

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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No. 29373

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PAUL PATTERSON,

*Appellee/Plaintiff,*

v.

PLOWBOY LLC,

*Appellant/Defendant.*

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Appeal from the Circuit Court  
Sixth Judicial Circuit  
Jones County, South Dakota

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The Honorable M. Bridget Mayer  
Circuit Court Judge

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**BRIEF OF APPELLANT PLOWBOY, LLC**

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*Attorneys for Appellant/Defendant*

Marty J. Jackley  
Gunderson, Palmer, Nelson & Ashmore  
111 W Capitol Ave, Ste 230  
Pierre, SD 57501  
mjackley@gpna.com

*Attorneys for Appellee/Plaintiff*

Robert Riter  
Riter Rogers LLP  
319 S. Coteau  
PO Box 280  
Pierre, SD 57501  
r.riter@riterlaw.com

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### **PRELIMINARY STATEMENT**

For the convenience of the Court, Appellant/Defendant Plowboy, LLC is referred to as “Plowboy”; Appellee/Plaintiff Paul Patterson is referred to as “Patterson”; documents from the record of the Jones County Clerk of Court are cited as “R. \_\_\_\_”; the Appendix is cited as “App. \_\_\_\_”; the transcript of the hearing for Patterson’s Motion for Partial Summary Judgment, which was held on June 5, 2020, is referred to as “HT \_\_\_\_”; the Order Granting Plaintiff’s Motion for Partial Summary Judgment and Judgment and Order for Plaintiff, filed on July 14, 2020, and which is found at R. 149-52 (App. 21-24), is referred to as “Order and Judgment”. All references will be followed by appropriate page and paragraph designations.

### **JURISDICTIONAL STATEMENT**

On July 13, 2020, the Honorable M. Bridget Mayer, Sixth Judicial Circuit, entered the Order and Judgment. R. 149-52 (App. 21-24). The Order and Judgment was filed with the Jones County Clerk of Court on July 14, 2020. *Id.* Notice of Entry of Order and Judgment was served and filed on July 14, 2020. R. 164-65.

On July 22, 2020, Plowboy filed a Petition for Permission to Appeal Intermediate Order of Circuit Court, which included an application for stay. *See* R. 172-73. Upon receiving Plowboy’s Petition, on July 23, 2020, this Court granted an Order for Temporary Stay. R. 170. This Court subsequently granted Plowboy’s Petition on August 7, 2020. R. 172-73. This Court thus has jurisdiction pursuant to SDCL 15-26A-3(6).

## **STATEMENT OF LEGAL ISSUES AND AUTHORITIES**

### **I. Whether the Order and Judgment, which directs entry of a final judgment as to fewer than all claims, may be immediately enforced and recognized as a final judgment if it was not certified as a final judgment under SDCL 15-6-54(b).**

The Order and Judgment, which directs entry of a final judgment as to fewer than all claims, may not be immediately enforced and recognized as a final judgment because the ruling was not certified as a final judgment under SDCL 15-6-54(b).

- SDCL 15-6-54(b)
- *Stromberger Farms, Inc. v. Johnson*, 2020 S.D. 22, 942 N.W.2d 249
- *Huls v. Meyer*, 2020 S.D. 24, 943 N.W.2d 340

### **II. Whether the circuit court erred in granting partial summary judgment in favor of Patterson when it did not consider this Court's interpretation of nearly identical statutory language related to unimproved roads and when there were genuine issues of material fact regarding whether the farm trail is an unimproved section line road that has been unlawfully obstructed.**

The court erred in granting Patterson's motion for partial summary judgment because it should have considered this Court's statutory interpretation related to the alteration of unimproved roads and because there are material facts in dispute regarding whether the farm trail is an improved road.

- SDCL 31-25-1.1
- *State v. Tracy*, 539 N.W.2d 327 (S.D. 1995)

## **STATEMENT OF THE CASE**

On September 6, 2019, Plaintiff Patterson filed a Complaint against Plowboy, challenging Plowboy's two unlocked (and typically open) swing gates on a section line farm trail, as well as Plowboy's fence on a separate section line. R. 2-6. On April 30, 2020, Patterson moved for partial summary judgment on the issue involving the swing gates and a hearing was held before the circuit court on June 5, 2020. R. 35-64, 69. The circuit court granted Patterson's motion, ruling that SDCL 31-25-1.1, which allows fences to cross unimproved county, township, and section line roads as long as the fence

has unlocked gates, does not authorize the placement of Plowboy's swing gates on the section line farm trail because the court found that the farm trail is an improved road. R. 150-51 (App. 22-23). In ruling that no other law or governmental body authorized the gates on the section line trail, and while ignoring that the township has not designated this trail as an improved road, the court ordered and adjudged that the gates be removed within twenty days from its decision. *See* R. 43 (App. 1), 87 (¶ 10) (App. 16), 151-52 (App. 23-24).

Plowboy sought this Court's permission to appeal the circuit court's Order and Judgment, which this Court granted on August 7, 2020. R. 172-73. Plowboy now appeals the circuit court's Order and Judgment.

