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STATE OF NORTH DAKOTA

**IN THE SUPREME COURT**
**STATE OF NORTH DAKOTA**

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| G&D Enterprises,<br><br>Plaintiff and Appellant,<br>v.<br><br>Marrilyn A. Liebelt,<br><br>Defendant and Appellee | Mercer County District Court<br>No. 29-2017-CV-00179<br><br>Supreme Court No. 20190256<br><br>**ORAL ARGUMENT REQUESTED** |

ON APEAL FROM JUDGMENT OF DISMISSAL DATED JUNE 26, 2019
FROM THE DISTRICT FOR THE
SOUTH CENTRAL JUDICIAL DISTRICT
MERCER COUNTY, NORTH DAKOTA
THE HONORABLE DANIEL BORGEN, PRESIDING

# BRIEF OF APPELLANT G&D ENTERPRISES

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## JURISDICTIONAL STATEMENT

[¶1.] This is a timely appeal from the district court's Judgment of Dismissal entered on June 26, 2019. The Judgment dismissed all of G&D Enterprises's ("G&D") claims against Merrilynn Liebelt ("Liebelt") with prejudice. The Court has appellate jurisdiction under N.D.C.C. §28-27-02(5).

## STATEMENT OF THE ISSUES

[¶2.] Whether the district court erred by granting summary judgment against G&D for its claim of private nuisance when deposition testimony supported G&D's claims of harm.

[¶3.] Whether the district court erred by granting summary judgment against G&D for its claim of civil trespass when the district court did not address the actual allegations G&D made against Liebelt.

[¶4.] Whether the district court erred by granting summary judgment against G&D for its request for permanent injunctive relief when it applied the preliminary injunction standard.

## STATEMENT FOR ORAL ARGUMENT

[¶5.] G&D is requesting the Court schedule oral argument in this case under N.D.R.App.P. 28(h). Oral argument would be helpful to provide clarification to the separate, but related, issues the Court will consider in its review of the district court's decision.

## STATEMENT OF THE CASE

[¶6.] On November 30, 2017, G&D filed its Complaint against Liebelt. App. 3. G&D's Complaint alleged that Liebelt was liable to G&D on the theories of private

nuisance and civil trespass. App. 8. G&D sought injunctive relief and money damages as a result of Liebelt's tortious conduct. App. 8–9. Liebelt denied the allegations in her Answer. App. 10.

[¶7.] Liebelt filed and served a motion for summary judgment on all claims under N.D.R.Civ.P. 56 on March 29, 2019. *See* App. 13. After two orders incorporating stipulations to extend the time to respond, G&D responded to Liebelt's motion on May 8, 2019. App. 4. In addition to an answer brief, G&D included three deposition transcripts as exhibits in its response. *See* App. 19–179 (copies of G&D's exhibits to the summary judgment motion). Liebelt then replied to G&D's answer on May 17, 2019. App. 4.

[¶8.] The district court held a motion hearing on Liebelt's motion for summary judgment on June 7, 2019. At the conclusion of oral arguments, the district court requested that the parties submit post-hearing briefs. Transcript of Motion for Summary Judgment Hearing 14:3–6. The parties then timely submitted post-hearing briefs. App. 5.

[¶9.] The district court ultimately granted summary judgment on all claims in favor of Liebelt. App. 199. On the private nuisance claim, the district court held G&D failed to produce competent evidence "that there is an actual danger to [its] property." App. 198. On the civil trespass claim, the district court held Liebelt, as a matter of law, had not committed any voluntary acts or had the requisite intent to commit a civil trespass. App. 199. Finally, the district court held that failed to provide competent evidence of "an immediate and irreparable harm to [its] interests." *Id.* An order for judgment and Judgment dismissing G&D's claims with prejudice with costs awarded were entered on June 26, 2019. App. 200. Notice of entry of judgment was filed and served on June 26, 2019, and the notice of appeal was timely filed on August 22, 2019. App. 5.

