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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Robert Hale, individually and State of North Dakota ex rel. Robert Hale, and Susan Hale, Plaintiffs-Appellants, vs. Ward County, City of Minot, and Bea Shaw, Defendants-Appellees.	Supreme Court No. 20130348 Ward County No. 51-09-C-1040

APPEAL OF THE AMENDED JUDGMENT, DATED SEPTEMBER 4, 2013

BRIEF OF APPELLEES WARD COUNTY AND CITY OF MINOT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND RULES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

I. JURISDICTIONAL STATEMENT

(1.) The district court had jurisdiction over this matter pursuant to N.D. Const. Art. VI, §§ 1 and 8, and N.D.C.C. § 27-05-06. This Court has jurisdiction to hear the appeal from the Amended Judgment, dated September 4, 2013 under N.D. Const. Art. VI, §§ 1 and 2, or N.D.C.C. § 28-27-01.

II. STATEMENT OF ISSUES

(2.) Appellees find it necessary to restate the issues as Appellant's Statement of Issues is difficult to understand, unduly argumentative, and does not succinctly state the actual issues.

I. Whether the district court's grant of *City of Minot and WC's Motion for Summary Judgment As To The Remaining Public Nuisance Claim* was in error.

II. Whether the district court properly considered the provisions of Section 42-01-08 requiring a "special injury" as a legal determination to be addressed as a matter of law.

III. Whether the district court properly considered only the alleged special injury to Hale, and not to third persons and neighbors, when it considered Hale's ability to bring and maintain a public nuisance claim under Section 42-01-08.

III. Whether the district court properly denied Hale's *Motion to Add Additional Parties*.

III. STATEMENT OF CASE

(3.) Plaintiffs and Appellants Robert Hale, individually and State of North Dakota *ex rel* Robert Hale, and Susan Hale (hereinafter "Hale" or "Appellants")) commenced suit against the City of Minot and Ward County (hereinafter "WC")[1] by Summons and Complaint on June 24, 2009, alleging the law enforcement shooting range (hereinafter "range" or "shooting range") located several miles southwest of Minot in rural WC is a danger to themselves and their property, a danger to surrounding property owners, and a danger to members of the general public who use CR12. Hale alleges on the basis the range is a public and private nuisance and resulting in devaluation of his property, inverse condemnation or taking. Hale seeks to abate the range and shut it down permanently. Hale brings this action on behalf of himself, and purportedly on behalf of neighbors.

(4.) As the Court is aware, this is the second appeal taken by Hale during the pendency of this lawsuit. This Court in Hale v. WC, 2012 ND 144, 818 N.W.2d 697 ("Hale I"), upheld the district court's Order, dated June 7, 2011, granting SJ to WC as to Hale's private nuisance, public nuisance to land, devaluation, and inverse condemnation/takings claims, and reversed and remanded the district court's grant of SJ on the limited issue of the public nuisance action solely as it relates to Hale's alleged use of CR12. The Hale I Court questioned whether the court and the parties had considered and addressed the requirements of N.D.C.C. § 42-01-08 ("42-01-08"), that a private party bringing a public nuisance action must first demonstrate a special injury in order to maintain such an action. On the basis of this invitation, the district court ("court") granted SJ to WC on Hale's remaining public nuisance claim, finding as a matter of law

[1] Defendant Bea Shaw has never been served with process in this case and Hale does not deny this fact. The District court dismissed Hale's claims against Bea Shaw on the basis that it lacked personal jurisdiction over Bea Shaw, but has never ordered her name be removed from the heading, and thus she remains.

Hale's admitted infrequent use of CR12 "once or twice" a month was inadequate to maintain a public nuisance action as such use did not and could not constitute a special injury.

(5.) Although Hale argues his status in the lawsuit as a private relator (*ex rel.*) means the Court should have considered the alleged special injury to neighbors as well as the alleged special injury to himself, this is in fact false and contrary to the plain and unambiguous language contained the Statute, which holds, "A private person may maintain an action for a public nuisance if it is specially injurious to that person or that person's property, but not otherwise." N.D.C.C. § 42–01–08 (emphasis added). Hale is not allowed to "bootstrap" any alleged injuries of nonparties in order to circumvent the special injury showing. Hale fails to support his position with any legal authority, and his status as a private relator was properly addressed by the court.

(6.) Hale further argues the court impermissibly required an actual injury to have occurred, which he equates to a gunshot wound, prior to allowing him to maintain a public nuisance action. The court never asserted or concluded Hale or anyone else first suffer a gunshot wound or other actual physical injury prior to being allowed to maintain a public nuisance lawsuit, and the court's legal conclusion finding Hale's injury evidence inadequate is supported by the plain language of 42-01-08 and supported by Hale I.

