

**STATE OF NORTH DAKOTA**  
**IN THE SUPREME COURT**  
**SUPREME COURT CASE NUMBER 20170190**

---

Owego Township,	)	
	)	<b>APPELLEE’S BRIEF</b>
Plaintiff and Appellee,	)	
	)	
vs.	)	
	)	
Leon Pfingsten,	)	
	)	
Defendant and Appellant.	)	

---

**Appeal from the Order Granting Motion to Dismiss  
dated April 6, 2017  
made by the Honorable Jay A. Schmitz,  
Judge of the District Court, Ransom County, North Dakota**

**District Court of the Southeast Judicial District  
The Honorable Jay A. Schmitz, Presiding  
District Court No. 37-2015-CV-00042**

---

Janel B. Fredericksen (North Dakota ID #05372)  
Amy M. Clark (North Dakota ID #06770)  
Attorneys for Appellee  
Smith & Strege Ltd.  
321 Dakota Avenue  
P.O. Box 38  
Wahpeton, North Dakota 58074  
(701) 642-2668

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iii

STATEMENT OF ISSUES ..... ¶ 1

STATEMENT OF THE CASE..... ¶ 3

STATEMENT OF THE FACTS ..... ¶ 13

ARGUMENT ..... ¶ 16

    1.    THE LOWER COURT PROPERLY DISMISSED  
          PFINGSTEN’S APPEAL BECAUSE IT WAS UNTIMELY ..... ¶ 17

        a.    Standard of Review..... ¶ 18

        b.    Pfingsten’s Appeal was Untimely..... ¶ 22

    2.    THE LOWER COURT PROPERLY DISMISSED  
          PFINGSTEN’S APPEAL BECAUSE IT LACKED SUBJECT  
          MATTER JURISDICTION TO CONSIDER THE APPEAL..... ¶ 27

        a.    Standard of Review..... ¶ 28

        b.    The Lower Court Properly Dismissed Pfingsten’s  
              Appeal Because it Lacked Subject Matter Jurisdiction ..... ¶ 30

    3.    UNLIKE KESSLER, PFINGSTEN DID NOT MAKE A  
          SPECIAL APPEARANCE ..... ¶ 34

CONCLUSION..... ¶ 40

CERTIFICATE OF COMPLIANCE ..... ¶ 43

CERTIFICATE OF SERVICE ..... ¶ 45

TABLE OF AUTHORITIES

1. STATUTES & COURT RULES

N.D.C.C. Chapter 24-07 ..... ¶¶ 4, 6, 12  
N.D.C.C. § 24-07-22..... ¶¶ 23, 24, 25  
N.D.C.C. § 28-34-01..... ¶¶ 23, 24, 32, 33  
N.D.R. Civ. P. 12 ..... ¶¶ 31, 32

2. CASES

Albrecht v. Metro Area Ambulance,  
1998 ND 132, 580 N.W.2d 583 ..... ¶ 29

Bolinske v. Herd,  
2004 ND 217, 689 N.W.2d 397 ..... ¶ 20

Earnest v. Garcia,  
1999 ND 196, 601 N.W.2d 260 ..... ¶ 29

Garaas v. Cass County Joint Water Resource Dist.,  
2016 ND 148, 883, N.W.2d 436 ..... ¶¶ 29, 31, 32, 33

Grand Forks Homes, Inc. v. State,  
2011 ND 65, 795 N.W.2d 335 ..... ¶ 31

Haman v. McHenry County,  
72 N.W.2d 630 (N.D. 1955) ..... ¶ 26

In re Estate of Vaage,  
2016 ND 32, 76 N.W.2d 527 ..... ¶¶ 29, 31

Kessler v. Thompson,  
75 N.W.2d 172 (N.D. 1956) ..... ¶¶ 35, 36, 37, 38, 39

Kliver v. Middlewest Grain Co. et al.,  
173 N.W. 468 (N.D. 1919) ..... ¶ 37

Smith v. Burleigh County Bd. Of Comm’rs.  
1998 ND 105, 578 N.W.2d 533 ..... ¶ 33

Spirit Property Management v. Vonelle,  
2017 ND 158, 897 N.W.2d 334 ..... ¶¶ 20, 21

Zajac v. Traill County Water Resource District,  
2016 ND 134, 881 N.W. 2d 666 ..... ¶ 33

3. SECONDARY AUTHORITIES

6 C.J.S. Appearances § 1. .... ¶ 37

[¶ 1] STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶ 2] Whether the lower court properly dismissed Appellant's appeal as being untimely when such appeal was made more than 30 days after Owego Township filed its Order to Alter Highway and Statement of Damages with the Owego Township Clerk.