## STATEMENT OF THE FACTS

[¶10.] G&D and Liebelt own adjacent properties in the city of Beulah, North Dakota. *See* App. 196. Both parcels were previously owned by one owner. *Id.* On Liebelt's parcel, there is a home where she had resided. *See id.* Prior to either party owning the property, a water line was installed to provide water to Liebelt's property. App. 195–96. The existence of the water line was not recorded, and neither party had actual knowledge of the location of the water line prior to the summer of 2015. App. 196. The water line was discovered in 2015 while G&D was digging on its property. App. 195.

## ARGUMENT

[¶11.] As the Court as held, "[t]he standard of review for summary judgments is well established." *Burden v. State*, 2019 ND 178, ¶6, 930 N.W.2d 619. The motion:

> . . . is a procedural device under N.D.R.Civ.P. 56(c) for promptly resolving a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. The party seeking summary judgment must demonstrate there are no genuine issues of material fact and the case is appropriate for judgment as a matter of law. In deciding whether the district court appropriately granted summary judgment, we view the evidence in the light most favorable to the opposing party, giving that party the benefit of all favorable inferences which can reasonably be drawn from the record. A party opposing a motion for summary judgment cannot simply rely on the pleadings or on unsupported conclusory allegations. Rather, a party opposing a summary judgment motion 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 raising an issue of material fact. When reasonable persons can reach only one conclusion from the evidence, a question of fact may become a matter of law for the court to decide. A district court's decision on summary judgment is a question of law that we review de novo on the record.

*Id.* (quoting *Becker v. Burleigh Cty.*, 2019 ND 68, ¶7, 924 N.W.2d 393). Although the factual basis for G&D's claims for private nuisance, civil trespass, and injunctive relief

rely on similar grounds, each claim is addressed separately below due to the different legal standards that apply to each claim.

## I. The District Court Erred In Finding There Was No Competent Evidence Supporting G&D's Private Nuisance Claim

[¶12.] A private nuisance is a nuisance "which affects a single individual or a determinate number of persons in the enjoyment of some private right not common to the public." N.D.C.C. §42-01-02. A private nuisance is contrasted with a public nuisance, which is a nuisance "which at the same time affects an entire community or neighborhood or any considerable number of persons, although the extent of the annoyance or damages inflicted upon the individuals may be unequal. *Hale v. Ward Cty.*, 2012 ND 144, ¶26, 818 N.W.2d 697 (quoting N.D.C.C. §42-01-06). G&D's nuisance claim clearly is a private nuisance. A nuisance "consists in unlawfully doing an act or omitting to perform a duty" which results in one of the following:

> 1. Annoys, injures, or endangers the comfort, repose, health, or safety of others;
>
> 2. Offends decency;
>
> 3. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake, navigable river, bay, stream, canal, basic, public park, square, street, or highway; or
>
> 4. In any way renders other persons insecure in life or in the use of property.

N.D.C.C. §42-01-01. The remedies for a private nuisance include a civil action or abatement. N.D.C.C. §42-01-03. The common-law doctrine of nuisance does not apply in North Dakota due to the relevant statutory provisions; however, the common law remains relevant where the common law and statute do not conflict. *Hale*, at ¶15 (citing *Rassier v. Houim*, 488 N.W.2d 635, 636 (N.D. 1992).

[¶13.] As the Court has held:

> [t]o render a person liable on the theory of either nuisance or negligence, there must be some breach of duty on his part, but liability for negligence is based on a want of proper care, while ordinarily, a person who creates or maintains a nuisance is liable for the resulting injury to others regardless of the degree of care or skill exercised to avoid the injury.

*Rassier v. Houim*, 488 N.W.2d 635, 637 (N.D. 1992) (quoting *Knoff v. Am. Crystal Sugar Co.*, 380 N.W.2d 313, 317 (N.D. 1986). The duty in nuisance cases is "an absolute duty, the doing of an act which is wrongful in itself." *Id.* The test is not one of foreseeability, but rather "the absolute duty not to act in a way which unreasonably interferes with other persons' use and enjoyment of their property." *Id.* Under North Dakota law, "[t]he owner of land in fee has the right to the surface and to everything permanently situated beneath or above it." N.D.C.C. §47-01-12.

