ELECTRONICALLY FILED AUG 30, 2023 CLERK OF SUPREME COURT

IN THE IOWA SUPREME COURT

No. 23-0537
Fayette County District Court No. LAVC055970

MARK VAGTS, JOAN VAGTS, ANDREW VAGTS, AND VAGTS DAIRY, LLC,

Plaintiffs-Appellees,

vs.

NORTHERN NATURAL GAS COMPANY,

Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR FAYETTE COUNTY
THE HONORABLE DAVID NELMARK

FINAL BRIEF OF DEFENDANT-APPELLANT NORTHERN NATURAL GAS COMPANY

Bret A. Dublinske
Brant M. Leonard
Sarah A. Arbaje
FREDRIKSON & BYRON, P.A.
111 East Grand Avenue, Suite 301
Des Moines, IA 50309
Tel: (515) 242-8900
Fax: (515) 242-8950
Email: bdublinske@fredlaw.com
bleonard@fredlaw.com
sarbaje@fredlaw.com

Attorneys for Defendant-Appellant Northern Natural Gas Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES 4

STATEMENT OF ISSUES..9

I. The District Court Erred in Holding that Plaintiffs Could Maintain a "Stand-Alone" Claim of Nuisance and Were Not Required to Demonstrate Negligence on the Part of Northern. 9

II. The District Court Erred in Denying Northern's Motion for Remittitur in this Case. 12

ROUTING STATEMENT..13

STATEMENT OF THE CASE..13

STATEMENT OF FACTS 15

ARGUMENT..21

I. The District Court Erred in Holding that Plaintiffs Could Maintain a "Stand-Alone" Claim of Nuisance and Were Not Required to Demonstrate Negligence on the Part of Northern. 27

A. *Martins* Should not Apply to this Case Because Operating a Cathodic Protection System is Not Inherently Dangerous as Required to Support a Standalone Nuisance Claim. 31

B. The Martins Majority Opinion Should be Overturned in Favor of Adopting the Principles of the Restatement (Second) of Torts Section 822..36

C. The Court Should hold that On Remand, PHMSA's Federal Safety Regulations Provide an Appropriate and Uniform Standard of Care for Stray Voltage Cases Predicated on Cathodic Protection. 45

II. The District Court Erred in Denying Northern's Motion for Remittitur in this Case. 48

CONCLUSION 51
REQUEST FOR ORAL SUBMISSION 51
CERTIFICATE OF COST 52
CERTIFICATE OF COMPLIANCE...53
CERTIFICATE OF SERVICE...54

TABLE OF AUTHORITIES

Page(s)

Cases

Adams v. Lang,
553 So. 2d 89 (Ala. 1989) 40

Adkins v. Thomas Solvent Co.,
487 N.W.2d 715 (Mich. 1992) 40

Bates v. Quality Ready-Mix Co.,
154 N.W.2d 852 (Iowa 1967) 47, 49

Blackman v. Iowa Union Electric Co.,
14 N.W.2d 721 (Iowa 1944) 31, 32, 38

Bowman v. Humphrey,
109 N.W. 714 (Iowa 1906) 35

Brown v. City of Craig,
168 S.W.2d 1080 (Mo. 1943) 32, 33

Carvalho v. Wolfe,
140 P.3d 1161 (Or. Ct. App. 2006) 40

Ching v. Dung,
446 P.3d 1016 (Haw. Ct. App. 2019) 40

Comet Delta, Inc. v. Pate Stevedore Co.,
521 So. 2d 857 (Miss. 1988) 40

Copart Industries, Inc. v. Consolidated Edison Co.,
41 N.Y.2d 564 (1977) 40

Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen.,
384 N.W.2d 692 (Wis. 1986) 40

Crosstex N. Tex. Pipeline, L.P. v. Gardiner,
505 S.W.3d 580 (Tex. 2016) 40

Culwell v. Abbott Constr. Co.,
506 P.2d 1191 (Kan. 1973) 40

Dalarna Farms v. Access Energy Coop.,
792 N.W.2d 656 (Iowa 2010)..30, 41

First Springfield Bank & Trust v. Galman,
702 N.E.2d 1002 (Ill. App. Ct. 1998) (rev'd on other grounds) 40

First Springfield Bank & Trust v. Galman,
720 N.E.2d 1068 (Ill. 1999) 40

Guzman v. Des Moines Hotel Partners, Ltd. P'ship.,
489 N.W.2d 7 (Iowa 1992) 34

Hall v. Phillips,
436 N.W. 2d 139 (Neb. 1989)..40

Hall v. Town of Keota,
79 N.W.2d 784 (Iowa 1956) 32, 33, 34, 37

Hendricks v. Stalnaker,
380 S.E.2d 198 (W. Va.1989) 40

Hoffmann v. Clark,
975 N.W.2d 656 (Iowa 2022)..47

Iverson v. Vint,
54 N.W.2d 494 (Iowa 1954) 35

Jerryco v. Union Stattino Plaza Assocs.,
625 A.2d 907 (Me. 1983)..40

Kinley Corp. v. Iowa Util. Bd.,
999 F.2d 354 (8th Cir. 1993)...26, 46

Kuper v. Lincoln-Union Elec. Co.,
557 N.W.2d 748 (S.D. 1996) 40, 41, 42, 43

Kuta v. Newberg,
600 N.W.2d 280 (Iowa 1999)...46, 48, 49

Larson v. Williams Elec. Coop., Inc.,
534 N.W.2d 1 (N.D.1995)..23

Lussier v. San Lorenzo Valley Water Dist.,
206 Cal. App. 3d 92 (1988)..40

Martin v. Artis,
290 P.3d 687 (Mont. 2012) 40

Martins v. Interstate Power Co.,
652 N.W.2d 657 (Iowa 2002)..*passim*

Meier v. Senecaut,
641 N.W.2d 532 (Iowa 2002)..26, 46

Morgan v. Quailbrook Condominium Co.,
704 P2d 573 (Utah 1985) 40

Ogle v. Ohio Power Co.,
903 N.E.2d 1284 (Ohio Ct. App. 2008)...40

Parks Hiway Enters. v. Cem Leasing,
995 P.2d 657 (Alaska 2000)..40

Pearson v. Kansas City,
55 S.W.2d 485 (Mo. 1932)..33

Pendergrast v. Aiken,
236 S.E.2d 787 (N. C. 1977)..40

Perkins v. Madison Co. Livestock Fair Ass'n,
613 N.W.2d 264 (Iowa 2000)..35

Pestey v. Cushman,
788 A.2d 496 (Conn. 2002)...40

Phillips Ranch, Inc. v. Banta,
543 P.2d 1035 (Or. 1975)...40

Pietz v. City of Oskaloosa,
92 N.W.2d 577 (Iowa 1958) 33

Pub. Serv. Co. v. Van Wyk,
27 P.3d 377 (Colo. 2001) 40

Robie v. Lillis,
299 A.2d 155 (N. H. 1972) 40

Ross v. Lowitz,
120 A.2d 178 (N.J. 2015)..40

Schlader v. Interstate Power Co.,
591 N.W.2d 10 (Iowa 1999) ....*passim*

Sherk v. Indiana Waste Sys., Inc.,
495 N.E.2d 815 (Ind. Ct. App. 1986) 40

Sparks v. City of Pella,
137 N.W.2d 909 (Iowa 1965)...34

Waschak v. Moffat,
109 A.2d 310 (Pa. 1954) 40

Weinhold, *v. Wolff*,
555 N.W.2d 454 (Iowa 1996)..28, 48

Yeager & Sullivan, Inc. v. O'Neill,
324 N.E.2d 846 (Ind. Ct. App. 1975) 40

Statutes

49 U.S.C. § 108(b) (2022)...45

49 U.S.C. § 60102(a)(2)...25

49 U.S.C. § 60102 *et seq*. 15, 25

49 U.S.C. § 60122...25, 45

Iowa Code § 657.1 (2023)..27

Iowa Code § 657.1(2) (2023) 30, 41

Other Authorities

49 C.F.R. § 1.96..25, 44

49 C.F.R. § 190.233 ....26, 45

49 C.F.R. § 192.1 *et seq*. 13, 15

49 C.F.R. § 192.455 (a)(2) 15, 25, 45

49 C.F.R. § 192.463 24

20 FERC ¶ 62,410, 1982 WL 40871 (Sept. 1, 1982) 15, 28

Restatement (Second) of Torts § 822 (1979) ..... *passim*

Peter G. Yelkovac, *Homogenizing the Law of Stray Voltage: An Electrifying Attempt to Corral the Controversy,* 28 Val. U.L. Rev. 1111 (Spring 1994). 36, 37

STATEMENT OF ISSUES

I. The District Court Erred in Holding that Plaintiffs Could Maintain a "Stand-Alone" Claim of Nuisance and Were Not Required to Demonstrate Negligence on the Part of Northern.

Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002).

Martins v. Interstate Power Co., 652 N.W.2d 657 (Iowa 2002).

