

IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 23-0537
Fayette County Case No. LACV055970

MARK VAGTS, JOAN VAGTS, ANDREW VAGTS,
AND VAGTS DAIRY, LLC
Plaintiffs-Appellees

v.

NORTHERN NATURAL GAS COMPANY
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT - FAYETTE COUNTY
THE HONORABLE DAVID NELMARK

**PLAINTIFFS-APPELLEES, MARK VAGTS, JOAN VAGTS,
ANDREW VAGTS AND VAGTS DAIRY, LLC'S FINAL BRIEF AND
CONTINGENT REQUEST FOR ORAL ARGUMENT**

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RULES:

Iowa R. Civ. P. 1.924

ROUTING STATEMENT

When evaluated on the detailed factual record developed in the District Court, this case presents only the application of existing legal principles. It therefore should be transferred to the Court of Appeals, pursuant to Iowa R. App. Proc. §6.1101(3)(a).

NNG's cathodic protection (CP) system in the vicinity of the Vagts' farm used the earth to conduct many times the current of an electric utility distribution system. The location of NNG's CP system and the increases in its electrification over time, resulting in continual earth current shock to cows on Vagts' dairy far higher than safe levels, demonstrate that NNG's system created a nuisance that was "an obstruction to the free use of property." The factual circumstances of this case similarly demonstrate that NNG's CP system, far more than a local electric utility distribution system, subjected the Vagts' farm to a "... degree of danger (likely to result in damage) inherent in the thing itself." *Martins v. Interstate Power Co.*, 652 N.W.2d 657 (Iowa 2002).

Although NNG tries mightily to present issues of first impression and to change applicable Iowa legal principles, it fails to make a substantial case for such an outcome. Indeed, its proposed "legal principles" would leave the Vagts without remedy by basing NNG's liability solely on violations of

applicable substantive federal pipeline safety regulations. Those substantive regulations are designed to protect NNG's pipeline, not the statutory and common law rights in property violated in this case. Moreover, by the federal statute's own terms, Vagts' tort remedies against NNG are preserved. Thus, NNG seeks to have the Iowa Courts shield it from tort claims which Congress expressly preserved.

Such issues cannot reasonably be deemed "substantial," "fundamental" or "urgent" under Iowa R. App. Proc. §6.1101(2). They should be evaluated - on the detailed factual record of this case - by the Court of Appeals.

STATEMENT OF THE CASE

Vagts sued NNG on claims of nuisance and negligence. Vagts also sued local electric utility Allamakee-Clayton Electric Cooperative (ACEC) on a related claim of negligence. Vagts alleged that portions of the electric current from NNG's CP system flowed into Vagts' dairy facilities, including portions which flowed over ACEC's grounding system, resulting in extensive damage to Plaintiffs' dairy herd and business. (App. 6) NNG and ACEC answered, denying liability.

Following extensive discovery, Vagts dismissed their negligence claim against NNG. (App. 13)

Vagts then settled with ACEC for \$500,000.00 and proceeded to trial

against NNG on their nuisance claim, seeking damages and injunctive relief.

(App. 15 and 148)

Vagts timely filed pre-trial motions in limine. (App. 35) Vagts' first motion sought to prohibit evidence or argument of:

1. ANY CLAIMS BY NNG THAT ITS CATHODIC PROTECTION SYSTEM COULD NOT BE A NUISANCE BECAUSE NNG WAS COMPLYING WITH FEDERAL AND/OR STATE REGULATIONS CONCERNING THE OPERATION OF A CATHODIC PROTECTION SYSTEM ON ITS PIPELINE.

NNG's Resistance to this motion concedes the point (App. 41):

NNG does not resist Plaintiffs' motion to the extent that it only prohibits NNG from arguing that compliance with federal regulations is a complete defense to a nuisance claim. NNG does resist Plaintiffs' motion to the extent it would purport to prohibit NNG from presenting evidence that it is required to have a CP system in place pursuant to federal pipeline safety regulations and is in compliance with those regulations.

Having conceded the point in the District Court, NNG now seeks to have this Court execute a sea-change in the law by requiring both proof of negligence for Vagts to prevail on their nuisance claim and establishing those very same federal regulations as the applicable "standard of care" for proving negligence!

Following a pre-trial conference at which the motions were argued, the District Court ruled on this motion as follows:

Plaintiffs' Motions in Limine

1. Claims that Compliance with the Law is a Complete Defense to Nuisance.

At the hearing, it became clear that the parties are in agreement on this point. Defendant may argue that it was in compliance with the law, but cannot argue that such compliance means it cannot be held liable in this case.

(App. 112)

Vagts' second Motion in Limine sought to exclude evidence or argument of:

2. ANY CLAIMS BY NNG ASSERTING PLAINTIFFS' COMPARATIVE FAULT OR NEGLIGENCE ARE IRRELEVANT AS THIS IS A PURE NUISANCE CASE.

NNG has not plead comparative fault as an affirmative defense. Its Answer to the Petition asserts mitigation, statute of limitations, and laches as affirmative defenses. NNG may not argue Vagts were negligent or at "fault" for the stray voltage condition on their dairy. The Iowa Supreme Court disposed of any argument NNG may make to the contrary in *Martins v. Interstate Power Co.*, 652 N.W.2d 657 (Iowa 2002).

(App. 35)

NNG's Resistance to Vagts' second motion challenged the holding of *Martins* and its applicability to this case. (App. 41)

The District Court ruled (App. 112):

2. Any Argument About Comparative Fault.

Plaintiffs dismissed their negligence claims, leaving only a claim for common law nuisance. Comparative fault does not exist in a nuisance claim. Thus, Defendant may not argue that Plaintiffs are responsible for any percentage of their claimed damages. Defendant is not, however, precluded from arguing that the claimed damages are caused by conditions beyond stray voltage.

The case proceeded to trial against NNG, from January 18-30, 2023. The jury returned a unanimous verdict (App. 119) finding NNG had created a nuisance on the Vagts' farm, causing damages to the Vagts since March 12, 2016 (5 years before the Petition was filed). (Id.) Economic damages were assessed at \$3 million, which was slightly less than Vagts' economist had projected, updated to the time of trial during his testimony. (Id.; App. 874-876; 01.25.2023Tr:P36L12-P38L20) The jury also assessed intangible "nuisance damages" of \$500,000 for loss of use and enjoyment of land; and \$1,250,000 for personal inconvenience, annoyance and discomfort. (App. 119)

Vagts and NNG settled the claim for permanent nuisance and injunctive relief during trial. (App. 829-830; 01.24.2023Tr:P135L1-P136L18) Thus, by the time the case was submitted to the jury, Vagts were not making claim for cost-of-abatement damages, for diminished value of their farm, or other permanent nuisance damages. The settlement agreement was not contingent

on the outcome of the jury trial. (Id.)

The District Court entered judgment on the Verdict. (App. 121) Following post-trial motions, the District Court (upon stipulation of the parties) provided NNG with a *pro tanto* credit for the \$500,000 settlement from ACEC. (App. 205)

NNG filed other Post-Trial Motions (App. 123), which Vagts resisted (App. 154).

NNG asserted (among other things) a motion for JNOV because the case had been submitted on a pure nuisance verdict (Motion I); and for remittitur on non-economic damages (Motion IV). These are the stated issues raised by NNG on this appeal. While NNG appears to have abandoned its motions II, III and V, vestiges of them appear in its appellate argument, which will be addressed in this brief as necessary. The District Court denied NNG's motions (except regarding the stipulated *pro tanto* credit). (App. 195)

Regarding the “pure nuisance” issue, the District Court ruled (in relevant part) as follows:

Defendants first argue that *Martins* was wrongly decided. This Court is bound by the Iowa Supreme Court's holding and thus does not address that argument. Defendant's second argument is that this case does not involve anything with an inherent “degree of danger likely to result in damage.”

In *Martins*, the defendant was an electric utility. Here

Defendant is a natural gas pipeline. The item allegedly causing the nuisance is the pipeline's Cathodic Protection System ("CPS"). The CPS sends electricity through the earth towards the pipeline to create an environment where a nearby anode bed degrades instead of the pipeline. Defendant argues that the CPS is not inherently dangerous and is, in fact, required by federal regulations.

As argued by Plaintiffs, the problems in this case arose because an anode bed associated with Defendant's CPS was too close to the Plaintiffs' barn. The barn thus essentially began to function as an anode bed. The resulting electricity flowing through the barn allegedly distressed the cows resulting in decreased milk production and an increased rate of death loss.

Plaintiffs have not alleged, and Defendant has not acknowledged, any failure of Defendant to exercise ordinary care. Thus, to the extent the CPS is causing damage to Plaintiffs, it is due to the inherent dangers of the CPS itself. Although a CPS may have less inherent danger than an electrical utility, that does not mean no inherent danger exists. Indeed, Plaintiffs argue that, unlike an electric utility – where the earth conducts only a portion of the voltage – a CPS intentionally runs all of its electricity through the ground towards the pipeline.

The *Martins* court affirmed the jury's verdict in a stray voltage case that proceeded on a theory of pure nuisance. The Court does not find a CPS so different from an electrical utility as to mandate a different result.

(Id.)

Regarding the non-economic damages, the District Court denied the remittitur, holding in relevant part:

The Court does not find the damages awarded to be

“flagrantly excessive or inadequate, [or] 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). The jury was attentive through seven days of trial. At no point did they appear outraged. The economic damages awarded were less than the Plaintiffs requested. Neither counsel suggested an appropriate number for non-economic damages. The fact that the non-economic damages are 58.33% of the economic damages does nothing to suggest a runaway jury.

(Id.) NNG now appeals the “pure nuisance” and remittitur issues.