**a. The District Court's Reliance on *Hale v. Ward Cty.* Was Misplaced.**

[¶14.] The district court primarily relied on this Court's decision in *Hale v. Ward Cty.*, 2012 ND 144, 818 N.W.2d 697 to dismiss G&D's private nuisance claim. App. App. 198. This reliance was unwarranted due to the factual differences between that case and G&D's claim. In *Hale*, the plaintiffs lived within one mile of a shooting range used by law enforcement officers. *Hale*, at ¶2. The district court initially denied a motion for summary judgment, but a second motion for summary judgment was granted. *Id.* at ¶¶7, 10. With regards to the plaintiff's private nuisance claim, this Court held the district court should not have conducted a balancing test on summary judgment, but that ultimately the plaintiffs did not provide competent evidence to support their claims. *Id.* at ¶¶20, 25.

[¶15.] In *Hale*, the plaintiff produced only his own speculation of the danger that the shooting range posed to his property. *Id.* at ¶24. The plaintiff's affidavit for the first

summary judgment motion made assertions regarding prevailing wind patterns, assertions about the type of weapons used at the range (without personal knowledge) and projectile trajectories. *Id.* at ¶6. The affidavit to the second summary judgment motion included additional assertions about projectile trajectories. *Id.* at ¶8. The plaintiff had admitted that he had no expertise regarding the assertions in the affidavits. *Id.* at ¶25. And because no other evidence in the record supported the plaintiff's position, this Court affirmed the district court's dismissal of the private nuisance claim. *Id.*

[¶16.] In this case, the district court concluded that G&D did not present any competent evidence to show there was "actual danger" to its property. App. App. 198. G&D did not rely upon its own affidavit regarding the private nuisance; rather, it relied on the deposition transcripts from three experts. These were the depositions of Loren Daede, a retired, registered engineer with Interstate Engineering; Justin Benz, acting foreman for the water and wastewater department of the City of Beulah; and Russell Duppong, the City Coordinator for the City of Beulah. App. 22, 52, 128.

[¶17.] The depositions excerpts that G&D specifically cited to, competent evidence existed to support G&D's claim that a private nuisance existed because (1) the waterline "[a]nnoys, injures, or endangers the comfort, repose, health, or safety of G&D; or (2) the waterline rendered G&D "insecure . . . in the use of property." N.D.C.C. §42-01-01(1), (4). In the portion of Daede's deposition cited in G&D's answer brief to the summary judgment motion, the following statements were made during the deposition:

> Kaffar: So there is a portion of it that you're not entirely sure of the route of, but you suspect is generally straight?
>
> Daede: Yes

> Kaffar: Okay, I see that there is a rough turn, fairly shallow turn, I'll describe it as. Is that the correct depiction of what you anticipate being underneath there?
>
> Daede: That, I do not know. Like I said it is not to scale. I dimensioned what I could-- . . . to try to pick it up, but I never actually when out to say that this line is directly in line with the manhole I didn't do that . . . I just dimensioned this 22 feet off of this set of plans and this 28 running basically parallel with the building.
>
> Kaffar: Okay. Is there a turn somewhere in this line then that hasn't necessarily been accurately been mapped?
>
> Daede: I don't know that.

App. 74. *See* Docket Index #45 at ¶3 (quotation of deposition testimony in G&D's answer brief to the summary judgment motion).

