

STATE OF WISCONSIN : CIRCUIT COURT : OZAUKEE COUNTY
BRANCH I

NORTHERN OZAUKEE SCHOOL DISTRICT,

Plaintiff,

Case No. 11-CV-144

v.

Code No(s). 30301 (Money Judgment
Greater than \$5,000)
30405 (Other Real Estate)

KENDALL J. THISTLE and CARLA G. THISTLE,

Defendants.

NOTICE OF MOTION AND MOTION FOR LEAVE TO AMEND PLEADINGS

TO: Attorney Elizabeth G. Rich
Elizabeth Gamsky Rich & Associates, S.C.
536 E. Mill Street
Plymouth, WI 53073-1850

NOTICE OF MOTION

PLEASE TAKE NOTICE that on August 17, 2012 at 2:00 p.m., or on a date and at a time to be set by the Court, the Plaintiff, Northern Ozaukee School District (the "District" or the "Plaintiff"), by its attorneys, Godfrey & Kahn, S.C., will appear before the Honorable Paul V. Malloy in his courtroom located at the Ozaukee County Courthouse, 1201 South Spring Street, Port Washington, Wisconsin 53074, to present the following Motion for Leave to Amend Pleadings (the "Motion").

MOTION

1. Relief Requested. Pursuant to Wis. Stat. § 802.09(1), the District seeks an order for leave to amend its complaint to add a claim for public nuisance by negligent conduct. A copy of the proposed Amended Complaint is attached hereto as **Exhibit A.**

2. Grounds. The Court should permit the District to amend its pleadings as set forth above because it is in the interests of justice and will not prejudice the Defendants in any way.

Indeed, the amendment merely adds a claim for public nuisance by negligent conduct, and the Defendants just emailed their first set of discovery requests to the District on August 6, 2012.

3. Basis. As a basis for its Motion, the District relies on the entire record before the Court, the Defendants' deposition testimony, as well as the accompanying Brief and Affidavit of Christopher G. Smessaert in Support of Plaintiff's Motion for Leave to Amend Pleadings.

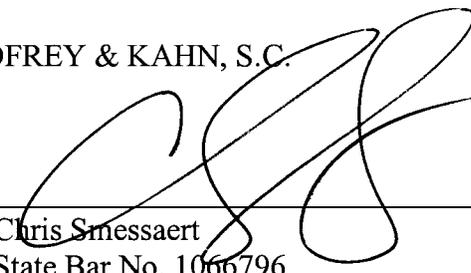
Dated this 9th day of August, 2012.

GODFREY & KAHN, S.C.

P.O. ADDRESS:

100 West Lawrence
Post Office Box 2728
Appleton, WI 54912-2728
Phone: 920-830-2800
Fax: 920-830-3530
csmessaert@gklaw.com

By: _____


Chris Smessaert
State Bar No. 1066796

Attorneys for Plaintiff, Northern Ozaukee School
District

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NORTHERN OZAUKEE SCHOOL DISTRICT
401 HIGHLAND DRIVE
FREDONIA, WI 53021-9499,

Plaintiff,

v.

KENDALL J. THISTLE and CARLA G. THISTLE,
N5549 HWY 57
BELGIUM, WI 53004,

Defendants.

Case No. 11-CV-144

Code No(s). 30301 (Money Judgment
Greater than \$5,000)
30405 (Other Real Estate)

AMENDED COMPLAINT

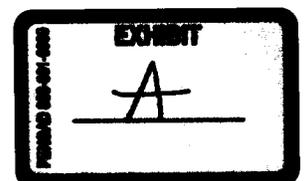
NOW COMES the Plaintiff, Northern Ozaukee School District (the "District"), by its attorneys, Godfrey & Kahn, S.C., and as and for its Amended Complaint filed in the above-entitled action, pleads and alleges as follows:

PARTIES

1. The Plaintiff, the District, is a Wisconsin school district with its principal place of business located at: 401 Highland Drive, Fredonia, WI 53021-9499.