STATEMENT OF THE FACTS

1. Introduction

NNG owns and operates a natural gas transmission system that extends from Texas to Michigan. (App. 881-883; 01.25.2023Tr:P57L8-P59L25) It includes about 4000 miles of pipe in Iowa. (Id.) One of its buried high-pressure steel pipelines, installed during 1964, passes through the Vagts’ farm. (Id.) NNG’s operation of the cathodic protection (CP) system along its pipe has severely damaged the Vagts’ dairy herd in recent years. (App. 119)

NNG cathodically protects its pipe to prevent corrosion and leaks, as is required by federal regulation. (App. 848; Bianchetti Depo: P16L9-22)¹ A CP

¹ Portions of 3 deposition transcripts of NNG witnesses were read into the record. Plaintiffs read excerpts of NNG expert Ronald Bianchetti, P.E. on 1/24/2023, and of NNG employee Rick Wolverton on 1/20/2023. NNG read in other portions of Bianchetti on 1/26/2023. The read-ins were not reported

system consists of a series of anode beds installed in the earth in the vicinity of the pipe. (Id.) The anode beds are electrically charged by a series of rectifiers, each of which operates off a local utility system and converts AC current to DC. (Id.) Each electrically-charged anode bed causes DC electrical current to flow between the anode bed and the pipe, then back to one or more rectifiers to complete a circuit. (Id.) All of the electrical current that flows between each anode bed and the pipe flows in the earth and on grounded conductive paths in or connected to the earth, such as barn floors and utility system grounded neutral conductors. (Id.; App. 627; 01.20.2023Tr:P65L3-25)

The polarity of the current is such as to prevent the pipe from corroding. CP is necessary because the coatings on the steel pipe always have some degree of defects (“holidays” in the industry jargon), which expose the steel to the soil. (App. 858-859; Bianchetti Depo:P40L23-P41L25)) This exposure inevitably leads to corrosion, and eventually leaks, if CP is not utilized. Coatings inevitably deteriorate over time. (Id.) This necessitates increases in the amount of electrical energy and current imposed on the pipe by the anode beds of the CP system. (Id.)

separately by the official reporter; transcript copies highlighted with the read-ins were filed, which are separate from the official reported transcript for the same day. References to those read-ins in this brief are in the form of “Bianchetti Depo:P__L__”

One of the anode beds on NNG's pipe was installed at the Vagts' farm during 1964. (App. 590; 01.18.2023Tr.P59L2-24) 1964 was also the year the pipeline was installed. (Id.) The original pipeline included only one anode bed in a six-county area. (App. 857-859; Bianchetti Depo:P39L18-P41L2) There are now ten anode beds in the same six counties. (Id.) The newer anode beds closest to Vagts were added during 2009, 2019, and 2021. (App. 625-626; 01.20.2023Tr:P63L2-P64L3) NNG increased the electrical energy applied to each of these anode beds between 2013 and 2021. (App. 649-652; 01.20.2023Tr:P174L4-P177L23; App. 221 and 223)

NNG's own CP expert attributes this dramatic increase in the amount of CP applied to the pipe to deterioration of the coating over time. (App. 859; Bianchetti Depo:P41L5-25) Coatings used today are of much better quality. (Id.)

NNG's [Proof] Brief incorrectly states (pp. 16-17) that "The level of electrical current from a cathodic protection system is low; typically, 1 volt or less than that of a single AAA battery, which produces 1.5 volts." Voltage is electrical potential, not electrical current. Current is not measured in volts; it is measured in amperes (A), milliamperes (mA) or microamperes (μ A). (App. 265) The "1 volt or less" is the typical polarized voltage drop between the pipe and the earth surface above the pipe with all rectifiers affecting the pipe cycled

off. (App. 851-852; Bianchetti Depo:P19L9-P20L15) That is only one of many voltage drops in the circuit which includes anode beds, rectifiers, and the pipe. (App. 849-850; Bianchetti Depo:P17L7-P18L5) NNG's own records establish that the single rectifier near Vagts has injected as much as 27.34 amperes into the anode bed closest to the Vagts' farm, at voltage as high as 19.38 volts. (App. 221) Both voltage and current have increased substantially since 2013. (Id.) The other rectifiers also contribute to charging the anode bed. (App. 639-640; 01.20.2023Tr:P130L8-P131L11) It is undisputed that current, not voltage, is the important electrical parameter when determining the effects of shock on cows. (App. 622-623; 01.20.2023Tr:P47L19-P48L8)

As NNG's pipe was aging and more electrical energy was applied to it, the Vagts' farm was expanding and modernizing. (App. 599-602; 01.18.2023Tr:P69L18-P72L25) Expansion is typical of modern dairies. (App. 599-600; 01.18.2023TR:P69L24-P70L7) The Vagts' dairy now consists of an approximately 500-cow herd, housed in a modern freestall barn built in two segments, during 2000 and 2017. (Id.; App. 594-595; 01.18.2023Tr:P63L3-P64L10) The west end of the barn is just over 1000 feet east of the pipe, and approximately 300 feet southeast of the anode bed installed at the Vagts' farm during 1964. (App. 263) The freestall barn floor includes a massive re-bar ground grid ("equipotential plane" or "EPP" in electrical jargon), as required

by the National Electrical Code. (App. 614-616; 01.20.2023Tr:P12L5-P14L9)

The EPP in the Vagts' barn floor, along with all the grounded structures on the Vagts' farm, becomes charged by NNG's CP system. (App. 631-633; 01.20.2023Tr:P69L7-P71L13) This results in low-level shock to the Vagts' cows, which affects their behavior, health, milk quality, and production. (App. 670-672 and 814-816; 01.20.2023Tr:P206L18-P208L1; 01.24.2023Tr:P94L9-P96L8) It has a profound effect on their immune function, particularly after calving, the most stressful times in the life cycle of a cow. (App. 796-797 and 806-808; 01.24.2023Tr:P43L9-P44L21; P86L7-P88L25) The effect on the herd's health, death rate, productivity, and milk quality has been catastrophic. (App. 814-816; 01.24.2023Tr:P94L9-P96L8)

Only heroic efforts on the part of the Vagts, their veterinarians, and employees has permitted the dairy herd to survive. (App. 800-802; 01.24.2023Tr:P68L9-P70L14) Trial Exhibit 194 depicts the physical layout of the Vagts Dairy facilities, the pipeline, anode bed, and rectifier nearest Vagts. (App. 263)

Vagts Dairy does not get natural gas service from NNG. (App. 693-694; Wolverton Depo:P24L23-P25L1)

2. Vagts' Dairy History

The third-generation Vagts Dairy is a very well-run, modern, clean dairy with a double-12 milking parlor and a freestall barn with capacity for approximately 500 milking cows. (App. 794; 01.24.2023Tr:P36L13-20)

The property was originally established as a dairy in 1957 by Mark Vagts' grandfather and great-uncle. (App. 588-589; 01.18.2023Tr:P57L23-P58L5) This was seven years prior to installation of the NNG pipeline and anode bed. (App. 589-590; 01.18.2023Tr:P58L1-P59L24) At the time, there were numerous dairies in this rural area near West Union. (App. 591; 01.18.2023Tr:P60L8-14)

The dairy is now managed by Mark and Andrew Vagts. Mark Vagts graduated from Iowa State University in 1979 with a four-year degree in Farm Operations. (App. 586-587; 01.18.2023Tr:P54L24-P55L16) Andrew returned to the farm full-time in 2007 after receiving his Dairy Science degree from Iowa State University. (App. 820; 01.24.2023Tr:P121L5-25) Vagts Dairy LLC was established in February of 2017 with the members consisting of Mark Vagts and Andrew Vagts. (App. 602; 01.18.2023Tr:P72L11-25) Andrew, his wife and four daughters reside at the dairy. (App. 819-820; 01.24.2023Tr:P120L14-P121L9) Mark and Joan Vagts live about a mile north of the dairy where they raise the heifers for the operation (the "heifer farm"). (App. 585-587; 01.18.2023Tr:P53L12-P55L23) Both Mark and Andrew are

active in the day-to-day operation of the dairy. (Id.) Joan does the bookkeeping and handles the finances for the dairy. (App. 841-842; 01.24.2023Tr:P202L6-P203L24)

Historically, Vagts have raised their own heifers for replacement stock and for growing the herd size. (App. 689-690; 01.20.2023Tr:P247L7-P248L21) In 2000, the decision was made to build a new freestall barn to accommodate an expanding herd. (App. 594-595; 01.18.2023Tr:P63L9-P64L10) A new milking parlor was then built in 2003. (App. 594; 01.18.2023Tr:P63L12-24) The parlor complex was built with the intent that Mark and Andrew Vagts, and their employees, would be able to milk more cows at a quicker pace and still be able to do all of their other chores. (App. 596-597; 01.18.2023Tr:P65L23-P66L5) In 2017 and 2018 the size of the freestall barn and the dairy herd was doubled with an addition built on the west end of the facility (the end closest to the pipeline). (App. 599-601; 01.18.2023Tr:P69L18-P71L20)

Vagts' dairy cows should be producing milk at the rate of 33,000 to 34,000 lbs./head per year. (App. 817; 01.24.2023Tr:P107L7-14) Vagts dairy cows reached 33,000 pounds in 2018 and were at or over 32,500 pounds in 2019, 2020 and 2021. (App. 228) The Vagts' herd consists of very large and productive Holstein cows of tremendous milk producing potential. (App. 794;

01.24.2023Tr:P36L13-20) As explained by Mark Vagts “a big cow is like a big manufacturing plant, the bigger the cow, the more capacity she has to produce milk.” (App. 598; 01.18.2023Tr:P68L21-23)

During the 2010’s and early 2020’s the plaintiffs have experienced difficulty reaching and maintaining expected levels of milk production and components (butterfat, proteins and solids), excessive milking times, poor milk quality in the form of high somatic cell counts (SCC), cows crashing, cows dying, decreased immune response, ineffectual medical treatment, cows lapping at water, cows standing in water tanks, and cows licking floors and walls. (App. 702, 703-704, 708, 709, 711, 716, 729, 736-738, 744, 762, 804-805, and 834-835; 01.23.2023Tr:P18L10-17; P22L6-P23L21; P37L6-11; P44L9-17; P53L15-23; P72L16-24; P85L8-25; P149L13-P151L16; P172L10-17; P218L4-25; 01.24.2023Tr:P84L10-P85L25; P173L20-P174L25; App. 214, 215, 216, 217, 218 and 219) Death rates have been far higher than normal. (App. 677 and 715; 01.20.2023Tr:P235L2; 01.23.2023Tr:P71L19-22; App. 266) The herd health declined to the point the cows were not responding to veterinary treatment and many cows had to be shot or sold because they were unable to recover from the health problems. (App. 728-729; 01.23.2023Tr:P84L11-P85L16) These events were unusual and inconsistent with the historical experience at Vagts Dairy. The death rate

increased notably after the freestall addition was populated in 2018. (App. 676-681; 01.20.2023Tr:P234L6-239L7; App. 266) The addition is the closest part of the cattle housing facilities for the milking herd to the NNG pipeline and cathodic protection system. (App. 603; 01.18.2023Tr:P76L4-13; App. 263)