> [¶18.] Benz similarly made the following statements during his deposition:
>
> Kaffar Q: Okay. When you receive a one-call now for this area, do you go back and mark that line at all?
>
> Benz A: No.
>
> Q. And why is that?
>
> A. Because I still don't know where it runs.
>
> Q. Okay. Has anybody explained that to you or provided you with that information?
>
> A. We – we have an idea where it runs.
>
> Q. Okay.
>
> A. And so I won't mark it. I will – if it is being dug and the contractor is on site, I will tell the contractor that there is a private line there.
>
> Q. Okay. But you won't specifically mark that line?
>
> A. No, because I don't know where it runs specifically and so I cannot mark it.

Q. Okay. So hypothetically speaking, if somebody were to run a fiber optic calbe in that area, will the one-call provide them sufficient notice to be on alert on that – for that line?

A. When you call in a one-call, it tells you that you are responsible for all private lines.

Q. Okay. When you make that call then, will anybody notify Merrilynn Liebelt to be able to warn?

A. No.

Q. Will anybody call G & D Enterprises?

A. No.
Q. And how are they going to be notified to put a contractor on notice?

A. I don't know.

Q. Okay. Do you – do you agree with me that that would create a certain amount of risk for G & D Enterprises having that waterline in that location?

A. I --

Mr. Solem: I'll throw in just the objection to making an opinion on something that he can't make an opinion on.

Q. (MR. KAFFAR CONTINUING) Go ahead and answer.

MR. SOLEM: Answer it.

THE WITNESS: Potentially.

Q. (MR. KAFFAR CONTINUING) Okay. Is the City of Beulah doing anything to remedy that?

A. Not that I know of.

Q. Okay. Have you ever been provided a copy of this map?

A. No.

Q. Is this a – so is this the first time you're seeing this map today?

A. Yes.

App 35–36.

[¶19.] Duppong explained how Beulah's one-call system works during his deposition:

> Kaffar Q. Okay. After the city receives the one-calls, they get distributed to the different departments; is that correct?
>
> A. Correct.
>
> Q. Okay.
>
> A. Yes.
>
> Q. And based on your knowledge, what happens next?
>
> A. On my knowledge after the departments receive them?
>
> Q. Yes.
>
> A. They look to see if they have anything that needs to be located within the area that's being described on the one-call.
>
> Q. And when you say they look for anything that needs to be located, what specifically are they looking for?
>
> A. Water plant would be looking for water services.
>
> Q. Okay.
>
> A. Mains. It's mostly mains, and then if we know where the curb stops are, those types of things.
>
> Q. So they're looking for --
>
> A. And then --
>
> Q. -- curb stops?
>
> A. -- sanitary sewers. So whatever deals with the water department's portfolio.
>
> Q. Okay.
>
> A. So water, sewer.

Q. Are they looking for private individual lines?

A. No. They're private lines.

App. 152.

[¶20.] Daede testified during his deposition that as a result of the puncture to Liebelt's waterline, water came into G&D's building. App. 58. The waterline to Liebelt's was unable to be turned off and turning off the valve to the subdivision did not work. App. 59. The flooding of G&D's building also impacted tangible personal property within the building. *Id.* The existence of the waterline has already caused G&D to have damage and unreasonable interference to its property rights. The fact that neither of the parties know where the line is located for sure and that the City of Beulah cannot locate the waterline through it's one-call service will continue to create an unreasonable interference with G&D's property rights.

[¶21.] In her arguments for summary judgment, Liebelt never asserted that she had acquired any right, such as an implied easement, to interfere with G&D's property rights. The issue of whether an implied easement exists or not generally involves factual issues. *Mougey Farms v. Kaspari*, 1998 ND 188, ¶19, 579 N.W.2d 583. Liebelt did not establish the elements for an implied easement which include "unity of title of the dominant and servient tenement and a subsequent severance; apparent, permanent, and continuous use; and, the easement must be important or necessary for the enjoyment of the dominant tenement." *Id.* at ¶8 (internal quotation marks omitted) (quoting *Lutz v. Krauter*, 553 N.W.2d 749, 751 (N.D. 1996)). At a minimum, Liebelt would did not establish apparent use since no one was aware of where the line was until it was struck, and no evidence was presented to show that any easement was important or necessary for Liebelt.

