STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF KIDDER

SOUTH CENTRAL JUDICIAL DISTRICT

Steven Shelquist and Lesley Shelquist,

Plaintiffs,

vs.

Black Gold Farms, Francisco Villarreal, Thomas Martinez, personally and d/b/a Martinez & Sons,,

Defendants.

Case No. 04-C-53

MEMORANDUM AND ORDER

OCT 23 2006

This is a personal injury action arising out of a motor vehicle accident which occurred September 26, 2002, in rural Kidder County, North Dakota. At the time of the accident, Plaintiff Steven Shelquist was employed as a field manager for Defendant Black Gold Farms, a potato farming operation located near Tappen, North Dakota. The accident occurred when Steven Shelquist made a left-hand turn into oncoming traffic and was struck by a potato truck owned by Defendant Martinez & Sons and driven by Defendant Francisco Villarreal, a Martinez employee. Shelquist was following behind another potato truck and his vision was obscured by dust at the time the accident occurred.

Shelquist commenced this action with a summons and complaint dated June 24, 2004, in which he alleged that: (1) Defendant Villarreal was negligent in the manner in which he operated a truck owned by Defendant Martinez; (2) Defendant Martinez personally and d/b/a Martinez & Sons is vicariously liable for damages caused by its employee Villarreal and that it negligently failed to supervise Villarreal; (3) Black Gold Farms was negligent for failing to water the public

gravel road which ran adjacent to its facility to reduce dust on the road; (4) Black Gold Farms failed to provide a safe workplace for its employee, Shelquist; and, (5) Thomas Martinez and Black Gold Farms were engaged in a common enterprise and should be jointly and severally liable for the Plaintiffs' damages. The complaint sought damages for personal injuries sustained by Shelquist in the accident and for loss of consortium damages by Steven Shelquist's wife, Plaintiff Leslie Shelquist. Answers filed by each of the Defendants denied liability for the Plaintiffs' damages.

Each of the Defendants has filed a motion for summary judgment requesting that the Plaintiffs' complaint against them be dismissed. The Plaintiff opposes the Defendants' motions for summary judgment and has filed a motion to amend the complaint to assert a nuisance claim against Defendant Black Gold Farms. Oral argument on these motions was heard by the Court on July 24, 2006. The Plaintiffs were represented at the hearing by Attorney David Schweigert of Bismarck. Defendant Black Gold Farms was represented by Attorney Kristi Warner of Minneapolis. And Defendants Villarreal and Martinez and Martinez & Sons were represented by Attorney Troy Wolf of Moorhead, Minnesota.

Law Regarding Summary Judgment. Rule 56(c) of the North Dakota Rules of Civil Procedure provides, in part, that summary judgment is proper "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."

In the recent case of *Beckler v. Bismarck Public School Dist.*, 2006 ND 58, ¶7, 711 N.W.2d 172, 175, the North Dakota Supreme Court stated:

> Summary judgment is a procedural device under N.D.R.Civ.P. 56 for prompt and expeditious disposition of a controversy without a trial if either party is entitled to judgment as a matter of law, and if no dispute exists as to either the material facts or the inferences to be drawn from undisputed facts, or if resolving disputed facts would not alter the result. *Green v. Mid Dakota Clinic*, 2004 ND 12, ¶ 5, 673 N.W.2d 257. The party moving for summary judgment must show that there are no genuine issues of material fact and that the case is appropriate for judgment as a matter of law. *Id.* . . . The party resisting the summary judgment motion cannot, however, merely rely on the pleadings, briefs, or unsupported and conclusory allegations. *Fast v. State,* 2004 ND 111, ¶ 6, 680 N.W.2d 265. The resisting party 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 in the record by setting out the page and line in depositions or other comparable documents containing testimony or evidence raising an issue of material fact. *Peterson v. Zerr,* 477 N.W.2d 230, 234 (N.D.1991). The nonmoving party cannot rely on speculation and must present "enough evidence for a reasonable jury to find for the plaintiff." *Iglehart v. Iglehart,* 2003 ND 154, ¶ 10, 670 N.W.2d 343.

Factual issues become appropriate for summary judgment "when reasonable minds can draw but one conclusion from the evidence." *Opp v. Source One Mgmt., Inc.*, 1999 ND 52, ¶ 16, 591 N.W.2d 101.