(7.) Hale argues the Hale I Court's discussion of the bullet holes in the signs fronting CR12 is sufficient to show a special injury under 42-01-08 allowing him to maintain the public nuisance action. The Hale I Court's conclusion reasonable inferences arising out of bullet holes is a fact question for the jury is a separate and distinct issue to the to the special injury showing. Hale dredges up old arguments about WC Commission meetings

constituting admissions pursuant to N.D. R. Evid. 801(d)(2) and res judicata (Hale brief at ¶¶ 68-69). These arguments have been fully put to rest by Hale I.[2]

(8.) Hale also makes a motion to "add additional" parties, and argues if non-parties had been allowed to join as plaintiffs, the evidence provided would be sufficient to satisfy 42-01-08. The court's denial of the motion to add parties on the eve of trial and more than four years into the litigation is not an abuse of discretion. Joinder of parties could have been raised during the first appeal but was not. The court also took notice of the nearly identical companion lawsuit, David Gowan vs. Ward County, City of Minot, and Mark Hamilton, Civil No. 51-10-C-1785, currently pending in WC, and decided any joinder of parties can be addressed there, if necessary. Hale's motion to add parties on the eve of trial is a mere contrivance geared to defeat SJ by interjecting new "facts" and claims into the case.

IV. UNDISPUTED FACTS

(9.) Hale's deposition ("Hale Depo.") was taken on October 1, 2010. At the deposition, and apparently well prior to any "special injury" issue being on Hale's "radar screen", Hale testified candidly he infrequently uses County Road 12 ("CR12"), which flanks the west edge of the shooting range. He failed to give any other or further details of his alleged use of the Road. He also testified CR12 is not a route leading from his home into Minot, does not serve his home, and not a route taken to work. Hale testified:

> Q. Bob, when you go to work in Minot, what do you do in the morning? Leave home and go to the

[2] The court denied Hale's motion for declaratory judgment where he argued various WC Commission hearings, meetings, and findings constituted admissions against a party opponent and res judicata. (Order, dated January 24, 2011 [Doc.118]). Hale I stated, "the remaining arguments made by the Hales are unnecessary . . . or without merit", which includes any "admission" or res judicata arguments raised yet again. 2012 ND 144 at ¶ 30.

office?

A. That's what I do.

Q. What's your route to work?

A. It varies. I either go down 17 to Highway 2 or I go out 17 to [CR]14 to Highway 83.

Q. There's been testimony about CR12 –

A. Mm-hmm.

Q. -- earlier. Would you agree?
A. Sure.

Q. Do you sometimes take [CR]12 to go to work?

A. I don't take [CR]12 to go to work.

Q. Would you agree with me that -- and I'm going to point to the map here -- that this portion of highway is [CR]12?

A. Well, it's not a highway. It's a county road and, yes.

Q. Okay. Can you show me where -- you said 17. Can you show me where 17 is on this map and trace it out in green?

A. (Drawing.) This is where [CR]17 shows on this map in green.

Q. And when you say you sometimes use County Road 17, is that the road you're referring to what you just traced out in green?

A. Yes.

Q. Could I have you write somewhere in here [CR]17, referring to [CR]17?

A. (Writing.)

Q. Does your driveway to your home hook up with [CR]17? Is that the nearest public road to your house?

A. Yes.

Q. And when you say you take another way, do you leave your house to the west and head southbound on [CR]17 and take a different route in to work?

A. Yep.

Q. Can you give me an estimate of how often you take -- you head south on 17 to go to work and how often do you go north on 17 to go to work?

A. Probably 80/20.

Q. 80 south and 20 north?

A. No. 80 north and 20 south.

Q. Okay. And there's been -- again, there's been talk about [CR]12. Can you trace out [CR]12 or is this too hard to see on this map? Could I have you trace out [CR]12 with blue dashes?

A. (Drawing.)

Q. And just so I understand your dashes, [CR]17 and 12 at one point merge and are the same road; is that correct?

A. Yes. They're identified with signage in that manner, also.

Q. And this portion of [CR]12 that's on Exhibit 19 that you've denoted with blue dashes, how often do you drive that road?

A. Probably once or twice a month.

Q. And what do you use it for?

A. To drive.

Q. You visit somebody?

A. Yes.

Q. Who do you visit?

A. Jerome Behm or Ron Behm or Ethel Behm are the general people that I visit when I go on that road.

Q. Are the Behms friends of yours?

A. They are.

Q. So in one of your affidavits when you refer to visiting your friends by driving [CR]12, that's who you would be talking about?

A. That group of people, yes.

Q. Okay. And you said about once a month?

A. I said about once or twice a month.

Q. Once or twice a month. Okay. . .

(Hale Depo. [Supp.App.] at 7-8; Hale Depo. Exh.19 [Supp.App.] at 34).

(10.) Prior to WC's most recent SJ motion, Hale never presented any evidence whatsoever his wife Susan (also a named party) had ever travelled CR12 at all or has been injured in her use of CR12. However, Hale filed an affidavit (Supp.App. at 35-38) along with the *Brief In Response to City and County's Motion For SJ As to Public Nuisance Claim* [App., Doc.220], in which Hale attempts to change his earlier deposition testimony the alone travels CR12 to visit friends "once or twice a month". Other than this affidavit, clearly intended to avoid SJ on the "specially injurious" requirement of N.D.C.C. § 42-01-08, Hale never provided any evidence indicating Susan travels CR12 at

all or has any reason to. Susan Hale's deposition was not taken as part of this lawsuit, and Robert Hale admittedly included her as a party plaintiff strictly due to her ownership interest in the Hale's property.[3]

(11.) At his deposition in October of 2010, Hale also testified about the alleged dangers he believes are posed by the shooting range to those using CR12, including to himself, his children, and grandchildren. He primarily focused on his own children riding the bus many years ago. (Hale Depo. [Supp.App.] at 5 & 13). Hale tires to change his earlier deposition testimony about his children's use of CR12, with new "affidavit evidence" supposedly showing "regular" use by the whole family. Hale formerly testified at his deposition all of his children are now grown and living outside the state of North Dakota. (Hale Depo. [Supp.App.] at 3). This changed testimony is in the aforementioned Affidavit [Supp.App. at 35-38], submitted by Hale in an attempt to defeat the "specially injurious" requirement of N.D.C.C. § 42-01-08.