[¶22.] As the deposition transcripts show, G&D had competent evidence by individuals with personal knowledge regarding (1) the annoyance, injury, or endangerment of the comfort or repose of G&D; or (2) the insecurity in the use of its property that G&D faces due to the existence of the waterline. The exact location of the waterline is unknown to either party and cannot be located by use of the City of Beulah's one-call system. The inability to locate the waterline prevents G&D from fully developing its property, as the summer 2015 incident that located the waterline demonstrates. The deposition transcripts create a genuine dispute regarding material facts, making summary judgment inappropriate in this case.

**b. The District Court Erred By Requiring G&D To Show "Actual Danger" for Its Private Nuisance Claim**

[¶23.] The district court also erred in its analysis of G&D's private nuisance claim by requiring G&D to show there was "actual danger" to its property. As the district court explained, "In the present case, the plaintiff has not provided competent evidence that there is an actual danger to [its] property. Because the plaintiff failed to provide competent evidence of an actual danger to [its] property, the plaintiff's claim does not survive summary judgment on this issue." App. 198. The district court, nor Liebelt, provided any authority that G&D must meet an "actual danger" standard. N.D.C.C. §42-01-1(1) does permit a court to find a nuisance exists if the party's failure to do an act or omitting to perform a duty which ". . . endangers the comfort, repose, health, or safety of others."

However, the use of the disjunctive "or" does not require endangerment to be the only grounds that a nuisance may be based on.[1]

[¶24.] As explained above, G&D established a genuine issue of material facts regarding the annoyance and injury and the insecurity in the use of its property that have resulted from the waterline. This is sufficient to permit a trial on G&D's claim of nuisance under N.D.C.C. §42-01-01(1) and (4), and G&D does not need to establish "actual danger" to its property.

## II. The District Court Erred in Finding There Was No Competent Evidence Supporting G&D's Civil Trespass Claim

[¶25.] Under North Dakota law, "[c]ivil trespass is a common law tort. . ." *Tibert v. Slominski*, 2005 ND 34, ¶15, 692 N.W.2d 133. As the Court has explained:

> This Court has defined trespass as an intentional harm where a person intentionally and without a consensual or other privilege enters land in possession of another or any part thereof or causes a thing or third person so to do. A person who commits a trespass is liable as a trespasser to the other irrespective of whether harm is thereby caused to any of his legally protected interests. If there is no intent or affirmative voluntary act by the alleged wrongdoer, there cannot be a claim for trespass.

Id. (quoting *McDermott v. Sway*, 78 ND 521, 529–30, 50 N.W.2d 235, 240 (1951)) (internal quotations, citations, and alterations omitted).

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[1] The Court has adopted a nuisance standard for when trees and plants encroach on a neighbor's land that required" actual harm or . . . imminent danger of actual harm to adjoining property." *Herring v. Lisbon Partners Credit Fund, Ltd. Partnership*, 2012 ND 226, ¶23, 823 N.W.2d 493. However, that case's holding was limited to establishing "a framework for the resolution of disputes arising from encroaching trees which authorizes judicial and self-help remedies. . .." *Id.* at ¶24. The Court's holding in *Herring* is not applicable to the facts of this case.

**a. The District Court Erred By Not Addressing Liebelt's Actual Alleged Conduct**

[¶26.] In this case, the district court erred in determining that Liebelt had not engaged in any affirmative voluntary act, or otherwise lacked the requisite intent, to be liable for civil trespass. App. 199. By failing to address the actual actions that G&D alleged constituted the civil trespass, the district court erred in dismissing the claim. The district court correctly identified that the water line providing water to Liebelt's property was installed prior to either party acquiring their parcels, and both parties acquired their parcels from a common prior owner. Id. However, the Court erred in determining G&D's claim of civil trespass was for the installation of the water line rather than Liebelt continual use of the water line, causing water to enter the line—and therefore G&D's property.