Health examination of select cows were conducted when indicated by the DelPro health index rating (a software program monitoring individual cow health), observation of visual symptoms suggesting health problems and upon reduced milk production. (App. 676, 705-706, 741 and 831; 01.20.2023Tr:P234L14-18; 01.23.2023Tr:P34L4-P35L16; P162L1-15; 01.24.2023Tr:P146L11-24) Vagts' veterinarian conducted reproduction and herd health visits every two weeks and as needed when other issues arose that Mark or Andrew Vagts could not address. (App. 701; 01.23.2023Tr:P10L20-25) Vagts utilize written health protocols. (App. 231)

Like all good producers, the Vagts first thought about the management tools that they use on a daily basis, such as the animal health, nutrition, milking equipment and any other factors that they could control. Vagts worked with their veterinarian. (App. 717-730; 01.23.2023Tr:P73L2-P86L8) They consulted with their nutritionist. (App. 604; 01.18.2023Tr:P80L16-23) They had the milking equipment checked. (App. 636-638;

01.20.2023Tr:P122L1-P124L1; and 01.23.2023Tr:P122L12-P124L4) They looked at their milking procedures. (App. 832-833; 01.24.2023Tr:P158L9-P159L20) Despite these efforts, herd health issues persisted and intensified. (App. 266) Stray voltage was not the first issue Vagts considered. (App. 746 and 821-823; 01.23.2023Tr:P176L1-23; 01.24.2023Tr:P126L6-P128L16) In fact, Mark Vagts challenged the herd veterinarian, Dr. Jessica Hammell to determine the cause of the herd health issues if the cause was not stray voltage. (App. 700-701; 01.23.2023Tr:P9L12-P10L10) After one and one-half years of working with the herd, including doing a number of postmortem examinations and an extraordinary amount of laboratory work, Dr. Hammell was unable to find a cause other than stray voltage. (Id.)

3. Stray Voltage and Earth Current Investigations

After a great deal of frustration, in 2020, it was suggested to Vagts that they check the electrical network for stray voltage. (App. 746; 01.23.2023Tr:P176L15-17) In September 2020, Vagts contacted Lawrence “Larry” Neubauer, a master electrician and stray voltage specialist with decades of experience to investigate the stray voltage issue. (App. 619; 01.20.2023Tr:P25L14-17)

Mr. Neubauer is a Master Electrician of over 40 years’ experience. His original training was in heavy industrial (especially paper mill) power quality

work. (App. 607-611; 01.20.2023Tr:P5L13-P9L21) He has tested farms, primarily dairies, for stray voltage since about 1995. Testing and consulting on farms has been his only business since about 2000. He has tested way over 1500 dairies; his testing typically takes at least three days of work with multiple oscilloscopes and other instruments. (App. 611-616; 01.20.2023Tr:P9L22-P14L25) Less than 3% of the farms he tests are in (or wind up in) litigation. (01.20.2023Tr:P17L4-6) He has tested farms in every state except Alaska. (01.20.2023Tr:P17L7-16). As established in response to NNG pre-trial motions, his expert testimony has been received in many jurisdictions over Daubert or similar challenges. (App. 50) The District Court denied NNG's motion to exclude Mr. Neubauer's opinion testimony. (App. 112)

During Mr. Neubauer's testing in 2020, Vagts first learned they had serious electrical issues in the form of earth currents; primarily DC emanating from the NNG CP system. (App. 822-824; 01.24.2023Tr:P127L18-P129L19)²

² ACEC had also tested Vagts Dairy for stray voltage in 1996, at the old dairy barn. Although ACEC found no AC stray voltage issue, it did measure DC voltage on the farm neutral when the NNG rectifier was energized, at 0.34 volts DC. When the rectifier was turned off, the voltage reduced to 0.07 volts. According to ACEC's own records, they did not tell Vagts about this finding. (App. 403) By the time Mr. Neubauer tested in 2020, the DC

During Mr. Neubauer's testing, Vagts contacted ACEC to express concern about the presence of stray voltage on their dairy. In the fall of 2020, ACEC did testing at the dairy. ACEC reported readings of DC voltage at the dairy that caused ACEC to contact NNG and request meetings with NNG engineers to address the concern. (App. 394; App. 747-749; 01.23.2023Tr:P177L16-P179L7) NNG never met with ACEC. (App. 385-386) ACEC and Vagts contacted NNG who did testing, but NNG would not discuss their results with Vagts. (App. 748; 01.23.2023Tr:P178L19-25)

Mr. Neubauer testified that NNG's cathodic protection system causes ground current to flow on the grounding systems of both ACEC and the dairy. (App. 628-632; 01.20.2023Tr:P66L20-P70L2) That DC ground current measured by Mr. Neubauer causes shocks to cows up to and exceeding 2 mA (milliamperes), a level sufficient to cause adverse health effects. (App. 667-668; 01.20.2023Tr:P203L17-P204L18)

Mr. Neubauer recommended ACEC install a neutral isolator at the dairy to separate the utility neutral (primary) from the farm (secondary) system in an effort to prevent the NNG current from entering the farm through its neutral

voltage on the neutral was several times higher, and reduced by a much smaller percentage when the local rectifier was turned off. He concluded (consistent with NNG records) that the pipeline had some "big time" CP added to it since 1996. (App. 642-643; 01.20.2023Tr:P151L5-P152L20)

interconnection with the ACEC system. (App. 631-632; 01.20.2023Tr:P69L19-P70L16) The isolator was installed in the fall of 2020. (App. 380) When all parties were testing at the dairy on April 20, 2022, the isolator was bypassed by ACEC testing personnel. Over 1 ampere of DC current was measured by ACEC flowing directly between the farm grounding system and the ACEC neutral on the bonding jumper. (App. 644-647; 01.20.2023Tr:P159L13-P162L25; App. 229) This demonstrated the isolator was effectively stopping the flow of DC on the interconnection of the ACEC power system with the farm system at the transformer pole; however, the isolator solved only a minor portion of the problem because there was still substantial exposure from current conducted solely in the earth. (Id.; also App. 634-635 and 667-668; 01.20.2023Tr:P93L8-P94L15; P203L17-P204L18)

Since September 2020, DC has been regularly measured by Mr. Neubauer and Andrew Vagts in the freestall barn and other areas on the dairy farm. The levels being measured are at cow contact points. (App. 825-827; 01.24.2023Tr:P131L10-P133L23)

Mr. Neubauer's testing had repeatedly demonstrated DC current from NNG's CP system exceeds 2 mA. Even with the nearby rectifier off, his August 2022 testing demonstrated that the polarized voltage from NNG's anode bed still was shocking the Vagts' cows at about 2 mA. (App. 667-668;

01.20.2023Tr:P203L17-P204L18) Ground current shocks at those levels - and even much lower - are sufficient to adversely affect the behavior, health, productivity and immune function of the cattle. (Id.; also App. 796-797 and 806-808; 01.24.2023Tr:P43L9-P44L12; P86L7-P88L23) Exposure to unavoidable ground current at these (and lower) levels impacts cows' immune function also and has resulted in the "scary high" death rates in the Vagts' herd. (Id.; also App. 801-802; 01.24.2023Tr:P69L4-P70L14)

4. Measurable Impact of CP System on Death Loss

In 2013 NNG had to replace the anode bed by the Vagts Dairy as the old anode bed had "failed." (App. 220 and 221) As a result, the rectifier near the dairy was off from approximately January 11, 2013, until June 5, 2013. (Id.) During that period of time, the death losses for the Vagts Dairy were well under 5%. (App. 266) As more rectifiers have been added to the NNG CP system, there has been a higher death loss, and the death losses have continued to climb at the dairy through the time of trial. (Id.)

Mark Vagts was aware the anode bed was replaced in early June of 2013. (App. 682-683; 01.20.2023Tr:P240L16-P241L3) However, Mark Vagts was not aware the anode bed was depleted, and the rectifier shut off in January of 2013 until discovery was exchanged in this litigation. (Id.) Upon learning this information, the herd health and death loss correlation became

obvious. (Id.) During 2022 Vagts had 76 cows die, a death loss rate of approximately 15%. (App. 681; 01.20.2023Tr:P239L2-7; App. 266) Normal death rate would be under 5%, as experienced in 2013. (App. 266 and 687-688; 01.20.2023Tr:P245L17-P246L2) Andrew Vagts had to euthanize 27 cows in 2022. (App. 756; 01.23.2023Tr:P196L12-25) Unfortunately, this last scenario had become the norm in recent years and has taken its toll on the financial stability of the dairy and to the great annoyance of the owners.

5. Physiological Impact of Earth Currents on Vagts' Dairy Herd; Vagts' Veterinary Testimony

Mark Vagts made clear to herd vet Jessica Hammell, DVM, that he wanted to find out why he was having unusual herd problems, especially high somatic cell count (SCC) and high death loss and challenged her to figure out what it was if it was not due to stray voltage. (App. 700-701; 01.23.2023Tr:P9L15-P10L5)

Dr. Hammell practices with the Postville Veterinary Clinic. Her clinic serves approximately 89 dairies in four counties. She has practiced there since two years after receiving her DVM degree from the University of Minnesota in 2004. The Postville clinic is a six-vet practice and does mainly large animal work. (App. 697-699; 01.23.2023Tr:P6L1-P8L20) The clinic through various vets has served the Vagts' farm for decades. (App. 742-743; 01.23.2023Tr:P170L22-P171L6)

Dr. Hammell spent a year and a half making detailed efforts to find a cause other than stray voltage and did not find another cause. (App. 701 and 730; 01.23.2023Tr:P10L1-5; P86L3-8) The Vagts' cows commonly would not respond well to treatment for common-place dairy issues like mastitis, ketosis, metritis, milk fever, and other fresh cow diseases. (App. 717-730; 01.23.2023Tr:P73L3-P86L8) The cows were subjected to a chronic stress that activated immune response and inflammation; when those cows hit a stressful time such as calving, their immune system is overwhelmed and less effective, making them more susceptible to the multiple conditions the Vagts' herd was experiencing, including high death loss. (App. 723-725; 01.23.2023Tr:P79L5-P81L14) Many cows had to be euthanized when their muscle damage was beyond repair. (App. 728; 01.23.2023Tr:P84L11-21)

Excessive deaths, culls and especially transition cow issues are caused by exposure to shock from stray voltage and ground current. (App. 796-797; 01.24.2023Tr:P43L9-P44L21) The additional stress of electrical exposure affects immune function and makes the already stressful transition (calving) and early lactation period much more problematic. (Id.) A recent peer-reviewed paper on the importance of added stress during transition (not aimed at stray voltage in particular) was published in the Journal of Dairy Science in 2022. (App. 806-808; 01.24.2023Tr:P86L7-P88L13) The immune activation

described in that paper is one of the sequelae of exposure to stray voltage and ground currents. (Id.)

