TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: PARAGRAPH

STATUTES:

NORTH DAKOTA RULES OF CIVIL PROCEDURE

OTHER STATUTES:

[1] **Statement Of The Issue Presented For Review**

[2] Did the district court err in granting summary judgment in favor of Lisbon Partners' Credit Fund Partnership and Five Star Services hereinafter "Lisbon Partners" where a duty was owed and there are material issues in dispute, and North Dakota Law offers other remedies besides self-help remedies.

[3] **Statement Of The Case**

[4] This case involves damages Dr. Herring sustained from Lisbon Partners' trees overhanging and brushing against Dr. Herring's building causing damage to the roof and wall of Dr. Herring's building. Dr. Herring filed a complaint on December 7, 2010. Dr. Herring's complaint alleged Lisbon Partners' trees caused damage to his building by overhanging limbs brushing against the roof and building and depositing leaves and debris onto the roof. The buildup of the leaves and debris clogged the gutters and downspouts leading to moisture intrusion along the outer edges of the roof migrating down within the concrete walls. That along with the built up water thawing and freezing led to the deterioration of the roof, walls, wood fascia and other damages requiring Dr. Herring to replace and fix the damage. The complaint sought monetary damages of $17,715.73 for the damages to Dr. Herring's building.

[5] Dr. Herring amended the complaint on August 9, 2011 seeking relief under N.D.C.C. § 42-01-01 and sought damages in the amount of $19,164.73. Lisbon Partners filed a motion for Summary Judgment on October 18, 2011. The hearing was held telephonically on December 6, 2011 before the Honorable Thomas Merrick. On December 6, 2011 Judge Merrick granted Summary Judgment. A Judgment of Dismissal was entered on January 9, 2012.

[6] On February 7, 2012, Dr. Herring's Notice of Appeal was filed.

[7] **Statement Of The Facts**

[8] Dr. Herring's business, Herring Chiropractic Clinic, is located at 12 West 10th Avenue in Lisbon, North Dakota. Lisbon Partners owns an apartment building to the south and west of Dr. Herring's business called 10 Oakes Apartments managed by Five Star Services. Lisbon Partners owns three trees along the north edge of their property abutting next to Dr. Herring's property on the south. The trees are approximately 30-40 feet tall and their branches extend over and overhang onto Dr. Herring's building and brushed and scraped the roof and south wall of his building. Appellant's Appendix (hereinafter "App") (App.p. 36-39, 43, 48). The debris from these overhanging limbs fell onto Dr. Herring's roof plugging the gutters and downspouts leading to a buildup of water on his roof. (App.p. 29, ¶ 4). Dr. Herring, knowing of the problem of the fallen debris on his roof, would clean out his gutters and downspouts semi-annually to allow the water to drain off the roof over the past thirty years. (App.p. 31, ¶ 10). Dr. Herring also would trim back the branches as much as he could, but the trees became so big that he could not trim back far enough without encroaching onto Lisbon Partners' property. (App.p. 31 ¶ 10). These steps were not enough, and Dr. Herring had to replace the roof and repair the cement blocks in the summer of 2010. (App.p. 31, ¶ 11, 40, 41, 42, 44-47).

[9] When Dr. Herring filed a claim with his insurance company, the insurance company sent an engineer to inspect the damage. The engineer's report found that the damage was caused from a buildup of water and ice on the roof from the overhanging tree limbs restricting or blocking the flow of water down the drain spouts leading to water intrusion down the sides of the walls resulting in damage to the cement blocks, roof and wood fascia. (App.p. 35). Dr. Herring replaced the roof, fixed the damage to the cement blocks and replaced the wood fascia. (App.p. 31, ¶ 11).

[10] Dr. Herring contacted Mr. Hendricks, the manager from Five Star Services, the managerial company for Lisbon Partners, concerning the damage Lisbon Partners' trees caused to his building. Dr. Herring wanted Lisbon Partners to trim back the trees and reimburse him for the damage their trees caused his building. (App.p. 30, ¶ 7). Lisbon Partners refused to accept responsibility for the damage sustained by Dr. Herring, but did trim back the trees. (App.p. 31 ¶ 9, ¶ 12).