[¶27.] G&D asserted in count three of its Complaint that "the water line used to provide water to the Defendant's home crosses on to. . .[G&D's] property" and "the entry on to the Plaintiff's property was and continues to be unauthorized." App. 8. G&D requested that injunctive relief be granted to prohibit Liebelt "from using the current water line. . ." *Id.* G&D's Complaint asserted claims against Liebelt's use of the water line, and not the original installation of the line. The focus of the civil trespass claim was also clarified in G&D's post-hearing brief when G&D asserted "there is simply no dispute that every time that water is used at . . . [Liebelt's] residence that water transmits from a city service line across . . . [G&D's] property and into . . . [Liebelt's] residence." Docket Index #45 at ¶4.

[¶28.] Liebelt had the initial burden to show that there is no genuine issue of material fact regarding G&D's civil trespass claim. She did not produce any competent

evidence that she never used the waterline that provided water to her residence. Liebelt's argument in support of summary judgment on G&D's civil trespass claim was that Liebelt did not install the waterline and no voluntary action was present, and that there was no interference with G&D's property. Docket Index #32 at ¶¶15–16.

[¶29.] The district court did not adequately address the actual allegations G&D had made regarding the actions that constituted Liebelt's trespass onto its property. G&D's claim was premised on Liebelt's continued use of the waterline, with each voluntary use of the waterline constituting a trespass upon G&D's property. The district court's focus on the initial installation of the waterline as the trespass misconstrued G&D's allegations. Therefore, the district court erred by dismissing G&D's civil trespass claim on the basis of its failure to establish a genuine issue of material fact regarding Liebelt's voluntary actions.

**b. There Is A Genuine Dispute Of Material Facts Regarding Liebelt's Trespasses**

[¶30.] G&D has established a genuine issue of material fact regarding its civil trespass claim against Liebelt, once the actual nature of G&D's allegations are understood. There are genuine issues of material fact for each element of civil trespass. First, there was an intentional entry by Liebelt onto G&D's property. Each time Liebelt intentionally caused water to travel through the waterline, it constituted a trespass upon G&D's property. Generally, a trespass is not limited to when an person's body enters into another's property, but also can occur when that person causes another thing to enter the property. Restatement (Second) of Torts §158(a). And the intentional entry may be committed beneath the surface of land. Restatment (Second) of Torts §158 cmt. g. Liebelt has not established that there was no intentional entry upon G&D's property.

[¶31.] This case is unlike the alleged affirmative voluntary act in *Knutson v. City of Fargo*, 2006 ND 97, 714 N.W.2d 44. In *Knutson*, a water main broke under the homeowners' residence. *Knutson*, at ¶2. The homeowners "claimed the leakage was an intentional trespass" *Id.* The Court held there was no intentional trespass, as the City of Fargo did not intend for the water main to break. *See id.* at ¶16. The Court also rejected alternative theories for what constituted the intentional entry, such as the original installation of the water main in the 1950s and the City's lack of systems to directly monitor deterioration. *Id.* The issue of water flowing through the water main was not at issue in *Knutson*, as the City of Fargo presumably had obtained an easement to have authority to originally install the water main. *See id.* Unlike the City of Fargo, which did not intend to break its water main, Liebelt does intentionally cause water to enter onto G&D's property.

[¶32.] Second, Liebelt has not established there was a consensual or other privilege to enter G&D's land. The district court partially relied on this Court's decision in *Gray v. Berg* for its finding that there was no intentional entry by Liebelt upon G&D's property. *See* App. 199 (citing *Gray v. Berg*, 2016 ND 82, 878 N.W.2d 79 in rule statement for civil trespass). Although the district court seemed to rely on this case to address whether there was an intentional entry, *Gray* addresses the second element—whether there was a consensual or other privilege—and not whether there was an intentional entry upon another's land. *Gray*, at ¶12. In *Gray*, the defendant shot a deer legally upon his own land and entered Gray's property to recover it. *Id.* at ¶¶2–3. In addition to statutory authorization to recover the deer, Gray actually consented to the entry when the hunter obtained the assistance of a game warden. *Id.* at ¶3. Therefore, no trespass could have occurred. *Id.* at ¶¶12–13. G&D never gave Liebelt permission to enter its land like Gray gave to the hunter,

and the district court did not address whether Liebelt had a privilege to enter G&D's property.