The Plaintiffs and their experts testified to using a process of elimination (i.e. differential diagnosis) to determine that stray voltage is and was the cause of the herd health problems and resulting production decline at the Vagts Dairy. (App. 701 and 802; 01.23.2023Tr:P10L11-19; 01.24.2023Tr:P70L15-21) Cows with certain illnesses typically respond well to certain treatments. For example, cows with mastitis causing high somatic cell counts can often be treated to alleviate the mastitis condition and in turn to reduce the somatic cell count. (App. 711 and 716; 01.23.2023Tr:P53L15-23; P72L16-21) Similarly, cows with metritis can be treated and death can be prevented. (App. 718-720; 01.23.2023Tr:P74L24-P76L10) In the Vagts Dairy after years of attempting to use traditional treatments and to adjust rations in an effort to resolve the physiological herd health problems, the only cause of the herd health and production issues Vagts and their veterinarians could not rule out was stray voltage. (App. 701, 725 and 730; 01.23.2023Tr:P10L1-5; P81L1-14; P86L3-8)³

³ NNG's veterinary testimony focused in part on bovine leukosis virus (BLV) as a cause for many of Vagts' herd problems. Dr. Hammell had ruled out BLV as causal, in lengthy testimony starting at 01.23.2023Tr:P62L9.

Dr. Andrew Johnson, DVM, is a 71-year-old dairy veterinarian from Green Bay, WI. He received training and gained experience in milk quality starting with his training at the University of Minnesota in the 1970s. (App 766-769; 01.24.2023Tr:P8L21-P11L1) He also learned stray voltage subjects at and immediately after vet school at UM, where much early research was done on the subject. (App. 769-770; 01.24.2023Tr:P11L2-P12L19) He developed a vet practice and then a consulting practice in preventive veterinary dairy medicine, milk quality, milking machine testing, and related subjects over many decades. (App. 771-776; 01.24.2023Tr:P13L10-P18L25) He has done milk quality consulting on over 4000 dairies in about 47 states and 20 countries, on farms ranging in size from 30 cows to 10,000 cows. (App. 778-780; 01.24.2023Tr:P20L22-P22L19) His work included many years of consulting for Grande Cheese (including its northeast Iowa dairies) on milk quality, and SCC in particular. (App. 777-778; 01.24.2023Tr:P19L16-P20L21) Stray voltage is always on his list of potential dairy issues. (App. 783-784; 01.24.2023Tr:P25L7-P26L5) Early in his career, before electrical instrumentation became very sophisticated, he carried a voltmeter and did basic tests for stray voltage. (Id.)

Dr. Johnson co-wrote the U.S. standards on how to test milking equipment. (App. 775-776; 01.24.2023Tr:P17L21-P18L25) He has been

President of the National Mastitis Council, a worldwide dairy industry organization for improving milk quality. (App. 781; 01.24.2023Tr:P23L8-25) He has served as President of the Wisconsin Veterinary Medical Association. (App. 782; 01.24.2023Tr:P24L1-9) He has testified in well over 50 stray voltage cases, over 60% for farmers and the rest for defendants. (App. 780-781; 01.24.2023Tr:P22L20-P23L7) Most of those cases occurred many years ago. (Id.)

The principal person to whom he will refer a farmer with a stray voltage concern is Lawrence Neubauer. (App. 784-785; 01.24.2023Tr:P26L6-P27L19) Those referrals have generally not been in matters in litigation. In this case, Dr. Johnson was retained by Vagts' counsel, after Mr. Neubauer had already tested the dairy. (Id.)

Dr. Johnson visited the Vagts' farm in 2021 and 2022. He approached Vagts like he would any other. (App. 788-789; 01.24.2023Tr:P30L4-P31L16) He found an impressive, well-run dairy with large, impressive Holstein cows capable of very high milk production. (App. 794; 01.24.2023Tr:P36L13-20) He was concerned that they had experienced some prototheca (an algae) mastitis. Prototheca is opportunistic and can be very contagious. (App. 788-795; 01.24.2023Tr:P30L15-P37L21) He assisted Dr. Hammell and Vagts in establishing a prototheca testing and control program; prototheca is now under

control; only four prototheca positive cows have been identified through extensive testing. (Id.) Vagts' approach to controlling prototheca mastitis exhibited good management. (Id.) Prototheca is not the cause of Vagts' high SCC and death loss. (Id.)

Dr. Johnson concluded that the DC earth current measured by Mr. Neubauer was the cause of the Vagts' "scary high" death loss, high SCC, lower than expected production, and unusual cattle behavior, among other things. (App. 801 and 814-816; 01.24.2023Tr:P69L4-24; 01.24.2023Tr:P94L9-P96L8) He is surprised Vagts have stayed in business. (App. 801-802; 01.24.2023Tr:P69L4-P70L9)

6. Industry and Scientific Publications

NNG cites a publication called the "Redbook," printed by the USDA in 1991. It was written by a group which included many expert witnesses who earned large sums of money testifying for the energy industry. (App. 813-814; 01.24.2023Tr:P93L5-P94L8)

Dr. Johnson (as well as Mr. Neubauer) testified about publications and scientific literature regarding the effects of shock on cows (and humans, who respond similarly to the same levels of current - not voltage - as cows). (App. 659-667 and 806-814; 01.20.2023Tr:P195L22-P203L10; 01.24.2023Tr:P86L7-P94L8) Examples of portions of treatises identified by

Dr. Johnson and Mr. Neubauer that were read into the record were marked for identification as “Exhibits” 153, 155 and 201. (App. 245; 246; and 264) In particular, Dr. Johnson demonstrated that decades of clinical experience show that dairy herds can be and are seriously impacted at shock levels much lower than the 2-4 mA range described in the “Red Book” relied upon by NNG and the utility industry. (App. 796-797 and 811-814; 01.24.2023Tr:P43L9-P44L8: 01.24.2023Tr:P91L4-P94L8) The Red Book’s own authors published studies with data and conclusions totally inconsistent with the “Red Book” levels. (Id.) A 1981 USDA/REA circular to rural electric co-ops describes much lower levels as seriously problematic, which is consistent with Dr. Johnson’s own training and experience. (App. 797-798; 01.24.2023Tr:P44L22-P45L10) Lower levels of ground current are particularly problematic in freestall barns. (App. 796-797; 01.24.2023Tr:P43L21-P44L8) Dr. Johnson even coined a term for this scenario - “non-traditional stray voltage” - for low-level earth currents, where cows are being exposed constantly and cannot avoid shock. (App. 786-787; 01.24.2023Tr:P28L2-P29L20) That term has even been picked up in legal decisions. (Id.; *Hoffmann v. Wisconsin Electric Power Co.*, 2003 WI 64, ¶14, 262 Wis.2d 264, 279-280, 664 N.W.2d 55, 63-64 (WI. S.Ct. 2003)).

Mr. Neubauer also testified regarding scientific literature which

contradicts the “Red Book” levels; some of it is authored by the Red Book’s own editor. (App. 661-667; 01.20.2023Tr:P197L14-P203L10) The Red Book itself acknowledges that cows and humans perceive shock at similar levels, but then badly misstates the lower level of perception, which is on the tongue. Shock on a cow’s tongue is important because that (with their muzzle and whiskers) is where they can receive shocks while drinking and eating. (Id.) The contact electrical resistance of cows’ hooves to the earth or concrete floors is very low, particularly in freestall barns where the floors are wet. (App. 654-656; 01.20.2023Tr:P189L6-P191L15)

Dr. Johnson and Mr. Neubauer both testified that the “Red Book’s” 4 mA “level of concern” for cows is equivalent to driving current through a human being with 160 volts. (App. 675 and 812; 01.20.2023Tr:P233L12-14; 01.24.2023Tr:P92L3-16) The “Red Book” itself acknowledges that humans and cows perceive current (not voltage) at similar levels. (App. 245) The jury likely concluded, as has Dr. Johnson, that the “Red Book” “levels of concern” were devised for litigation defense and not as serious science.⁴

⁴In *Schlader v. Interstate Power Co.*, 591 N.W.2d 10, 13 (Iowa 1999), plaintiffs’ own expert apparently conceded that the “Red Book” was authoritative. On the record of this case, the Red Book conclusions on shock levels causing harm to cows is contested by multiple witnesses and many contrary scientific publications.