2. The Defendant, Kendall J. Thistle ("Mr. Thistle"), is an adult resident of the State of Wisconsin with his place of residence located at: N5549 Hwy 57, Belgium, WI 53004. Upon information and belief, Mr. Thistle is the husband of Defendant, Carla G. Thistle.

3. The Defendant, Carla G. Thistle ("Ms. Thistle"), is an adult resident of the State of Wisconsin with her place of residence located at: N5549 Hwy 57, Belgium, WI 53004. Upon information and belief, Ms. Thistle is the wife of Defendant, Mr. Thistle. (together, Mr. Thistle and Ms. Thistle shall be referred to as the "Thistles.")



FACTS

4. The District is the owner in fee simple of several adjacent parcels of property that comprise the District school grounds located at 401 Highland Drive, Fredonia, WI 53021-9499 (the “District Property”), and has been owner of the District Property at all times relevant to this Amended Complaint.

5. The Thistles are the owners in fee simple of three adjacent parcels of property that sit east of and adjacent to the District Property (the “Thistle Property”), and have been the owners of the Thistle Property at all times relevant to this Amended Complaint.

6. State Highway 57 runs north and south along the eastern edge of both the District Property and the Thistle Property (“Hwy 57”).

7. Historically, storm water runoff has flowed through a natural drainage way across the District Property and a portion of the Thistle Property toward drainage facilities located on the other side of Hwy 57.

8. In or around September 2007, Mr. Thistle intentionally and unreasonably had a berm constructed on or near a portion of the western edge of the Thistle Property and adjacent to the District Property (the “Berm”).

9. The Berm prevented storm water runoff from flowing through its natural drainage way across the Thistle Property to its appropriate drainage facilities on the other side of Hwy 57.

10. During construction of the Berm, Mr. Thistle noticed that water was backing up on the District Property immediately adjacent to the Berm, where water never backed up previously. Despite this, Mr. Thistle continued construction of the Berm.

11. As a direct result of the Thistles’ Berm, storm water runoff backed up and pooled on the District Property, which formed a pond approximately three-fourths (3/4) of an acre in size that sat adjacent to the District High School.

12. The pond was dangerous to District students, visitors and employees and prevented them from safely and fully utilizing the District Property.

13. Despite being repeatedly asked by the District to remove the Berm or to fix the storm water runoff problem, Mr. Thistle refused to resolve the matter.

14. Accordingly, to ensure the safety of its students, visitors and employees, and so it could again safely and fully utilize the District Property, the District engaged a third-party to help mitigate the storm water runoff backup problem and eliminate the pond on the District Property (the "Drainage Fix").

15. The District incurred at least \$8,343.13 in costs for the Drainage Fix.

16. Despite being repeatedly asked by the District to pay for the Drainage Fix, Mr. Thistle has refused to do so.

17. Moreover, there is no guarantee that the Drainage Fix is a long-term solution and, regardless, the Drainage Fix physically interferes with the District Property and may prevent the District from fully utilizing the District Property for possible future expansion or otherwise.

18. As of the date of this Amended Complaint, Mr. Thistle has not paid the District any monies to offset the cost of the Drainage Fix, has not removed the Berm and has not remedied the problem.

FIRST CAUSE OF ACTION: PUBLIC NUISANCE (INTENTIONAL CONDUCT BY MR. THISTLE)

19. The District realleges and incorporates by reference as though fully set forth herein all the allegations contained in Paragraphs 1 through 18, above.

20. Mr. Thistle had the Berm constructed to block the flow of storm water runoff across the Thistle Property to its appropriate drainage facilities on the other side of Hwy 57.

21. Mr. Thistle's Berm caused storm water backup that flooded certain portions of the District Property and created a pond which was dangerous to District students, visitors and employees and prevented safe and full utilization of the District Property.

22. Mr. Thistle's Berm is a public nuisance because it unreasonably interfered with the use of the public District Property.