Bormann v. Bd. of Supervisors, 584 N.W.2d 309 (Iowa 1998)).

Weinhold, *v. Wolff*, 555 N.W.2d 454 (Iowa 1996).

Guzman v. Des Moines Hotel Partners, Ltd. P'ship., 489 N.W.2d 7 (Iowa 1992).

Hall v. Town of Keota, 79 N.W.2d 784 (Iowa 1956).

Dalarna Farms v. Access Energy Coop., 792 N.W.2d 656 (Iowa 2010).

Blackman v. Iowa Union Electric Co., 14 N.W.2d 721 (Iowa 1944).

Brown v. City of Craig, 168 S.W.2d 1080 (Mo. 1943).

Pearson v. Kansas City, 55 S.W.2d 485 (Mo. 1932).

Pietz v. City of Oskaloosa, 92 N.W.2d 577 (Iowa 1958).

Sparks v. City of Pella, 137 N.W.2d 909 (Iowa 1965).

Perkins v. Madison Co. Livestock Fair Ass'n, 613 N.W.2d 264 (Iowa 2000).

Bowman v. Humphrey, 109 N.W. 714 (Iowa 1906).

Iverson v. Vint, 54 N.W.2d 494 (Iowa 1954).

Schlader v. Interstate Power Co., 591 N.W.2d 10 (Iowa 1999).

Adams v. Lang, 553 So. 2d 89, 92 (Ala. 1989).

Parks Hiway Enters. v. Cem Leasing, 995 P.2d 657 (Alaska 2000).

Lussier v. San Lorenzo Valley Water Dist., 206 Cal. App. 3d 92 (1988).

Pub. Serv. Co. v. Van Wyk, 27 P.3d 377 (Colo. 2001).

Pestey v. Cushman, 788 A.2d 496 (Conn. 2002).

Ching v. Dung, 446 P.3d 1016 (Haw. Ct. App. 2019).

First Springfield Bank & Trust v. Galman, 702 N.E.2d 1002 (Ill. App. Ct. 1998).

First Springfield Bank & Trust v. Galman, 720 N.E.2d 1068 (Ill. 1999).

Jerryco v. Union Stattino Plaza Assocs., 625 A.2d 907 (Me. 1983).

Adkins v. Thomas Solvent Co., 487 N.W.2d 715 (Mich. 1992).

Comet Delta, Inc. v. Pate Stevedore Co., 521 So. 2d 857 (Miss. 1988).

Hall v. Phillips, 436 N.W. 2d 139 (Neb. 1989).

Robie v. Lillis, 299 A.2d 155 (N. H. 1972).

Ross v. Lowitz, 120 A.2d 178 (N.J. 2015).

Copart Industries, Inc. v. Consolidated Edison Co., 41 N.Y.2d 564, 569 (1977).

Pendergrast v. Aiken, 236 S.E.2d 787 (N. C. 1977).

Ogle v. Ohio Power Co., 903 N.E.2d 1284 (Ohio Ct. App. 2008).

Carvalho v. Wolfe, 140 P.3d 1161 (Or. Ct. App. 2006).

Phillips Ranch, Inc. v. Banta, 543 P.2d 1035 (Or. 1975).

Waschak v. Moffat, 109 A.2d 310 (Pa. 1954).

Kuper v. Lincoln-Union Elec. Co., 557 N.W.2d 748, 761 (S.D. 1996).

Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 505 S.W.3d 580 (Tex. 2016).

Morgan v. Quailbrook Condominium Co., 704 P2d 573 (Utah 1985).

Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen., 384 N.W.2d 692 (Wis. 1986).

Hendricks v. Stalnaker, 380 S.E.2d 198, 200 (W. Va.1989).

Culwell v. Abbott Constr. Co., 506 P.2d 1191 (Kan. 1973).

Yeager & Sullivan, Inc. v. O'Neill, 324 N.E.2d 846 (Ind. Ct. App. 1975).

Sherk v. Indiana Waste Sys., Inc., 495 N.E.2d 815, 818 (Ind. Ct. App. 1986).

Martin v. Artis, 290 P.3d 687 (Mont. 2012).

Kinley Corp. v. Iowa Util. Bd., 999 F.2d 354 (8th Cir. 1993).

Iowa Code § 657.1 (2023).

Iowa Code § 657.1(2) (2023).

49 U.S.C. § 60122 (2022).

49 C.F.R. § 1.96 (2022).

49 C.F.R. § 108(b) (2022).

49 C.F.R. § 190.233 (2022).

49 C.F.R. § 192.455 (2022).

49 C.F.R. § 192.463 (2022).

20 FERC ¶ 62,410, 1982 WL 40871 (Sept. 1, 1982).

Restatement (Second) of Torts § 822.

Peter G. Yelkovac, *Homogenizing the Law of Stray Voltage: An Electrifying Attempt to Corral the Controversy,* 28 Val. U.L. Rev. 1111, (Spring 1994).

II. The District Court Erred in Denying Northern's Motion for Remittitur in this Case.

Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002).

Kuta v. Newberg, 600 N.W.2d 280 (Iowa 1999).

Hoffmann v. Clark, 975 N.W.2d 656, 666 (Iowa 2022).

Bates v. Quality Ready-Mix Co., 154 N.W.2d 852, 859 (Iowa 1967).

Weinhold, *v. Wolff*, 555 N.W.2d 454 (Iowa 1996).

ROUTING STATEMENT

This case will require the Court to determine whether *Martins v. Interstate Power Co*., 652 N.W.2d 657 (Iowa 2002), a decision permitting a standalone claim of nuisance alleging stray voltage against an electric utility, applies to a pipeline company's operation of its federally-required cathodic protection system. Specifically, the Court will have to decide whether the operation of a cathodic protection system as mandated by federal safety regulations meets the "inherent danger" test enunciated in *Martins* such that a plaintiff can recover against a pipeline company on a standalone nuisance theory. Alternatively, the case will require the Court to determine whether to overturn the *Martins*' majority's adoption and application of an "inherent danger" test in stray voltage cases in favor of the Restatement (Second) of Torts § 822 (1979). The Supreme Court should retain the case because it presents substantial issues of first impression, fundamental issues of broad public importance, and substantial questions of enunciating or changing legal principles. *See* Iowa R. App. P. 6.1101(c), (d), (f).

STATEMENT OF THE CASE

This case presents one of the first of its kind in the country – a stray voltage case that proceeded to trial against a natural gas pipeline company for operating a required, critical safety feature of pipeline operations – cathodic

protection. Despite the extensive regulation of pipeline safety by the federal government[1] and the requirement that Northern maintain a cathodic protection system with specific levels of electrical current applied to the pipeline to prohibit corrosion, Vagts were permitted to proceed on a standalone nuisance theory; that is, Vagts were permitted to recover against Northern without showing that Northern was negligent in any manner in the operation of its cathodic protection system.

The district court relied on *Martins* – a decision which held that "excessive" stray voltage from an *electric utility* serving the plaintiff dairy met an "inherent danger test" – to find that that the plaintiff could proceed on a standalone nuisance claim. *Id.* at 664. The holding of *Martins* is not only inapplicable to the facts of this case, which does not involve excessive stray voltage from an electrical utility, it is also internally inconsistent for the reasons identified in Justice Cady's dissent therein, and contrary to the useful parameters on private nuisance set forth in the Restatement (Second) of Torts.

Accordingly, the Court should reverse the district court and hold that in a stray voltage case against a pipeline company for operation of its federally-required cathodic protection system, a showing of negligence is required. The

[1] *See, e.g.,* 49 C.F.R. § 192.1 *et seq*.

Court should do so in one of the following ways: (1) by holding that the "inherent danger" test applied in *Martins* is not met in the case of alleged voltage from cathodic protection systems, and therefore a showing of negligence is required; or (2) by holding that the adoption and application of the "inherent danger" test in *Martins* should be reversed in favor of the adoption of the Restatement (Second) of Torts Section 822 for stray voltage cases. In either case, the Court should determine that the standard of care for demonstrating negligence against a pipeline company in a case involving cathodic protection is provided by federal pipeline safety regulations.

STATEMENT OF FACTS

Background Facts

Plaintiff-Appellees Mark Vagts, Joan Vagts, Andrew Vagts and Vagts Dairy, LLC (collectively, "Vagts") own and operate a dairy farm in West Union, Iowa.[2] Northern is an interstate natural gas pipeline company that provides natural gas transmission services to utilities and other end-use customers.[3] Northern's pipeline system stretches across 11 states from Texas to the Upper Peninsula of Michigan and includes approximately 14,000 miles of pipeline.[4]

---

[2] App. 585; 602; 820; 842 (01.18.23 Tr. at 53; 72; 01.24.23 Tr. at 121; 203).

[3] App. 880 – 882 (01.25.23 Tr. at 56 – 58).

[4] App. 882; 261 (01.25.23 Tr. at 58; Exhibit 173).