### **STATEMENT OF THE FACTS<sup>1</sup>**

Patterson and Plowboy are adjoining landowners in Jones County, South Dakota. R. 2. Relevant to this appeal, Plowboy owns the south half of Section 28, Township 2 South, Range 30 East, while to the east, Patterson owns the west half of the southwest quarter of Section 27, Township 2 South, Range 30 East. R. 2; *see also* R. 43 (township map) (App. 1). A section line running east and west lies on the southern edge of these properties. R. 3; *see also* R. 43 (App. 1).<sup>2</sup>

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<sup>1</sup> Given the standard for summary judgment, the stated facts are those that are viewed in the light most favorable to Plowboy, who was the nonmoving party. *See Robinson v. Ewalt*, 2012 S.D. 1, ¶ 7, 808 N.W.2d 123, 125 ("The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party.").

<sup>2</sup> Patterson claims that the only access to his land in Section 27 is by using the southern section line of Section 28. *See* R. 40 (¶ 6) (App. 7); *cf.* R. 41 (¶ 19) (App. 8) (Patterson indicating that "[t]here is no reasonable access to my property from any other direction.") (emphasis added). However, Patterson appears to have access to that land through the land that he owns in the north half of Section 28. *See* R. 43 (App. 1).

Along Section 28's southern section line is a farm trail. R. 87 (¶ 11) (App. 16). This farm trail is used by Patterson a couple times a year, as well as by hunting trespassers. *Id.* The farm trail primarily consists of worn vehicle tracks with no grade or ditches, *see, e.g.*, R. 10, 11, 179 (¶ 8) (App. 27), 191 (App. 31), and while it runs the length of the southern section line of Section 28, the trail goes north and ends after crossing into Section 27; it does not connect any improved state, county, or township roads. *See* R. 43 (App. 1), 88 (¶ 20) (App. 17) (noting that the Section 27 southern section line - a continuation of the Section 28 southern section line - is cross-fenced approximately 500 feet east of the unlocked gate).

Importantly, the township has not designated this farm trail as an improved road and the township does not maintain it. R. 87 (¶ 10) (App. 16). Although, there was a culvert purchased by Patterson and installed approximately forty years ago, the functionality of that culvert is disputed. *See* R. 40 (¶ 9) (App. 7), 96 (¶ 2) (App. 19); *compare* R. 40 (¶ 9) (App. 7), 45 (App. 28) *with* 178 (¶ 4) (App. 26), 185 (App. 29). Also, while Patterson has asserted that the trail had been graded, Plowboy specifically disputes that fact and even so, the record shows that the trail in its entirety has not been graded or improved. *Compare* R. 40 (¶ 10) (App. 7) *with* 82 (¶ 5) (App. 11); *see also* R. 10, 11, 179 (¶ 8) (App. 27), 191 (App. 31). Recently, Plowboy himself had added some gravel on the trail, but this was added in an isolated spot on the trail and was temporary for purposes of a construction project. *See* R. 87 (¶ 9) (App. 16).

Because livestock is a part of Plowboy's as well as the adjoining landowners' farming practices, fencing has been installed on the north-south section lines of Section 28. R. 86 (¶ 3) (App. 15). Plowboy first explored the possibility of vacating the section

line, which would have given Plowboy the opportunity to install a fence across the farm trail with either a locked gate or no gate at all. *See* R. 60; SDCL 31-18-1 (“There is along every section line in this state a public highway located by operation of law, except where some portion of the highway along such section line has been heretofore vacated or relocated by the lawful action of some authorized public officer, board, or tribunal.”) *Cf. Douville v. Christenson*, 2002 SD 33, ¶ 13, 641 N.W.2d 651, 655 (indicating that “[a] township does not have a roving duty to inspect every unimproved and un-vacated section line for possible natural and man-made obstructions”). However, Plowboy was informed by the township that it could not petition to have the section line vacated because of residency requirements. *See* R. 60.

Thus, pursuant to SDCL 31-25-1.1, Plowboy engaged in a discussion with Patterson to accommodate Patterson’s needs and provide Patterson with suitable access to the unimproved section line farm trail. *See* SDCL 31-25-1.1 (providing that “the landowner shall erect and maintain an unlocked gate which may be opened easily or provide other suitable access to the highway”). After discussing the possibility of a gate on each end of the southern section line to accommodate Patterson, Patterson requested two sets of twenty-foot swing gates to bookend the farm trail on the Section 28 section line. *See* R. 86 (¶ 5) (App. 15), 139, 177 (¶ 3) (App. 25), 180, 181; *see also* R. 191 (App. 31) (photograph of the trail taken on the east side of Plowboy’s property and facing west).

Subsequently, Plowboy installed the type of gates that Patterson had requested. R. 86 (¶ 5) (App. 15). These gates are typically left open, but if they are shut, they are not locked. R. 88 (¶ 18) (App. 17). It is undisputed that on November 21, 2019, a

neighbor moved cows on the north-south road on the western boundary of Plowboy's property and had there not been the existing fence with closed gates, those cattle would have been able to enter and damage Plowboy's property, including its food plots. *See* R. 88 (¶ 19) (App. 17)

On September 6, 2019, Patterson filed suit against Plowboy, raising two separate claims. R. 2-5. Although the parties had discussed, and Patterson had initially requested, the swing gates on each end of the trail on the southern section line for Section 28, Patterson's first claim is that the gates on each end of the trail are unlawful. R. 2-5. In a second claim, Patterson challenges a fence placed by Plowboy on the section line forming the eastern boundary of Plowboy's property and dividing Patterson's and Plowboy's properties. R. 2-5.