[¶ 3] STATEMENT OF THE CASE

[¶ 4] Owego Township ("Owego") commenced proceedings to alter a local road known as the "Bagoon Road" on or about April 21, 2015. Appellee's App. 71-72 ("Resolution of Necessity"). Such proceedings were taken pursuant to Chapter 24-07 of the North Dakota Century Code. As recognized by the lower court, the taking was not through court action, but was rather through township board proceedings. Appeal Transcript of Proceeding, March 30, 2017 ("R.") at 19:16-17. As a result, much of the township board proceedings are not part of the lower court record. In fact, the only records in this matter of the township board's proceedings are contained as exhibits to the affidavits filed in this case. Those records are found in Appellee's Appendix as follows:

1. Resolution of Necessity: Appellee's App. at 35-37, 71-72.
2. Order to Alter Highway: Appellee's App. at 38-40.
3. Statement of Damages: Appellee's App. at 43-44.
4. Letter to Don Eppler, legal counsel for Leon Pfingsten ("Pfingsten"), dated October 5, 2016, providing copies of the Order to Alter Highway and Statement of Damages dated September 26, 2016: Appellee's App. at 45.
5. Confirmation dated December 3, 2016, which confirmed the Order to Alter Highway and Statement of Damages dated September 26, 2016: Appellee's App. at 46.
6. Letter to Don Eppler enclosing a check made payable to Pfingsten in the amount of \$9,000.00 for the damages award: Appellee's App. at 47.

[¶ 5] Owego Township filed an Order to Alter Highway and Statement of Damages with the Owego Township Clerk on September 26, 2016. Appellee’s App. 39, 44. Pfingsten appealed these decisions by filing a notice of appeal with the lower court on January 19, 2017. Case No. 37-2015-CV-00042, Docket ID# 47. Owego Township filed a motion to dismiss the appeal on January 26, 2017, on the grounds that the appeal was untimely. Case No. 37-2015-CV-00042, Docket ID# 50. A telephonic hearing before the lower court was held on March 30, 2017. Appellant’s Appendix (“App.”) at 012. The following facts were found by the lower court:

- a. On September 26, 2016, Owego Township passed an Order to Alter Highway, which provided a legal description for the road that was to be altered.
- b. According to the legal description, two acres of Pfingsten’s property were taken for purposes of altering the road.
- c. On September 26, 2016, Owego Township passed a Statement of Damages that awarded Pfingsten \$9,000.00 as damages for the taking of the two acres.
- d. Pfingsten was provided notice of the Order and Statement of Damages on September 26, 2016.
- e. Pfingsten served and filed a Notice of Appeal on January 19, 2017.

Based on these facts, the lower court dismissed Pfingsten’s appeal on the ground that the appeal was untimely. App. at 014.

[¶ 6] In his brief, Pfingsten describes various lower court proceedings that, with the exception of Owego Township’s motion to dismiss Pfingsten’s appeal, are not relevant. The lower court proceeding involved two separate cases that were later consolidated. Appellee’s App. 26. The two lower court cases involved the following:

- a. Case No. 37-2015-CV-00042: This was a proceeding brought by Owego Township to determine whether a part of the Bagoon Road was a road by prescription, and it also sought damages from

Pfingsten for intentional damage to the Bagoon Road. Appellee's App. 5-8 ("Complaint").

- b. Case No. 37-2015-CV-00048: This proceeding was simultaneously brought by Owego Township to request permission to access land owned by Pfingsten for the purpose of conducting a survey. Appellee's App. 67-72 ("Application for Permit to Enter Land").