The Northern system operates pursuant to a Federal Energy Regulatory Commission ("FERC") certificate of public convenience and necessity[5] and is governed by the safety regulations of the U.S. Department of Transportation's Petroleum and Hazardous Materials Safety Administration ("PHMSA") pursuant to the Pipeline Safety Act.[6]

Pursuant to a written easement agreement entered into by and between Northern and Mark Vagts' paternal grandparents and great uncle in 1960 and 1961, Northern has installed a segment of pipeline on the Vagts farm.[7] Also pursuant to written agreement, Northern owns cathodic protection equipment that is located in the road ditch on 265th Street to the northwest of the Vagts farm, consisting of a rectifier (the "265th Street Rectifier") and sacrificial anode ground bed.[8] A cathodic protection system is a critical safety feature mandated by PHMSA regulations that involves applying a low-level electrical current to the

---

[5] *See* 20 FERC ¶ 62,410, 1982 WL 40871 (Sept. 1, 1982).

[6] App. 884 – 890 (1.25.23 Tr. at 60 – 66); *see also* 49 U.S.C. § 60102 *et seq.*; C.F.R. § 192.1 *et seq*.

[7] App. 261; 890 – 891; 269 – 271; 373 – 379 (Ex. 173; 01.25.23 Tr. at 66 – 67); Ex. 501; 531).

[8] App. 261; 890 – 891; 272 – 296; 373 – 379 (Ex. 173; 01.25.23 Tr. at 66 – 67; Ex. 502; 531).

pipeline, which mitigates corrosion.[9] The level of electrical current from a cathodic protection system is low; typically 1 volt or less and less than that of a single AAA battery, which produces 1.5 volts.[10]

Since the early 1960's, Northern's pipeline and cathodic protection system, including the ground bed and nearby rectifier, have been in their current locations.[11] In June of 2013, the existing anode ground bed was upgraded with new anodes to replace the original depleted anodes. It remained, however, in the same location as it had been for approximately 50 years.[12] Over the years, Vagts added various buildings and improvements to the property as they've attempted to grow their dairy operation.[13] In 2017, Vagts substantially expanded their free stall barn (where most milking cows are housed) to roughly double its size toward the west, in the direction of Northern's pipeline.[14] During that same time frame,

---

[9] App. 883 – 885 (01.25.23 Tr. at 59 – 61); 49 C.F.R. § 192.455 (a)(2) (providing that each buried pipeline "must have a cathodic protection system designed to protect the pipeline in accordance with this subpart …").

[10] App. 885; 887 – 889; 907 (01.25.23 Tr. at 61; 63 – 65; 01.26.23 Tr. at 13).

[11] App. 757; 890; 901 – 902; 373 (01.23.23 Tr. at 197; 01.25.23 Tr. at 66; 108 – 109; Ex. 531).

[12] App. 901 – 902 (01.25.23 Tr. at 108 – 109).

[13] App. 591 – 595; 211; 212 (01.18.23 Tr. at 60 – 64; Ex. 1; Ex. 6).

[14] App. 734 – 735; 758 – 760; 211; 212; 373 (01.23.23 Tr. at 136 – 37; 210 – 212; Ex. 6; Ex. 8; Ex. 531).

Vagts also aggressively grew the size of their herd, roughly doubling its size to more than 500 cows from 2015 to 2021.[15]

In late 2020, Vagts contacted Allamakee-Clayton Electrical Cooperative, Inc. ("ACEC"), the local electric utility that served the dairy, regarding their belief that stray voltage was accessing their property; ACEC then contacted Northern.[16] ACEC was initially included as a defendant in this lawsuit and ultimately settled with Vagts prior to trial.[17]

In October 2020, Northern representatives visited the Vagts farm and performed testing for stray voltage.[18] That testing revealed that levels of voltage detected on the Vagts farm were below the level of concern established in the USDA's "Redbook"[19] and other publications, including the Iowa Stray Voltage Guide.[20] As testified to at trial by witnesses, the USDA Redbook is a publication of the United States Department of Agriculture written by a group of respected professors and other professionals which sets levels of concern for stray

---

[15] App. 840; 915 – 916; 404 (01.24.23 Tr. at 190; 01.27.23 Tr. at 16 – 17; Ex. 602).

[16] App. 746 – 748; 895 – 896 (01.23.23 Tr. 176 – 78; 01.25.23 Tr. at 81 – 82).

[17] App. 175 (Vagts' Resistance to Northern's Post-Trial Motions, filed Feb. 22, 2023, at 20) (acknowledging settlement with ACEC).

[18] App. 895 – 897; 368 – 372; 373 – 379 (01.25.23 Tr. at 81 – 83; Ex. 530; Ex. 531).

[19] App. 405 – 555 (Exhibit 641).

[20] App. 556 – 583 (Exhibit 642).

voltage.[21] The Iowa Stray Voltage Guide in turn cites to and relies upon the USDA Redbook.[22] The level of concern established by the Redbook is 4 mA, a much larger current than could arise from the voltages measured at the Vagts farm.[23]

Although the voltage levels detected were not near the level of concern in the Iowa Stray Voltage Guide or USDA Redbook, in late October 2020, Northern shut down the 265th Street Rectifier located near the Vagts farm.[24] With the exception of a few minutes for testing purposes when the parties to this case were present with their expert witnesses, the 265th Street Rectifier has remained off and non-operational since October 2020.[25] In order to maintain cathodic protection on the pipeline, Northern installed a new rectifier, the "Big Timber Rectifier," approximately 16 miles north of the Vagts farm, in the fall of 2021.[26] Northern's other rectifiers in the area – the Waukon Rectifier and the Edgewood

---

[21] App. 673 – 674; 908 – 910 (01.20.23 Tr. at 221 – 22; 01.26.23 Tr. at 14 – 16). *See also Schlader v. Interstate Power Co.,* 591 N.W.2d 10, 13 (Iowa 1999) (discussing the Redbook as the "definitive work in the field of stray voltage.").

[22] App. 910 – 911 (01.26.23 Tr. at 16 – 17).

[23] App. 912; 908 – 910; 253 – 260 (01.26.23 Tr. at 42; 01.20.23 Tr. at 221 – 22; Ex. 160).

[24] App. 890 – 891; 899 – 900 (01.25.23 Tr. at 66 – 67; 85 – 86).

[25] App. 890 – 891; 899 – 900 (01.25.23 Tr. at 66 – 67; 85 – 86).

[26] App. 891; 367 (01.25.23 Tr. at 67; Ex. 526).

Rectifier, are located more than 15 miles and 25 miles from Vagts farm, respectively.[27]

District Court Proceedings

Vagts filed their Petition on March 12, 2021, alleging claims for negligence and nuisance against Northern and negligence against ACEC, alleging that each was contributing to alleged stray voltage accessing their dairy farm.[28] Vagts voluntarily dismissed their negligence claim against Northern on October 18, 2022[29] and voluntarily dismissed all claims against ACEC on November 22, 2022, following negotiation of a settlement agreement with ACEC.[30]

A jury trial was held in Fayette County District Court from January 18, 2023 through January 27, 2023. On January 30, 2023, the jury returned a verdict in favor of Vagts in the amount of $4.75 million, assessed as follows: (1) $3 million in economic damages; (2) $1.25 million for "personal inconvenience,

---

[27] App. 891 – 892 (01.25.23 Tr. at 67 – 68).

[28] App. 6 – 12 (Vagts' Petition at Law and Jury Demand).

[29] App. 13 – 14 (Vagts' Dismissal of Count 2).

[30] App. 15 (Vagts' Dismissal with Prejudice; Vagts' Resistance to Northern's Post-Trial Motions at 20) (acknowledging settlement with ACEC)).

annoyance and discomfort"; and (3) $500,000 for "loss of use of enjoyment of land."[31]

On February 14, 2023, Northern filed post-trial motions pursuant to Iowa Rules of Civil Procedure 1.1003, 1.1004, 1.1007, 1.1010 and 1.904, seeking judgment notwithstanding the verdict, new trial, remittitur, and modification of the amount of the judgment to reflect a credit against the judgment for amounts paid to Vagts by ACEC pursuant to the settlement agreement.[32] On March 8, 2023, the district court denied all of Northern's post-trial motions with the exception of Northern's motion for a credit for amounts paid to Vagts by ACEC.[33] The District Court entered its Order Modifying Judgment on March 27, 2023 to reflect that credit.[34]

ARGUMENT

Vagts were permitted to proceed on a standalone nuisance theory against Northern, recovering an exorbitant award without being required to establish that Northern acted negligently or violated any defined standard of care. The district court rejected Northern's efforts to require a showing of negligence, relying on *Martins v. Interstate Power Co.*, 652 N.W.2d 657 (Iowa 2002) and the "inherent

---

[31] App. 119 – 120 (Verdict Form).

[32] App. 123 – 147 (Northern's Post-Trial Motions).

[33] App. 195 – 204 (Ruling on Post-Trial Motions).