7. Financial Impact of Earth Currents on Vagts Dairy

The resulting financial impact on the Vagts Dairy has been catastrophic. Dr. Logan Kelly, a Professor and past Chairman of the Economics Department of the University of Wisconsin-River Falls conducted a standard lost profits analysis beginning five years prior to the filing of the lawsuit. (App. 863; 01.25.2023Tr:P8L4-8) Dr. Kelly calculated the lost profits damages to the Vagts Dairy at \$3,020,567.09 through October 1, 2022, plus approximately \$248,500.00 in additional damages through the date of the trial in light of the ongoing nature of the stray voltage impacting the dairy. (App. 863 and 873; 01.25.23Tr:P8L9-13; 01.25.23Tr:P18L7-18. The entire economic damage analysis is at 01.25.2023Tr:P13L12-P39L23)

While milk production has remained below the estimates for Vagts' dairy herd and expenses have been excessive, a further example of the damages up to trial can be found in the excess cow deaths experienced at the Vagts Dairy in 2022 alone. (App. 863-873; 01.25.2023Tr:P8L9-P18L23) The 76 cows that died in 2022 exceeds the total of 45 cows that died in 2020 and 60 cows that died in 2021, and significantly exceeds the death losses in the years of 2016, 2017, 2018 and 2019. (App. 266)

The Plaintiffs' estimate that without the impact of stray voltage, their cow death losses would and should have been 5% or less. (App. 680 and 834;

01.20.2023Tr:P238L5-10; 01.24.2023Tr:P173L2-6) Death losses were under 5% when the rectifier and anode field were off in 2013. (App. 681-682; 01.20.2023Tr:P239L18-P240L22) A unanimous jury concluded economic damages were \$3 million, which was slightly less than Dr. Kelly projected. (App. 119)

In addition to the pecuniary damages identified by Dr. Kelly, stray voltage has caused Mark and Andrew Vagts to spend much more hands-on time caring for their herd, providing health care, addressing calving issues, struggling to lower SCC and fighting to meet expected production levels. (App. 731-733 and 843-845; 01.23.2023Tr:P133L21-P135L23; 01.24.2023Tr:P206L12-P208L13) Vagts have on a number of occasions had to sell groups of high SCC cows in order to keep their bulk SCC low enough to have saleable milk. (App. 732-733; 01.23.2023Tr:P134L6-P135L17) In addition to the time spent on the dairy addressing the day-to-day problems caused by stray voltage, Vagts had to incur significant debt to keep their dairy farm. (App. 761; 01.23.2023Tr:P213L12-15) Vagts' loan indebtedness rose from approximately \$3,443,437 in 2017 to over \$5,266,500 in 2022. (App. 302 and 345) In doing so, Vagts worked with their bank at a time when the cause of the herd health and production issues had not been identified. (App. 749-755; 01.23.2023Tr:P179L8-P185L8) As a result, Vagts' banker viewed

the management of the dairy as “below average” not realizing the problems caused by stray voltage were beyond Vagts’ control. (App. 357, 359 and 361) Mark and Andrew knew the amount of labor and the quality of management they were providing, making their banker’s analysis of management particularly annoying to Vagts. (App. 749-755; 01.23.2023Tr:P179L8-P185L8) Vagts questioned whether they would recover from the debt they had to incur, certainly an annoying and uncomfortable prospect. (App. 761 and 844-845; 01.23.2023Tr:P213L7-25; 01.24.2023Tr:P207L9-P208L13; and Andrew Vagts rebuttal testimony at 01.27.2023Tr:P66L7-11) Perhaps the most impactful aspect of the personal annoyance, inconvenience and discomfort over the past years has been the increasing frequency with which they have had to euthanize cows that have not recovered following calving. (App. 836-839; 01.24.2023Tr:P179L4-P182L8) All of the issues noted above contributed to Vagts’ personal annoyance, inconvenience and discomfort having to conduct the business of this dairy under the conditions imposed on them by NNG. A unanimous jury concluded the damages for personal inconvenience, annoyance and discomfort were \$1,250,000. (App. 119)

The jury also assessed intangible “nuisance damages” of \$500,000 for loss of use and enjoyment of land. These damages were substantiated by the uncertainty the stray voltage would be remedied (an agreement was not

reached until the middle of trial). (App. 828-830; 01.24.2023Tr:P134L19-P136L16) Vagts had specific plans to further expand their dairy by increasing the number of cows, adding a building for just prefresh and dry cows. (App. 739-740; 01.23.2023Tr:P157L20-P158L21) They also had plans to build a new calf barn. (App. 707-708; 01.23.2023Tr:P36L24-P37L11) Essentially, any capital improvements, plans for expansion or other major decision concerning the dairy operation were put on hold due to the uncertainty created by the impact stray voltage has had on their dairy. (App. 739-740; 01.23.2023Tr:P157L20-P158L21) With the significant increase in bank loans to keep the dairy afloat while fighting the stray voltage issues, Vagts faced the loss of a multi-generational dairy business. (App. 845; 01.24.2023Tr:P208L2-13)

ARGUMENT

I. THE DISTRICT COURT PROPERLY SUBMITTED VAGTS' PURE NUISANCE CLAIM TO THE JURY.

A. Preservation of Error.

Vagts agree that NNG preserved the issue of “pure nuisance” for appeal. However, NNG has not preserved its argument that federal PSA/PHMSA regulations should be controlling of its liability; NNG stipulated pre-trial to the contrary, as described in Statement of the Case, *supra*.

B. Standard of Review.

Vagts agree with NNG that review is for correction of errors at law.

C. Argument

- i. ***Martins v. Interstate Power Co.* is Controlling Authority and Establishes that Pure Nuisance Applies to Stray Voltage Claims, Including This One, As NNG's CP System Creates Far More Electric Current (and Voltage) in the Earth Than An Electric Utility System.**

In *Martins v. Interstate Power Co.*, 652 N.W.2d 657, 664 (Iowa 2002), the Iowa Supreme Court held as follows regarding a stray voltage claim against an electric utility:

D. The merits. The foregoing survey of our nuisance cases makes clear that there can be a nuisance claim without an underlying actionable conduct, such as negligence, being proved. ... This, of course, is contrary to the position of the Restatement (Second) of Torts section 822, which this court has not adopted.

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. *Guzman*, 489 N.W.2d at 11. Excessive stray voltage from an electric utility resulting in damage to a dairy herd meets that test. [Emphasis supplied]

The *Martins* decision also surveyed the statutory definition of nuisance (Iowa Code §657.1 (1995), now Iowa Code §657.1.1) and parts of its lengthy development in the common law of Iowa:

A private nuisance is "an actionable interference with a person's interest in the private use and enjoyment of the

person's land." *Weinhold [v. Wolff]*, 555 N.W.2d [454,] 459 [Iowa 2009](citation omitted). "Parties must use their own property in such a manner that they will not unreasonably interfere with or disturb their neighbor's reasonable use and enjoyment of the neighbor's property." *Id.*

....

Whether a lawful business is a private nuisance depends on the reasonableness of conducting the business in the manner, at the place, and under the circumstances in question. Thus, the existence of [such] a nuisance does not depend on the intention of the party who created it. Rather, it depends on the following three factors: priority of location, the nature of the neighborhood, and the wrong complained of.

Weinhold, 555 N.W.2d at 459 (citations omitted). Whether a party has created and maintained a nuisance is ordinarily a fact question. *Id.*

There is a distinction between the concepts of "nuisance" and "negligence," which we explained in *Bormann*:

Negligence is a type of liability forming conduct, for example, a failure to act reasonably to prevent harm. In contrast, nuisance is a liability-producing condition. Negligence may or may not accompany a nuisance; negligence, however, is not an essential element of nuisance. **If the condition constituting the nuisance exists, the person responsible for it is liable for resulting damages to others even though the person acted reasonably to prevent or minimize the deleterious effect of the nuisance.** [Emphasis supplied]

Bormann [v. Board of Supervisors In and For Kossuth County], 584 N.W.2d [309.] 315 [Iowa 1998] (citations omitted); [...] In other words, nuisance simply refers to the results; negligence might be the cause. *Guzman*, 489 N.W.2d at 11.

Martins, 652 N.W.2d at 660-661.

In this case, the *Weinhold* - *Martins* requirements were met. The dairy predated the pipeline. The neighborhood was and is agricultural. The wrong complained of is a threat to agriculture.

NNG argues in effect that it is merely complying with federal CP requirements, and therefore should not be liable for the effects of its system. However, the jury found that its system was in fact causing a nuisance at the Vagts' farm under the classic Iowa definition:

In determining whether an invasion is "unreasonable" you shall consider:

- (a) the extent of the harm involved;
- (b) the character of the harm involved;
- (c) the type of use or enjoyment invaded;
- (d) the suitability of the particular use or enjoyment invaded to the character of the locality;
- (e) the burden on the person harmed of avoiding the harm;
- (f) the historic use of the land and whether that use precedes the nuisance;
- (g) the suitability of the invading conduct to the character of the locality; and, the reasonableness of conducting the

defendant's business in the manner, at the place and under the circumstances in question.

The degree of harm is "significant" if normal persons in the community would regard the invasion as definitely offensive, seriously annoying or intolerable. If normal persons in the community would not regard the invasion as such, the invasion is not a significant one, even though the idiosyncrasies of the Vagts may make it unendurable to them.

(App. 117, Jury Instruction #12)

As noted by the District Court (App. 195):

In *Martins*, the defendant was an electric utility. Here Defendant is a natural gas pipeline. The item allegedly causing the nuisance is the pipeline's Cathodic Protection System ("CPS"). The CPS sends electricity through the earth towards the pipeline to create an environment where a nearby anode bed degrades instead of the pipeline. Defendant argues that the CPS is not inherently dangerous and is, in fact, required by federal regulations.

As argued by Plaintiffs, the problems in this case arose because an anode bed associated with Defendant's CPS was too close to the Plaintiffs' barn. The barn thus essentially began to function as an anode bed. The resulting electricity flowing through the barn allegedly distressed the cows resulting in decreased milk production and an increased rate of death loss.

Plaintiffs have not alleged, and Defendant has not acknowledged, any failure of Defendant to exercise ordinary care. Thus, to the extent the CPS is causing damage to Plaintiffs, it is due to the inherent dangers of the CPS itself. Although a CPS may have less inherent danger than an electrical utility, that does not mean no inherent danger exists. Indeed, Plaintiffs argue that, unlike an electric utility

– where the earth conducts only a portion of the voltage – a CPS intentionally runs all of its electricity through the ground towards the pipeline.

The *Martins* court affirmed the jury’s verdict in a stray voltage case that proceeded on a theory of pure nuisance. The Court does not find a CPS so different from an electrical utility as to mandate a different result.