[11] **Law And Argument**

[12] **I. Standard Of Review**

[13] When a district court grants a motion of summary judgment dismissing a claim, the standard of review by the appellate court is de novo on the entire record. Miller v. Diamond Res., Inc., 2005 ND 150, ¶ 8, 703 N.W.2d 316. On appeal, the Supreme Court reviews the evidence in a light most favorable to the party opposing summary judgment. Makeeff v. City of Bismarck, 2005 ND 60, ¶ 12, 693 N.W.2d 639. On appeal of a district court's grant of summary judgment, questions of law are fully reviewable, and the Court assumes the truth of factual assertions made by the party opposing the motion for summary judgment and draws all favorable inferences for that party. Jones v. Barnett, 2000 ND 207, ¶ 6, 619 N.W.2d 490.

[14] **II. The District Court Erred In Granting Summary Judgment For Summary Judgment Was Not An Appropriate Remedy.**

[15] This Court has repeatedly held that summary judgment is inappropriate if the court must draw inferences and make findings on disputed facts to support the judgment. Farmers Union Oil Co. of Garrison v. Smetana, 2009 ND 74, ¶ 10, 764 N.W.2d 665. Summary judgment is a procedural method to promptly and expeditiously dispose of a controversy without a trial where no genuine issue of material fact exists or if the law is

such that resolution of disputed facts will not change the outcome. Makeeff, 2005 ND 60, ¶ 12, 693 N.W.2d 639. Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. N.D. R. of Civ. P. 56(c). The party seeking summary judgment must demonstrate there are no genuine issues of material facts. Hurt v. Freeland, 1999 ND 12, ¶ 8, 589 N.W. 2d 551. If the movant meets the initial burden of establishing there are no genuine issues of material fact, the party resisting the motion for summary judgment may not simply rely on the pleadings or upon unsupported, conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence raising an issue of material fact. Pechtl v. Conoco, Inc., 1997 ND 61, ¶ 6, 567 N.W.2d 813.

[16] When the North Dakota Supreme Court reviews the propriety of summary judgment, it views the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences that can be reasonably drawn from the evidence.

[17] **A. The district court wrongfully applied N.D.C.C. § 47-01-12.**

[18] N.D.C.C. § 47-01-12 (2011) states as follows:

> The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it.

The district court misapplied this statute in this case by saying that anything that encroaches either above or below your property belongs to you. The district court found that the encroaching branch and branches that hung over Dr. Herring's property belonged

to him and therefore were his responsibility. (App.p. 23-24). That is not what N.D.C.C. § 47-01-12 (2011) says. N.D.C.C. § 47-01-12 (2011) refers to things permanently situated above or below. An encroaching tree branch that overhangs your property does not make the tree branch a permanent item situated above your property. The tree branch is wrongfully trespassing onto your property. The main part of the tree where the tree receives its nourishment and ability to grow is on the neighbor's side of the property. If Dr. Herring had cut down the branches that over hung his property and damaged the trees, he would be liable to Lisbon Partners for the damage done to the trees.

[19] However, a landowner may not enter the property of their neighbor to remove vegetation located on their neighbor's property. N.D.C.C. § 47-01-17 (2011) states:

> Trees whose trunks stand wholly upon the land of one owner belong exclusively to that owner although their roots grow into the land of another. Trees whose trunks stand partly on the land of two or more coterminous owners belong to them in common.

N.D.C.C. § 47-01-17 (2011) states that two owners cannot own the tree if the trunk is placed exclusively on one's land even though the roots grow onto the land of another. An adjoining landowner could not cut the encroaching roots on his property without damaging the tree located on his neighbor's property therefore exposing him to liability for damaging his neighbor's tree. Encroaching roots and branches are not permanent items since N.D.C.C. § 47-01-17 clearly states the owner of the tree is he who owns the land where the trunk stands. The owner of the tree could cut down the tree without gaining the permission of the adjoining landowner where the roots and branches are encroaching. This is not what the State legislature had in mind when N.D.C.C. § 47-01-12 was drafted, for N.D.C.C. §47-01-17 clearly states that the tree is owned by the land

owner upon which the tree is located. In this case the trees' trunks are clearly on the property of Lisbon Partners and therefore their property.