On April 30, 2020, Patterson moved for partial summary judgment on the first claim of whether Plowboy may have gates on each end of the farm trail. R. 35. Citing SDCL 31-18-1 and 31-25-1.1, Patterson contended that Plowboy's unlocked gates on the farm trail interfere with and obstruct an improved section line highway that Patterson uses to access his property in Section 27. R. 59-63. While SDCL 31-25-1.1 authorizes landowners to "erect a fence across an unimproved county, township, or section-line highway" and maintain an unlocked gate where the fence crosses the unimproved road, the parties disputed whether the section line farm trail in this case is unimproved. To that point, the township map does not identify the section line as an improved road and Plowboy submitted two affidavits speaking directly to disputed issues of material fact. *See* R. 43, 86-89 (App. 15-18), 177-92 (App. 25-27 in part).

A hearing on the motion was held on June 5, 2020. *See* R. 101-30 (HT). At the

hearing and despite the factual dispute on whether the road was unimproved, the court ruled that Patterson was entitled to summary judgment on the issue of the gates and requested proposed findings of fact and conclusions of law from Patterson within ten days from the date of the hearing. R. 125-28 (HT 25:2-28:20). The court indicated that proposed findings and conclusions were important “to make sure that [the court] got this right” and that the court “would be looking at it closely.” R. 128 (HT 28:8-15); *see also* R. 127 (HT 27:4-9, 27:22-24); R 125 (HT 25:18-24).

Patterson did not submit any proposed findings of fact and conclusions of law, instead submitting a proposed Order Granting Plaintiff’s Motion for Partial Summary Judgment and Judgment and Order for Plaintiff. *See* R. 138. Plowboy, however, filed Proposed Findings of Fact and Conclusions of Law, setting forth the law and issues of material fact, including the classification of the trail as an unimproved road, whether the trail was unlawfully obstructed with an unlocked gate, and other law and circumstances supporting denial of Patterson’s Motion for Partial Summary Judgment. R. 153-62.

Subsequently, on July 14, 2020, the court entered its Order Granting Plaintiff’s Motion for Partial Summary Judgment and Judgment and Order for Plaintiff<sup>3</sup> which was in line with the court’s initial ruling that the unlocked gates on each end of the section line were unlawful. R. 149-52 (App. 21-24). Within its Order and Judgment, the court granted Patterson “Judgment requiring that Defendant remove the gates on both the west and east ends of the affected section line road . . . and that [Plowboy] shall have twenty (20) days from the entry hereof to comply with this Court’s Judgment and Order[.]” *See*

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<sup>3</sup> There is no indication in the record that the Order Granting Plaintiff’s Motion for Partial Summary Judgment and Judgment and Order entered by the circuit court was different from Patterson’s proposed Order and Judgment.

R. 152 (App. 24). Thus, pursuant to the Order and Judgment, Plowboy was to remove its gates by Monday, August 3, 2020. R. 152 (App. 24).

### **ARGUMENT**

**I. The Order and Judgment, including its requirement that the gates be removed within twenty days, may not be immediately enforced and recognized as a final judgment because the ruling was not certified as a final judgment under SDCL 15-6-54(b).**

The first issue is whether the circuit court erred when it recognized and enforced the Order and Judgment as a final judgment without certifying it as a final judgment under SDCL 15-6-54(b). South Dakota Codified Law addresses the scenario presented in this case, where a portion of the case is decided through a motion for partial summary judgment. Specifically, SDCL 15-6- 54(b) provides limited circumstances in which a ruling on a motion for partial summary judgment may be entered as a final judgment:

When multiple claims for relief or multiple parties are involved in an action, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

SDCL 15-6-54(b) (emphasis added). Importantly, if a circuit court does not certify its ruling as a final judgment, the court may revise its ruling “at any time” until the court enters its final judgment on all claims in the case. *See* SDCL 15-6-54(b).

Here, the circuit court entered an Order and Judgment on the motion for partial summary judgment, concluding that Plowboy had no authority to place unlocked gates on his property and ordering Plowboy to remove its gates within twenty days after entry of



the Order and Judgment. However, while the court appeared to expressly direct judgment as to that claim,<sup>4</sup> the court did not certify its decision as a final judgment and indeed conducted no analysis of whether certification was appropriate. *Cf. Outdoor Cent., Inc. v. GreatLodge.com, Inc.*, 643 F.3d 1115, 1118 (8th Cir. 2011), *as corrected* (Aug. 4, 2011) (internal citations and quotation marks omitted) (“A district court must first determine that it is dealing with a final judgment . . . in the sense that it is an ultimate disposition of an individual claim. Then: In determining that there is no just reason for delay, the district court must consider both the equities of the situation and judicial administrative interests, particularly the interest in preventing piecemeal appeals.”). The record in this case supports that no analysis was performed.

Specifically, the Order and Judgment does not mention SDCL 15-6-54(b) and

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<sup>4</sup> Of note, SDCL 15-26A-3, in relevant part, indicates that “appeals to the Supreme Court from the circuit court may be taken as provided in this title from:

- (1) A judgment;
- (2) An order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken;
- (3) An order granting a new trial;
- (4) Any final order affecting a substantial right, made in special proceedings, or upon a summary application in an action after judgment;
- (5) An order which grants, refuses, continues, dissolves, or modifies any of the remedies of arrest and bail, claim and delivery, injunction, attachment, garnishment, receivership, or deposit in court;
- (6) Any other intermediate order made before trial, any appeal under this subdivision, however, being not a matter of right but of sound judicial discretion, and to be allowed by the Supreme Court in the manner provided by rules of such court only when the court considers that the ends of justice will be served by determination of the questions involved without awaiting the final determination of the action or proceeding; or
- (7) An order entered on a motion pursuant to § 15-6-11.