[34] App. 205 – 206 (Order Modifying Judgment).

danger" test espoused therein. The *Martins* case – a typical stray voltage case brought by a dairy farmer against the electric utility serving the plaintiff dairy – is inapplicable to the facts of this case, which involves a pipeline company maintaining a cathodic protection system required by federal pipeline safety regulations. The holding of *Martins* is not only inapplicable to the facts of this case, but should also be overturned because it is internally inconsistent for the reasons identified in Justice Cady's dissent therein and contrary to the parameters on private nuisance set forth in the Restatement (Second) of Torts.

For the reasons that follow, the Court should reverse the district court and hold that, in a stray voltage case against a pipeline company for maintenance of its required cathodic protection system, a showing of negligence is necessary. The Court should do so in one of the following ways: (1) by holding that the "inherent danger" test applied in *Martins* is not met in the case of alleged voltage from cathodic protection systems, and therefore a showing of negligence is required; or (2) by holding that the adoption and application of the "inherent danger" test in *Martins* should be reversed in favor of the adoption of the Restatement (Second) of Torts Section 822 for stray voltage cases. In either case, the Court should determine that the standard of care for demonstrating negligence in a case regarding cathodic protection is provided by federal pipeline safety regulations.

While Northern's legal arguments are set forth below, a brief general discussion of stray voltage and cathodic protection is necessary to inform those arguments.

Stray Voltage in General

Stray voltage cases involving electric utilities have existed for decades in Iowa and other dairy states. *See, e.g., Schlader v. Interstate Power Co.*, 591 N.W.2d 10, 12 (Iowa 1999) ("Stray voltage has been addressed by many courts including our own; the concept is not new," and collecting cases). Those cases, however, present typical stray voltage cases, in which the plaintiff dairy farm sues the electric utility that serves the dairy, alleging that cows are being subjected to small amounts of current through the neutral-grounded network. This Court has explained the concept of stray voltage in line with that traditional type of stray voltage case:

> Those urging a stray-voltage recovery would describe the concept this way:
>
> In order to understand stray voltage or neutral-to-earth voltage, one must first understand the neutral-grounded network. All electricity leaving an electrical substation must return to that substation in order to complete a circuit. Unless that circuit is completed, electricity will not flow. The current leaves the substation on a high voltage line which eventually connects to some electrical "appliance." After exiting the "appliance" that current must return to the substation. The neutral-grounded network provides the returning current two choices. Either it can return via the neutral line, which accounts for the second wire on our electrical poles, or it can return through the ground. These two pathways comprise the grounded-neutral network. Electricity flows through the path of lowest

> resistance. If there exists more resistance in the neutral line than in the ground, the current will flow through the ground to return to the substation.
>
> Neutral-to-earth voltage or stray voltage will occur when current moves from either the neutral line to the ground or from the ground to the neutral line. It uses a cow as a pathway if that animal happens to bridge the gap between the two. A cow's hooves provide an excellent contact to the earth while standing on wet concrete or mud, while at the same time the cow is contacting the grounded-neutral system consisting of items such as metal stanchions, stalls, feeders, milkers, and waterers. The current simply uses the cow as a pathway in its eventual return to the substation. Apparently very slight voltages can affect cattle. Evidence [has] suggested anything greater than one volt can be catastrophic to a dairy farm.

Id. at 12 (citing *Larson v. Williams Elec. Coop., Inc.,* 534 N.W.2d 1, 1-2 n. 1 (N.D.1995)); *see also Martins*, 652 N.W.2d at 661 (utilizing same quote from *Larson*).

Similarly, the Court has noted:

> Yelkovac suggests that the sources of stray voltage most often stem from problems in an electrical provider's transmission and distribution system or in a farmer's wiring or equipment, or from a combination of problems in the electrical systems of both the provider and farmer. *Id.* at 1112. The writer also suggests that "[s]ome stray voltage may always be present as an *inherent* part of supplying electricity; however, problems in the electrical systems can elevate the levels of voltage to an undesirable level, causing an electrical current to flow through the cattle and into the ground or earth.

Martins, 652 N.W.2d at 662 (citing Peter G. Yelkovac, *Homogenizing the Law of Stray Voltage: An Electrifying Attempt to Corral the Controversy,* 28 Val. U.L. Rev. 1111, 1117-19 (Spring 1994)) (hereinafter "*Yelkovac*"). The *Martins* court

tied the use of the term "inherent" in Yelkovac's description back to the standard for standalone nuisance cases – inherent danger.

The present case, however, is unlike most stray voltage cases in that it attacks a low-voltage *safety* feature as the inherent danger and cause of damage. Unlike most stray voltage cases, this is not a claim against an electric utility serving a dairy. Rather, it presents a claim against a pipeline company for its operation of a required cathodic protection system.

Cathodic Protection

A cathodic protection system is a safety feature of underground pipelines that involves applying a low-level electrical current to the pipeline, which mitigates corrosion.[35] The level of voltage produced by a cathodic protection system is typically at or below a single volt, less than that of a single AAA battery[36], and is typically measured in fractions of a volt. The system receives electrical service from the electric utility to a rectifier owned by the pipeline company, which converts the current from traditional alternating current ("AC") to "rectified" or, as it is often referred to, "DC" current.[37] The rectifier is

---

[35] App. 883 – 885 (01.25.23 Tr. at 59 – 61).

[36] App. 885; 907 (01.25.23 Tr. at 61; 01.26.23 Tr. at 13); *See also* Appendix D to 49 C.F.R. § 192.463 (requiring 0.85 volts of cathodic protection for steel pipeline).

[37] App. 883 – 885; 626; 262 (01.25.23 Tr. at 59 – 60; 01.20.23 Tr. at 64; Ex. 179).

connected to the underground pipeline, and to an “anode bed” or “ground bed” that consists of a series of anodes – sacrificial metal rods buried in the ground that are replaced from time to time.[38] This allows a low level of “DC” current to flow along the pipeline, prohibiting corrosion.[39]

Pursuant to the Pipeline Safety Act (“PSA”)[40], natural gas pipelines in the United States are subject to the exclusive safety regulation of the U.S. Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (“PHMSA”) pursuant to the Pipeline Safety Act (“PSA”).[41] PMHSA’s regulations require each buried gas pipeline “must have a cathodic protection system designed to protect the pipeline in accordance with this subpart …” 49 C.F.R. § 192.455(a)(2). Those regulations further provide: “[e]ach cathodic protection system required by this subpart must provide a level of cathodic protection that complies with one or more of the applicable criteria contained in appendix D of this part.” 49 C.F.R. § 192.463(a). Appendix D to Part 192 specifies the level of electric voltage that must be applied to the pipeline,

---

[38] App. 883 – 885; 626; 262 (01.25.23 Tr. at 59 – 60; 01.20.23 Tr. at 64; Ex. 179).

[39] App. 883 – 885; 626; 262 (01.25.23 Tr. at 59 – 60; 01.20.23 Tr. at 64; Ex. 179).

[40] 49 U.S.C. § 60102 *et seq.*

[41] *See* 49 U.S.C. § 60102(a)(2) (providing for regulation by the Secretary of Transportation); 49 C.F.R. § 1.96 (delegating authority to PHMSA).

depending on whether the cathodic protection voltage is being applied to a steel, cast iron, or ductile iron surface.

Any failure on the part of an operator to install and operate a cathodic protection system on a buried gas pipeline in accordance with these requirements would result in a violation of PHMSA laws and regulations subjecting a pipeline operator to enforcement. *E.g.*, 49 U.S.C. § 60122 (establishing civil penalties for a violation); 49 C.F.R. § 190.233 (allowing PHMSA to issue a corrective action order requiring compliance with safety standards). And, as described more fully below, because PHMSA regulations occupy the field, there is "no regulatory room for the state to either establish its own safety standards or supplement the federal safety standards." *Kinley Corp. v. Iowa Util. Bd.*, 999 F.2d 354, 359 (8th Cir. 1993) (emphasis added).

I. The District Court Erred in Holding that Plaintiffs Could Maintain a "Stand-Alone" Claim of Nuisance and Were Not Required to Demonstrate Negligence on the Part of Northern.

Error Preservation. Northern argued that Vagts should be required to establish negligence on the part of Northern in this case in its pre-trial filings, in motions for judgment as a matter of law at the close of Vagts' case and at the close of the evidence, and in its post-trial motions.[42] The district court rejected

[42] App. 022 – 025; 043 – 048 (Northern's Trial Brief at 7 – 10; Northern's Resistance to Plaintiffs' Motion in Limine at 3 – 8); App. 877 – 879; 917 – 918

Northern's arguments and denied its motions.[43] Northern therefore preserved error on this issue. *Meier v. Senecaut*, 641 N.W.2d 532, 537–38 (Iowa 2002).

Standard of Review. Because this argument alleges that the district court applied the wrong law to the case, review is for correction of errors at law. *Martins*, 652 N.W.2d at 659 (noting the Court was reviewing "whether the district court erred by applying a 'pure nuisance' claim against the utility…").