(12.) In addition to the changed testimony regarding Hale's wife Susan and the Hale's children, Hale also submitted in response to WC's SJ motion an "affidavit proof" of neighbor Steve Dupre consisting of a discussion about bullets, hearsay statements allegedly from Steve Kukowksi, and alleged dangers emanating from the range. (Dupre Aff. [Supp.App.] at 39-43). This "affidavit" is unsigned except for a "/s/", which apparently is meant to denote the electronic signature of Dupre, and is further not notarized in any manner, which is a requirement under North Dakota law to be considered a sworn statement. The Hale "affidavit" suffers from the same defects. [Supp.App. at 35-38]. The Hale and Dupre "affidavits" are not evidence, and should not be given any consideration by the Court. Any bullets allegedly found on Dupre's

[3] (App., Doc.23).

property and any conversations he allegedly had with Steve Kukowski are based on hearsay and are not before the Court, [4] and even if they were, Dupre's "affidavit" states he lives south of the range, which is not across from CR12, and thus irrelevant to any injury arising out of Hale's use of the Road. The Dupre "affidavit" cannot satisfy the "specially injurious" requirement of 42-01-08.

(13.) The remainder of Robert Hale's deposition testimony pertaining to his asserted infrequent use of CR12 focuses on alleged "cone of fire" evidence provided by others. (Hale Depo. [Supp.App.] at 11, 15-16).

V. STATEMENT OF STANDARD OF REVIEW

(14.) The relevant SJ standard is as follows:

> Summary Judgment is a procedural device for promptly disposing of a lawsuit without a trial if there are no genuine issues of material fact or inferences which can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. Whether Summary Judgment was properly granted is a question of law which we review de novo on the entire record. On appeal, [the N.D. Supreme] Court decides if the information available to the trial court precluded the existence of a genuine issue of material fact and entitled the moving party to SJ as a matter of law. 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.
>
> A party resisting a motion for Summary Judgment may not simply rely upon the pleadings or upon unsupported, conclusory allegations. Factual assertions in a brief do not raise an issue of material fact satisfying Rule 56(e). Nor may a party merely reassert the allegations in his pleadings in order to defeat a Summary Judgment motion.

[4] There are chain of custody, notice, spoliation, and other issues that arise out of Hale's unnoticed inspection of the neighboring property with regard to the alleged bullet evidence, all of which at a minimum calls into serious question the evidentiary value of any such "evidence". The alleged bullet "evidence" is not before the Court and does not present a genuine issue of material fact. (Transcript (Supp.App.) at 85, 99 et seq.)

Zuger v. State, 2004 ND 16, ¶¶ 7-8, 673 N.W.2d 615, 619 (internal citations and quotations omitted) (emphasis added). Under this standard, WC is entitled to SJ on Hale's public nuisance action regarding CR12.

VI. LAW & ARGUMENT

A. Standing And Public Nuisance *Special Injury* Requirement

(15.) "Standing is a concept utilized to determine if a party is sufficiently affected so as to insure that a justiciable controversy is presented to the court." Johnson v. Johnson, 2000 ND 170, ¶ 40, 617 N.W.2d 97, 109 (quoting Billey v. North Dakota Stockmen's Association, 1998 ND 120, ¶ 7, 579 N.W.2d 171). "A party is entitled to have a court decide the merits of a dispute only after demonstrating the party has standing to litigate the issues placed before the court. . ." Rebel v. Nodak Mut. Ins. Co., 1998 ND 194, ¶ 8, 585 N.W.2d 811, 813 (internal citations omitted) (emphasis added). "Standing analysis requires a two-fold inquiry: (1) plaintiffs must suffer some threatened or actual injury resulting from the putatively illegal action, and (2) the asserted harm must not be a generalized grievance shared by all or a large class of citizens, *i.e.*, plaintiffs generally must assert their own legal rights and interests and cannot rest their claim for relief on the legal rights and interests of third parties." Nodak Mut. Ins. Co. v. Ward Cnty. Farm Bureau, 2004 ND 60, ¶11, 676 N.W.2d 752, 758 (citations omitted)).

(16.) On top of these irreducible constitutional "standing" minimums, 42-01-08 demands the nuisance must be "specially injurious" to Hale's person or property, and if not, he is barred from bringing and maintaining the action. This Court in Hale I set forth the applicable legal standard a plaintiff must prove under 42-01-08 in order to "maintain"

a public nuisance action, which is the functional equivalent of a "standing" determination. The Court stated:

> "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. The N.D.C.C. § 42–01–01 definition of nuisance applies to public nuisance claims. Kappenman v. Klipfel, 2009 ND 89, ¶ 36, 765 N.W.2d 716. "A private person may maintain an action for a public nuisance if it is specially injurious to that person or that person's property, but not otherwise." N.D.C.C. § 42–01–08.