(Emphasis added). Judgment, in turn, is defined in SDCL 15-6-54(a) as “a decree and means the final determination of the rights of the parties in an action or proceeding.”

the court did not recognize the three general rules in a certification decision:

(1) the burden is on the party seeking final certification to convince the [circuit] court that the case is the “infrequent harsh case” meriting a favorable exercise of discretion; (2) the [circuit] court must balance the competing factors present in the case to determine if it is in the best interest of sound judicial administration and public policy to certify the judgment as final; (3) the [circuit] court must marshal[] and articulate the factors upon which it relied in granting certification so that prompt and effective review can be facilitated.

*Stromberger Farms, Inc. v. Johnson*, 2020 S.D. 22, ¶ 22, 942 N.W.2d 249, 256.<sup>5</sup>

Further, the court did not address any of the following factors relevant to the determination of whether to certify a ruling as a final judgment:

(1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the [circuit] court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

*Id.* ¶ 23, 942 N.W.2d at 256-57. The court also did not “include a reasoned statement in support of [any] determination that there is no just reason for delay and its express direction for the entry of a final judgment as to one or more but fewer than all of the claims or parties[.]” *See id.* (internal quotation marks omitted); *see also Huls v. Meyer*,

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<sup>5</sup> Although not explicitly set forth in *Stromberger Farms*, it seems appropriate that the prevailing party carries the onerous of seeking final certification as that is the party attempting to enforce the decision as a final judgment. *See Stromberger Farms, Inc. v. Johnson*, 2020 SD 22, ¶ 13, 942 N.W.2d 249 (indicating that the prevailing party had sought certification of the summary judgment ruling). *But see Huls v. Meyer*, 2020 S.D. 24, ¶ 20, 943 N.W.2d 340, 345. This is especially so, considering it would then trigger the nonprevailing party’s right to appeal a final judgment. *See Jacquot v. Rozum*, 2010 SD 84, ¶ 19, 790 N.W.2d 498, 505 (recognizing a nonprevailing party’s thirty day appeal deadline after certification of final judgment).

2020 S.D. 24, ¶ 20, 943 N.W.2d 340, 345 (indicating that the judgment in that case was “not accompanied by a reasoned statement supporting a Rule 54(b) certification.”). Moreover, the record does not “provide conspicuous reasons for certification developed at a hearing or through the submissions of the parties” and “it does not appear that [Patterson] moved to designate the summary judgment order as final under Rule 54(b).” *Cf. Huls*, 2020 S.D. 24, ¶ 20, 943 N.W.2d at 345 (indicating that “the summary judgment order does not cite Rule 54(b), it does not designate the order as final, and it is not accompanied by a reasoned statement supporting a Rule 54(b) certification. Nor does the clarity of the record provide conspicuous reasons for certification developed at a hearing or through the submissions of the parties. In fact, it does not appear that the Appellants moved to designate the summary judgment order as final under Rule 54(b).”).

With no certification of the court’s partial summary judgment ruling as a final judgment, the Order and Judgment requiring that the unlocked gates be removed within twenty days from entry of the Order and Judgment is questionable at best. *See Local P-171 , Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Thompson Farms Co.*, 642 F.2d 1065, 1071 n.7 (7th Cir. 1981) (certification of claim as final judgment under Federal Rule of Civil Procedure 54(b) signals appealability as well as timing for issuance of writ of execution); *Redding & Co. v. Russwine Const. Corp.*, 417 F.2d 721, 727 (D.C. Cir. 1969) (interpreting Federal Rule of Civil Procedure 54(b) as not only affecting appealability of judgment but also its execution). In addition, SDCL 15-6-62(g) seems to further support that a ruling on one claim in a case involving multiple claims may not be enforceable unless it is certified as a final judgment. That statute

authorizes a court to stay enforcement of a ruling certified under SDCL 15-6-54(b) as a final judgment:

When a court has ordered a final judgment under the conditions stated in § 15-6-54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

SDCL 15-6-62(g). Yet in this case, without the certification of the Order and Judgment as a final judgment, Plowboy is inappropriately deprived of the opportunity to seek a stay of the final decision under SDCL 15-6-62(g).

Further, an inference derived from SDCL 15-6-62(g) is that the Order and Judgment is not enforceable as a final judgment until it is certified and only upon the ruling's certification may the parties need the protection of a stay of enforcement. That lack of enforceability of the ruling on partial summary judgment unless certified as a final judgment certainly aligns with the court's ability under SDCL 15-6-54(b) to revise an uncertified ruling "at any time" until final judgment is entered on all claims in the case.<sup>6</sup> *Cf. Bierman v. Dayton*, 817 F.3d 1070, 1072-73 (8th Cir. 2016) (recognizing the First Circuit Court of Appeal's statement in *CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.*, 48 F.3d 618, 620 (1st Cir.1995), that "[t]he impetus behind the statutory exception to the 'final judgment' rule that allows an immediate appeal of an order refusing a preliminary injunction is to prevent irreparable harm to a litigant who, otherwise, might triumph at trial but be left holding an empty bag.").

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<sup>6</sup> If a party moved for partial summary judgment hoping to obtain an immediately enforceable judgment without requesting certification, such motion would certainly lose its allure if that judgment could be amended at any point prior to resolution of the remaining claims.