Argument

"Nuisance," as codified by the Iowa legislature, refers to whatever is injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property. Iowa Code § 657.1 (2023). This statutory definition does not modify the application of common law to nuisances; the Iowa Supreme Court has made clear that "the statutory provisions are 'skeletal in form, and we look to the common law to fill in the gaps.'" *Martins v. Interstate Power Co.*, 652 N.W.2d 657, 660 (Iowa 2002) (citing *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 314 (Iowa 1998)).

(01.25.23 Tr. at 51 – 53; 01.27.23 Tr. at 69 – 70); App. 127 – 133 (Northern's Post-Trial Motions at 5 – 11).

[43] App. 877 – 879; 917 – 918 (01.25.23 Tr. at 51 – 53; 01.27.23 Tr. at 69 – 70); App. 112; 195 – 197 (Ruling on Motion in Limine at 1; Ruling on Post-Trial Motions at 1 – 3).

The common law on private nuisance has filled in the gaps with additional factors to consider when it comes to evaluating whether lawful business, such as operating a natural gas pipeline pursuant to federal law, is a private nuisance. Private nuisance in the business context "depends on the reasonableness of conducting the business in the manner, at the place, and under the circumstances in question." *Id.* at 660 (citing *Weinhold*, *v. Wolff*, 555 N.W.2d 454, 459 (Iowa 1996) (citations omitted)). Priority of location, the nature of the neighborhood, and the wrong complained of are all factors considered under this analysis. *Id.*

It is notable, however, that Northern's operation of its pipeline and cathodic protection system differs from the ordinary business that might be conducted on neighboring property, such as the hog confinement facility in *Weinhold*. Its natural gas pipeline system provides transmission of critical energy resources utilized by persons and businesses throughout the Midwest and beyond.[44] It is important infrastructure operated for the benefit of the public, pursuant to a U.S. Federal Energy Regulatory Commission ("FERC") certificate of "public convenience and necessity" and it is operated in the manner required by the federal pipeline safety regulations of the Pipeline and Hazardous Materials Safety Administration ("PHMSA").[45]

---

[44] App. 880 – 882; 261 (01.25.23 Tr. at 56 – 58; Exhibit 173).

[45] *See* 20 FERC ¶ 62,410, 1982 WL 40871 (Sept. 1, 1982).

But even beyond how the common law treats business, the most crucial point from common law is this: claims for private nuisance separate from negligence do not exist as a separate tort theory of recovery in every case, but *only* in circumstances where there is a "*degree of danger* (likely to result in damage) *inherent* in the thing [responsible for the harm], beyond that arising from mere failure to exercise ordinary care in its use." *Martins*, 652 N.W.2d at 665-66 (Cady, J., dissenting) (emphasis supplied) (citing *Guzman v. Des Moines Hotel Partners, Ltd. P'ship.*, 489 N.W.2d 7, 11 (Iowa 1992) and *Hall v. Town of Keota*, 79 N.W.2d 784, 790 (Iowa 1956)). The Iowa Supreme Court in *Martins* found that excessive stray voltage from an electric utility met the inherent danger test that would allow stray voltage cases against electric utilities to proceed on standalone nuisance claims. *Id.* at 664. But *Martins* was a typical stray voltage case – one brought by the dairy farmer against the electric utility that served the dairy.

When danger itself would be created by removing a feature, that feature must not be called an inherent danger worthy of a standalone nuisance claim without a showing of negligence. The holding from *Martins* is inapplicable to the facts of this case, which does not involve an allegation of excessive stray voltage from an electrical utility, but rather from a gas company's corrosion safety features. The court should reverse the district court on this basis alone.

Alternatively, the Court should overturn the *Martins* decision as internally inconsistent and contrary to the key Restatement (Second) of Torts parameters on private nuisance. A decision to overturn *Martins* in favor of Justice Cady's dissent and the Restatement would not only clarify Iowa law, it would lead to safer transportation using pipelines and clearer guidance to all who use electricity.

A. *Martins* Should not Apply to this Case Because Operating a Cathodic Protection System is Not Inherently Dangerous as Required to Support a Standalone Nuisance Claim.

The most basic reading of the *Martins* majority indicates it does not apply to this case against a gas company's electric current. *Martins*, 652 N.W.2d at 664 ("The key for such a stand-alone claim of nuisance is that the degree of danger likely to result in damage must be inherent in the thing itself.…Excessive stray voltage ***from an electric utility*** resulting in damage to a dairy herd meets that test.") (emphasis supplied, internal citations omitted).

The Iowa legislature has indicated that it too saw the *Martins* holding as limited to cases against electric utilities. Less than two years after *Martins* was decided, the legislature added subsection 2 to section 657.1 of the Iowa code to

allow "an electric utility" to assert a defense of comparative fault in a nuisance case brought against it.[46]

Even if *Martins* were not a case involving an electric utility, operating a cathodic protection system does not meet the test utilized in *Martins*. The *Martins* majority opinion and the dissent by Justice Cady agreed on one thing – the degree of danger inherent in the thing responsible for the harm is what separates a standalone nuisance claim from nuisance as a theory that must be paired with a negligence finding. *Martins,* 652 N.W.2d at 664; (Cady, J., dissenting) at 665-66.

Cathodic protection does not meet that test for standalone nuisance. They are not inherently dangerous when used as intended, and typically produce less voltage than a single AAA battery.[47] A cathodic protection system is itself a critical safety feature mandated by PHMSA regulations. When used as intended, cathodic protection systems carry no inherent degree of danger likely to result in damage, making proof of negligence necessary in establishing liability, even under the majority holding in *Martins*.

---

[46] *See* Iowa Code § 657.1(2); *see also Dalarna Farms v. Access Energy Coop.*, 792 N.W.2d 656, 659 (Iowa 2010) (discussing legislature's reaction to *Martins*).

[47] App. 885; 907 (01.25.23 Tr. at 61; 01.26.23 Tr. at 13).

The cathodic protection system on Northern's pipeline bears a much greater resemblance to the items that Iowa courts have found unworthy of a standalone nuisance suit because they were not inherently dangerous. The example most on point is *Blackman v. Iowa Union Electric Co.*, 14 N.W.2d 721 (Iowa 1944), which involves, like this case, a gas pipeline. In *Blackman*, when a utility pipeline leaked gas into the plaintiffs' home, the Iowa Supreme Court rejected the plaintiffs' nuisance theory. *Blackman*, 14 N.W.2d at 721. Proof of negligence was essential in the case because, as the court held, gas companies can only be liable for their own negligence. *Id.* at 723. Put another way, as Justice Cady did in the *Martins* dissent, there is no inherent degree of danger in providing gas service beyond the danger posed by doing so negligently:

> The majority side-steps *Blackman* by pointing out that it involved mixed claims of negligence and nuisance, unlike this case. Yet, this is a distinction without a difference. The plaintiff in *Blackman* asserted claims for nuisance and negligence, but the court made it clear that the utility could not be subject to liability for nuisance, only negligence. *Blackman*, 234 Iowa at 862, 14 N.W.2d at 723. The court specifically held that because "proof of negligence was essential in this case, it cannot be said to be a nuisance action." … Proof of negligence was essential because the *harm inherent in transporting gas by pipes into homes is not so great that reasonable care on the part of the utility could not make it safe*. This law applies with equal force to this case.

Martins, 652 N.W.2d at 666 (Cady, J., dissenting) (emphasis supplied).

The case against Northern also bears greater resemblance to the cases following and expanding on *Blackman*. In *Hall v. Town of Keota*, 79 N.W.2d 784

(Iowa 1956), the first Iowa Supreme Court case to formalize the danger-inherent rule, a street pole fell and caused personal injuries to the plaintiff. The Court in *Hall* affirmed the dismissal of plaintiffs' nuisance suit, while determining that plaintiffs' negligence claim could proceed, explaining:

> But in the case at bar the traffic sign was directly connected with the intended use of the street. It was a means of regulating travel upon it. True, as we have pointed out in Division I above, the town owed a duty to keep it in a safe condition. It was a part of the street and sidewalk and should have been kept in repair. But we think failure to do so did not amount to maintenance of a nuisance. It is often difficult to distinguish between negligence and nuisance. Each arises from a failure to perform a duty owed. We think the true distinction so far as our present situation is concerned is pointed out by the Missouri Supreme Court in *Brown v. City of Craig*, 350 Mo. 836, 168 S.W.2d 1080, 1082, where, quoting from *Pearson v. Kansas City*, 331 Mo. 885, 55 S.W.2d 485, 489, it is said: *'That to constitute a nuisance 'there must * * * be a degree of danger (likely to result in damage) inherent in the thing itself, beyond that arising from mere failure to exercise ordinary care in its use''.* The cited case involved an action for the wrongful death of plaintiff's husband while confined in the city jail when it burned. It was held the jail was a lawful structure and the failure to maintain it properly and free from danger of fire was at most negligence rather than a nuisance. The parallel with the situation in the instant case is exact. *The traffic post was a lawful structure lawfully on the sidewalk. Failure to maintain it in a safe condition, if there was such failure, was no more than negligence; it was not a nuisance.*

Id. at 790 (emphasis added). Put differently, under *Hall*, where something is used as intended yet causes injury, the only available claim is one for negligence – a showing that it was not property maintained or repaired. This should be the test for cathodic protection on gas pipelines.