Hale I, 2012 ND 144, ¶ 26, 818 N.W.2d 697, 705 (emphasis added).

B. Relevant Language From *Hale I* Opinion

(17.) Following is some of the pertinent public nuisance and special injury analysis and language taken from Hale I:

> **WC and Minot do not argue the Hales failed to meet the "specially injurious" requirement, and neither the parties nor the court addressed the propriety of the Hales bringing an action to abate the law enforcement shooting range under N.D.C.C. ch. 42–02. This issue will have to be addressed on remand, and we express no position whether the Hales' use of the CR qualifies them to maintain their public nuisance claim.** To the extent the Hales are claiming a public nuisance for injury to their neighbors' property, the Hales' failure to establish injury sufficient to sustain their private nuisance action necessarily means the Hales cannot show the required special injury establishing they represent "an entire community or neighborhood or any considerable number of persons" who are harmed by the alleged public nuisance. See N.D.C.C. §§ 42–01–06 and 42–01–08. Therefore, as to the CR claim, we consider whether the Hales raised a genuine issue of material fact whether the shooting range is a public nuisance under N.D.C.C. § 42–01–06.

Hale I, 2012 ND 144, ¶ 26 (emphasis added).

C. Permissive Joinder Standard

(18.) Rule 20 of the North Dakota Rules of Civil Procedure[5] provides for the permissive joinder of parties. N.D. R. Civ. P. 20. Rule 20 provides the joinder of additional parties is a permissive determination for the court and is not a matter of right, and thus discretion is allowed. Revoir v. Kansas Super Motels of N. Dakota, Inc., 224 N.W.2d 549, 552 (N.D. 1974) (holding joinder under Rule 19 is "subject to the sound discretion of the trial court."); Bagge v. Dardis, 389 N.W.2d 606, 608 (N.D. 1986) (Rule 20 joinder discretionary with trial court) (*Levine, Justice, concurring specially*). "The [joinder] decision . . . will not be reversed absent an abuse of discretion." Matter of Estate of Murphy, 554 N.W.2d 432, 438 (N.D. 1996) (citation omitted)).

D. The Court Properly Granted WC's SJ Motion As To The Remaining Public Nuisance Claim.

1. Hale Failed to Meet The Specially Injurious Standing Requirement of N.D.C.C. §§ 42-01-08, Which Is A Strict Requirement For A Private Person To Bring and Maintain A Public Nuisance Action, And Therefore SJ was Proper.

(19.) "**A private person may maintain an action for a public nuisance if it is specially injurious to that person or that person's property, but not otherwise**." N.D.C.C. § 42-01-08 (emphasis added). A special injury is not a requirement placed on Hale by the court but is a strict requirement of N.D.C.C. § 42-01-08, which is further reinforced by the "but not otherwise" language. The "special injury" requirement is analogous to a statutory "standing" provision, which is a threshold legal determination for the court to decide. The evidence in this case is clear Hale's infrequent use of CR12, coupled with his non-specific fear of danger, has never resulted in any actual injury,

[5] Plaintiffs' *Brief In Support Of Motion To Add Additional Parties* [Doc.226] references Rule 20 as a grounds for joining additional plaintiffs, and does not reference any other Rule or statute. It is unclear on what legal grounds Hale attempts to join neighbor Steve Dupre as a party plaintiff and whether Steve Dupre himself was requesting to be joined.

much less any special injury, and thus Hale is not permitted to maintain the public nuisance action. The Hale I Court was clearly skeptical of the public nuisance claim as it relates to Hale's use of CR12, and yet the Court hesitated to dismiss the claim as the evidence relating to the Hale's infrequent use of the road was not put squarely before the Court. The undisputed evidence regarding Hale's usage of the Road is now squarely before the Court.

(20.) In order to bring and maintain a public nuisance action, Hale must first demonstrate he has been specially injured. N.D.C.C. § 42-01-06 defines public nuisance as "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." However, the special injury of 42-01-08, which is required to maintain a public nuisance action, whether an action for damages or for abatement, is not defined in the statute, nor is it defined elsewhere in Chapters 42-01 or 42-02. The Court has stated in the absence of a statutory definition, the general definition or usage of a term, such as that found in the dictionary, controls its meaning. Wanner v. N. Dakota Workers Comp. Bureau, 2002 ND 201, ¶ 21, 654 N.W.2d 760, 769 (citing N.D.C.C. § 1–02–03). The Merriam-Webster Online Collegiate Dictionary (11th Edition) defines "specially" as: (1) "in a special manner"; (2)(a) "for a special purpose"; and (2)(b) "in particular".

(http://www.merriam-webster.com/dictionary/specially?show=0&t=1365177163).

Black's Law Dictionary defines "injury" as: "harm or damage"; and states "injurious" is the adjective form of "injury" and thus "injurious" means "harmful" or "damaging". (Black's Law Dictionary (Second Pocket Edition-2001)). Taken together, "specially

injurious" means "of particular harm or damage" or "harmed in a special manner". See id.