The intent of a motion for partial summary judgment is “to isolate and dispose of factually unsupported claims or defenses[.]” See *Chem-Age Indus., Inc. v. Glover*, 2002 S.D. 122, ¶ 18, 652 N.W.2d 756, 765 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–324, 106 S. Ct. 2548, 2553 (1986)). Yet here, through the court’s requirement that the unlocked gates be removed within twenty days from entry of the Order and Judgment and effectively treating its ruling on a motion for partial summary judgment as a final judgment with no certification, Plowboy was not provided the potential opportunity for a stay of judgment under SDCL 15-6-62(g) and its right to appeal a final judgment under SDCL 15-26A-3. This issue is significant because this case involves a farm trail which has an unlocked gate to keep cattle out of fields. The Order and Judgment allowed Plowboy a mere 20 days to remove the gates, which absent a stay by this Court, would have most certainly led to damage to Plowboy’s fields caused by cattle coming in. Even if that is the law, which it clearly is not, 20 days is insufficient to obtain permission from the township, which does not recognize the trail as an improved road, for placement of a cattle guard under SDCL 31-25-2. With the above in mind, the circuit court erred in entering a judgment on a motion for partial summary judgment (that had clearly disputed facts) that requires Plowboy to remove its unlocked gates, which keep cattle out of its fields, within 20 days of entry of the Order and Judgment without the necessary protections associated with certification of that ruling as a final judgment under SDCL 15-6-54(b).

**II. The circuit court erred in granting partial summary judgment because it did not consider this Court’s interpretation of nearly identical statutory language related to unimproved roads and because it resolved genuine issues of material fact regarding whether the farm trail was an unimproved section line road that was unlawfully obstructed.**

In addition to the certification issue, Plowboy appeals the Order and Judgment on its merits because it did not consider this Court’s earlier interpretation of virtually identical statutory language in *State v. Tracy*, 539 N.W.2d 327 (S.D. 1995), and because it erroneously resolved a number of disputed material facts through summary judgment. In analyzing whether the circuit court erred in granting Patterson’s motion for partial summary judgment, the Court:

must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper.

*See Robinson v. Ewalt*, 2012 S.D. 1, ¶ 7, 808 N.W.2d 123, 125; *see also* SDCL 15-6-

56(c). In addition to the above standard, this Court has set forth a number of “guiding principles” regarding motions for summary judgment:

(1) The evidence must be viewed most favorable to the nonmoving party; (2) The burden of proof is upon the movant to show clearly that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law; (3) Though the purpose of the rule is to secure a just, speedy and inexpensive determination of the action, it was never intended to be used as a substitute for a court trial or for a trial by jury where any genuine issue of material fact exists. (4) A surmise that a party will not prevail upon trial is not sufficient basis to grant the motion on issues which are not shown to be sham, frivolous or so unsubstantial that it is obvious it would be futile to try them. (5) Summary judgment is an extreme remedy and should be awarded only when the truth is clear and reasonable doubts touching the existence of a genuine issue as to material

fact should be resolved against the movant. (6) Where, however, no genuine issue of fact exists it is looked upon with favor and is particularly adaptable to expose sham claims and defenses.

*Wilson v. Great N. Ry. Co.*, 83 S.D. 207, 212, 157 N.W.2d 19, 21 (1968) (emphasis added) (internal footnotes omitted). Ultimately, this Court “will affirm [a circuit court’s grant of summary judgment] only when there are no genuine issues of material fact and the legal questions have been correctly decided.” *Hayes v. N. Hills Gen. Hosp.*, 1999 SD 28, ¶ 12, 590 N.W.2d 243, 247.

In this case, the Order and Judgment goes against the principles and standard for motions for summary judgment, particularly because there are genuine issues of material fact, the evidence was seemingly viewed most favorable to Patterson – the moving party, the court did not consider this Court’s precedent related to the interpretation of nearly identical statutory language, and summary judgment was incorrectly used as a substitute for a trial. Here, the following issues of material fact and legal miscues exist and support a reversal of the grant of partial summary judgment: (1) whether the section line farm trail constitutes an improved or unimproved road, including the factual subcategories of common usage and the alteration of that trail and in light of this Court’s earlier interpretation of language virtually identical to that in SDCL 31-25-1.1; and (2) whether the unlocked (and typically open) swing gates are an unlawful obstruction. R. 17, 112 (HT 12:9-19, 13:18-14:21, 14:5-15). It is axiomatic that these issues are central to whether a gate may be placed on the section line farm trail. *See A-G-E Corp. v. State*, 2006 S.D. 66, ¶ 17, 719 N.W.2d 780, 786 (“A fact is material when it is one that would impact the outcome of the case ‘under the governing substantive law’ applicable to a claim or defense at issue in the case.”). And as “[s]ummary judgment is not the proper

method to dispose of factual questions,” it was incorrectly utilized in this case to address and resolve these disputed material facts. *See Stern Oil Co., Inc. v. Brown*, 2012 S.D. 56, ¶ 9, 817 N.W.2d 395, 399.

- A. The circuit court erred in finding that SDCL 31-25-1.1, which permits fences and gates on unimproved roads, does not authorize Plowboy’s gates because the section line farm trail is an improved road.