This Court in *Hall* adopted the inherent danger test from a Missouri case, *Brown v. City of Craig*, 168 S.W.2d 1080 (Mo. 1943), where the court held that there was nothing "inherently dangerous" about operating the jail, but rather, "danger would arise only from failure, on the part of the city police officers or the prisoners, to exercise reasonable care, foresight, and prudence"

in its operation. *Id.* at 1082-83. The Iowa Supreme Court has also decided similar cases in line with *Hall* and *Brown*. *See, e.g., Pietz v. City of Oskaloosa*, 92 N.W.2d 577 (Iowa 1958) (finding, in case involving tree in city park that fell on plaintiff, "There is nothing inherently dangerous in a live tree standing in a park…the most that one would have would be negligence and not a nuisance."); *Sparks v. City of Pella*, 137 N.W.2d 909 (Iowa 1965) (quoting degree of danger test and determining that city storm sewer which flooded and damaged plaintiffs' home could not constitute a nuisance); *Guzman v. Des Moines Hotel Partners*, 489 N.W.2d 7 (Iowa 1992) (lawn sprinkler which was inadvertently spraying water onto street causing car accident held not to meet the inherent danger test – "nuisance is merely a condition created by this defendant, if at all, through negligence.").

A crucial distinction from the facts of *Martins* brings this case further in line with *Hall* and its progeny: unlike an electric line, which becomes merely useless without the purported nuisance of electric current, a gas pipeline *becomes*

unsafe when it does *not* have a cathodic protection system running electricity. Without electricity, or without high enough current to allow a cathodic protection system to operate, rapid corrosion on pipelines becomes inevitable.[48] The traffic sign in *Hall* was a sign warning against U-turns in that particular spot. *Hall,* 79 N.W.2d at 785. Traffic signs, like cathodic protection systems, are safety features, or "a means of regulating travel upon [the street where it stood]." *See id.* at 790.

Contrast this with *Perkins v. Madison Co. Livestock Fair Ass'n,* 613 N.W.2d 264 (Iowa 2000) (finding a racetrack as a nuisance for noise and pollution); *Bowman v. Humphrey*, 109 N.W. 714 (Iowa 1906) (finding the dumping of refuse from a creamery as creating a nuisance) and *Iverson v. Vint*, 54 N.W.2d 494 (Iowa 1954) (finding the dumping of molasses as creating a nuisance). No safety feature has ever been evaluated using this framework in Iowa case law; no activity designed to increase safety has been allowed to stand as a nuisance claim on its own. For this reason alone, this Court should hold that the *Martins* holding does not apply to cathodic protection systems and reverse the district court, requiring a showing of negligence on Northern's part on retrial.

B. The *Martins* Majority Opinion Should be Overturned in Favor of Adopting the Principles of the Restatement (Second) of Torts Section 822.

---

[48] App. 883 – 884; 898 (01.25.23 Tr. at 59 – 60; 84).

To the extent the Court chooses to evaluate the facts of this case under *Martins*, the *Martins* case should be overturned in favor of adopting the Restatement (Second) of Torts, Section 822. Justice Cady's dissent in *Martins*, the legislature's reaction to *Martins*, and the reasoning behind the test developed by the Restatement (Second) of Torts, section 822 all weigh in favor of overturning it.

1. <u>The *Martins* Majority Opinion Creates a Strict Liability Standard in Stray Voltage Cases that Other Precedent Forbade.</u>

In announcing its conclusion that excessive stray voltage from an electric utility meets the inherent danger test, the *Martins* majority cited approvingly to the following language from a law review article:

> Some stray voltage may always be present as an inherent part of supplying electricity; however, *problems in the electrical systems* can elevate the levels of voltage to an undesirable level...

652 N.W.2d at 662 (citing Yelkovac at 1112) (emphasis supplied). The majority relied on the first clause and the use of the word "inherent" to reach its conclusion that stray voltage is the sort of inherent danger that supports a standalone nuisance claim. *Id.* at 662; 664. Justice Cady's dissent, however, correctly points out that the second clause, which goes unaddressed by the majority, reflects that a requirement of negligence is appropriate in cases of stray voltage:

> The majority incorrectly concludes that excessive stray voltage responsible for damage to a dairy herd meets this test of a nuisance. It does not, because the case only satisfies part of the test. Although some stray voltage is

> inherent in the process of supplying electricity, the undesirable levels of stray voltage responsible for harm to cattle result because of "problems in the electrical systems." Yelkovac, 28 Val. U.L. Rev. at 1112-13. Stray voltage can be minimized or controlled by proper methods of distribution. Id. at 1119-20. Thus, the failure of a utility to properly minimize and contain stray voltage to an acceptable inherent level would be no more than negligence.

Id. at 665 – 66 (Cady, J. Dissenting). As Justice Cady recognized, the fact that there is some stray voltage inherent in the provision[49] of electricity does not mean that the danger is inherent ***without problems*** in the electrical systems that elevate it to undesirable levels. *Id*. That danger and those problems result from "the failure of a utility to properly minimize and contain stray voltage to an acceptable level" – that is, "no more than negligence." *Id*.

Adopting the Cady dissent would bring the law on private nuisance in line with the precedent on which *Martins* rests, specifically *Hall* and its progeny, as well as *Schlader*. *Hall* and its progeny stand for the proposition that items properly designed and used as intended are not inherently dangerous and should not suffer nuisance claims absent claims of negligence. *See, e.g., Hall*, 79 N.W.2d at 790 ("The traffic post was a lawful structure lawfully on the sidewalk. Failure

[49] At the risk of belaboring the point, Northern's cathodic protection system is not a provider or supplier of electricity, but a user of electricity provided by the electric utility; if the *Martins* majority holding is to stand at all, it does not and should not apply to mere *users* of electricity but its providers and suppliers.

to maintain it in a safe condition, if there was such failure, was no more than negligence; it was not a nuisance.").

The *Martins* majority and the case against Northern rest on the assumption that electricity itself is enough of an inherent danger to meet the test, regardless of the design of the system through which it is supplied or used, the manner of its use, or the level of electric current at issue. This confuses Iowa law and has already led, in one instance, to the mention of electricity as an attempt to let a negligence claim pass as a nuisance claim on its own. *See Kellogg v. City of Albia*, 902 N.W.2d 822 (Iowa 2018), (finding a claim of standalone nuisance for dangerous conditions inherent in a flooding basement – including the "danger of mixing water with electricity" – to be a barred negligence claim in disguise). More importantly, this incorrect assumption about electricity belies the countless systems such as distribution lines and cathodic protection systems that operate safely when designed well and without negligence. Vagts, in this case, recovered not based upon any error committed by Northern in running its cathodic protection system, but on the system's existence in the vicinity of the Vagts' farm alone.

In *Schlader v. Interstate Power Co.*, 591 N.W.2d 10 (Iowa 1999), this Court refused to impose strict liability in stray voltage cases, noting that the legislature has repealed a statue providing for strict liability and stating, "It seems

apparent that we would astonish the legislature if we were to adopt strict liability regarding stray voltage." *Id*. at 12. In effect, however, *Martins* and the case against Northern ignore *Schlader* and adopt that strict liability standard. *Martins* stands for the proposition that a private nuisance does not have to be intentional, does not have to rest on negligence, and therefore imposes liability in every stray voltage case where a plaintiff merely *alleges* the voltage is "excessive." As Justice Cady's dissent explains:

> The effect of the majority decision is to impose a form of strict liability on a utility in a stray voltage case. Nearly sixty years ago, we expressly said that a utility "can only be held liable for its own negligence." *Blackman,* 234 Iowa at 862, 14 N.W.2d at 723. Moreover, this concept was recently reaffirmed in *Schlader v. Interstate Power Co.,* where we refused to allow the concept of strict liability to creep into a stray voltage case brought against the utility. *Schlader,* 591 N.W.2d at 12. Furthermore, we indicated our legislature has expressed its intent not to impose strict liability regarding stray voltage. *Id*. at 13.

Martins, 652 N.W.2d at 666 (Cady, J., dissenting).

Accordingly, the majority opinion in *Martins* should be overturned in favor of a test requiring a negligence finding in stray voltage cases, as advocated for by Justice Cady in his dissent, which is in line with the Restatement (Second) of Torts Section 822, discussed below.