(21.) Analogous terms are "special injury" or "special damage", and in case law denote a particular type of injury or harm different or greater than "regular" harm suffered by members of the public generally. E.g. Fisher v. Pederson, 100 N.W.2d 156, 159 (N.D. 1959) (in class action, special injury to litigants required, which is different and greater than ordinary injury suffered by members of general public); United Power Ass'n v. Heley, 277 N.W.2d 262, 267 (N.D. 1979) (emphasis added) (In eminent domain, recovery of consequential damages requires proof of "special damages", which is "the disturbance of a right . . . the owner enjoys in connection with his property [giving] it additional value [which must be] in excess to that sustained by the public generally.")

(22.) In addition to the above, the 1968 Frandsen v. Mayer, 155 N.W.2d 294 (N.D. 1967), opinion provides solid guidance on what does and does not constitute a special injury under 42-01-08. The plaintiff Frandsen purchased a piece of real property fronting a public road; a was commercial sign for a trucking company was located there for some time prior to the sale. Id. at 295-96. Earlier, the City of Jamestown and the previous landowner where the sign was located (now Frandsen's property), had agreed contrary to an ordinance, the sign could remain on the land. Id. Frandsen disagreed the sign could remain based on the ordinance stating otherwise and sued the City alleging a public nuisance. Id. The only "injury" evidence provided was Fransen believed the sign was an eyesore, and had allegedly harmed his motel business in "some unspecified degree." Id. Although Frandsen does not explicitly define "specially injurious", it is particularly instructive to the case at bar as Frandsen's injury evidence was held to be "non-specific"

and therefore not of a "special" character. Id. at 298. Presumably, the injury to Frandsen, if he had provided specific evidence of an actual injury, may have satisfied the "specially injurious" requirement as his business was close to the sign and could be construed as confusing. Id. Nevertheless, the Court concluded Frandsen's lack of evidence of any specific injury required dismissal under 42-01-08. Id. ("As we have said before, there is no evidence in this case to show [Frandsens] suffered any injury to themselves or to their property by the sign; therefore, under [Section] 42-01-08, they may not maintain an action for a public nuisance.").

(23.) In the case at bar, Hale's evidence of injury in his use of CR12 is limited to using the road "once or twice a month" to visit friends. This is even more conclusory, non-specific, and lacking in a special nature than Frandsen's injury evidence. CR12 is not part of Hale's route he takes to work each day, and Hale's home is not accessed by CR12 where bullets allegedly cross the road. Susan Hale either never uses CR12 or it must be presumed so as Hale has not submitted evidence of such use.[6] Hale should be taken at his word Susan Hale was added as a plaintiff strictly due to her ownership interest in the Hale property. The evidence as to the Hale's children's use of CR12 is similarly lacking, and moreover the Hale adult children are not parties to this lawsuit and thus have not and cannot meet the specially injurious standard as required.

(24.) Hale attempts to change his prior deposition testimony of use of CR12, by "affidavit evidence, submitted solely to avoid SJ by changing former deposition testimony conceding infrequent use. The new "affidavit" purports to show "regular" use by the whole family, and in addition to being fatally defective as it was never properly

[6] See discussion below and above regarding Hale's "sham" affidavit.

signed or notarized[7], should be considered a "sham affidavit" submitted solely to create a fact issue where none exists. Hysjulien v. Hill Top Home of Comfort, Inc., 2013 ND 38, ¶ 23, 827 N.W.2d 533, 542 (citations omitted) ("A sham affidavit is . . . an affidavit that contradicts clear testimony given by the same witness, [usually] used in an attempt to create an issue of fact in response to a motion for SJ . . . when a party attempts to create a fact issue by filing an affidavit contradicting earlier testimony to avoid SJ, the party raises a sham issue of fact instead of a genuine one." (internal citations and quotations omitted)). Hale already testified his use of the road is "once or twice" per month, and he does not travel past the range on the way to work, and the use is solely to visit friends. Hale presents no further details regarding this alleged use, and the Court should not consider Hale's "sham" affidavit as evidence.

(25.) Hale also points to bullet holes in signs as evidence of a special injury and asserts he is in fear of being shot. (Hale brief at ¶¶ 38-47). However, he never bothered to look for bullets on the road and cannot offer any evidence of specific instances when he actually feared for his life. Moreover, he fails to provide evidence of how often the range is in use, if at all, when he travels CR12 "once or twice a month". There can be no public nuisance and certainly no special injury, if when he passes, the range is not in use. Hale further fails to provide any dates when he allegedly drove past the range, saw persons firing weapons or heard firing occurring, and was in fear he would be hit or injured. Rather, Hale makes non-specific allegations of fear for himself, family, and for the general public because of the existence of the range. Hale fails to provide evidence he

[7] N.D. R. Civ. P. 43(b) allows a party to present evidence by affidavit in support of a motion.

stopped visiting his friends, or has been forced to take an alternate route. This is the type of non-specific testimony inadequate to maintain a public nuisance.

