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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 REPLY BRIEF OF DEFENDANT-APPELLANT NORTHERN NATURAL GAS COMPANY

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ARGUMENT

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

The Vagts brief fails to squarely address, let alone refute, Northern's assigned errors regarding *Martins v. Interstate Power Co.*, 652 N.W.2d 657 (Iowa 2002). Since the inception of this case, Vagts have conflated legal principles. This approach was successful because, following *Martins*, the Vagts did not have to prove that Northern was negligent in any manner in the operation of its pipeline or cathodic protection system. This result is untenable.

The holding of Martins is inapplicable to this case. Moreover, the post-*Martins* amendments to Iowa Code section 657.1 indicate the legislature's concern with the *Martins* holding. *Martins* created a strict liability standard for stray voltage cases that cannot be allowed to stand. This Court must reverse and remand.

A. Standalone Nuisance Claims Should Not be Permitted to Proceed Against Safety Systems.

Vagts do not address the key distinction between cathodic protection and electric lines: that one is a safety system and the other is not. Instead, they devote a substantial portion of their Brief to mischaracterizing *Martins* as holding that electricity meets the inherent danger test, and because CP systems are capable of producing similar current they must therefore meet that same test. Setting aside

for the moment that the Iowa legislature amended the statute to alter that result, Vagts do not address the most crucial difference between a pipeline CP system and an electric utility line – that unlike electric utility lines, without the current from a CP system pipelines *become dangerous*. Put another way, there is inherent danger in the *absence* of a CP system; without it, pipeline faults and leaks are inevitable.[1]

> The *Martins* Court announced the inherent danger test as follows:
>
> > The true distinction between negligence and nuisance is 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.'"

Martins v. Interstate Power Co., 652 N.W.2d 657, 661 (Iowa 2002) (quoting *Guzman v. Des Moines Hotel Partners, L.P.*, 489 N.W.2d 7 at 11 (Iowa 1992)).

Whether a given activity meets the inherent danger test is a legal question. *See Freeman v. Grain Processing Corp.*, 895 N.W.2d 105, 123 (Iowa 2017). To argue that operation of a cathodic protection system is inherently dangerous is to argue that safety systems required by law[2] are themselves inherently dangerous.

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[1] App. 859 (Bianchetti Dep. Tr. at 41).

[2] See 49 C.F.R. § 192.455(a)(2) (providing that each buried gas pipeline "must have a cathodic protection system designed to protect the pipeline in accordance with this subpart …"); 49 C.F.R. § 192.463(a) ("[e]ach cathodic protection system required by this subpart must provide a level of cathodic protection that

The Court should reject the argument that all electric current should be treated the same regardless of its source in the context of the inherent danger analysis. Safety features should not be evaluated under the same legal test as items like electric utility lines which merely become useless, rather than dangerous, absent current.

B. The Iowa Legislature's Amendments to the Private Nuisance Statute Are Evidence of its Displeasure with the Majority Holding in *Martins*.

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.[3] It is beyond question that the legislature's amendment was a reaction to *Martins*, and an attempt to impart fault principles into stray voltage litigation. As the Iowa Supreme Court has repeatedly held, "[A]n amendment to statutory text following our construction of the text raises a presumption that the legislature intended to alter the rights explained by our cases." *Iowa Farm Bureau Fed'n v. Env't Prot. Comm'n*, 850 N.W.2d 403, 434 (Iowa 2014) (citing *Postell v. Am. Family Mut. Ins. Co.*, 823 N.W.2d 35, 49 (Iowa 2012)).

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complies with one or more of the applicable criteria contained in appendix D of this part.").

[3] *See* Iowa Code § 657.1(2).

More to the point, the Iowa Supreme Court has expressly held that the amendment to section 657.1 to add subsection (2) was a reaction to *Martins*, and permits a comparative fault defense for electric utilities. *See Dalarna Farms v. Access Energy Coop.*, 792 N.W.2d 656, 659 – 661 (Iowa 2010) (noting, "The amendment to section 657.1 clearly appears to have been a legislative response to our decision in *Martins*" and permitting electric utility's comparative fault defense in stray voltage case). The legislature's amendment of Iowa Code section 657.1 following *Martins* is evidence of the problems inherent in that case and support for the fact that it should be overturned.