The District Court was correct in its analysis. The undisputed factual record in this matter demonstrates that the NNG CP system injected far more electric current into the earth at the Vagts’ farm than a local utility system. NNG inspection reports demonstrate the DC amperage on the NNG rectifier near Vagts put as much as 27.34 amperes DC at about 19 volts DC on the anode bed during 2020. (App. 221) Current (as well as voltage) had been increased more or less steadily since 2013. (*Id.*) Other rectifiers contributed to charging the anode bed, also. (App. 639-640; 01.20.2023Tr:P130L8-P131L7) As described by Mr. Neubauer, NNG added to its CP system “big time” over the years. (App. 643 and 649; 01.20.2023Tr:P152L6-20; 01.20.2023Tr:P174L4-16) Mr. Bianchetti, NNG’s own expert, acknowledges these additions were due to the deterioration of the coating on the old steel pipeline, which was installed during 1964. (App. 859; Bianchetti Depo:P41L5-25)

NNG attempts to liken its system to a “AAA battery” operating at or

under 1.5 volts. (NNG [Proof] Brief at 17, 25, 32) Unlike a AAA, the CP system is like a very large battery which puts electrical current in the earth, as acknowledged by experts on both sides. The earth is the electrolyte between the anodes and the pipeline. The system creates a variety of voltage drops in the earth. (App. 848-855 and 620-621; Bianchetti Depo:P16L1-P23L14; 01.20.2023Tr:P44L6-P45L17) The current from the multiple rectifiers charges the system, resulting in polarized DC voltage. The rectifiers' output has been increased over time. The rectifiers charge the system with rectified AC current; the resulting polarized system produces steady DC current and voltage between the anodes and the pipe. (Id.) The object of all of this is to maintain polarized negative DC voltage between the pipe itself and the surface of the soil just above it at -850 mV (-0.850 volts) or greater, when all rectifiers are cycled off. (Id.) The voltage drop between the surface of the earth and the pipe several feet down is just one of many voltage drops in this very large "battery." (Id.) NNG's massive CP system is nothing like a AAA battery; likening it to one is a fundamental misrepresentation. The output of its rectifiers far exceeds the 1.5 volts of an AAA battery, at much higher current than a AAA is capable of producing. NNG's current has been as high as 27.34 amperes DC. (App. 221)

In contrast, the maximum primary (electrical utility) current measured

under high load on the local power system at Vagts by the utility, ACEC, was about 2.693 amperes AC. (App. 395; Exh. 548, ACEC memo Sept. 2020, p.16, LB [load box] High I Pri Line (Ip)) ACEC's electrical current was less than 10% of the maximum NNG CP rectifier current. As noted by the District Court, only a portion of the ACEC electrical current travels through the earth, whereas all of NNG's CP current travels from the anode bed to the pipe through the earth. (App. 195) Per Mr. Neubauer's tests and testimony, the ACEC system contributed to shock levels in the Vagts' barns only minimally, and only when an ACEC capacitor bank near the barns was energized. (App. 641 and 669; 01.20.2023Tr:P137L10-24; 01.20.2023Tr:P205L5-22) The serious DC problem from NNG remained with the capacitor bank de-energized. (Id.) The ACEC contribution to shock at Vagts was substantially less than 10% with the capacitor bank energized. (Id.) DC levels of shock by electric current have approximately the same effects on cows (and humans, which perceive current - not voltage - similarly to cows) as AC levels (measured as rms or root mean square average of the AC sine wave, the standard way of measuring AC current). (App. 660-664 and 818; 01.20.2023Tr:P196L2-P200L21; 01.24.2023Tr:P118L6-25)

According to NNG, its system complies with all applicable regulations. Nonetheless, the jury's verdict was based on compelling evidence of harm

from NNG's system. NNG does not challenge on this appeal the evidentiary support for the jury's verdict. The verdict itself confirms the degree of danger, which is inherent in the "thing itself" - the NNG CP system.

ii. Iowa Statutory Law of Nuisance, as Modified After Martins, Does Not Require Negligence.

Iowa Code §657.1.1 provides in relevant part as follows:

657.1 Nuisance - what constitutes - action to abate - electric utility defense.

1. Whatever is injurious to health, indecent, or unreasonably offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere unreasonably with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary proceedings may be brought to enjoin and abate the nuisance and to recover damages sustained on account of the nuisance.

The statute does not and never has required negligence to be proven to maintain an action for nuisance in the circumstances of this case. NNG does not allege otherwise.

It is true that the statute was amended following the Martins decision, by the addition of §657.1.2. That new subsection, effective several years after the Martins decision provides as follows:

2. 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 if the electric utility demonstrates that in the course of providing electric services to its customers it has complied with engineering and safety standards as adopted by the utilities

board of the department of commerce, and if the electric utility has secured all permits and approvals, as required by state law and local ordinances, necessary to perform activities alleged to constitute a nuisance.

NNG does not claim that it is an electric utility, nor can it. (NNG [Proof] Brief at 24) Nonetheless, it asks this Court to make an unwarranted change in the law of Iowa, to require that its negligence be proven before it can be held liable to the Vagts.

The legislature, by enacting Iowa Code §657.1.2, addressed stray voltage claims against electric utility defendants in certain circumstances only. The legislature clearly did not make this change applicable to NNG or its CP systems or any other utilities. “The legislature is presumed to know the state of the law, including case law, at the time it enacts the statute.” *Iowa Farm Bureau Federation v. Environmental Protection Commission*, 850 N.W.2d 403, 434 (Iowa 2014), citing *Welch v. Iowa Department of Transportation*, 801 N.W.2d 590, 600 (Iowa 2011), and *State v. Jones*, 298 N.W.2d 296, 298 (Iowa 1980).

Thus, the legislature has not chosen to impose a requirement that there be a finding of negligence on the part of NNG before the Vagts may recover in this case. If NNG believes that public policy requires a similar change applicable to natural gas pipeline companies, its remedy is to petition the

legislature.

Iowa Code §657.1.1, consistent with *Martins* and a long line of Iowa cases, does not include negligence in the elements of nuisance. To hold otherwise as a matter of common law (such as by adopting §822 of the Restatement (Second) of Torts) would negate the statute and thus the intent of the legislature. While it is true that the Iowa Supreme Court may change the common law of Iowa even where the legislature has not, such is an extraordinary remedy, reserved for extraordinary circumstances:

We believe that the proper relationship between the legislature and the court is one of cooperation and assistance in examining and changing the common law to conform with the ever-changing demands of the community. There are, however, times when there exists a mutual state of inaction in which the court awaits action by the legislature and the legislature awaits guidance from the court. Such a stalemate is a manifest injustice to the public.

Goetzman v. Wichern, 327 N.W.2d 742, 751 (Iowa 1982).

The circumstances in this case are just the opposite of *Goetzman*. The legislature has long established nuisance as not requiring negligence, by refusing to include such a requirement in the statute. The Court has issued a long line of decisions establishing that nuisance can and does occur without proof of negligence. As noted by the *Martins* court: “In other words, nuisance simply refers to the results; negligence might be the cause.” *Martins*, 652

N.W.2d at 661; citing *Guzman v. Des Moines Hotel Partners*, 489 N.W.2d 7, 11 (Iowa 1992).

NNG seeks to have this Court rewrite nuisance law where there is no “gap in the common law that results in injustice.” Adopting NNG’s position would perpetrate an injustice on the Vagts. The “demands of society” referenced by the *Goetzman* court do not require imposition of a huge financial burden on a family farm which is a very small business in comparison to NNG, by requiring the Vagts to endure huge economic loss. NNG seeks to make it cheaper to continue to use its old pipe, anode beds, and CP system configured as it had historically, by simply “turning up the juice” applied to the CP system so that more fundamental measures need not be taken. If NNG’s ability to protect its pipe from leaks is compromised by the age and configuration of its CP system, NNG should re-engineer the system in such a way as to not cause harm to Vagts or other farms. NNG should not be able to protect itself by having this Court adopt a rule of law which would destroy the Vagts’ dairy, as well as the livelihood of the Vagts’ families and their employees.

iii. The *Martins* Majority Opinion Should Stand; Federal Pipeline Statutes and Regulations Specifically Preserve the Vagts’ Tort Rights at Issue.

NNG advocates adoption of the dissenting opinion in *Martins*. The

facts and circumstances of this case demonstrate why such a result is inappropriate. NNG asserts it is complying with all federal CP regulations, yet the jury found the Vagts' property rights were seriously violated. Thus, without any "problems" in the CP system (from NNG's CP perspective), serious damage was done. The *Martins* dissent's reliance on a 1994 law review article to conclude that excessive stray voltage (or earth currents, as in this case) only follows from "problems in electrical systems," presumably resulting from negligence, had no factual support on the record of *Martins*. It certainly has no support on the record of this case, where NNG is maintaining required levels of CP but nonetheless devastates the Vagts' dairy operation.

NNG attempts to equate nuisance without negligence to strict liability, citing the dissent in *Martins*, and *Schlader v. Interstate Power Co.*, 591 N.W.2d 10, 12 (Iowa 1999), and *Blackman v. Iowa Union Electric Co.*, 14 N.W.2d 721 (Iowa 1944). These arguments are identical to those rejected by the Iowa Supreme Court in *Martins* 652 N.W.2d at 664-665 and should be rejected here. The law review author relied upon by the dissent in *Martins* did not even address the application of nuisance theory to stray voltage. *Id.* at 662 Nothing in the record indicates that author had any expertise in the technical electrical or veterinary aspects of the subject. The Court in *Martins* rejected the idea that "some underlying prerequisite conduct like negligence" is

necessary to establish liability against electric utilities in stray voltage cases; such a requirement “conflicts with the present state of nuisance law in Iowa, an issue that we did not consider and address in Schlader.” *Id.* at 665. Schlader did address “strict liability” in the context of a claim under §402A of the Restatement (Second) of Torts, and a repealed statute establishing a presumption of negligence (not nuisance). Martins, 652 N.W.2d at 665; Schlader, 591 N.W.2d at 12-13. Blackman was tried on a theory of negligence; Martins, 652 N.W.2d at 664-665 held that: “Therefore, the case cannot support the proposition that a claim of nuisance against a utility can only be predicated upon negligence.”

Thus, NNG’s arguments about “strict liability” fail under well-established Iowa law. Nuisance is a fundamentally different tort than §402A strict liability. NNG’s [Proof] Brief (pp. 38-39) acknowledged (perhaps inadvertently) the inherent danger of its system: “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.”

While that characterization oversimplifies the nuisance analysis the jury made under the Weinhold-Martins factors, it focuses on the essence of nuisance: *the invasion of rights in the use and enjoyment of land*. It is

obvious that electrifying multiple anode beds on a pipe near a dairy barn at many volts and amperes - as here - could endanger cows, who can be adversely affected by exposure to much less electricity - thousands of times less current - than is being applied. As the pipe aged and the electrification increased, the danger of NNG's current in the earth to the Vagts increased. The danger is clearly inherent in the CP system; the rights invaded are unquestionably the Vagts' rights in the use and enjoyment of their farm.