[20] However, even if N.D.C.C. § 47-01-17 is applicable, the district court assumed facts in determining that the damage done by Lisbon Partners' trees was done by the portion of the trees that overhung Dr. Herring's property. There was never any determination, by a trier of fact, whether the portion of the trees wholly on Lisbon Partners' property blew branches and twigs onto Dr. Herring's building leading to the damage caused to Dr. Herring's roof or whether the damage was caused only by the portion of the trees over and above Dr. Herring's property. (App. p. 31, ¶ 4). Part of the debris could have come from parts of the trees that were wholly on Lisbon Partners' property. These are disputed facts the district court inferred in making its finding for Summary Judgment; therefore Summary Judgment is inappropriate. See Farmers Union Oil Co. of Garrison v. Smetana, 2009 ND 74, ¶ 10, 764 N.W.2d 665.

[21] **B. Nuisance is an available remedy.**

[22] Nuisance cases are not appropriate cases for summary judgment and the facts should be heard by a trier of fact. In the case of Jerry Harmon Motors Inc. v. Farmers Union, 337 N.W.2d 427 (N.D. 1983), the ultimate resolution of whether or not a nuisance exists is a conclusion of law; however the underlying facts and circumstances of the case must be developed before the correct law can be applied to those facts. Once the facts are determined on the evidence submitted, the law may be applied to those facts to determine if a nuisance exists. This was reiterated in City of Minot vs. Freelander, 368 N.W.2d 514 (N.D. 1985). Therefore nuisance cases are not appropriate cases for summary judgment and the facts should be heard by a trier of fact.

[23] **1. The district court erred in failing to determine whether a naturally occurring nuisance is actionable when combined with an artificial cause.**

[24] The district court erred in granting summary judgment in favor of Lisbon Partners. Lisbon Partners owes Dr. Herring a duty to maintain their trees under North Dakota Nuisance law. The district court incorrectly determined as a matter of law that Lisbon Partners owed no duty to Dr. Herring to properly maintain their trees to prevent damage to Dr. Herring's building because the trees were a naturally occurring nuisance and therefore not actionable under North Dakota law.

[25] The basic criterion in the whole law of private nuisance is reasonableness of conduct. Rassier vs. Houim, 448 N.W.2d 635 (N.D. 1992). The duty which gives rise to a nuisance claim is the absolute duty not to act in a way which unreasonably interferes with other persons' use and enjoyment of their property. Knoff v. American Crystal Sugar Co., 380 N.W.2d 313 (N.D. 1986). The Knoff court discussed the duty which gives rise to a claim of nuisance and contrasted that with the duty implicated in a negligence action. In Knoff the court stated:

> "To 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. The creation or maintenance of a nuisance is a violation of an absolute duty, the doing of an act which is wrongful in itself, whereas negligence is a violation of a relative duty, the failure to use the degree of care required under particular circumstances in for its existence is liable for resulting damage to others."

Id. at 317 [quoting 58 Am Jur. 2d Nuisances § 3 (1971)].

[26] In this case the district court applied what is called the Massachusetts Rule, and determined the only remedy available to an adjoining landowner who is damaged by

encroaching tree branches is to seek self-help remedies. See (App.p. 23-24). Michalson v. Nutting, 75 Mass 232, 175 N.E. 490, 491 (1931). The Michalson court stated that the common sense of the common law has recognized that it is wiser to leave the individual to protect himself, if harm results to him from this exercise of another's right to use his land in a reasonable way than to subject that other to the annoyance, and the public to burden, of actions at law, which would be likely to be innumerable and in many instances, purely vexatious. Id. at 491.

[27] Only six states limit the remedy to self-help when a tree encroaches upon an adjoining land owner's property and causes damage. Those six states are District of Columbia, Florida, Kentucky, Maryland, Massachusetts, and Missouri. Other states allow remedies other than self-help if the tree causes actual damage. However in the majority of states, including North Dakota, the law is unclear. North Dakota has no case law on point regarding trees. The closest case on point is Kukowski v. Simonson Farm Inc., 507 N.W.2d 68 (N.D. 1993). Kukowski dealt with weeds and whether damage caused by naturally occurring nuisances was actionable. The Court in Kukowski determined that a nuisance cannot arise from the neglect of one to remove that which exists or arises from purely natural causes. But, when the result is traceable to artificial causes, or where the hand of man has, in any essential measure, contributed thereto, the person committing the wrongful act cannot excuse himself from liability upon the ground that natural causes conspired with his act to produce the ill results. Id. at 70.