Neither case involved the actual taking of Pfingsten's land by Owego Township; rather, the taking action was by a separate township proceeding conducted pursuant to N.D.C.C. Chapter 24-07. As such, it was inappropriate for Appellant to have filed his notice of appeal in Case No. 37-2015-CV-00042. This was recognized by the lower court when it stated: "There was no, there was no taking action filed. You never contested their taking action. . . . That was pending in the township board proceedings. You have to file an appeal once the decision is made." R. at 19:3-5, 19:16-18.

[¶ 7] While the proceedings in case numbers 37-2015-CV-00042 and 37-2015-CV-00048 are not relevant to this appeal for the reasons cited above, Appellee wishes to correct certain mischaracterizations of the lower court record.

[¶ 8] First, Pfingsten references the lower court's denial of a temporary restraining order and implies that Owego Township misled the lower court. The temporary restraining order dealt with the ability of a local farmer to gain access to his land for the purpose of planting and Pfingsten's efforts to interfere with the same. The issues before the Court involved (a) the likelihood of a prescriptive easement ultimately being granted, and (b) whether the farmer's crop had been planted at the time the farmer's affidavit was signed/filed. These issues are irrelevant for the purpose of determining whether Pfingsten's appeal of this matter is timely.

[¶ 9] Second, Pfingsten references a related criminal case (Case No. 37-2015-CV-00156) in which Pfingsten was charged with damaging the Bagoon Road and failing to erect signs for public safety at the time of such damage. See Appellant’s Brief, ¶ 8. Pfingsten implies wrongdoing by Owego Township involving a letter to be sent to the state’s attorney. Id. ¶ 11. The referenced letter was, in fact, sent to the state’s attorney, but is not part of the lower court records. Again, whether such letter was sent is irrelevant for purposes of whether Pfingsten’s appeal of this matter is timely.

[¶ 10] Third, opposing counsel mischaracterizes the parties’ stipulation entered into on December 10, 2015. See App. at 006-011 (“Stipulation”). Opposing counsel incorrectly states that the stipulation “expressly said the Township cannot commence a takings action unless a survey was conducted and that survey was not dated until January of 2017.” Appellant’s Br., ¶ 12. This is simply not true. The stipulation specifically references that Owego was already in the process of taking property through a separate proceeding, but needed to obtain an order allowing access to Pfingsten’s property for the purpose of conducting a survey. App. at 007, ¶ 10. The stipulation contemplates that Owego Township would proceed with its taking action upon obtaining a survey, which is exactly what Owego Township did. App. at 008, ¶ 15. Owego Township proceeded to have a survey done, obtained a description of the land to be taken, entered and filed the Order to Alter Highway and Statement of Damages, and provided Pfingsten with notice of the same. R. at 11:8-24; Appellee’s App. at 38-40, 43-45. Contrary to Pfingsten’s argument, nothing within the stipulation restricted Owego Township’s right to complete the separate taking action; rather, the stipulation contemplated that Owego would proceed



with the separate taking action, which is exactly what Owego Township did. See App. 006-011 (“Stipulation”).

[¶ 11] Fourth, opposing counsel makes a second mischaracterization of the parties’ stipulation entered into on December 10, 2015. Opposing counsel quotes a line within the stipulation stating: “[t]he parties agree to take no action in furtherance of their position’ until a resolution is found or until December 31, 2016.” Appellant’s Brief, ¶ 21; quoting App. at 010 (Stipulation, ¶ 21, Dec. 10, 2015). This sentence of the stipulation is not in regard to the Bagoon Road or the taking action at all. Rather, this sentence is in regard to a dispute between the parties about a different road located between Sections 8 and 9 of Owego Township. See App. at 009-010. The second road that is referenced in the quote cited by opposing counsel is irrelevant for purposes of this appeal.

[¶ 12] Again, this appeal concerns actions taken by Owego Township pursuant to N.D.C.C. Chapter 24-07. Neither of the two lower court cases (Civil Nos. 37-2015-CV-00042 and 37-2015-CV-00048) are Owego Township’s taking action, and as such, the proceedings of the two lower court cases are largely irrelevant to the present appeal.