2. <u>The Restatement (Second) of Torts Section 822 Should be Adopted.</u>

The majority in *Martins* made clear it was taking a position contrary to the Restatement (Second) of Torts section 822. *Id.* at 664. Section 822 of the Restatement provides:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either:
>
> (a) intentional *and* unreasonable, or
>
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, *or* for abnormally dangerous conditions or activities.[50]

Restatement (Second) of Torts § 822 (1979) (hereafter "Section 822"). Twenty-two states have adopted section 822,[51] with another three either partially adopting

---

[50] As indicated in comment (j) to the Restatement, the term "abnormally dangerous activities" refers not to the "inherent danger" test that the Court in *Martins* discussed, but to the application of strict liability for activities such as "blasting activities"; the "storage of a large quantity of explosives"; or maintaining a pet known to be vicious.

[51] See *Adams v. Lang*, 553 So. 2d 89, 92 (Ala. 1989); *Parks Hiway Enters. v. Cem Leasing*, 995 P.2d 657, 666 (Alaska 2000); *Lussier v. San Lorenzo Valley Water Dist.*, 206 Cal. App. 3d 92, 101-02 (1988); *Pub. Serv. Co. v. Van Wyk*, 27 P.3d 377, 391 (Colo. 2001); *Pestey v. Cushman*, 788 A.2d 496, 506 (Conn. 2002); *Ching v. Dung*, 446 P.3d 1016, 1032 (Haw. Ct. App. 2019); *First Springfield Bank & Trust v. Galman*, 702 N.E.2d 1002, 1010-11 (Ill. App. Ct. 1998) (rev'd on other grounds), *First Springfield Bank & Trust v. Galman*, 720 N.E.2d 1068 (Ill. 1999); *Jerryco v. Union Stattino Plaza Assocs.*, 625 A.2d 907, 908 (Me. 1983); *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 720 (Mich. 1992); *Comet Delta, Inc. v. Pate Stevedore Co.*, 521 So. 2d 857, 859-60 (Miss. 1988); *Hall v. Phillips*, 436 N.W. 2d 139, 145 (Neb. 1989); *Robie v. Lillis*, 299 A.2d 155, 158 (N. H. 1972); *Ross v. Lowitz*, 120 A.2d 178, 184-85 (N.J. 2015); *Copart Industries, Inc. v. Consolidated Edison Co.*, 41 N.Y.2d 564, 569 (1977);

it or adopting tests for nuisance which are substantially similar.[52] In its rejection of Section 822, the *Martins* majority held that nuisance claims not only can be established without a showing of underlying negligent conduct, but also "can be established without a showing of intentional conduct." *Martins*, 652 N.W.2d at 664.

It is important to note that post-*Martins*, the Iowa legislature expressed its displeasure with the policy adopted therein. Less than 2 years after *Martins*, the legislature added subsection 2 to section 657.1 of the Iowa code to allow an electric utility to assert a defense of comparative fault in a nuisance case brought against it.[53] That amendment limits *Martins* and imparts traditional negligence concepts into stray voltage cases against electric utilities by adding comparative

---

Pendergrast v. Aiken, 236 S.E.2d 787, 796 (N. C. 1977); *Ogle v. Ohio Power Co.*, 903 N.E.2d 1284, 1288 (Ohio Ct. App. 2008); *Carvalho v. Wolfe*, 140 P.3d 1161, 1163-64 (Or. Ct. App. 2006) and *Phillips Ranch, Inc. v. Banta*, 543 P.2d 1035, 1038-39, n.4 (Or. 1975); *Waschak v. Moffat*, 109 A.2d 310, 314 (Pa. 1954); *Kuper v. Lincoln-Union Elec. Co.*, 557 N.W.2d 748, 761 (S.D. 1996); *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 604-09 (Tex. 2016); *Morgan v. Quailbrook Condominium Co.*, 704 P2d 573, 576 (Utah 1985); *Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen.*, 384 N.W.2d 692, 695 (Wis. 1986); *Hendricks v. Stalnaker*, 380 S.E.2d 198, 200 (W. Va.1989).

[52] *Culwell v. Abbott Constr. Co.*, 506 P.2d 1191, 1195-96 (Kan. 1973); *Yeager & Sullivan, Inc. v. O'Neill*, 324 N.E.2d 846, 851 (Ind. Ct. App. 1975) and *Sherk v. Indiana Waste Sys., Inc.*, 495 N.E.2d 815, 818 (Ind. Ct. App. 1986); *Martin v. Artis*, 290 P.3d 687, 690 (Mont. 2012).

[53] *See* Iowa Code § 657.1(2); *see also Dalarna Farms v. Access Energy Coop.*, 792 N.W.2d 656, 659 (Iowa 2010) (discussing legislature's reaction to *Martins*).

fault to the analysis. By definition, that requires a finding of a percentage of fault as to respective parties. Northern was not afforded that opportunity, actually putting it in a *worse* position than the defendant in a typical stray voltage case – an electric utility.

Stray voltage precedent from states that have adopted section 822 provides insight into why a standard requiring a showing of intent or negligence is imperative. In *Kuper v. Lincoln-Union Elec. Co*., 557 N.W.2d 748 (S.D. 1996), despite finding that delivering electricity can be dangerous, the court made it a point to require a jury instruction that instructed the jury as to the duty of ordinary care. *Id*. at 756. More importantly, the South Dakota court in *Kuper* explained the importance of intent in the nuisance context:

> The unintentional forms of [nuisance], however, have fallen into disfavor, in particular because imposing nuisance liability without intent may result in liability without any fault. One leading authority has noted, for example, that splitting the law of nuisance into intentional and unintentional theories "has produced much confusion and some erroneous results ... [therefore] nuisance [is a term] that should describe intentional torts." … "Intent," in its most commonly used sense, means (1) a state of mind; (2) about consequences of a given act, not about the act itself; and (3) having in mind a desire to cause certain consequences knowing these consequences are substantially certain to result. Id. § 8, at 43. Furthermore, an intentional intrusion in the nuisance context is an invasion
>
>> that the actor knowingly causes [i.e., natural stray voltage] in the pursuit of a laudable enterprise [i.e., provision of electrical power] without any desire to cause harm.... It is not enough to make an invasion intentional that the actor realizes or should realize that this conduct involves a serious risk or likelihood of causing the invasion.

> [The actor] must either act for the purpose of causing it or know that it is resulting or is substantially certain to result...
>
> ***The knowledge element on which the definition of "intentional invasion" turns exists not when the electric power company knows it is providing electricity with a natural by-product being stray voltage and ground current, but when the company knows these phenomena are occurring at unreasonable levels, causing harm to dairy cows and continues to act to cause the harm***….In cases where the offending elements, i.e., stray voltage and ground current, are phenomena naturally occurring in the production of electricity, annoying only to certain animal species and detectable by humans only with special instruments, the electrical provider will not know of it until the consumer points out that the levels of these elements are causing harm. Unique local conditions, including a farmer's own electrical appliances; the type of grounding, if any, of farm buildings; soil composition or the existence of current carrying objects in the ground; particular sensitivities of the animals; and other factors, may combine to produce problems with excessive stray voltage, circumstances of which a utility company may not be aware and over which it may have no control. ***Therefore, maintaining an intent element in the discussion of nuisance in such cases allows a more sound result, predicated on the actual knowledge and purpose of the tortfeasor.***

Id. at 762 (emphasis added; internal citations omitted).

The *Kuper* court's analysis of intent helps to untangle the complicated knot created in *Martins*. Setting aside strict liability theories for "abnormally dangerous activities," which *Schlader* makes clear do not apply in stray voltage, a private nuisance arises from either "intentional and unreasonable conduct," or "negligent or reckless conduct" under Section 822. If a party has knowledge that an activity will create a nuisance and proceeds with the nuisance-causing activity anyway without amending their behavior, that party has acted intentionally and unreasonably. If a party acts outside the applicable standard of care, that party

has acted negligently. Vagts were required to show neither in this case. And, absent a showing of fault by one of those methods, permitting a nuisance claim to proceed as a standalone tort is equivalent to permitting the strict liability recovery that *Schlader* prohibited, as Justice Cady's dissent points out.

In sum, the *Martins* holding permits recovery without any showing of fault. That, by definition, is strict liability. The *Martins* decision is therefore out of step with the science of stray voltage as explained in Justice Cady's dissent, the actions of the Iowa legislature post-*Martins*, and the principles of the Restatement. The Martins majority holding should therefore be overturned in favor of adopting the principles of the Restatement.

C. The Court Should hold that On Remand, PHMSA's Federal Safety Regulations Provide an Appropriate and Uniform Standard of Care for Stray Voltage Cases Predicated on Cathodic Protection.

Federal law and PHMSA regulations governing safety of pipelines and cathodic protection systems should be considered in evaluating stray voltage cases predicated on the operation of cathodic protection systems. Enacted in 1994, the federal Pipeline Safety Act evinces a clear congressional intent to occupy the field of interstate pipeline safety: Rather than allow each individual locality that an interstate pipeline passes through to burden interstate commerce with a patchwork of policymaking and parochial interests, the Pipeline Safety

Act assigns exclusive authority to regulate pipeline safety to the U.S. Secretary of Transportation.