[28] Kukowski determined that the issue is not whether no duty existed based on the fact a tree is a naturally occurring nuisance and the burden is too great to society, but instead that a duty to maintain property is imposed under N.D.C.C. § 42-01-01 (2011). N.D.C.C. § 42-01-01(2011) states:

> A nuisance consists in unlawfully doing an act or omitting to perform a duty, which act or omission:
> 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, basin, public park, square, street, or highway; or
> 4. In any way renders other persons insecure in life or in the use of property.

Five states have similar statutes. See S.D Codified Laws Ann. § 21-1-1 (2011); Ky. Rev. Stat. Ann. § 411.550 (2012); N.J. Stat. Ann. § 2C:33-12 (2012); N.M. Stat. Ann. § 30-8-1 (2012); Okla. Stat. Ann. tit 50, § 1 (2012). One such state is New Jersey which defines a nuisance as any conduct that is unreasonable or unlawful. See N.J. Stat. Ann. § 2C: 33-12 (2012). This is very similar to North Dakota's nuisance statute that also defines nuisance as unlawful or unreasonable. See N.D.C.C. § 42-01-01 (2011).

[29] In New Jersey there is a case on point where the court looked specifically at whether a tree was a natural cause or an artificial cause. In Deberjeois v. Schneider, 604 A.2d 210 (N.J. 1991), the court found that a planted tree was actionable while a naturally occurring tree or wild tree was not actionable. The court said:

> There has arisen a distinction between conditions of land artificially created as opposed to those which come into existence naturally..."The former are actionable (cit. omitted); the latter are not." .... In this regard, it has been held that the planting of a tree which causes damage to adjoining premises is *not* a natural condition.... Under such distinction, the damages suffered by plaintiffs in this case could be "actionable" against defendant if it were presumed or proven that he or some predecessor in title may have planted the tree in question. (citations omitted).

Id. at 215.

[30] In this case the district court looked at whether this duty was owed to Dr. Herring under N.D.C.C. § 42-01-01 (2011), the nuisance statute and case law. The district court looked at the balance of the following factors in determining whether a duty exists in each case: (1) the foreseeability of harm to plaintiff; (2) degree of certainty that plaintiff

suffered injury; (3) closeness of connection between defendant's conduct and injury suffered; (4) moral blame attached to defendant's conduct (5) policy of preventing future harm; (6) extent of burden to defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (7) availability, cost, and prevalence of insurance for the risk involved. See (App. p. 19). Hurt v. Freeland, 1999 ND 12, ¶ 6, 589 N.W.2d 551. The district court focused on factor number six to find that imposing a duty for naturally occurring conditions would be almost without limit finding naturally occurring nuisances are not actionable. See (App.p. 19).

[31] The court failed to follow established case law as outlined in Kukowski v. Simonson Farm Inc., 507 N.W.2d 68 (N.D. 1993), that a property owner maintaining a naturally occurring nuisance is actionable if combined with artificial causes. The district court dismissed the idea of determining whether a tree is natural or has been planted or preserved and therefore an artificial cause as being too difficult. The district court summarized it as more logical to not impose a duty based on that distinction. The district court never made a determination whether artificial causes combined to impose a duty upon Lisbon Partners. See (App.p. 21-22)

[32] **2. Courts are moving away from distinguishing between natural and artificial cause in nuisance actions.**

[33] Even if you only look at whether a nuisance is naturally occurring or artificially occurring, Courts in other jurisdictions are moving away from the distinction of naturally occurring or artificially occurring in applying the Virginia Rule and the Hawaiian Rule. The Virginia Rule has changed over time. Before 2007, the Rule was that the intrusion of roots and branches from a neighbor's tree which were not noxious in their nature and had caused no sensible injury were not actionable by law. The Plaintiff was limited to his

right of self-help. Smith v. Holt, 5 S.E.2d 492 (VA 1939). That rule was overturned in 2007 in the case of Fancher v. Fagella, 650 S.E.2d 519 (VA 2007). The new Virginia Rule states:

> Encroaching trees and plants are not nuisances merely because they cast shade, drop leaves, flowers, or fruit or just because they happen to encroach upon adjoining land either above or below land. However encroaching trees and plants may be regarded as a nuisance when they cause actual harm or pose an imminent danger or actual harm to adjoining property. If so the owner of the tree or plant may be held responsible for harm caused to adjoining property and may be required to cut back the encroaching branches or roots, assuming the encroaching vegetation constitute a nuisance.