#### [¶ 13] STATEMENT OF FACTS

[¶ 14] On September 26, 2016, the Owego Township Board of Supervisors passed an Order to Alter Highway and Statement of Damages, which were filed with the Township Clerk the same day. See Appellee’s App. at 38-40, 43-44. The Order to Alter Highway altered a portion of a township road, locally known as the “Bagoon Road”, located in the Southwest Quarter (SW1/4) of Section 9, in Township 135, Range 53, Ransom County, North Dakota. Appellee’s App. at 38-40. The alteration required the

taking of two acres of Pfingsten's property by Owego Township. Appellee's App. at 43-44. The Statement of Damages awarded Pfingsten \$9,000.00 for the two acres that were taken. Id. The Order to Alter Highway and Statement of Damages were filed with the Owego Township Clerk. Appellee's App. at 39, 44. Pfingsten was provided copies of the Order to Alter Highway and Statement of Damages. Appellee's App. at 45; App. at 013; R. at 5:8-11, 8:11-17; 20:13-14.

[¶ 15] On or about January 19, 2017, Pfingsten filed a Notice of Appeal in North Dakota case number 37-2015-CV-00042, in which he attempted to appeal Owego Township's Order to Alter Highway and Statement of Damages. Appellee's App. at 29. On January 26, 2017, Owego Township filed a motion to dismiss the appeal. Appellee's App. at 31. A hearing on Owego Township's motion was held on March 30, 2017, and the lower Court dismissed Pfingsten's appeal on the ground that it was untimely. App. 012-014.

#### [¶ 16] ARGUMENT

[¶ 17] 1. THE LOWER COURT PROPERLY DISMISSED PFINGSTEN'S APPEAL BECAUSE IT WAS UNTIMELY.

[¶ 18] a. Standard of Review.

[¶ 19] The determination of whether Pfingsten's appeal was timely filed involves a mixed question of law and fact.

[¶ 20] The findings of fact determined by the lower court, such as the date of Owego Township's decision and the date of Pfingsten's appeal, are subject to a clearly erroneous standard of review. Spirit Property Management v. Vonell, 2017 ND 158, ¶ 16, 897 N.W.2d 334, citing Bolinske v. Herd, 2004 ND 217, ¶ 7, 689 N.W.2d 397 ("we use...a clearly erroneous standard for factual findings"). "A finding of fact is clearly

erroneous if it is not supported by any evidence, if, although some evidence supports the finding, a reviewing court is left with a definite and firm conviction a mistake has been made, or if the finding is induced by an erroneous conception of the law.” Spirit Property Management, 2017 ND 158, ¶ 16, 689 N.W.2d 397.

[¶ 21] The lower court’s legal conclusion, namely that Pfingsten’s appeal is untimely, is a conclusion of law that this Court reviews under a de novo standard of review. Id. (“we use the de novo standard of review for legal conclusions”).

[¶ 22] b. Pfingsten’s Appeal was Untimely.

[¶ 23] The lower court correctly concluded that Pfingsten’s appeal was untimely. N.D.C.C. § 24-07-22 provides the following:

Any person who feels aggrieved by any determination or award of damages made by the board having jurisdiction, either in laying out, altering, or discontinuing, or in refusing to lay out, alter, or discontinue, any highway or cartway, within thirty days after the filing of such determination or award of damages, as provided in this chapter, may appeal therefrom to the district court in accordance with the procedure provided in section 28-34-01.

(emphasis added). Similarly, Section 28-34-01(1) provides: “The notice of appeal must be filed with the clerk of court within thirty days after the decision of the local governing body.” (emphasis added).

[¶ 24] The Order to Alter Highway and Statement of Damages from which Pfingsten appealed were made and filed on September 26, 2016. Appellee’s App. at 39, 44. Pfingsten’s time to appeal the decisions expired on October 26, 2016, which is 30 days after the Order to Alter Highway and Statement of Damages were filed with the Township Clerk. N.D.C.C. 24-07-22; N.D.C.C. § 28-34-01(1). Pfingsten’s notice of appeal was not filed within those 30 days; therefore, the appeal was untimely.