Vagts insist that Northern be ***treated*** as an electric utility for the purpose of applying the *Martins* holding on stray voltage for electric utilities, while also repeating that Northern is ***not*** an electric utility[4] and should not be afforded the protection of the comparative fault provision the legislature added in section 657.1.(2). Vagts argue that section 657.1(2) specifically permits an "electric utility" to assert a comparative fault defense, but does not mention pipeline companies. Vagts attempt to support their argument by citing cases which hold that "[t]he legislature is presumed to know the state of the law, including case law, at the time it enacts a statute." *Iowa Farm Bureau Fed'n*, 850 N.W.2d at 434;

[4] See Appellant's Brief at 37, n. 49. Northern has never disputed that it is not an electric utility.

see also Roberts Dairy v. Billick, 861 N.W.2d 814, 821 (Iowa 2015) ("[W]e presume the legislature is familiar with the holdings of this court relative to legislative enactments"), internal citations omitted.

What Vagts *ignore*, however, is that Iowa case law does not contain any stray voltage cases involving cathodic protection.[5] In response to Northern's Brief, Vagts do not even attempt to argue against the reality that stray voltage cases have, traditionally, been brought against electrical utilities. Similarly, Vagts do not challenge Northern's assertion that this case is the first stray voltage case in the state to have proceeded to trial against a natural gas pipeline operating a federally mandated cathodic protection system.

At the time the legislature amended section 657 in April of 2004, every single Iowa opinion involving stray voltage had been from cases brought against an electric utility.[6] Thus, that the legislature did not include "pipeline

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[5] The complete list of published stray voltage cases in Iowa includes the following cases, none of which involve cathodic protection and the unique current produced by a cathodic protection system: *Schlader v. Interstate Power Co*., 591 N.W.2d 10 (Iowa 1999); *Martins v. Interstate Power Co*., 652 N.W.2d 657 (Iowa 2002); *Fox v. Interstate Power Co.*, 521 N.W.2d 762 (Iowa Ct. App. 1994) (per curiam); *Dalarna Farms v. Access Energy Coop.*, 792 N.W.2d 656 (Iowa 2010); *Umbdenstock v. Interstate Power Co.*, 756 N.W.2d 481 (Iowa Ct. App. 2008); *Hegg v. Hawkeye Tri-County REC*, 512 N.W.2d 558 (Iowa 1994) (per curiam).

[6] *Schlader v. Interstate Power Co*., 591 N.W.2d 10 (Iowa 1999); *Martins v. Interstate Power Co*., 652 N.W.2d 657 (Iowa 2002); *Fox v. Interstate Power Co*.,

companies" in the amendment to section 657 is not evidence that it intended to provide a comparative fault defense for electrical utilities while depriving pipeline companies of the defense; it had no reason to believe that a stray voltage case could or would be brought against a pipeline company. In sum, while the legislature may be presumed to know the state of the Iowa Supreme Court's cases at the time of an enactment, the legislature cannot be presumed to know what has never occurred before in any case in its state.

To the contrary, that the legislature saw fit to amend the statute to alter the rights of the parties to provide a comparative fault defense to the only type of defendant it had seen in a stray voltage case is further evidence that the legislature was displeased with the balancing of rights in *Martins*. *Dalarna Farms* makes this clear. There, the Plaintiff argued, and the district court agreed, that section 657.1(2) permitted an electric utility to assert a comparative fault defense *only* against injunctive relief or future damages in lieu of that injunctive relief. The Plaintiff pointed to the literal language of subsection (2), which states:

> Notwithstanding subsection 1, *in an action to abate a nuisance against an electric utility,* an electric utility may assert a defense of comparative fault as set out in section 668.3…

Dalarna Farms v. Access Energy Coop., 792 N.W.2d 656, 659 (Iowa 2010).