NNG's reliance on cases such as Guzman v. Des Moines Hotel Partners, 489 N.W.2d 7 (Iowa 1992) is off the mark. Guzman involved an auto accident allegedly caused by a lawn sprinkler spraying water onto a street. Nuisance was held inapplicable, as the "inherent danger" test was not met. Even more fundamentally, the interest invaded was not the private use and enjoyment of land.

Among the most succinct and insightful summaries of the use and attempted misuses of nuisance law was the Iowa Court of Appeals' observation in Martins v. Interstate Power Co., No. 00-0791, 2002 WL 534890 at p.2 (Iowa Ct. App. 2002) (affirmed in Martins, 652 N.W.2d 657):

"Confusion exists in statements of the legal basis of liability as applied to the law of nuisance because the term "nuisance" has been used indiscriminately to designate harmful results"
Taylor v. City of Cincinnati, 55 N.E.2d 724, 729 (Ohio 1944).
... **The confusion on this score vanishes in large part,**

however, when proper heed is paid to the sound propositions that private nuisance is a field of tort liability rather than a single type of tortious conduct; that the feature which gives unity to this field of tort liability is the interest invaded, namely the interest in the use and enjoyment of the land; that any substantial non-trespassory invasion of another's interest in the private use and enjoyment of land by any type of liability forming conduct is a private nuisance. [Emphasis supplied]

In this case, as in *Martins*, the interest invaded is the Vagts' rights in the use and enjoyment of land. NNG's practice of using the earth to conduct ever greater electrification to its pipe invaded Vagts' rights. This type of invasion of Vagts' rights is exactly the type of wrong which Iowa nuisance law seeks to remedy. The remedy is - and ought to be - independent of whether NNG was negligent. NNG's operation of its CP system has severely and unreasonably invaded the Vagts' rights in the use and enjoyment of their farm. Where the effect of NNG's conduct is significant and unreasonable, it must be compensated, regardless of whether NNG was negligent.

NNG further seeks to have this Court adopt the PSA and PHMSA federal safety regulations as a standard of care for stray voltage cases (presumably based only on negligence) where cathodic protection is involved. (NNG [Proof] Brief at 44-47) Nowhere does NNG explain how application of such a "standard of care" would protect the Vagts' property interests at issue in this case.

The only federal regulations discussed in NNG’s Brief, or in the evidence of this case, are the CP requirements relating to certain polarized voltages (i.e., voltages measured with all rectifiers off) needed to maintain adequate cathodic protection. The federal Pipeline Safety Act is codified at 49 U.S.C. Ch. 601, §§60101-60143, inclusive. It is uncontested that the Act and federal regulations adopted pursuant to it relied upon by NNG (App. 920-926; 49 C.F.R. §192.1 et seq, and especially 49 C.F.R. §192.455) are in place to prevent degradation of the pipe. In the case of CP systems, the object is to prevent corrosion and leaks. (App. 848; Bianchetti Depo:P16L19-22)

In the absence of Iowa nuisance law, nothing in the federal regulations protects Vagts’ rights in the use and enjoyment of their property on the facts of this case.

NNG ignores the provision of the PSA which does preserve the rights in tort of landowners such as Vagts, which is set forth in 49 U.S.C. §60120(c):

(c) EFFECT ON TORT LIABILITY.-This chapter does not affect the tort liability of any person. [Emphasis supplied]

The reference to “This chapter ...” encompasses the entire PSA, 49 U.S.C. Chapter 601, §§60101-60143, inclusive. Thus, the PSA includes a specific Congressional reservation of tort rights. “Any person” includes corporations such as NNG. 49 U.S.C. §60101(17), and 1 U.S.C. §1. The PSA expressly

preserves the Vagts' rights to recover from NNG under Iowa tort law, including Iowa nuisance law.

Interestingly, 49 U.S.C. §60121(a)(1) permits actions for injunctive relief for violations of the PSA. Congress again made clear - as it did in 49 U.S.C. §60120(c), quoted above - that this right does not restrict other legal rights (such as common law nuisance rights) at §60121(d):

(d) ADDITIONAL REMEDIES.-A remedy under this section is in addition to any other remedies provided by law. This section does not restrict a right to relief that a person or a class of persons may have under another law or at common law. (Emphasis supplied.)

Thus, contrary to NNG's assertions, Congress has not even attempted to occupy the field which includes the Vagts' rights at issue in this case. Rather, Congress has expressly preserved state tort law as a remedy for breach of Vagts' rights in the use and enjoyment of their property.

Relevant federal decisions recognize that state tort law claims are not preempted by the PSA. In *American Energy Corp., et al v. Texas Eastern Transmission, LP*, 701 F.Supp.2d 921, 931 (S.D. Ohio 2010) the court, following other similar rulings, held:

The Court finds that Plaintiffs have stated sufficient claims and that their claims are not preempted by federal law. **The PSA does not preempt Ohio property or tort law. The PSA itself provides that it**

“does not affect the tort liability of any person.” 49 U.S.C. § 60120(c). Further, as discussed in *Abramson*, 909 F.Supp. at 416, neither the PSA, nor the NGA, prevents claims based on state contract, tort, or property law. **The *Abramson* court noted, “that the state’s areas of law relating to damages to property owners on whose property pipelines run are a legitimate state concern.” *Id.* at 416. [Emphasis supplied]**

The *Abramson v. Florida Gas Transmission Co.* case cited is at 909 F.Supp. 410 (E.D.La. 1995). Similar holdings can be found in more recent federal court decisions, such as *Van Scyoc v. Equitrans, LP*, 255 F.Supp.3d 636 (W.D.Pa. 2015).

NNG attempts to equate its tort liability to Vagts to being subject to a comprehensive state permitting and regulatory program preempted by federal law. In *Kinley Corp v. Iowa Utilities Bd.*, 999 F.2d 354 (8th Cir. 1993), the federal court addressed an Iowa permitting and regulatory program under Iowa Code Ch. 479 (1991), as applied to a jet fuel pipeline. The Eighth Circuit held the Iowa statute was expressly preempted by 49 U.S.C. §2001 et. seq., the Hazardous Pipeline Safety Act of 1979. *Kinley Corp*, 999 F.2d at 358. There was no issue regarding tort liability or express Congressional language preserving tort liability, as here. NNG’s reliance on *Kinley* appears to be a backdoor attempt to assert federal preemption as an affirmative defense, which NNG did not plead. Given the express Congressional

preservation of tort liability under the PSA, preemption is a defense unavailable to NNG in any event.

NNG did raise federal preemption on post-trial motions. (App. 123) NNG also claimed in its Reply in the District Court (App. 177) that federal preemption was timely raised because it goes to subject matter jurisdiction. The District Court (App. 195) correctly ruled:

Federal Preemption

Defendant's arguments about federal preemption were not raised prior to or during trial. They were not pled as an affirmative defense. Accordingly, Plaintiff argues that any such argument was waived. Defendant argues that because preemption doctrines impact subject matter jurisdiction, they may be raised at any time. The Court agrees with the Plaintiffs. "State courts are not deprived of subject matter jurisdiction over claims involving federal preemption unless Congress has given exclusive jurisdiction to a federal forum." *Ackerman v. Am. Cyanamid Co.*, 586 N.W.2d 208, 214 (Iowa 1998). The federal Pipeline Safety Act ("PSA") does not provide exclusive jurisdiction to the federal courts. Further, even if the preemption argument had been timely raised, it fails on the merits.

The PSA precludes state regulations governing pipeline safety. But no safety standards or other state regulations were at issue in this case. No standard of care was discussed at trial. Plaintiffs asserted only a claim for common law nuisance. Such a claim is clearly within the savings clause of the PSA: "This chapter does not affect the tort liability of any person." 49 U.S.C. 60120(c). In discussing remedies, the PSA emphasizes this point: "A remedy under this section is in addition to any other remedies provided by law. This section does not restrict a right to relief that a person or a class of persons may have under another law or at common law." 49 U.S.C. 60121(d).

Federal Courts have remanded improperly removed state court tort and property law claims, finding no federal question even though the defense raised preemption under the PSA. Stutler v. Marathon Pipeline Co., 998 F.Supp. 968, 970-971 (S.D. Ind. 1998); Pennsylvania Services Corp. v. Texas Eastern Transmission, Case No. 2: 2011 WL 13234909 (W.D. PA 2011). A “high threshold” must be met if a state law is to be preempted for conflicting with the purposes of a federal act. Chamber of Commerce of the US v. Whiting, 563 U.S. 582, 131 S.Ct. 1968 at 1984-1985 (2011).

Vagts’ right to pursue relief under Iowa nuisance law is clear. NNG would have this Court impose, as a matter of Iowa common law, a form of federal preemption of state tort law rights, where Congress has expressly preserved those rights. Such an outcome would be contrary to Congressional intent, as well as Iowa statutory and case law. Such an outcome would fail to preserve the Vagts’ rights in the use and enjoyment of their property. Nothing in federal law or Iowa law establishes or even implies that NNG has immunity to meet its cathodic protection requirements by any means it finds convenient, including destroying Vagts’ dairy. Such a result would be absurd and unjust.

II. THE NON-ECONOMIC DAMAGE AWARDS WERE NOT EXCESSIVE UNDER THE EVIDENCE AND THE MOTION FOR REMITTITUR WAS PROPERLY DENIED.

A. Preservation of Error.

Vagts agree NNG preserved its claim the jury's non-economic damage awards were excessive by filing the motion for remittitur. However, NNG did not preserve its argument that the jury instructions created a potential for excess damages, as NNG stipulated to the instructions. See Statement of the Case, *supra*.

B. Standard of Review.

Vagts agree the standard of review for motions of remittitur is abuse of discretion. *Triplett v. McCourt Mfg. Corp.*, 742 N.W.2d 600, 602 (Iowa Ct. App. 2007).

C. Argument.

The Iowa Supreme Court has explained:

When we review claims for excessive damages, “we view the evidence in the light most favorable to the plaintiff.” *Kuta v. Newberg*, 600 N.W.2d 280, 284 (Iowa 1999). We should not “disturb a jury verdict for damages unless it is ‘flagrantly excessive or inadequate, so out of reason so as to shock the conscience, the result of passion or prejudice, or lacking in evidentiary support.’ ” *Id.* (quoting *Olson v. Prosoco, Inc.*, 522 N.W.2d 284, 292 (Iowa 1994)). We apply an abuse of discretion standard because the trial court had the advantage of seeing and hearing the evidence. *Id.*

Stender v. Blessum, 897 N.W.2d 491, 501 (Iowa 2017).