[¶33.] Liebelt also did not established she had a privilege to enter G&D's property, and G&D established no privilege existed. Liebelt did not explicitly make the argument to the district court, but she seemed to implicitly assert she had been granted an implied easement from a pre-existing use. *See generally Griffeth v. Eid*, 1998 ND 38, 573 N.W.2d. 829. However, the question of whether or not an implied easement exists "ordinarily involves factual issues." *Mougey Farms v. Kaspari*, 1998 ND 118, ¶19, 579 N.W.2d 583. Liebelt did not provide with her summary judgment motion any competent evidence supporting all of the elements for an implied easement. Liebelt did not meet her burden under the summary judgment standard. If this issue has been preserved by Liebelt, it should be addressed by the district court after a trial. Liebelt also did not provide any competent evidence to support any other claim that she had a privilege to enter G&D's property.

[¶34.] Third, there was an intentional harm as a result of Liebelt's entry upon G&D's land. "[A]ctual harm is not one of the requisite elements to a claim for trespass," but "actual interference with another's property is." *Tibert v. Slominski*, 2005 ND 34, ¶16, 692 N.W.2d 133 (citing *McDermott v. Sway*, 78 N.D. 521, 530, 50 N.W.2d 235 (1951); 75 Am.Jur.2d Trespass §§8, 14 (1991)). Liebelt did not establish that there was no genuine issue of material fact with regard to this element of civil trespass.

[¶35.] This case involves present interference with G&D's property by Liebelt's continued use of the waterline, unlike the speculative interference alleged in *Tibert v. Slominski*, 2005 ND 34, 692 N.W.2d 133. In *Tibert*, homeowners sued the owners of a neighboring grain elevator regarding a planned road expansion by the grain elevator. *Id.* at

¶¶2–3. The homeowners' claim of trespass against the grain elevator was based on dust particles that would settle on the homeowners' property after the expansion. *Id.* at ¶6. The Court held the homeowners had not suffered harm because the alleged interference with their property would only come after the road had been expanded. *Id.* at ¶16. The homeowners also did not establish how much dust would accumulate after the expansion. *Id.* For these reasons, the Court affirmed the district court's dismissal of the homeowner's trespass claim. *Id.* at ¶17. The alleged interference in *Tibert* is unlike this case, because Liebelt's interference with G&D's property has already occurred by her use of the waterline. By causing water to travel through the waterline, Liebelt has interfered with G&D's property rights. *See* N.D.C.C. §47-01-12 ("The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it.").

[¶36.] For each element of civil trespass, Liebelt has failed to establish that there is no genuine issue of material fact. Liebelt failed to meet her burden with her summary judgment motion with regards to G&D's civil trespass claim. The Court should reverse and remand to allow G&D's civil trespass claim to go to trial.

## III. The District Court Erred By Applying The Wrong Legal Standard for Injunctive Relief

[¶37.] Preventive, or injunctive, relief "consists in prohibiting a party from doing that which ought not to be done." N.D.C.C. §32-05-03; *see also Injunction*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("A court order commanding or preventing an action."). A final injunction may be granted to prevent a breach of an obligation "[w]hen pecuniary compensation would not afford adequate relief" and "[w]hen the restraint is necessary to prevent a multiplicity of judicial proceedings." N.D.C.C. §32-05-04(1), (3). Final injunctions are governed by N.D.C.C. ch. 32-05. N.D.C.C. §32-05-01; *Riemers v. Jaeger*,

2013 ND 30, ¶13, 827 N.W.2d 330 (citing N.D.R.Civ.P. 65 Explanatory Note). Temporary restraining orders and preliminary injunctions may be obtained under N.D.C.C. ch. 32-01 and N.D.R.Civ.P. 65. *Riemers*, at ¶13 (citing N.D.R.Civ.P. 65 Explanatory Note). However, the standards for obtaining a temporary restraining order or injunctive relief are different than for a final injunction. *Magrinat v. Trinity Hosp.*, 540 N.W.2d 625, 628–29 (N.D. 1995).