I. MARTINEZ AND VILLARREAL'S MOTION FOR SUMMARY JUDGMENT

Villarreal and Martinez have brought a motion for summary judgment claiming that Villarreal, and thus Martinez, were not negligent under the undisputed facts of this case. Negligence actions typically involve questions of fact and are generally inappropriate for summary judgment. *Azure v. Belcourt Pub. Sch. Dist.*,

2004 ND 128, ¶ 9, 681 N.W.2d 816, 819. "Questions of negligence and contributory negligence are questions of fact for the jury unless the evidence is such that reasonable men can draw but one conclusion therefrom." *Spenningsby v. Peterson*, 67 N.W.2d 913, 915 (N.D. 1955) (citing *Armstrong v. McDonald*, 72 N.D. 28, 4 N.W.2d 191 (1942); *Fagerlund v. Jensen*, 74 N.D. 766, 24 N.W.2d 816 (1946); *Pachl v. Officer*, 79 N.D. 143, 54 N.W.2d 883 (1952)).

Shelquist alleges that Villarreal was driving at a speed in excess of what was reasonably safe and prudent for the existing road conditions and without care for the conditions. Villarreal and Martinez assert that Villarreal was not negligent, that there is no genuine issue of material fact on the issue of speed, and that Villarreal's speed was not a proximate cause of the accident.

Martinez and Villarreal are correct that the lawful speed limit on the township road was 55 m.p.h. pursuant to N.D.C.C. § 39-09-02(1)(f). However, subsection 1(f) is qualified by the statement "unless otherwise permitted, restricted, or required by conditions." Also, subsection 1(d) provides that the speed limit is 20 m.p.h. "when the driver's view of the highway ahead is obstructed within a distance of one hundred feet." Further, under N.D.C.C. § 39-09-01:

> No person may drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. Consistent with the foregoing, every person shall drive at a safe and appropriate speed when approaching and crossing an intersection or railroad grade crossing, when

> approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions.

"[A] motorist whose vision is obscured by atmospheric conditions such as fog or rain must exercise care commensurate with the situation and cannot assume that his course of travel is free of danger or obstruction in the absence of ability to see clearly." *Morton v. Dakota Transfer & Storage Co.*, 78 N.D. 551, 555-56, 50 N.W.2d 505, 508 (1952) (citing *Schaller v. Bjornstad*, 77 N.D. 51, 40 N.W.2d 59 (1949)).

In a case factually similar, but with snow rather than dust, the South Dakota supreme court stated:

> Ordinary care is commensurate with existing and surrounding hazards. 'The greater the danger, the greater is the care required, so that a very high degree of danger calls for a very high degree of care, which, however, amounts to ordinary care in view of the situation and circumstances.

Theunissen v. Brisky, 438 N.W.2d 221, 223-24 (S.D. 1989) (quoting *Lovell v. Oahe Elec. Co-op*, 382 N.W.2d 396, 398 (S.D. 1986)). In *Theunissen*, the decedent, plaintiff's husband, made a left-hand turn in front of the defendant's semi truck. *Id.* at 221. At the time of the collision, visibility was diminished due to snow. *Id.* The defendant could not see decedent until just before impact and decedent made the

turn without knowing if it was safe to do so. *Id.* at 224. The court determined it was not an appropriate case for summary judgment holding that:

> [W]hat this amounts to is a fact finding without giving the nonmoving party the benefit of every inference. The fact that Brisky was overdriving his range of visibility does not prove anything about decedent's conduct. We hold that under the circumstances of this case, it was for the jury to determine whether decedent was negligent in the manner in which he attempted to make the left-hand turn. It must determine whether decedent exercised due care under the circumstances. This is a question of fact. *Id.*

Likewise, in this case, it is for the jury to decide the issues of negligence even where Shelquist may have turned in violation of statute. Even though Mr. Villarreal may have been traveling at a speed below the posted speed limit, Shelquist argues that Villarreal should not have been proceeding forward at all under the existing conditions. The question of whether Villarreal was traveling too fast for the existing conditions, regardless of his speed, is a question of fact which makes summary judgment inappropriate. The standard for granting summary judgment is not the likelihood of success at trial, but rather whether a disputed factual issue exists. While the facts presented to the Court for this motion seem to indicate that the Plaintiff will likely have a difficult time convincing a jury that he was less than fifty percent at fault for this accident, he has nevertheless presented evidence of a factual dispute sufficient to withstand summary judgment. Consequently, the summary

judgment motions of Villarreal and Martinez for dismissal of the Plaintiffs' negligence claims are DENIED.