(26.) Another North Dakota Supreme Court case applying the public nuisance statute, Kappenman v. Klipfel, 2009 ND 89, 765 N.W.2d 716 ("Kappenman"), arose out of an ATV accident resulting in the death of a minor child, which occurred on a Township section line road near the minor's parent's (plaintiffs) farm. The minor child was thrown from his ATV and fatally injured when he drove through a "four and one-half foot wide, three feet deep" trench on the section line road. Id. at 718-19. The minor's parents sued the landowner Klipfel as well as the Township for wrongful death alleging Klipfel and the Township were aware of the danger posed by the trench and yet failed to warn of such danger, and further alleged the trench itself posed a public nuisance. Id. The court granted SJ to Klipfel and the Township, concluding they had not breached any duties owed to the plaintiffs or to the public. Id. at 728-29. Although the Kappenman Court did not focus its analysis on the "specially injurious" requirement, it nevertheless overturned the court's grant of SJ to the Township on the public nuisance, holding "[] Township had actual notice "of an unusually dangerous condition". Id. It is clear in Kappenman all of the parties and the Court believed the trench, that "was hard to see until you were right on it" constituted an "unusually dangerous condition" capable of great injury to anyone using the section line road, including the Kappenmans and their son. Furthermore, Township had a statutory legal responsibility for the land, including roads, in its jurisdiction, which included the responsibility to warn of known hazards that are unreasonably dangerous. Id. The existence of the trench and its great potential for harm

and injury were facts not in dispute, and plaintiffs met the special injury requirement as a matter of law in that case.

(27.) In the case at bar, Hale's opinion testimony cited above regarding the "cone of fire" allegedly resulting in actual rounds being fired over CR12, is simply an opinion or a "belief", and not an established undisputed fact like the trench in Kappenman. Furthermore, it cannot be said WC has actual notice of an unusually dangerous condition, like the Township in Kappenman. The North Dakota Supreme Court in Hale I agrees the so-called "cone of fire" testimony by Hale was mere unsupported opinion, saying: "[Hale] explains his belief the shooting range poses a danger to his property is based on his understanding of the testimony of others, his reading of the Gowan findings, his interpretation of maps and topography of the area and his knowledge about the direction of prevailing winds." Hale I, 2012 ND 144 at ¶ 24 (emphasis added). Hale's subjective belief about danger posed by the "cone of fire" or even by the bullet holes in signs is far different than the very real and undisputed danger posed by the trench in Kappenman, which was never disputed by any of the parties in that case. While Kappenman is distinguishable and of limited assistance to the case at bar given its lack of discussion regarding special injury, it is clear the alleged special injury to Hale is non-existent when compared to the very real danger posed by the trench to the Kappenman family.

(28.) The undisputed evidence shows Hale seldom drives CR12 and thus any fear arising out of this infrequent use is nothing more than the same type of non-specific fear shared equally by other members of the general public who may have driven the road occasionally, and who may have seen bullet holes in signs next to the road, or who may have heard testimony at County Commission meetings. Any of these people arguably

have experienced the precise "injury" experienced by Hale, which is not an actual injury at all, much less a special injury. The identical nature of the "harm" to anyone and everyone who drives the road illustrates Hale has not met the "constitutional minimums" or the special injury allowing him to maintain his public nuisance action. Nodak Mut. Ins. Co. v. Ward Cnty. Farm Bureau, 2004 ND 60, ¶ 11, 676 N.W.2d 752, 758 ("the asserted harm must not be a generalized grievance shared by all or a large class of citizens, *i.e.*, plaintiffs generally must assert their own legal rights and interests and cannot rest their claim . . . on the legal rights and interests of third parties.") (citation omitted)).

(29.) The undisputed evidence demonstrates Hale has not suffered any particular harm or damage in using CR12 once or twice a month, and the non-specific injury "evidence" is legally insufficient to demonstrate a special injury allowing Hale to maintain the public nuisance action. It is clear something more is required that would show the required special injury establishing they represent "an entire community or neighborhood or any considerable number of persons" harmed by the public nuisance." Hale I, 2012 ND 144 at ¶26; N.D.C.C. §§ 42–01–06 and 42–01–08.

2. Hale's Status As A Private Relator Does Not Allow Him To Circumvent The Special Injury Requirement of N.D.C.C. § 42-01-08.

(30.) Hale argues his status as a private relator (*ex rel.*) means the Court should have considered special injury to neighbors and surrounding property owners as well to himself. He argues as a private relator he is "standing in the shoes" of neighboring property owners and those who use CR12, which he describes as persons not having the "wherewithal to bring a legal action." (Hale brief at ¶¶ 62-63). This type of argument is

false and contrary to the plain and unambiguous language contained in N.D.C.C. § 42-01-08, which holds, "A private person may maintain an action for a public nuisance if it is specially injurious to that person or that person's property, but not otherwise." N.D.C.C. § 42–01–08 (emphasis added). This language does not allow for someone else's injury as a substitute, but specifically states it can only be maintained "if it is specially injurious to that [private] person". Id. This can only mean the person bringing the action must demonstrate the special injury particular to him or herself. Furthermore, Hale fails to support his "bootstrap" argument with any legal authority.

(31.) Hale's argument is also contrary to the Hale I Court's holding requiring Hale to have first demonstrated a special injury to his own property to support the public nuisance to property claim, before allowing him to represent others in such a claim. Hale I, 2012 ND 144 at ¶ 26. The Hale I Court agreed the special injury requirement must be particularized to the private individual bringing the action. Id. Under Hale's faulty conception of the law, the Hale I Court should have considered alleged injury to the surrounding properties and persons, not just the Hales. Hale appears to be attempting a further appeal of Hale I, which is improper.