[34] The Hawaii Rule holds that living trees and plants are not ordinarily nuisances, but can become so when they cause actual harm or pose an imminent danger of actual harm to adjoining property. Whiteshell v. Houlton, 632 P.2d 1077 (Haw. 1981). The court held in Whiteshell, that when overhanging branches or protruding roots actually cause, or there is imminent danger of them, causing harm to property other than plant life in ways other than by casting shade or dropping leaves, flowers, or fruit, the damaged or imminently endangered neighbor may cause the cut back to be done at the owner's expense. Id. at 1079.

[35] The courts of other states have also gone away from the Massachusetts Rule. In Kansas, The Court of Appeals of Kansas held that where a tree is a nuisance, one landowner may compel his neighbor to abate that nuisance or seek damages for any injury caused by the tree. Pierce v. Casady, 711 P.2d 766, 767 (KA 1985). The Kansas Court ruled that if trees with overhanging branches do substantial harm or create an imminent danger the tree is a nuisance. Id. at 768.

[36] The New Mexico Court of Appeals discussed Whiteshell, 632 P.2d 1077 (Haw. 1981), the Hawaii Rule, and a number of other cases involving invading branches and roots and ultimately adopted the Hawaii Rule. Abbinett v. Fox, 103 N.M. 80 at 84-85, 703 P.2d 177 (1985). Landowners may use their property in ways that maximize their own enjoyment; they may not unreasonably interfere with the rights of adjoining landowners or create a private nuisance. Id. In Abbinett, the defendants had negligently maintained their tree, damaging the plaintiff, and the appellate court concluded that the trial court had correctly required the defendants to respond in damages. Id. at 84.

[37] Even states that advocate self-help have ruled that self-help is not the only remedy. In Lane v. W.J. Curry and Sons, 92 S.W.2d 355, 359 (Tenn. 2002), the court ruled that self-help is not the only remedy when tree branches and roots encroach upon and damage the neighboring landowner's property. The landowner may recover damages.

[38] **3. There are genuine issues of material facts.**

[39] The party seeking summary judgment must demonstrate there are no genuine issues of material fact. Hurt v. Freeland, 1999 ND 12 ¶ 8, 589 N.W.2d 551. Summary judgment is a procedure for deciding an action without a trial if, after viewing the evidence in the light most favorable to the party opposing summary judgment and giving that party the benefit of all favorable factual inferences which can reasonably be drawn from the evidence, there are no genuine disputes as to either the material facts or the inferences to be drawn from the undisputed facts, or if resolving the disputed facts would not change the result. Kristianson v. Flying J Oil & Gas, Inc., 553 N.W.2d 186 (N.D. 1996).

[40] But here, there were major issues of material fact which were never addressed by the district court. These issues of material fact were whether the trees were naturally occurring trees, ones that were not planted, or ones where the hand of man contributed to the damage by the trees being planted. The district court never looked at such facts as whether the trees were planted in a row or the type of trees to determine whether they were planted or were wild trees. (App. p. 29 ¶ 3). These facts would take the trees from being a naturally occurring nuisance to an artificial occurring nuisance which would be actionable under North Dakota law as discussed in Kukowski v. Simonson Farm Inc., 507 N.W.2d 68 (N.D. 1993). These material facts alone would remove this from a summary judgment motion. The district court never addressed the damage done by the trees or even whether the size of the trees prevented Dr. Herring from resorting to the remedy of self-help. See (App. p. 37, 38, 39, 43). These are all genuine issues of material fact needing to be decided before granting Summary Judgment.

[41] This Court's review of this matter is de novo on the entire record. This Court should determine that the facts as presented by Dr. Herring could establish that Lisbon Partners breached a duty to Dr. Herring as a matter of law. This case should then be remanded to the district court for further proceedings. If this Court determines that there are factual issues for the jury to resolve as to whether Lisbon Partners owed a duty to Dr. Herring under theories of nuisance, then the district court's grant of summary judgment and dismissal of the action should be reversed on that basis and the case remanded to the district court for jury trial.