Patterson’s claim that the gates must be removed revolves around the status of the farm trail as an improved or unimproved section line highway. Pursuant to SDCL 31-25-1.1, Plowboy may erect and maintain an unlocked gate across unimproved section line highways:

**31-25-1.1. Fences erected across unimproved section-line highways--Gates--Access to highways protected--Violation as misdemeanor.**

A landowner may erect a fence across an unimproved county, township, or section-line highway. For the purposes of this section an unimproved county, township, or section-line highway is any county, township, or section line not commonly used as a public right-of-way and never altered from its natural state in any way for the purpose of facilitating vehicular passage. At any point where a fence crosses such highway, the landowner shall erect and maintain an unlocked gate which may be opened easily or provide other suitable access to the highway. If the gate or other access is not large enough or if the gate does not open easily enough to satisfy the needs of those using the highway, the landowner shall erect a larger gate or a gate that can be more easily opened or provide other suitable access to the highway. The landowner shall erect the larger gate or the gate which opens easily or provide the other suitable access upon a request filed with the sheriff of the county in which the land is located by an adversely affected person. If a request is filed, the sheriff shall notify the landowner. The landowner shall comply with the provisions of this section within seven days of notice. A landowner who violates any of the provisions of this section is guilty of a Class 2 misdemeanor.

**Source:** SL 1984, ch 215, § 2.

Applying this statute, the circuit court found that the section line farm trail is an improved, rather than an unimproved, road because it “has been altered from its natural



state for the purpose of facilitating vehicular passage and furthermore, the section line road has been commonly used as a public right-of-way[.]” *See* R. 151 (App. 23).

Because of its finding that the farm trail is an improved road, the court concluded that SDCL 31-25-1.1 provided Plowboy no authority to place unlocked gates on that trail.

Such ruling, however, is outside the bounds of the summary judgment standard as the record is bursting with factual disputes regarding whether the farm trail is improved or unimproved, especially considering that the township and its own map itself does not identify the trail as an improved road. R. 43 (App. 1), 87 (¶ 10) (App. 16).

1. *Whether the section line farm trail is “commonly used as a public right-of-way” is a genuine issue of material fact that should have precluded the grant of partial summary judgment.*

First, the court’s finding that the road is commonly used as a public right-of-way is a disputed material fact that was incorrectly decided through a motion for partial summary judgment. In its Order and Judgment, the court noted that “the section line road has been commonly used by [Patterson] for decades as a public right-of-way.” R. 150 (App. 22). Crucially, however, the phrase “commonly used” is without a doubt a fact-intensive inquiry.

“Common” is defined as “occurring or appearing frequently” or “widespread, general.” *See* Common, 3a, 4a, Merriam-Webster Online Dictionary, *available at* <https://www.merriam-webster.com/dictionary/common> (last visited Sept. 23, 2020). Yet a finding that the farm trail’s use is widespread and occurring frequently is directly contrary to Plowboy’s evidence that the trail has been used by Patterson only a couple times a year and by hunting trespassers that did not have permission to hunt his land. R. 87 (¶ 11) (App. 16).

Also weighing against the court’s factual determination that the section line is commonly used as a public right-of-way is that Patterson himself has a cross fence that blocks all vehicular travel on the continuation of the section line a mere 500 feet east of Plowboy’s eastern gate. *See* R. 88 (¶ 20) (App. 17). Additionally, the farm trail does not connect to any improved state, county, or township road, which certainly begs the question why the public would be routinely using a farm trail that leads nowhere. *See* R. 43 (App. 1), 88 (¶ 20) (App. 17). At a minimum, the competing evidence confirms that the court erred in using summary judgment as a substitute for trial on this issue.

2. *Whether the section line farm trail was “altered from its natural state in any way for the purpose of facilitating vehicular travel” should have been analyzed under this Court’s interpretation of that phrase in State v. Tracy and is a genuine issue of material fact that should have precluded the grant of partial summary judgment.*

Regarding the second consideration under SDCL 31-25-1.1 - whether the section line farm trail was “never altered from its natural state in any way for the purpose of facilitating vehicular passage” - two reasons support reversal of the court’s grant of summary judgment. First, the circuit court should have analyzed that phrase in the context of this Court’s earlier interpretation of a virtually identical phrase in *State v. Tracy*. And second, as with the “commonly used” inquiry, the circuit court erred in resolving disputed material facts.

- a. This Court’s interpretation of the phrase “never altered from its natural state in any way for the purpose of facilitating vehicular travel” in *State v. Tracy*, 539 N.W.2d 327, should apply for purposes of SDCL 31-25-1.1.

At the outset, the court’s use of the phrase “never altered from its natural state in any way for the purpose of facilitating vehicular passage” in SDCL 31-25-1.1 failed to recognize this Court’s earlier interpretation of that same language (albeit in a different

statute). As indicated above, SDCL 31-25-1.1 provides that “an unimproved county, township, or section-line highway is any county, township, or section line . . . never altered from its natural state in any way for the purpose of facilitating vehicular passage.” Notably, substantially similar language appeared in an earlier version of SDCL 41-9-1.1, which addressed hunting in public rights-of-way:

Except for controlled access facilities as defined in § 31–8–1 and interstate highways, unimproved section lines not commonly used as public rights-of-way and never altered from their natural state in any way for the purpose of facilitating vehicular passage, or highways within parks or recreation areas or within or adjoining public shooting areas or game refuges posted for restriction of an applicable use as hereinafter set forth by the department of game, fish and parks, § 41–9–1 does not apply to fishing, trapping or hunting on highways or other public rights-of-way within this state.

1992 S.D. Sess. Law ch. 293, § 13 (emphasis added). Essentially, under that version of SDCL 41-9-1.1, an individual could not lawfully hunt from an unimproved section line unless the individual had permission of the landowner or lessee. *See* SDCL 41-9-1 (1995).