[¶ 25] Appellant incorrectly argues that “[t]he timetable for when [P]fingsten” should have appealed started the date he received the award of damages[.]” Appellant’s Brief ¶ 15. This is contrary to the plain meaning of the statute, which clearly provides as follows: “Any person who feels aggrieved by any determination or award of damages..., within thirty days after the filing of such determination or award of damages, as provided in this chapter, may appeal therefrom to the district court.” N.D.C.C. § 24-07-22 (emphasis added). Per the statute, the appeal period begins to run after the filing of an order or award of damages, not after payment of the damages, as argued by Appellant.

[¶ 26] In Haman v. McHenry County, 72 N.W.2d 630 (N.D. 1955), the North Dakota Supreme Court specifically addressed when the appeal period begins to run. While that case involved a board of county commissioners and the present case involves a township proceeding, the same statute and appeal period are at issue. See id. at 633 (discussing NDRC Section 24-0716 as “dealing with procedure for the ascertainment of damages by the board of county commissioners, or in some instances by the board of township supervisors”). In that case, a board of county commissioners brought an eminent domain proceeding for the purpose of taking land for highway purposes. Id. at 631-32. An award was made to the affected landowner, but it was unclear when the award was filed with the county auditor. Id. at 632. The Court specifically held that the appeal period began at the time the award was filed with the county auditor, and due to the inability to determine when the filing date occurred in that case, the Court gave the landowner the benefit of the doubt and assumed the filing date was the same as the date of payment. Id. at 634. In making this determination, the Court provided the following reasoning on why the filing date starts the appeal period:

Under the provisions of Section 24-0716, NDRC 1943 the statement of the amount of damages assessed by the board of county commissioners must be filed with the county auditor who shall note the time of filing. Under Section 24-0722, NDRD 1943 a person aggrieved by the awarded damages may appeal within thirty days after the filing of the award. We deem the provision with regard to filing important for it fixes the place to which the property owner may go to ascertain what award has been made. There is no provision in the statute for giving him notice of the award. It is not made available to him in any other manner than by filing in the office of the county auditor. Until that act has been performed an award that has been made has no definite place of repose.

Id. In the present case, the Order to Alter Highway and Statement of Damages were clearly made and filed on September 26, 2016. Appellee’s App. 39, 44. Per the plain meaning of the statute, Pfingsten had 30 days to appeal from the filing of the Township’s decision. Pfingsten failed to file a notice of appeal within such 30 day appeal period, and as such, the lower court correctly determined that Pfingsten’s appeal was untimely.

[¶ 27] 2. THE LOWER COURT PROPERLY DISMISSED PFINGSTEN’S APPEAL BECAUSE IT LACKED SUBJECT MATTER JURISDICTION TO CONSIDER THE APPEAL.

[¶ 28] a. Standard of Review.

[¶ 29] “Subject-matter jurisdiction is the court’s power to hear and determine the general subject involved in the action[.]” Garaas v. Cass County Joint Water Resource Dist., 2016 ND 148, ¶ 4, 883 N.W.2d 436, citing Albrecht v. Metro Area Ambulance, 1998 ND 132, ¶ 10, 580 N.W.2d 583. “Issues involving subject matter jurisdiction cannot be waived and can be raised sua sponte at any time.” Garaas, 2016 ND 148, ¶ 4, 883 N.W.2d 436 (citing Earnest v. Garcia, 1999 ND 196, ¶ 7, 601 N.W.2d 260). “When jurisdictional facts are not disputed, the issue of subject matter jurisdiction is a question of law, which we review de novo.” Garaas, 2016 ND 148, ¶ 4, 883 N.W.2d 436 (citing In re Estate of Vaage, 2016 ND 32, ¶ 14, 76 N.W.2d 527).

[¶ 30] b. The Lower Court Properly Dismissed Pfingsten’s Appeal Because it Lacked Subject Matter Jurisdiction.