[42] **C. Negligence is an appropriate remedy.**

[43] Negligence and proximate cause are generally questions of fact for the finder of fact to resolve. Makeeff vs. City of Bismarck, 2005 ND 60, 693 N.W.2d 639. Because

negligence cases often involve questions of fact, summary judgment is generally inappropriate. Id. Therefore this makes negligence actions inappropriate for summary judgment because they involve issues of fact. Botner v. Bismarck Parks and Recreation Dist., 2010 ND 95, 782 N.W.2d. 662. A Court may not weight the evidence, determine credibility, or attempt to discern the truth of the matter when ruling on a motion for summary judgment. Farmers Union Oil Co. of Garrison vs. Smetana, 2009 ND 74, 764 N.W.2d 665. Even undisputed facts do not justify summary judgment if reasonable differences of opinion exist as to the inferences to be drawn from those facts. Doan v. City of Bismarck, 2011 ND 152, 632 N.W.2d 815. Therefore wherever questions of negligence are in issue, summary judgment is improper if there is any doubt as to the existence of a genuine issue of material fact, or if differing inferences can be drawn from the undisputed evidence. Barsness v. Gen. Diesel & Equip. Co. Inc., 383 N.W.2d 844 (N.D. 1986).

[44] **1. Lisbon Partners owed a duty to Dr. Herring to properly maintain their trees.**

[45] It is well established law in North Dakota that for a plaintiff to prevail in a negligence action, there must be a duty on the part of the defendant, a breach of that duty and injuries that are proximately caused by the failure to exercise due care. Groleau v. Bjornson Oil Co., 2004 ND 55, ¶ 6, 676 N.W. 2d 763. For a cause of action in negligence, the plaintiff must prove or establish that the defendant owed a duty to protect him from injury. Grewal v. N.D. Ass'n of Counties, 2003 ND 156, ¶ 9, 670 N.W.2d 336.

[46] The district court in this case wrongfully determined that as a matter of law that Lisbon Partners owed no duty because of the burden naturally occurring conditions would place on a property owner and the potential for unlimited and burdensome lawsuits

on the court system. Generally, the existence of a duty is a preliminary question of law for the court to decide, but if in determining the existence of a duty depends on resolving factual issues, the facts must be resolved by the trier of fact. Pechtl v. Conoco, Inc., 1997 ND 161, ¶ 7, 598 N.W.2d 813. This is in line with N.D.C.C. § 9-10-06 (2011). The district court wrongfully ruled as a matter of law that the trees, a naturally occurring nuisance was not actionable. The district court first should have considered whether the facts existed that showed whether and if any duty was owed Dr. Herring based on the circumstances of the case, such as whether the trees were factually, artificially or naturally occurring.

[47] If the facts show that there is an issue as to whether the trees were naturally occurring or artificially occurring this then is a genuine issue of material fact. This is because Kukowski, supra, says that if there is artificial or act of man involved a natural occurring condition is an actionable cause. The district court never made any determination on that genuine issue of material fact.

[48] In North Dakota everyone owes a duty to avoid injury to another. Every person is bound without contract to abstain from injuring the person or property of another or infringing upon any of his rights. N.D.C.C. § 9-10-01 (2011). Everyone is responsible for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person. N.D.C.C. § 9-10-06 (2011); State v. Stensaker, 2007 ND 6, 725 N.W.2d 883. Whether a defendant owes a plaintiff a duty is generally a question of law for a court to decide, but where the resolution of factual issues is necessary, the factual issues must be resolved by the jury. Iglehart v. Iglehart, 2003 ND 154, ¶ 11, 670 N.W.2d 343.

[49] This is in line with North Dakota statutes and current case law. In Saltsman v. Sharpe, 2011 ND 172, ¶ 10, 803 N.W.2d 553, it was stated:

> "every person is bound without contract to abstain from injuring the person or property of another or infringing upon any of that person's rights." N.D.C.C. § 9-10-01; See also Dinger v. Strata Corp., 2000 ND 41, ¶ 16, 607 N.W.2d 866. "A person is responsible...for an injury occasioned to another by the person's want of ordinary care or skill in the management of the person's property or self." N.D.C.C. § 9-10-06.