This Court interpreted that bolded language in SDCL 41-9-1.1 in *State v. Tracy*, 539 N.W.2d 327 (S.D. 1995).<sup>7</sup> Although acknowledging that SDCL 41-9-1.1 indicated an unimproved road was one that had not been altered in any way, the Court focused on the phrase “facilitating vehicular passage” and concluded that “a section line is improved for the purposes of ‘facilitating vehicular passage’ when the improvement is in the nature

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<sup>7</sup> The backdrop of *State v. Tracy* is a criminal conviction of Tracy for interfering with hunters that were lawfully hunting. *See* 539 N.W.2d at 328. The trial court concluded that the group of hunters were hunting on an improved section line and therefore did not need the landowner’s/lessee’s permission in order to be “lawfully” hunting. *Id.* at 330-32. This Court reversed the individual’s conviction, concluding that the hunters were not lawfully hunting because they were not on an improved section line and they did not have permission. *Id.* at 332.

of intentional enhancement of the natural terrain's utility for travel or adaptation which will permit travel where it was not previously possible." *Tracy*, 539 N.W.2d at 331 (emphasis added). Importantly, under that narrowed standard in *Tracy*, the Court determined that a farm trail with similarities to the farm trail at issue today was not an improved road.<sup>8</sup> *See id.* And considering that SDCL 31-25-1.1 contains language virtually identical to that which was interpreted in *Tracy*, it follows that the same narrowed interpretation should apply to SDCL 31-25-1.1.<sup>9</sup>

- b. Whether the section line farm trail was "altered from its natural state in any way for the purpose of facilitating vehicular travel" is a genuine issue of material fact that should have precluded the grant of summary judgment.

Applying that standard to today's case shows that the section line was not undisputedly improved to the extent that it is "an intentional enhancement of the natural terrain's utility for travel or adaptation which will permit travel where it was not previously possible." *See Tracy*, 539 N.W.2d at 331. "[M]ere travel along a road does not constitute an improvement." *Id.* This farm trail, for the most part, is worn tire tracks and as Patterson admits, contained mud holes "not uncommon on section line roads,

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<sup>8</sup> *State v. Tracy* concluded that its earlier case of *State v. Peters*, 334 N.W.2d 217 (S.D. 1983), had "defined an 'improved road' in an overly broad manner." *See* 539 N.W.2d at 331. In *Peters*, the Court determined that a farm trail consisting of compacted tire tracks on a section line that was used by an individual for farming and ranching purposes was an improved road. *See* 334 N.W.2d at 220-21 (including photographs of the trail in dispute). Based on the Court's indication in *Tracy* that the *Peters*' definition of "improved road" was overly broad, it seems that the circuit court's definition of "improved road" in this case is likewise overly broad.

<sup>9</sup> Even if the interpretation of *Tracy* is not applied, summary judgment was still inappropriate as the record supports a dispute of material fact under the "overly broad" interpretation of "never altered from its natural state in any way for the purpose of facilitating vehicular passage."

especially those that are not as built up as other section line roads.” *See, e.g.*, R. 10, 11, 179 (¶ 8) (App. 27), 191 (App. 31); *see also* R. 111 (HT 11:2-6).

While Patterson presented evidence that he added one culvert to the trail 40 years ago, Plowboy submitted evidence countering the functionality of that culvert. R. 40 (¶ 9) (App. 7), 157 (¶ 15). Also, it is questionable whether one culvert (which may not even be functional), on one portion of the farm trail, installed by one individual, is sufficient to enough to convert the trail from “unimproved” to “improved”, especially considering that other parts of the farm trail are effectively impassible. *See* R. 88 (¶ 20) (App. 17) (noting that Patterson has a fence with no gate that crosses a mere 500 feet east of Plowboy’s eastern gate, on a continuation of that same section line farm trail) *and* R. 178 (¶ 4) (App. 26) (noting an area of the trail that can be impassible). Even considering the one culvert and possible grading of an isolated portion of the farm trail in a light most favorable to Patterson (the moving party), there is a difference between improved section lines and “a piece or portion of an improved section line.” *See State v. Tracy*, 539 N.W.2d 327, 331 (S.D. 1995).

Importantly in this case, the facts indicate that Patterson himself views the road as unimproved. Patterson has treated the section line as unimproved by obstructing it with a cross fence that does not have a gate. Patterson himself has a fence with no gate that crosses a mere 500 feet east of Plowboy’s eastern gate, on the southern section line of neighboring Section 27, which is a continuation of that same section line on Section 28. R. 179 (¶ 8) (App. 27); *see also* R. 79, 88 (¶ 20) (App. 17).<sup>10</sup> Given the above actions by

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<sup>10</sup> Patterson indicates that he has “never installed cross fences on the township section line road running from west to the east along the south side of [Plowboy’s] property.” R. 96 (¶4) (App. 19). That may technically be true if Patterson is claiming that he has never

Patterson, at a minimum, there exists a genuine issue of material fact whether the trail is unimproved.