(32.) Additionally, there is no requirement a public nuisance action by a private citizen has to be brought *ex rel*. Rather, 42-01-08 is clear a private person who has been specially injured by a public nuisance has "standing" to sue in his own capacity, but not otherwise. While it is true Section 42-02-01, which provides for abatement of common nuisances, states, "any citizen of the county where a nuisance exists or is maintained, may bring an action in the name of the state to abate and perpetually enjoin the nuisance", this particular statute does not contradict the requirement of 42-01-08 that this

citizen must first demonstrate a special injury particular to him or herself. Furthermore, although never addressed in the proceedings below, N.D.C.C. § 42-02-02 requires, "If the action is brought by a citizen, that citizen shall give a bond in an amount sufficient to cover the costs of such action as the court may direct." Hale has never given the bond required by this section, which is a further unfulfilled requirement for maintaining an action to abate a public nuisance. Notwithstanding Hale's unsupported arguments regarding his *ex rel.* status, these issues were properly addressed by the court, ([App.] at 18 et seq.), where the court held Hale was required to show a special injury particular to himself under the plain language of 42-01-08, which he failed to do. At present, Hale is unable to maintain the public nuisance action under 42-01-08 given his failure to show a special injury particular to himself, and is further unable to maintain an abatement action given his failure to first pay the required statutory bond.

3. The *Hale I* Court's Determination Regarding Reasonable Inferences Arising Out of Bullet Holes In Signs, Which Is A Genuine Issue of Material Fact For The Jury, Is Not *Special Injury* To Hale Under N.D.C.C. § 42-01-08, Which Is A Legal Determination For The Court.

(33.) Hale also argues the Hale I Court's discussion of bullet holes in signs fronting CR12 is sufficient to show a special injury under 42-01-08 allowing him to maintain the public nuisance action. (Hale brief at ¶¶ 58-59). The Hale I Court's conclusion inferences from bullet holes in signs constitutes a jury question is extraneous to the determination under 42-01-08, which is a threshold or "standing" determination to be made by the Court. In other words, the direct invitation of the Hale I Court and the statutory requirement of a special injury to "maintain" a public nuisance action "but not otherwise" means the legal determination of special injury must be settled as a matter of

law prior to any trial and presentation of evidence to the jury. The factual issue to be worked out by the jury at trial and the special injury legal determination are separate and distinct issues. The first is a fact issue, while the latter is purely legal. Only the latter issue is now before the Court.

(34.) This point is reinforced by the order in which the Hale I Court discussed the issues in the first appeal. Prior to its analysis of bullet holes in signs and the effect of such evidence on the public nuisance claim, the Hale I Court first discussed the legal issues that needed to be addressed on remand, including Hale's very ability to bring and maintain a public nuisance action in an attempt to enjoin the nuisance. The Court invited the parties and the Court to look at the "specially injurious" requirement of 42-01-08, and invited the Court to decide whether Hale's use of CR12 rose to the level of a "special injury" allowing the public nuisance action to go forward. Hale I, 2012 ND 144 at ¶ 26. The Hale I language can only be construed as requesting the court first determine as a matter of law whether Hale's evidence regarding his use of CR12 is sufficient to support the remaining public nuisance claim. It is important to realize the Hale I Court was not presented with the evidence discussing Hale's infrequent use of the road. Therefore, the Court invited the parties to visit these purely legal issues on remand. What is not stated in Hale I, but is implied, is that if the court on remand determined Hale's use of CR12 satisfied the special injury requirement, the fact question involving bullet holes in signs would be for the jury to decide. Hale has it precisely backwards and believes the inferences of bullet hole evidence, in itself, is sufficient to show special injury. (Hale brief at ¶ 58). Moreover, Hale concedes Hale I is a direct invitation for the court to determine as a matter of law Hale's ability to bring and maintain a public nuisance action.

Again, Hale argues this Court was in error for not considering his *ex rel.* status in the first appeal. (Hale brief at ¶¶ 10 & 62).

(35.) As stated above, the nonspecific "injury" evidence provided by Hale – the fear he allegedly feels when infrequently driving the road to visit neighbors "once or twice a month" – is precisely the same "injury" or "harm" experienced by any other infrequent user of CR12. This is not the type of injury or harm that confers "standing" on a private citizen to represent "an entire community or neighborhood or any considerable number of persons who are harmed by the alleged public nuisance." Hale I, 2012 ND 144 at ¶ 26; N.D.C.C. §§ 42-01-01, 42–01–06 and 42–01–08. 42-01-08 envisions something more than what Hale has shown. Rather than focus on the legal standard, Hale offers argument based on "blood on your hands" hyperbole that only gunshot wounds would provide acceptable evidence of special injury. It is clear from Hale's argument that he simply wishes the legislature had not provided for the heightened threshold to maintain a public nuisance action. Hale's reading of the law essentially negates the special injury or make it superfluous, which the rules of statutory construction do not allow. Olson v. Job Serv. N. Dakota, 2013 ND 24, ¶¶ 12-14, 827 N.W.2d 36, 42, reh'g denied (Apr. 4, 2013) (refusing to construe Social Security benefits provision so as to make it superfluous). In addition, Section 42-01-07 provides for the available remedies for a public nuisance, including "A civil action" and "Abatement". Section 42-02-01 provides "[A]ny citizen of the county where the nuisance exists or is maintained, may bring an action in the name of the state to abate and perpetually enjoin the nuisance." (emphasis added). Abatement in the context of section 42-02-01, when brought by a private citizen, is a civil action in the general sense of the term. There is no indication the legislature intended the specially