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521 N.W.2d 762 (Iowa Ct. App. 1994) (per curiam); *Hegg v. Hawkeye Tri-County REC*, 512 N.W.2d 558 (Iowa 1994) (per curiam).

The Iowa Supreme Court reversed the district court, setting aside a "literal reading" of section 657.1(2) and instead holding,

> The amendment to section 657.1 clearly appears to have been a legislative response to our decision in *Martins.* It is less clear, however, that the legislative response was intended to limit the comparative fault defense to actions seeking injunctive relief. Instead, we think a reading of section 657.1 in its entirety and in proper context demonstrates a legislative intent to authorize a comparative fault defense in any nuisance action seeking damages against an electric utility if the utility demonstrates compliance with the standards and secures the permits and approvals referenced in the statute.

Dalarna Farms v. Access Energy Coop., 792 N.W.2d 656, 661 (Iowa 2010).

Accordingly, the legislature's amendment of Iowa Code section 657.1 following *Martins* is evidence of the problems inherent in that case and support for the fact that it should be overturned.

C. <u>The Inherent Danger Necessary to Sustain a Private Nuisance is a Separate Element from Use and Enjoyment of Land.</u>

Vagts' attempt to distinguish Iowa case law upon which *Martins* is based misses the mark. In attempting to distinguish *Guzman v. Des Moines Hotel Partners, L.P.*, 489 N.W.2d 7 (Iowa 1992), Vagts conflate two aspects of nuisance: (1) whether a nuisance meets the inherent danger test and may stand apart from negligence; and (2) whether the nuisance claimant's use and enjoyment of its land has been affected. Of *Guzman*, the Vagts argue that "[e]ven more fundamentally" than the fact that the inherent danger test was not met and

therefore the nuisance claim was found inapplicable, "the interest invaded was not the private use and enjoyment of land." (Vagts' Brief at 57). It is not in dispute that the Vagts are claiming invasion of private use and enjoyment of their land; it is the first inquiry – the inherent danger test – that is missing here.

Iowa case law makes clear that it is possible for claimants to fail the standalone nuisance test even when it is undisputed that claimants own the land for which they claim their private use and enjoyment interest was affected. *See, e.g., Kellogg v. City of Albia*, 908 N.W.2d 822 (Iowa 2018). As for *Guzman*, Vagts mischaracterize that case (and *Hall v. Town of Keota* by extension). These cases did not involve claimants who owned the land over which they claimed there was a nuisance. The standalone nuisance claims at issue in those cases were a form of public nuisance for which the claimant's interest in the land is not an element. *Guzman v. Des Moines Hotel Partners, L.P.*, 489 N.W.2d 7, 10 (Iowa 1992) ("A public or common nuisance is… an interference with the rights of a community at large…A private nuisance, on the other hand, is a civil wrong based on a disturbance of rights in land"); *Hall v. Town of Keota*, 248 Iowa 131, 134 (Iowa 1956) ("failure of the town to keep its public highways and streets in repair and free from nuisances…is alleged."). Those cases were not dismissed on the grounds of the relationship of the harm to the private use and enjoyment of the land, but on the claims' failures to stand as nuisances without negligence.

Guzman, 489 N.W.2d at 11 ("the court erred in submitting the issue of nuisance as a separate theory. As the above authorities note, nuisance is merely a condition created by this defendant, if at all, through negligence"); *Hall*, 248 Iowa at 142 ("Failure to maintain it in a safe condition, if there was such a failure, was no more than negligence; it was not a nuisance.")

Interest in land is a separate and distinct issue from the inherent danger necessary to maintain a standalone nuisance claim without negligence. A CP system is not an inherent danger worthy of a standalone nuisance claim, regardless of whether that claim is for public nuisance or—as is undisputed in this case and therefore a red herring—private. The connection of the alleged nuisance to the use and enjoyment of the Vagts land does nothing to clarify the law at issue regarding the difference between negligence and standalone nuisance.

D. Applying *Martins* to a Cathodic Protection System Creates a Strict Liability Standard for An Activity that is Required By Law.