[¶ 31] The lower court properly entered an order dismissing Pfingsten’s appeal because it lacked subject matter jurisdiction to consider the appeal. “Timely filing of an appeal from a decision of a [local governing body] is mandatory to invoke a district court’s appellate subject matter jurisdiction over the appeal.” Garaas, 2016 ND 148, ¶ 28, 883 N.W.2d 436 (quoting Grand Forks Homes, Inc. v. State, 2011 ND 65, ¶ 20, 795 N.W.2d 335. “North Dakota Rule of Civil Procedure 12(h)(3) compels the district court to dismiss an action whenever it appears the court lacks jurisdiction of the subject matter.” Garaas, 2016 ND 148, ¶ 5, 883 N.W.2d 436.

[¶ 32] In Garaas, the North Dakota Supreme Court considered whether a lower court properly dismissed an appeal of a decision from the Cass County Joint Water District when the notice of appeal was filed but not served within the 30 day appeal period. Garaas, 2016 ND 148, ¶ 4, 883 N.W.2d 436. The Court affirmed the lower court’s dismissal of the action due to a lack of subject matter jurisdiction. Id. ¶ 29. The Court held as follows:

“Timely filing of an appeal from a decision of a [local governing body] is mandatory to invoke a district court’s appellate subject matter jurisdiction over the appeal.” “The 30-day time limit for appealing a local governing body decision under N.D.C.C. § 28-34-01 is...a statute conferring appellate subject-matter jurisdiction upon a reviewing court.” “For subject-matter jurisdiction to attach, the particular issue to be determined must be properly brought before the court in the particular proceeding.” To properly bring an appeal under N.D.C.C. § 28-34-01, [the person bringing the appeal] had 30 days after the District’s decision to file a notice of appeal with the clerk of court and serve a member of the local governing board. Without fulfilling both requirements, subject matter jurisdiction did not attach and the district court was required to dismiss the case under N.D.R.Civ. P. 12(h)(3).

Id. ¶¶ 28-29 (internal citations omitted) (emphasis added).

[¶ 33] N.D.C.C. § 28-34-01 is the statute that confers appellate subject matter jurisdiction to the lower court in this case. Garaas, 2016 ND 148, ¶ 28, 883 N.W.2d 436 (citing Zajac v. Traill County Water Resource District, 2016 ND 134, ¶ 10, 881 N.W.2d 666). The statute provides: “The notice of appeal must be filed with the clerk of the court within thirty days after the decision of the local governing body. A copy of the notice of appeal must be served on the local governing body in the manner provided by rule 4 of the North Dakota Rules of Civil Procedure.” N.D.C.C. § 28-34-01(1). Furthermore, unlike North Dakota’s appellate court rules, N.D.C.C. § 28-34-01 does not recognize any post-decision motions that would extend the time to appeal a local governing body’s decision. Smith v. Burleigh County Bd. Of Comm’rs., 1998 ND 105, ¶ 8, 578 N.W.2d 533. In this case, Pfingsten did not file and serve a notice of appeal within 30 days. As such, the lower court lacked subject matter jurisdiction and properly dismissed the appeal.

[¶ 34] 3. UNLIKE KESSLER, PFINGSTEN DID NOT MAKE A SPECIAL APPEARANCE.

[¶ 35] Mr. Pfingsten relies on Kessler in arguing that his right to appeal has not been waived. Kessler v. Thompson, 75 N.W.2d 172 (N.D. 1956). Kessler was a unique case that is distinguishable from the present matter. In Kessler, a board of county commissioners commenced an eminent domain proceeding to take property owned by Kessler. Id. at 176. Kessler made a special appearance at a hearing held by the county commissioners for the sole purpose of objecting to the board’s subject matter jurisdiction and personal jurisdiction, arguing that the constitution only allows courts to make determinations with respect to the taking of property. Id. at 177. In his special appearance, Kessler stated that he did not intend to appeal the county commissioner’s

award, but rather would bring an action to enjoin the methods used by the board on the grounds that such methods were unconstitutional. Id. at 186. Kessler then proceeded to bring the separate court action to enjoin further proceedings by the board. Id. at 176.