injurious requirement of 42-01-08 to apply only to civil actions seeking damages and not to civil actions seeking abatement/injunction. The only way to harmonize both statutes is to give effect to each. People to Save the Sheyenne River, Inc. v. N. Dakota Dep't of Health, 2005 ND 104, ¶ 18, 697 N.W.2d 319, 327 ("In interpreting statutory provisions, every effort must be made to give each word, phrase, clause, and sentence meaning and effect because the law neither does nor requires idle acts. A specific statute controls over a general statute." (citations and quotations omitted)). Additionally, Section 42-08-01 is the more specific statute where it deals with private persons bringing abatement actions, and thus controls in this case, which means Hale's civil action seeking abatement is also subject to the specially injurious requirement of Section 42-08-01. Id.

E. The Court Did Not Abuse Its Discretion In Properly Denying Hale's Request To Add Additional Parties.

(36.) At the August 2013 hearing on WC's SJ motion, Hale orally moved the Court to "add additional" parties as plaintiffs (Transcript [Supp.App] at 93-94), and filed a motion after the hearing, notwithstanding the fact the Court stated it was not requesting briefing on this issue. (Email from Court [Supp.App.] at 109-10). Hale maintains that if one or both of the firing range neighbors, identified as Steve Dupre and David Gowan, had been allowed to join as plaintiffs in their own right, the evidence of injury provided by these persons was more than sufficient to satisfy the specially injury. (Hale brief at ¶¶ 60-65). To further his "bootstrap" theory, Hale presented purported evidence to the court in the way of "affidavit proof" of neighbor Steve Dupre ("Dupre") consisting of a discussion about bullets, hearsay statements allegedly from Steve Kukowksi, and alleged dangers emanating from the range. This "affidavit" is unsigned except for a "/s/", which apparently is meant to denote the electronic signature of Mr. Dupre, and is further not

notarized in any manner, a requirement to be considered evidence. As stated above, the Hale "affidavit" submitted at the same time as the Dupre "affidavit" was intended to change Hale's earlier deposition testimony regarding infrequent use of CR12. The Hale and Dupre "affidavits" are not evidence, and should not be given any consideration by the Court. Any bullets allegedly found on Dupre's property are not before the Court, [8] and even if they were, Dupre's "affidavit" states he lives south of the range, which is not across CR12, and thus irrelevant to any injury Hale in using CR12. Both the "affidavit" of Steve Dupre and "affidavit" of Robert Hale should be considered "sham affidavits" and should be given no weight whatsoever, and certainly not considered as "special injury" evidence. Hysjulien, 2013 ND 38 at ¶ 23 (defining "sham" affidavit.).

(37.) Even if the new "affidavit evidence" is considered, none of it raises a genuine issue of material fact as to whether Hale has shown or can show he himself has been "specially injured" in his use of CR12. The Dupre "affidavit" does nothing to suggest a special injury to Hale, and is mainly composed of hearsay or double hearsay. Hale's former deposition testimony is dispositive of his use or lack thereof of CR12 and is dispositive of the "special injury" issue.

(38.) Under the discretionary standard for joining or refusing to join parties to an action, the Court properly denied the motion to add additional parties essentially on the eve of trial and more than four years since the action was started. Hale's "sitting on his rights" and not requesting joinder for more than four years constitutes a waiver by Hale. Stenehjem v. Sette, 240 N.W.2d 596, 600 (N.D. 1976) (waiver is the "voluntary and

[8] There are chain of custody, notice, spoliation, and other issues that arise out of Hale's unnoticed inspection of the neighboring property with regard to the alleged bullet evidence, all of which calls into question the evidentiary value of any such "evidence". Suffice it to say, the alleged bullet "evidence" is not before the Court and does not present a genuine issue of material fact.

intentional relinquishment and abandonment of a known existing right, advantage, benefit, claim, or privilege which, except for such waiver, the party would have enjoyed." (citation omitted)); Lindemann v. Lindemann, 336 N.W.2d 112, 116 (N.D. 1983) (waiver is question of law for the court). Furthermore, any joinder of parties to this litigation could have been an issue raised by Hale during the first appeal but was not. The Court also took notice of the nearly identical Gowan companion lawsuit, currently pending in WC, and decided any joinder can be addressed there if necessary. Hale's motion to add additional parties is a mere contrivance geared to defeat SJ by attempting to interject new "facts" and parties into the case. The court did not abuse its discretion in denying this motion.

VII. CONCLUSION

(39.) WC respectfully requests the Court affirm the *Amended Judgment*, dated September 14, 2013, granting SJ to WC and the City of Minot as to Hale's remaining public nuisance claim and denying motion to add additional parties, and affirming dismissal of said claims with prejudice.

Dated this 12th day of February, 2014.

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CERTIFICATE OF COMPLIANCE

(40.) The undersigned, as attorneys for the Defendants-Appellees WC and City of Minot in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 7,919.

Dated this 12th day of February, 2014.

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CERTIFICATE OF SERVICE

(41.) I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEES WC AND CITY OF MINOT** was on the 11th day of February 2014, e-mailed to the following:

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CERTIFICATE OF SERVICE

(41.) I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEES WARD COUNTY AND CITY OF MINOT** was on the 12th day of February 2014, e-mailed to the following:

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