Vagts, perhaps understandably, do not provide any support for their argument that nuisance is a "fundamentally different" tort than strict liability;[7] that is because any "fundamental differences" there were between standalone

[7] Vagts Proof Brief at 56. *Schlader* involved a claim of strict products liability under the Restatement (Second) of Torts section 402A, but the *Schlader* holding is broad: "[W]e would astonish the legislature if we were to adopt strict liability regarding stray voltage." *Schlader*, 591 N.W.2d at 12.

nuisance and strict liability collapsed in *Martins* when applied to stray voltage. The majority in *Martins* purported to thread the needle between: (a) finding stray voltage claims did not need to be based in negligence; and (b) assigning – as *Schlader* forbade – strict liability in the stray voltage context. *See Schlader v. Interstate Power Co*., 591 N.W.2d 10, 12 (Iowa 1999).

This attempt to thread the needle failed. The majority in *Martins*, determined that, "***Excessive*** stray voltage from an electric utility resulting in damage to a dairy herd meets that test." *Martins*, 652 N.W.2d at 664 (emphasis added). The *Martins* court relied on the term "excessive" without asking whether providing electricity itself, apart from reasonable care, is inherently dangerous, and without defining what level of stray voltage makes it "excessive." As a result, that holding now requires only that a plaintiff plead the stray voltage is "excessive," citing to no particular adopted standard, in effect creating a strict liability standard. As Justice Cady's dissent in *Martins* explained:

> 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.*** The majority has created a case for nuisance that is not supported by law, facts, or science.

> ***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.

Id. at 665 – 66 (Cady, J., Dissenting) (emphasis added).[8]

Simply put, assigning liability without a finding of intent or negligence is a form of strict liability. The *Martins* court stretched the boundaries of standalone nuisance theory beyond sense in order to get around *Schlader*, and the legislature responded by changing the law. This brief does, indeed, cover the same ground as was fought in *Martins* on strict liability because *Martins* was wrongfully decided and should be overturned.

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[8] Vagts criticize the use of the Yelkovac citations used in the *Martins* dissent. 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) (hereafter "Yelkovac"); Vagts Proof Brief at 55 ("The law review author relied upon by the dissent in Martins did not even address the application of nuisance theory…Nothing in the record indicates the author had any expertise in the technical electrical or veterinary aspects of the subject"). But the Vagts do not acknowledge that the *Martins* majority also relies on Yelkovac, quite heavily: "The writer [Yelkovac] 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." [Yelkovac] at 1112-13 (emphasis added)." *Martins*, 652 N.W.2d at 662 (emphasis in original).

Standalone nuisances have one key feature that stray voltage lacks: obviousness. Standalone nuisances are not found in circumstances that require complex diagnostic tools and hours of investigations to detect as is the case with stray voltage. Rather, stray voltage cases are a departure from Iowa's traditional stand-alone nuisances, which are based in smell, sound, and visible contamination. *Perkins v. Madison Cnty Livestock & Fair Ass'n*, 613 N.W.2d 264 (Iowa 2000) (finding a racetrack caused a nuisance through noise and pollution); *Harms v. City of Sibley*, 702 N.W.2d 91 (Iowa 2005) (finding the noise, dust, and traffic from a ready-mix plant causing nuisance); *Iverson v. Vint*, 54 N.W.2d 494 (Iowa 1952) (finding dumping spoiled molasses near a well to be a nuisance). Put differently, another way to understand the inherent danger of a standalone nuisance is ***permanent knowledge*** on the part of the tortfeasor that it is ***always*** at risk of creating a specific nuisance due to the nature of the tortfeasor's activities. *See Kuper v. Lincoln-Union Elec. Co*., 557 N.W.2d 748, 762 (S.D. 1996) ("In cases where the offending elements, i.e., stray voltage and ground current, are… 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… 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."); see also Restatement Second of Torts § 822 (1979) (defining private nuisance as it relates to intent).