II. JOINT AND SEVERAL LIABILITY.

Shelquist does not appear to be contesting Villarreal and Martinez's motion for summary judgment regarding joint and several liability. The case law in North Dakota dealing with the issue does not appear to support an allegation of "in concert" action among the defendants.

> "In the tort field, the doctrine [of § 876] appears to be reserved for application to facts which manifest a common plan to commit a tortious act where the participants know of the plan and its purpose and take affirmative steps to encourage the achievement of the result . . ."

Hurt v. Freeland, 1999 ND 12, ¶ 23, 589 N.W.2d 551, 557 (quoting *Olson v. Ische*, 343 N.W.2d 284, 288 (Minn. 1984)).

The North Dakota Supreme Court has declined to construe "in concert" broadly. *Reed v. UND*, 1999 ND 25, ¶ 34, 589 N.W.2d 880, 888-89. The facts of this case do not appear to rise to the level of an "in concert" action to which joint and several liability would apply. Therefore, the summary judgment motion of Villarreal and Martinez requesting dismissal of the allegations of Joint and Several Liability contained in Part H of the Complaint is GRANTED.

III. BLACK GOLD FARMS' MOTION FOR SUMMARY JUDGMENT

The subject accident occurred on a township road. Under N.D.C.C. § 24-01-01, local officials are given the authority to "plan, develop, operate, maintain, and protect the highway facilities." N.D.C.C. § 24-06-01 provides that "The board of township supervisors of any township in the state has general supervision over the roads, highways, and bridges throughout the township." "The state, its political subdivisions, municipal corporations, and other units of local government are the vehicles by which the public roads and highways are established and maintained." *Small v. Burleigh County*, 225 N.W.2d 295, 302 (N.D. 1974). The North Dakota Supreme Court has recognized "a duty on the part of political subdivisions to maintain reasonably safe roads and streets." *Boudreau v. Estate of Miller*, 2000 ND 30, ¶ 7, 606 N.W.2d 514, 517; *see also Zueger v. Boehm*, 164 N.W.2d 901, 906 (N.D. 1969) (stating maintenance of a highway is the duty of the government).

Under the Restatement (Second) of Torts,

> A possessor of land over which there is a public highway or private right of way is not subject to liability for physical harm caused to travelers upon the highway or persons lawfully using the way by his failure to exercise reasonable care
>
> (a) to maintain the highway or way in safe condition for their use, or
>
> (b) to warn them of dangerous conditions in the way which, although not created by him, are known to him and which they neither know nor are likely to discover.

RESTATEMENT (SECOND) OF TORTS § 349 (1965). However,

> A possessor of land over which there is a public highway is subject to liability for physical harm caused to travelers thereon by a failure to exercise reasonable care in creating or maintaining in reasonably safe condition any structure or other artificial condition created or maintained in the highway by him or for his sole benefit subsequent to its dedication.

RESTATEMENT (SECOND) OF TORTS § 350 (1965). Section 350 applies to owners of land abutting the highway whether or not the highway is actually on the owner's land. RESTATEMENT (SECOND) OF TORTS § 350 cmt. c (1965). For example, in *Houser v. Gilbert*, 389 N.W.2d 626, 627 (1986), a sugar beet operation was held to be liable when dirt and mud, which was deposited by the trucks hauling sugar beets, became slippery from rain and an accident resulted. This is not the situation present here.

In the instant case, the evidence indicates that the dust at issue in this accident was not the result of dirt from the trucks falling on the road, but rather, the dust was from the gravel road being traveled upon. It does not appear that Black Gold Farms deposited anything artificial on the road which caused the dust. All vehicles traveling on the gravel road produced dust, not only trucks being driven for Black Gold Farms. Black Gold Farms had no duty as a matter of law to maintain the public road adjacent to its facility.

Shelquist argues that once Black Gold Farms began watering the road it obligated itself to continue to water the road.

The Restatement of Torts states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

RESTATEMENT (SECOND) OF TORTS § 323 (1965).

Shelquist asserts that Black Gold Farms undertook the duty to maintain the road in an effort to control the dust but failed to control the dust. Further, Shelquist asserts that it was Black Gold Farms' duty, in providing a safe workplace, to control the dust on the road. The cases cited by Shelquist, however, are distinguishable. In those cases, the facts involved property owned by the employer. The road is not owned by Black Gold Farms, and it has already been determined that there was no duty on the part of Black Gold Farms to maintain the road, including controlling the dust, rather it was a governmental duty.

Shelquist admitted that he thought Black Gold Farms did a good job of watering and keeping the dust down. Further, testimony reveals that the main