NNG asserts generally at Issue II of its brief, the jury's \$1,250,000 award for "personal inconvenience, annoyance, and discomfort" was "a result of passion, prejudice" and was "lacking in evidentiary support." (NNG [Proof] Brief at 47-48) NNG does not point to anything in the record to support its assertion the verdict was the result of passion or prejudice. In asserting at page 48 of its brief that "[t]here 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," NNG ignores a large volume of evidence, including that noted at pages 42-45 of Statement of Facts above, including but not limited to:

1. Excessive milking times, three times daily, over the entire damage period;
2. Constant maneuvering to keep bulk tank somatic cell counts low enough to have saleable milk, including selling otherwise high quality cows to achieve this basic requirement of dairying;
3. Very frequent treatment of down cows, including (but not limited to) euthanizing many of them;
4. Continual dealing with excessive expense and debt from Vagts' accumulating financial problems, as demonstrated by the bank

records introduced by NNG (App. 297, 302, 306, 318, 327, 336, 345, 354, 357, 359, 361, 363 and 365);

5. Dealing with the financial and management fall-out from the extraordinarily excessive death rate incurring approximately \$1.8 million in additional debt between 2017 and 2022 (App. 302 and 345);
6. Going to extraordinary lengths, with the assistance of their herd veterinarians, to stay on top of all conditions that might upset the Vagts' herd's extraordinarily fragile immune status as the result of exposure to the ground current from NNG's CP system;
7. All of the above have been occurring, at an accelerating pace, throughout the damage period of March 12, 2016, through the trial.

Compelling evidence established the significant impact stray voltage had on the hours, days, and years of the Vagts' lives which have been spent dealing with the effects of NNG's ground current. (App. 843-845; 01.24.2023Tr:P206L2-P208L13) Veterinary witnesses Hammell and Johnson described the challenges facing the Vagts as a nearly impossible task to keep the dairy functioning in those conditions. (App. 710 and 799-800; 01.23.2023Tr:P47L7-13; 01.24.2023TrP67L11-P68L8) Evidence of the

challenges faced by Vagts was not lost on the trial Judge:

Joan Vagts testified how difficult it was to see her husband and son struggle running the dairy operation. When asked about having to shoot so many cows that could not recover from their ailments, Andrew Vagts became so choked up he could barely answer. The testimony was compelling. Additionally, in order to avoid even more economic losses, Plaintiffs had to engage in numerous time-consuming efforts. Had Plaintiffs not reduced their herd's somatic cell count, they could not have sold their milk for consumption.

(App. 195) The jury's award of \$1,250,000 is reasonable, in light of the overwhelming evidence of causation and the enormous and ongoing difficulties in simply keeping the Vagts Dairy functioning as a viable enterprise.

NNG also sought remittitur of the \$500,000 awarded for Vagts' loss of use and enjoyment of their land. Again, NNG is unable to point to any portion of the record suggesting the award was the result of passion or prejudice. The jury was instructed:

An interest in the use and enjoyment of land is not only the interests that a person may have in the actual use of land for residential, agricultural, commercial, industrial and other purposes, but also the person's interests in having the use of the land unimpaired by changes in its physical condition.

(App. 117) Plaintiffs presented substantial evidence of interference with Vagts' use of their land for agricultural purposes, including their ability to use their farm "unimpaired" by the impact of stray voltage. Vagts and their

veterinarian testified to the expansion that had been put on hold due to the impact stray voltage had on their dairy operation. Vagts could not proceed with a prefresh/dry cow barn. (App. 739-740; 01.23.2023Tr:P157L20-P158L21) They could not build a new calf barn. (App. 708; 01.23.2023Tr:P37L1-11) All of these improvements were intended to grow and improve their dairy herd. (App. 739-740; 01.23.2023Tr:P157L20-P158L21)

For NNG to suggest that forcing Vagts to delay expansion plans did not have significant impact on the Vagts' use and enjoyment of their land, ignores the financial reality that growth of a dairy herd is necessary to maintain financial viability. (App. 599-600; 01.18.2023Tr:P69L18-P70L14). Vagts' ability to keep modernizing their dairy has been on "hold" since at least the 2017-2018 freestall barn addition. Vagts have not been able to further expand their facilities due to both the physical and financial impact of the nuisance maintained by NNG. Vagts' ability to keep their facilities and herd expanding and modernizing with the times has been seriously curtailed. This is an enterprise that sells millions of dollars of product each year, all of which is produced on their land. The jury's award of \$500,000 for loss of use and enjoyment of that land is hardly excessive, given the degree to which the nuisance created by NNG has delayed, retarded and made more difficult

Vagts' ability to use and enjoy that land.

NNG argues the potential for the jury to award excessive damages “was exacerbated by an omission in the verdict form.” (NNG [Proof] Brief at 49) This argument is disingenuous at best. NNG stipulated to the verdict form and cannot now claim error. The verdict form (along with the jury instructions) were developed and filed jointly by counsel for both parties, subject only to NNG’s position that the case should be submitted only upon comparative fault principles. NNG’s failure to object to the verdict form (as not having an end date) before closing arguments waived the objection it now seeks to raise. Iowa R. Civ. P. 1.924; *Olson v. Sumpter*, 728 N.W.2d 844, 850 (Iowa 2007). The District Court correctly rejected NNG’s jury verdict argument on both procedural and substantive grounds:

First and foremost, any errors in the verdict form are waived. *Olson v. Sumpter*, 728 N.W.2d 844, 850 (Iowa 2007); Iowa R. Civ. P. 1.924 [...] The verdict form was jointly submitted by the parties and adopted by the Court without revision. The Court made a record that there were no objections to the jury instructions and verdict form.

Second, the Court does not find any errors in the verdict form. The two classes of non-economic damages are consistent with Iowa law. Although the verdict form does not contain an end date for damages, the jury was not asked to consider future damages.¹ Neither the jury instructions nor the verdict form make any reference to future damages. Further, Instruction No. 14 provided the end date of January 30, 2023. January 30, 2023, is the date the jury rendered its

verdict. The jury is presumed to have understood the instructions. *State v. Hanes*, 790 N.W.2d 545, 552 (Iowa 2010).

¹ Plaintiffs' counsel made reference in closing argument to the future of the dairy being in doubt. But that was not a request for "future damages." In the Court's view it was in reference to the dairy being \$5.2 Million in debt based on loans taken out to cover past losses.

(App. 195) There is nothing in this record to suggest the jury awarded damages beyond the relevant damage period.

There was substantial evidence to support the non-economic damages awarded in this case. The non-economic damages awarded in this case are in line with those awarded in similar cases in other jurisdictions, which were not disturbed upon appeal. (App. 154) In denying the NNG motion for remittitur, Judge Nelmark correctly noted:

The Court does not find the damages awarded to be "flagrantly excessive or inadequate, [or] 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). The jury was attentive through seven days of trial. At no point did they appear outraged. The economic damages awarded were less than the Plaintiffs requested. Neither counsel suggested an appropriate number for non-economic damages. The fact that the non-economic damages are 58.33% of the economic damages does nothing to suggest a runaway jury. The Wisconsin Court of Appeals held that \$1,000,000 in non-economic damages was not excessive in a stray voltage case with \$750,000 in awarded [sic] non-economic damages. *Allen v. Wisconsin Pub. Serv. Corp.*, 694 N.W.2d 420 (Wis.

Ct. App. 2005).

(App. 195) The abuse of discretion standard for review of denial of a motion for remittitur is applied because “the trial court has had the advantage of seeing and hearing the evidence; in applying that standard, other cases are of limited value.” *Triplett v. McCourt Mfg. Corp.*, 742 N.W.2d at 602 (citing *Rees v. O’Malley*, 461 N.W.2d 833, 840 (Iowa 1990)) The court “will not find an abuse of discretion unless it is shown that the trial court’s discretion was exercised on grounds clearly untenable or to an extent clearly unreasonable.” *Id.* (citing *State v. Brumage*, 435 N.W.2d 337, 341 (Iowa 1989)) As Judge Nelmark made clear in his ruling, the verdict for non-economic damages was supported by substantial evidence and was not the product of passion or prejudice. (App. 195)

The jury award should not be disturbed on appeal because NNG believes it is too high. This would be contrary to the directive in *Stender* “courts should not interfere with an award when it is within a reasonable range of the evidence.” *Stender v. Blessum*, 897 N.W.2d at 517. There is no “compelling” reason to disturb the jury verdict in this case. The District Court’s decision to deny NNG’s motion for remittitur should be affirmed.

CONCLUSION

(1) The “pure nuisance” form of the verdict and jury instructions

follows long-established Iowa law.

(2) The danger of NNG’s CP system is clearly “inherent in the thing itself,” particularly where NNG chooses to maintain an anode bed very close to a dairy barn and in proximity to an old pipe with deteriorated coating, or the amount of current on the system is increased substantially over time to protect the deteriorated pipe, or both.

(3) Creating new law to protect NNG from liability by making federal PSA regulations the “standard of care” would not only improperly make negligence an element of nuisance, contrary to long precedent and the choices of the legislature as embodied in Iowa Code §657.1; it would also in effect immunize NNG with a form of “federal preemption” that Congress has expressly chosen not to create. In doing so, the “new rule” sought by NNG could leave Vagts with no remedy for NNG’s serious violation of Vagts’ property rights.

(4) Remittitur of non-economic damages is inappropriate. The unanimous jury heard seven days of testimony and deliberated over two days. The District Court denied remittitur, noting no evidence of impropriety by the jury as well as the similarity of its award to other reported cases. The verdict form and jury instructions were proper; NNG waived any objection it may now assert. The Judgment entered by the District Court on the unanimous jury

verdict should be affirmed.

ORAL ARGUMENT

Plaintiffs, Mark Vagts, Joan Vagts, Andrew Vagts and Vagts Dairy, LLC, do not believe an oral argument is necessary. However, in the event Defendant is granted oral argument, Plaintiffs would respectfully request to be heard in oral argument.

Dated this the 29th day of August 2023.

Respectfully Submitted,

/s/Andrew F. Van Der Maaten

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This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because: this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font size and contains 13,817 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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