23. Mr. Thistle's Berm resulted in significant harm to the District that differs from the harm suffered by other members of the public exercising their right to use the District Property because, among other things, the District has a duty to ensure the safety of its students, visitors and employees on the District Property and had to commit public funds to swiftly remedy the dangerous circumstances created by the pond.

24. Mr. Thistle intentionally caused the nuisance by building the Berm to block the storm water runoff from flowing across the Thistle Property to its appropriate drainage facilities.

25. Mr. Thistle's conduct in causing the nuisance was unreasonable because, among other things, whatever harm may have come to the Thistle Property from resulting storm water runoff is far outweighed by the risk of accident and danger involving the District students, visitors and employees.

26. As a direct and proximate result of Mr. Thistle intentionally creating said public nuisance, the District incurred damages and is entitled to judgment in the amount of at least Eight Thousand Three Hundred Forty-three and 13/100 Dollars (\$8,343.13), together with interest at the highest rate allowed by law and costs of collection, including attorney's fees.

**IN THE ALTERNATIVE, SECOND CAUSE OF ACTION: PUBLIC NUISANCE
(NEGLIGENT CONDUCT BY MR. THISTLE)**

27. The District realleges and incorporates by reference as though fully set forth herein all the allegations contained in Paragraphs 1 through 26, above.

28. Mr. Thistle intentionally and unreasonably had the Berm constructed on the Thistle Property which blocked a natural drainage way and prevented the flow of storm water runoff across the Thistle Property to its appropriate drainage facilities on the other side of Hwy 57.

29. The Thistles' Berm caused storm water backup that flooded certain portions of the District Property and created a pond which was dangerous to District students, visitors and employees and prevented safe and full utilization of the District Property.

30. The Thistles' Berm is a public nuisance because it unreasonably interfered with the use of the public District Property.

31. The Thistles' Berm resulted in significant harm to the District that differs from the harm suffered by other members of the public exercising their right to use the District Property because, among other things, the District has a duty to ensure the safety of its students, visitors and employees on the District Property and had to commit public funds to swiftly remedy the dangerous circumstances created by the pond.

32. Mr. Thistle's conduct in causing the nuisance was unreasonable because, among other things, the Berm blocked a natural drainage way for storm water and whatever harm may have come to the Thistle Property from resulting storm water runoff is far outweighed by the risk of accident and danger involving the District students, visitors and employees.

33. Because the Thistles' Berm was an unreasonable use of the Thistle Property and blocked storm water from draining through a natural drainage way causing the pond to form, Mr. Thistle had a positive duty to act to abate the nuisance pond, a pond which he became aware of during the Berm's construction.

34. Despite the fact Mr. Thistle created the nuisance pond by his own negligent conduct, and that he had a positive duty to act to abate it, he failed to do so despite having many opportunities to do so during and after the construction of the Berm.

35. As a direct and proximate result of Mr. Thistle's negligent conduct which resulted in the public nuisance, the District incurred damages and is entitled to judgment in the amount of at least Eight Thousand Three Hundred Forty-three and 13/100 Dollars (\$8,343.13), together with interest at the highest rate allowed by law and costs of collection, including attorney's fees.

WHEREFORE, Northern Ozaukee School District demands judgment as follows:

A. For the sum of Eight Thousand Three Hundred Forty-three and 13/100 Dollars (\$8,343.13) in favor of the District, and against Mr. Thistle, plus costs, disbursements and attorney's fees of this action to the highest extent permitted by law;

B. Pursuant to Wis. Stat. § 844.01, an order requiring the Thistles to abate the public nuisance, which is the source of the interference with the District Property, by eliminating the Berm; and

C. For such other and further relief as this Court deems just and equitable.

Dated this 9th day of August, 2012.

GODFREY & KAHN, S.C.

P.O. ADDRESS:

100 West Lawrence Street
Post Office Box 2728
Appleton, WI 54912-2728
Phone: 920-830-2800
Fax: 920-830-3530
csmessaert@gklaw.com

By: _____
Chris Smessaert
State Bar No. 1066796

Attorneys for Plaintiff, Northern Ozaukee School
District