Klipfel did not have a duty to abate a public nuisance on the section line road.

[¶44] “A public nuisance is one which at the same time affects an entire community or neighborhood or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal.” N.D.C.C. § 42-01-06. Nuisance requires proof of either an unlawful act or failure to perform a duty. N.D.C.C. § 42-01-01. A party’s failure to perform a certain act is not a public nuisance if the law does not impose a duty to perform such act. Jerry Harmon Motors, Inc. v. Farmers Union Grain Terminal Ass’n, 337 N.W.2d 427, 433 (N.D. 1983). The ultimate decision of whether or not a nuisance exists is a conclusion of law for the court. Id. at 430.

[¶45] Here, plaintiffs cannot identify any law that imposes a duty on Klipfel to warn of the washout on the section line road. No evidence exists that Klipfel unlawfully created the washout, and both N.D.C.C. § 47-01-23 and the recreational use statute absolve Klipfel of any duty to warn Brason about the washout. See Cudworth, 380 F.3d

at 383 (dismissing nuisance claim because landowner immune under recreational use statute). Plaintiffs cannot establish that Klipfel failed to perform a required duty. Plaintiffs' claim for nuisance therefore fails as a matter of law.

[¶46] **II. The Trial Court Properly Denied Plaintiffs' Motion to Amend Complaint.**

[¶47] Plaintiffs argue that the trial court erred when it denied plaintiffs' attempt to amend their Complaint to include allegations that Klipfel's and Albion Township's failure to warn of the washout was "willful and malicious." As explained below, the trial court properly denied plaintiffs' attempt to avoid summary judgment because the amendment was pointless.

[¶48] Once a responsive pleading has been filed, a plaintiff must obtain leave of court or consent of the adverse party to amend a complaint. N.D.R.Civ.P. 15(a). The decision to grant leave to amend is within the sound discretion of the trial court. Farmers Alliance Mut. Ins. Co. v. Hulstrand Const., Inc., 2001 ND 145, ¶ 10, 632 N.W.2d 473. Leave to amend is not granted automatically. Bernabucci v. Huber, 2006 ND 71, ¶ 28, 712 N.W.2d 323. A court should deny a requested amendment that would be futile or unsupported by the evidence. Id.; see also Messiha v. State, 1998 ND 149, ¶ 12, 583 N.W.2d 385 (denying motion to amend complaint because plaintiffs could not present any evidence to support amendment); First Interstate Bank of Fargo, N.A. v. Rebarchek, 511 N.W.2d 235, 243 (N.D. 1994) (denying attempt to amend pleadings because party failed to raise genuine issue of fact that supported amendment).

[¶49] Here, the plaintiffs did not produce any evidence of willful and malicious conduct by Brent Klipfel and were attempting to amend the Complaint as a fishing expedition to avoid the recreational use immunity defense. The depositions of Klipfel

and of the Albion Township Board members were complete at the time of plaintiffs' motion, and both defendants in this action had filed Motions for Summary Judgment based, among other grounds, on recreational use immunity. The plaintiffs were asking the Court to allow an amendment to the Complaint that mirrors the exact language of the only exception to such immunity without pointing to any evidence developed by the discovery or supported by affidavit that substantiated the allegations.

[¶50] Absolutely no evidence existed from which a reasonable jury could find that Brent Klipfel constructed or left in place the washout between Sections 5 and 6 with the intent to injure users of the section line road. Such a request was futile and was properly denied by the Court. The bare allegation that Klipfel acted with willful and malicious intent would not be enough to defeat summary judgment in any event. The interests of justice precluded the plaintiffs from amending their Complaint at that late stage in the proceedings.

[¶51] **CONCLUSION**

[¶52] For the reasons stated above, Brent Klipfel respectfully requests that this Court affirm the decision of the district court in all respects.

Respectfully submitted this 31st day of October, 2008.

VOGEL LAW FIRM

By: /s/ Robert B. Stock
Robert B. Stock (#05919)
Carlton J. Hunke (#02855)
218 N.P. Avenue
P.O. Box 1389
Fargo, ND 58107-1389
Telephone: (701) 237-6983
ATTORNEYS FOR DEFENDANT-
APPELLEE, BRENT KLIPFEL