Unlike other forms of nuisance which are obvious and detectable to humans, Northern had no permanent knowledge it was at risk of creating a nuisance like stray voltage to a dairy herd. Much to the contrary, Jim Johnson testified that he had never before been involved in a stray voltage claim in his 25 years of experience at Northern, which operates approximately 14,000 miles of pipeline in 11 states.[9]

Cathodic protection has been expressly found not to be worthy of adoption of strict liability as a matter of law. *Fletcher v. Conoco Pipe Line Co.*, 129 F. Supp. 2d 1255, 1259 (W.D. Mo. 2001) ("The Court concludes that the doctrine of strict liability does not apply because ***neither the operation of a petroleum pipeline nor the use of cathodic protection are abnormally dangerous activities, as a matter of law***"). The same logic should hold here – strict liability has no place in the stray voltage context in accordance with *Schlader*. Neither the operation of a natural gas pipeline nor the use of cathodic protection are abnormally dangerous activities that warrant the imposition of strict liability.

[9] 01.25.23 Tr. at 58:5 – 6; 75:21 – 22; 80:22 – 25.

Accordingly, the Court must overturn *Martins*' implied strict liability standard for stray voltage cases.

E. Federal Pipeline Safety Regulations Should be Considered on Remand as an Appropriate Standard of Care for Stray Voltage Cases Involving Cathodic Protection.

In dismissively characterizing the purpose of Pipeline and Hazardous Materials Safety Administration (PHMSA) regulations as "designed to protect the NNG pipeline, not the statutory and common law rights in property violated in this case," the Vagts conspicuously avoid defining what it ***means*** to protect the pipeline. Pipeline protection is the prevention of faults and leaks through mechanisms like CP systems. Those faults and leaks would absolutely interfere with statutory and common law property rights on property where the Northern pipeline is located.

It is for this reason that the Court should consider the PHMSA safety regulations on remand as setting the standard of care in stray voltage cases where cathodic protection is involved. Congress has mandated that the PHMSA Administrator "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). To that end, each buried gas pipeline is required to have a cathodic protection system that provides certain levels of

protection. 49 C.F.R. §§ 192.455(a)(2) and 192.463(a) (2022). Those levels are more specifically outlined in Appendix D to Part 192, which prescribes the amount of electric current that must be applied to pipelines depending on their respective surface materials.

Contrary to Vagts' suggestion, Northern does not maintain that Vagts are prohibited by federal law from bringing a tort claim against it related to the operation of its cathodic protection system. However, Northern maintains that Vagts must establish some negligent conduct on the part of Northern, and the requirements of federal pipeline safety regulations are an important source to consider in establishing the applicable standard of care.

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

The jury's award in this case of noneconomic damages – specifically $1.25 million for "personal inconvenience, annoyance and discomfort" and $500,000 for "loss of use of enjoyment of land"[10] cannot be squared with the type of case at issue here: stray voltage to a dairy herd. Personal injuries and physical suffering of the Vagts is not at issue. *See, e.g.*, *Kuta v. Newberg*, 600 N.W.2d 280, 284 (Iowa 1999). This case lacks the hallmarks of a true standalone nuisance case because Vagts were never subjected to sensory offenses such as noxious

[10] App. 119 – 120 (Verdict Form).

odors at their home which cause personal discomfort.[11] The alleged stray voltage or "ground current" in this case is not something that Vagts – or any human – could perceive.

A new trial or remittitur is required when the evidence presented does not support the level of award issued by the jury, or is a result of passion or prejudice. *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 v. Quality Ready-Mix Co.*, 154 N.W.2d 852, 859 (Iowa 1967) (reducing nuisance award where evidence was lacking). 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. This Court should reverse.

CONCLUSION

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

[11] *See, e.g., Weinhold v. Wolff*, 500 N.W.2d 454, 467 (Iowa 1996) (upholding jury award of $45,000 in special damages for permanent nuisance caused by neighboring hog confinement).

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.

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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 3,953 words, excluding the parts of the brief exempted from the type-volume requirements by Iowa R. App. P. 6.903(1)(*g*)(1).

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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 30, 2023 which will serve a notice of electronic filing to all registered counsel of record.

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