[¶38.] In this case, the district court denied G&D's request for preventative relief through a final injunction. The district court held G&D "would need to show an immediate and irreparable harm to [its] interests." App. 199 (citing *Nodak Mut. Ins. Co. v. Ward Cty. Farm Bureau*, 2004 ND 60, ¶24, 676 N.W.2d 752). Because G&D "has not shown competent evidence of actual danger to [its] property, . . .[G&D's] claim does not survive summary judgment." App. 199.

[¶39.] As this Court has held, the application of factors to be considered for preliminary injunctions are inappropriate when considering whether to grant a final injunction. *Magrinat v. Trinity Hosp.*, 540 N.W.2d 625, 628–29 (N.D. 1995). In *Magrinat*, a cardiologist obtained a final injunction preventing the hospital from suspending his practice privileges during an internal investigation. *Id.*, at 629. The district considered whether the cardiologist had a substantial probability of succeeding on the merits, whether there would be irreparable injury, whether there would be harm to other interested parties, and the effect on the public interest. *Id.* As the Court reasoned, these are the factors to grant a preliminary injunction, not a final injunction. *Id.* at 628–29. The Court did not determine that the cardiologist's evidence was insufficient under the four factors, but rather that the

cardiologist was not successful in meeting the different standard for final injunctions. *Id.*, at 630.

[¶40.] As argued previously, G&D has demonstrated that there is a genuine dispute of material fact regarding its private nuisance and civil trespass claims. And as argued above, these claims demonstrate that G&D has been harmed by the waterline and Liebelt's use of the waterline. Pecuniary compensation would not afford adequate relief to G&D under these factual circumstances. The Court should hold that the district court erred by granting Liebelt's motion for summary judgment on G&D's request for injunctive relief, and the Court should reverse and remand so that the genuine disputes over material facts can be resolved by a trial.

## CONCLUSION

[¶41.] Liebelt failed to establish there was no genuine issue of material fact for each of G&D's claims. G&D produced deposition testimony in response to her summary judgment motion, establishing the harm that G&D experienced due to the private nuisance. The district court did not identify the correct intentional interference with G&D's property and erred in dismissing G&D's civil trespass. There is a genuine issue of material fact for G&D's civil trespass claim to permit it to go to trial. And the district court erred by applying the preliminary injunction standard to G&D's request for a permanent injunction. For these reasons, the Court should reverse the district court's dismissal of G&D's claims and remand this case to the district court so that a trial may be held.

## CERTIFICATE OF COMPLIANCE

[¶42.] I, Mark Kaffar, as the attorney for the Appellant and the author of this brief, hereby certify that this brief is in compliance with N.D.R.App.P. 32(a)(8)(A). This brief is 23 pages long, excluding any addendum.

Dated: December 2, 2019. s/ Mark A. Kaffar

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**IN THE SUPREME COURT**
**STATE OF NORTH DAKOTA**

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| G&D Enterprises,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>Marrilyn A. Liebelt,<br><br>Defendant and Appellee | Mercer County District Court<br>No. 29-2017-CV-00179<br><br>Supreme Court No. 20190256<br><br>**CERTIFICATE OF SERVICE** |

I, Mark A. Kaffar, certify that on December 2, 2019, I served the following documents by Electronic Service under N.D.R.App.P. 25(c)(1)(D) by filing and serving through the North Dakota Supreme Court E-Filing Portal:

1. Appellant's Brief
2. Appellant's Appendix

On:

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Dated: December 2, 2019.

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