The Secretary of Transportation has delegated authority to implement the PSA to an expert federal agency— PMHSA. *See* 49 C.F.R. § 1.96 (2022). PHMSA, in turn, has promulgated an extensive body of federal safety rules that pervasively regulate the design, construction, and operation of interstate pipelines like Northern. See 49 C.F.R. § 195 et seq. No function of PHMSA is more important than ensuring the safety of pipeline operations. Congress has mandated that when implementing pipeline policy, PHMSA's Administrator must "assig[n] and maintai[n] safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in pipeline transportation and hazardous materials transportation." 49 U.S.C. § 108(b) (2022).

Significantly, PHMSA's regulations set a governing standard of care regarding cathodic protection. Each buried gas pipeline "must have a cathodic protection system designed to protect the pipeline in accordance with this subpart …" (49 C.F.R. § 192.455(a)(2)) and "[e]ach cathodic protection system required by this subpart must provide a level of cathodic protection that complies with one or more of the applicable criteria contained in appendix D of this part." 49 C.F.R. § 192.463(a) (2022). Appendix D to Part 192 specifies the level of

electric voltage that must be applied to the pipeline, depending on whether the cathodic protection voltage is being applied to a steel, cast iron, or ductile iron surface, and any failure on the part of an operator to install and operate a cathodic protection system on a buried gas pipeline in accordance with these requirements would result in a violation of PHMSA laws and regulations subjecting a pipeline operator to enforcement. *E.g.*, 49 U.S.C. § 60122; 49 C.F.R. § 190.233 (2022) (allowing PHMSA to issue a corrective action order requiring compliance with safety standards). Because PHMSA regulations occupy the field, there is "no regulatory room for the state to either establish its own safety standards or supplement the federal safety standards." *Kinley Corp.*, 999 F.2d at 359 (emphasis added).

In this context, it is quite possible that pipeline operators could be subject to conflicting standards with respect to the same interstate pipeline, thus subjecting the operators to a patchwork of conflicting regulation that the Eighth Circuit found contrary to Congress' intent. Accordingly, PHMSA regulations governing cathodic protection provide an appropriate, and uniform, standard of care that should be applied to negligence claims based upon stray voltage from cathodic protection systems.

II. The District Court Erred in Denying Northern's Motion for Remittitur in this Case.

Error Preservation. Northern timely filed a motion for remittitur, or in the alternative, new trial, following the verdict in this case.[54] The district court considered and denied Northern's motion.[55] Northern therefore preserved error on this issue. *Meier v. Senecaut*, 641 N.W.2d 532, 537–38 (Iowa 2002).

Standard of Review. The Court reviews a ruling on a motion for new trial for abuse of discretion. *Kuta v. Newberg*, 600 N.W.2d 280, 284 (Iowa 1999).

Argument

The jury in this case awarded damages of $4.75 million, as follows (1) $3 million in economic damages; (2) $1.25 million for "personal inconvenience, annoyance and discomfort"; and (3) $500,000 for "loss of use of enjoyment of land."[56]

Iowa courts reduce an award or order new trial where the award is "flagrantly excessive or inadequate, so out of reason as to shock the conscience or sense of justice, ***a result of passion, prejudice*** or other ulterior motive, or ***lacking in evidentiary support***." *Hoffmann v. Clark*, 975 N.W.2d 656, 666 (Iowa 2022) (emphasis added; citations omitted); *see also Bates v. Quality Ready-Mix*

---

[54] App. 140 – 143 (Northern's Post-Trial Motions at 18 – 21).

[55] App. 201 – 203 (Ruling on Post-Trial Motions at 7 – 9).

[56] App. 119 – 120 (Verdict Form).

Co., 154 N.W.2d 852, 859 (Iowa 1967) ("One of the grounds for allowing a new trial is that the amount allowed is lacking in evidentiary support."). While determination of damages is "within the discretion of the jury" that "discretion is not unlimited." *Hoffman*, 975 N.W.2d at 666.

In the present case, the jury's award of $1,250,000 for "personal inconvenience, annoyance, and discomfort" is lacking in evidentiary support. There was no evidence presented from which the jury could conclude that $1.25 million is a reasonable figure for the inconveniences experienced by the Vagts, especially when considering that the jury also awarded $500,000 for "loss of use and enjoyment of land" – an additional category of non-economic damage. *See* Jury Instruction No. 12 (defining loss of use of enjoyment of land to include "pleasure, comfort, and enjoyment" derived from use of the land)[57].

This is not a case involving personal injuries, where physical suffering is at issue. *See, e.g.*, *Kuta v. Newberg*, 600 N.W.2d 280, 284 (Iowa 1999). Further, unlike a nuisance case where, for example, the plaintiff is subject to noxious odors at their home which cause personal annoyance and discomfort[58], the

---

[57] App. 117 (Jury Instruction No. 12).

[58] *See, e.g., Weinhold,* 555 N.W.2d 454 (upholding jury award of $45,000 in special damages for permanent nuisance caused by neighboring hog confinement).

alleged stray voltage or "ground current" in this case is not something that Vagts – or any human – could perceive.

Moreover, the potential for the jury to award excessive damages was exacerbated by an omission in the verdict form. During trial in this matter, the parties' entered into a settlement agreement pursuant to which Plaintiffs' claim for permanent nuisance was dismissed and any damages flowing from such permanent nuisance released. The parties thereafter agreed that Jury Instruction No. 14 should therefore include an "end date" as to the time-period for which damages were recoverable, and agreed to insert "January 30, 2023" as such end date to each relevant section of Jury Instruction No. 14.[59] The verdict form, however, did not include the "end date" for each type of damages. This plain error created confusion and invited the jury to speculate and award damages beyond the relevant damage period.

Where the evidence presented does not support the level of award issued by the jury, or is a result of passion or prejudice, a new trial or remittitur is required. *See, e.g., Kuta*, 600 N.W.2d at 284 (reducing award of $982,000 for pre-death pain and suffering and loss of mind and body to $300,000 where decedent was conscious only for a few minutes after vehicle accident); *Bates,* 154

[59] App. 118 (Jury Instruction No. 14).

N.W.2d at 859 (reducing nuisance award where evidence was lacking). Accordingly, the district court erred in denying Northern's motion for new trial, or in the alternative, remittitur, regarding the excessive damages awarded in this case.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court and remand for a new trial of this case.

REQUEST FOR ORAL SUBMISSION

Northern respectfully requests oral submission of this matter.

Respectfully submitted this 30th day of August, 2023

/s/ Brant M. Leonard
Brant M. Leonard
Bret A. Dublinske
Sarah A. Arbaje
FREDRIKSON & BYRON, P.A.
111 East Grand Avenue, Suite 301
Des Moines, IA 50309
Tel: (515) 242-8900
Fax: (515) 242-8950
Email: bleonard@fredlaw.com
bdublinske@fredlaw.com
sarbaje@fredlaw.com

Attorneys for Appellant Northern Natural Gas Company

CERTIFICATE OF COST

The undersigned certifies that the cost for printing and duplicating paper copies of this brief was $0.00.

Respectfully submitted this 30th day of August, 2023.

/s/ Brant M. Leonard
Brant M. Leonard
Bret A. Dublinske
Sarah A. Arbaje
FREDRIKSON & BYRON, P.A.
111 East Grand Avenue, Suite 301
Des Moines, IA 50309
Tel: (515) 242-8900
Fax: (515) 242-8950
Email: bleonard@fredlaw.com
bdublinske@fredlaw.com
sarbaje@fredlaw.com

Attorneys for Appellant Northern Natural Gas Company

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) because it has been prepared in a proportionally spaced typeface using 14 point Times New Roman font in Microsoft Word 2010 and contains 9,542 words, excluding the parts of the brief exempted from the type-volume requirements by Iowa R. App. P. 6.903(1)(*g*)(1).

Respectfully submitted this 30th day of August, 2023.

/s/ Brant M. Leonard
Brant M. Leonard
Bret A. Dublinske
Sarah A. Arbaje
FREDRIKSON & BYRON, P.A.
111 East Grand Avenue, Suite 301
Des Moines, IA 50309
Tel: (515) 242-8900
Fax: (515) 242-8950
Email: bleonard@fredlaw.com
bdublinske@fredlaw.com
sarbaje@fredlaw.com

Attorneys for Appellant Northern Natural Gas Company

CERTIFICATE OF SERVICE

The undersigned certifies the foregoing document was electronically served on the Clerk of the Supreme Court using the Electronic Document Management System on August 30th, 2023 which will serve a notice of electronic filing to all registered counsel of record.

Respectfully submitted this 30thth day of August, 2023.

<u>/s/ Brant M. Leonard</u>
Brant M. Leonard
Bret A. Dublinske
Sarah A. Arbaje
FREDRIKSON & BYRON, P.A.
111 East Grand Avenue, Suite 301
Des Moines, IA 50309
Tel: (515) 242-8900
Fax: (515) 242-8950
Email: bleonard@fredlaw.com
bdublinske@fredlaw.com
sarbaje@fredlaw.com

Attorneys for Appellant Northern Natural Gas Company