[¶ 36] The two unique facts of Kessler are the same facts that distinguish Kessler from the present case. First, Kessler made a special appearance; Pfingston did not. Second, Kessler commenced a separate court action to protect his rights; Pfingsten did not.

[¶ 37] As provided in Kessler, “A special appearance, while not regarded as an appearance at all for some purposes, is one which is made for the sole purpose of objecting to the jurisdiction of the court over the person of defendant.” Id. at 186, citing 6 C.J.S. Appearances § 1, p. 6; Kluver v. Middlewest Grain Co. et al., 173 N.W. 468 (N.D. 1919). While Pfingsten participated in and made a number of objections throughout the township board’s proceedings, Pfingsten did not make a special appearance to object to the Township’s personal or subject matter jurisdiction.

[¶ 38] Pfingsten also did not bring a separate action before the Court to enforce constitutional property rights, as was done in Kessler. Rather, the two consolidated lower court actions were brought by Owego Township for the purpose of establishing a portion of the Bagoon Road as a road by prescription, and to obtain access to Pfingsten’s property in order to conduct a survey in furtherance of the pending township board proceedings. There were also two separate criminal cases in which Pfingsten was found guilty for damaging the Bagoon Road.<sup>1</sup> See North Dakota Case No. 37-2015-CR-00156

---

<sup>1</sup> In Case No. 37-2015-CR-00156, a Judgment of Acquittal was entered following the return of a jury’s guilty verdicts.



(found guilty for injury to highway, obstructing highway, and failure to erect warning sign) and North Dakota Case No. 37-2014-CR-00167 (found guilty for injury to highway). The criminal actions were brought by the county following damage to the Bagoon Road by Pfingsten; the actions were not brought by Pfingsten to assert constitutional property rights as in Kessler.

[¶ 39] Kessler was a unique case that is distinguishable from the present matter. Unlike Kessler, Pfingsten made no special appearance and took no unique legal action to preserve his rights. Therefore, Pfingsten's arguments under Kessler must fail.

#### [¶ 40] CONCLUSION

[¶ 41] The lower court properly granted Owego Township's motion to dismiss Pfingsten's appeal. Pfingsten failed to file his notice of appeal within 30 days of the filing of Owego Township's Order to Alter Highway and Statement of Damages. Pfingsten's appeal is therefore untimely, the lower court lacked subject matter jurisdiction to hear the appeal, and the lower court properly entered an order granting Owego Township's motion to dismiss the appeal. As such, Appellee respectfully requests this Court to affirm the lower court's decision.

[¶ 42] Dated this 27 day of September, 2017.

SMITH & STREGE LTD.  
321 Dakota Avenue  
P.O. Box 38  
Wahpeton, North Dakota 58074  
(701) 642-2668  
(701) 642-4729 (Fax)

By /s/ Janel B. Fredericksen  
Janel B. Fredericksen  
Attorney for Appellee  
North Dakota ID #05372  
janelfredericksen@smithstrege.com

[¶ 43] CERTIFICATE OF COMPLIANCE

[¶ 44] The undersigned, as attorney for Appellee, hereby certifies that Appellee's Brief was prepared with proportional typeface and that Appellee's Brief does not exceed 8,000 words.

SMITH & STREGE LTD.  
321 Dakota Avenue  
P.O. Box 38  
Wahpeton, North Dakota 58074  
(701) 642-2668  
(701) 642-4729 (Fax)

By /s/ Janel B. Fredericksen  
Janel B. Fredericksen  
Attorney for Appellee  
North Dakota ID #05372  
janelfredericksen@smithstrege.com

[¶ 45] CERTIFICATE OF SERVICE

[¶ 46] I hereby certify that on the 27th day of September, 2017, true and correct copies of Appellee's Brief and Appellee's Appendix were served electronically upon Scott Brand, attorney for Appellant, at the following e-mail address:  
sbrand@brudviklaw.com.

[¶ 47] Dated this 27th day of September, 2017.

/s/ Amy M. Clark  
Amy M. Clark (#06770)