[50] In this case, the district court concluded, as a matter of law, that Lisbon Partners owed no duty to Dr. Herring. (App. p. 24). That ruling was wrong. Lisbon Partners owed a duty to Dr. Herring or to any other neighbor to maintain their trees in a way not to damage the property of others. This duty was owed as a matter of law. The district court instead analyzed this case based on the burden that would be placed on the property owner to properly maintain a tree. See (App.p. 19). Saltsman and N.D.C.C. § 9-10-01 imposes a duty on Lisbon Partners to maintain their property in a way not to injure Dr. Herring.

[51] **2. Genuine issues of material fact exist under the law of negligence.**

[52] To establish a cause of action for negligence, a plaintiff must show the defendant has a duty to protect the plaintiff from injury. Pechtl v. Conoco, Inc., 1997 ND 161, ¶ 7, 598 N.W.2d 813. Whether a duty exists is generally a preliminary question of law for the court to decide. Id. If however, the existence of a duty depends upon the resolution of factual issues, the facts must be resolved by the trier of fact. Id. In this case, there are material facts that were never resolved. The Court dismissed any material facts and ruled solely based on the fact the tree was a natural condition of the land and therefore not actionable. But whether a tree is a natural condition of the land or an artificial condition

should at the very least be determined before rendering a decision as to whether Lisbon Partners owed a duty to protect Dr. Herring from harm. If a property owner creates an artificial condition, a duty of reasonable care to guard against injury is imposed. See Harris v. Woolworth, 824 S.W.2d 31, 33 (Mo. App. 1991). One cannot dismiss this case based solely on the trees being a naturally occurring condition because whether the trees are naturally occurring is a factual issue that must go to the jury. The district court never looked at the placement of the trees being almost in a row or the species of trees to determine whether it was planted or wild trees. (App.p. 29, ¶ 3). These issues needed to be determined by a trier of fact.

[53] **D. The lower court wrongfully dismissed the case under civil trespass.**

[54] Generally, civil trespass is a common law tort in North Dakota and is not statutorily defined. However, it has been defined 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 civil trespass. McDermott v. Sway, 78 N.D. 521, 50 N.W.2d 235, 240 (N.D. 1951). If there is no intent or "affirmative voluntary act" by the alleged wrongdoer, there cannot be a claim for trespass. Id. This can pertain to things as well as to people. See Tibert v. Slominski, 2005 ND 34, 692 N.W.2d 133, 137 (Claiming dust formed by the passing by trucks constituted a trespass.)

[55] In this case, Dr. Herring had informed Lisbon Partners, by and through Lisbon Partners' management company, Five Star Services, that their trees were encroaching upon his land and causing damage. (App.p. 30). Lisbon Partners knew the trees were encroaching onto Dr. Herring's property. This fits into part of the definition of civil

trespass as defined by Tibert v. Slominski. Lisbon Partners' permissiveness, in allowing their trees to grow onto Dr. Herring's property, when they had actual knowledge of that trespass, shows their intent to allow the trees to continue to trespass onto Dr. Herring's property. Any ruling by the Court dismissing the trespass as a matter of law was improper due to Lisbon Partners' knowledge that their trees were encroaching onto Dr. Herring's property. Lisbon Partners actual knowledge shows their intent to let their trees to continue to trespass onto Dr. Herring's property. This again demonstrates a genuine issue of material fact.

[56] **III. Conclusion**

[57] The district court erred in determining that Lisbon Partners owed no duty of care to Dr. Herring and that Dr. Herring's only recourse was to seek self-help remedies. Summary Judgment was wrongfully granted for the following reasons:

1. The Court wrongfully applied N.D.C.C. § 47-1-12 for clearly the trees are owned by Lisbon Partners as outlined by N.D.C.C. § 47-01-17.

2. The Court wrongfully applied as a rule of law that self–help is the only available remedy without considering whether any act of man contributed to the damage caused by the trees.

3. The Court wrongfully granted summary judgment for there remain issues of material facts as to the duty owed by Lisbon Partners to Dr. Herring to properly maintain their trees so not to cause injury to Dr. Herring.

[58] Dr. Herring respectfully requests that the Court reverse the District Court's Summary Judgment ruling and remand the case to the District Court for further proceedings and trial.

Dated this 26th day of March, 2012

JONES AND KELLY ATTORNEYS AT LAW

By: _____

Charlotte Selland, ID # 06926
316 Main St
P.O. Box 391
Lisbon, ND 58033-0391
701 683-4123
jklaw@drtel.net
ATTORNEYS FOR APPELLANT