Ultimately, a conclusion that unlocked gates and fences are prohibited on section line farm trails would wreak havoc on fencing throughout South Dakota and set dangerous precedent throughout ranch country. It is hard to imagine a trail that would not meet the “improved road” standard set by the circuit court in this case - 1) that the trail is traveled by at least one person; and 2) that an individual or individuals made any alteration to the trail, including possibly removing a rock from its path. *Cf.* R. 150-51 (App. 22-23). Under the Order and Judgment, gates and fences across all of those section line trails would not be permissible. This would arguably include every trail on which the State has placed a “please close gate” sign into hunting and sportsman areas. As follows, under the rationale of the Order and Judgment, every landowner (including the State of South Dakota) may have a duty to keep section line trails safe for entry and use, as well as a duty to warn of dangerous conditions. *Cf.* SDCL 31-18-5 (indicating that generally, “a landowner owes no duty of care to keep an unimproved section line safe for entry or use by any uninvited person for an outdoor recreational purpose or tourism activity. The landowner does not have a duty to give any warning of a dangerous condition, use, or structure on an unimproved section line to any uninvited person entering for an outdoor recreational purpose or tourism activity, except for any condition

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cross fenced the Section 28 southern section line or if he is claiming that a prior owner of his property installed the cross fence. However, that ignores the significance that the section line is unimproved because its continuation is effectively obstructed by Patterson’s own cross fence (with no gate) approximately 500 feet past Section 28 on the southern section line of the neighboring Section 27. R. 88 (¶ 20) (App. 17). Regardless, this dispute highlights that summary judgment was inappropriate to resolve these factual issues.

created by the willful and wanton act of the landowner.”). And finally, battles over the maintenance responsibility of these “improved” section line farm trails would be sure to follow if this ruling is upheld. *Cf. Rusch, Arthur L., Douville v. Christensen: An Answer to the Issue of Township Responsibility for the Improvement of Section Line Rights of Way*, 48 S.D. L. Rev. 247 (2003). With this in mind, reversing the grant of partial summary judgment and remanding this case is appropriate to allow the circuit court to consider the disputed facts in light of the applicable law and the *Tracy* interpretation.

*3. Through negotiations, the parties discussed the installation of the gates and Patterson requested the type of gate that was installed.*

As an aside, one crucial fact in this case that should not be overlooked is that Patterson had requested the type of gate purchased and ultimately installed by Plowboy that Patterson now challenges. *See* R. 86 (¶ 5) (App. 15), 139, 177 (¶ 3) (App. 25), 180, 181. The record, especially viewed in the light most favorable to Plowboy, shows Plowboy had purchased and installed larger gates at Patterson’s request in order to accommodate Patterson’s concerns. *See* R. 177 (¶ 3) (App. 25), 182-84. Yet after those larger gates have been purchased and installed, Patterson now says that he had never discussed the swing gates with Plowboy’s owner. R. 96 (¶ 4). At a minimum, a disputed fact exists on this issue. R. 96 (¶ 4) (App. 19) (Patterson stating that he had never discussed the swing gates with Plowboy’s owner).

B. Whether the unlocked gate is an obstruction under SDCL 31-18-1 was incorrectly analyzed and is a genuine issue of material fact that should have precluded the grant of partial summary judgment.

Finally, the Order and Judgment should be reversed because the court ordered the removal of the gates without even addressing whether the unlocked gate was an obstruction, regardless of whether the section line farm trail is improved or not improved.

R. 151 (App. 23). While SDCL 31-25-1.1 addresses gates on unimproved section lines, there is no indication that unlocked gates on improved section lines are categorically prohibited. Even under a determination that the farm trail was an improved road, the court incorrectly placed the burden on Plowboy to show that the gates were authorized, rather than requiring Patterson, as the moving party, to show that they were not authorized.

Generally, “section line rights-of-way cannot be obstructed by private citizens absent legal authority to do so.” *See Douville v. Christensen*, 2002 SD 33, ¶ 11, 641 N.W.2d 651. It is the responsibility of the governing body of the road to determine whether there is an obstruction to be removed. *See* SDCL 31-32-9. Here, there is no evidence that township has taken any action deeming the unlocked gate as an obstruction and the court’s determination has replaced the township’s authority to do so. *See* R. 151 (App. 23).

Regardless, whether an unlocked gate is an obstruction is a factual question that was not ripe for partial summary judgment. Two South Dakota Attorney General Opinions support that the “obstruction” question is a factual determination. First, a South Dakota Attorney General Opinion indicated that the issue of whether the farming, fencing, or altering the grade of any portion of a section line highway violates SDCL 31-18-1 is a factual determination. *See* Official Attorney General Jackley Opinion, 18-01 (March 15, 2018); *see* R. 116 (HT 16:3-7). And similarly, another Attorney General Opinion has indicated that the determination of whether an obstruction exists may involve factual distinctions: a “logical distinction would be possible, for example, between a low-growing alfalfa and a head-high crop of corn or cane.” *See* Official



Attorney General Meierhenry Opinion, 85-40 at p. 2 (Oct. 7, 1985).

Here, the record shows that at a minimum, there is a disputed fact whether the unlocked gate is an obstruction. If the gate is closed (which it typically is not), Patterson points to an “inconvenience” in having to get off his equipment and open the gate. *See* R. 41 (¶¶ 16, 17). However, Patterson presents no other evidence to support that Patterson’s access is obstructed. This is not the case where the section line was obstructed by a cross fence, as in *Lawrence v. Ewert*, 21 SD 580, 114 N.W. 709, 710-11 (1908), or a man-made dam, as in *Douville v. Christensen*, 2002 SD 33, 641 N.W.2d 651. Considering these factual issues, the extreme remedy of summary judgment was inappropriate, especially with the clear record of an unlocked and typically open gate. *See Discover Bank v. Stanley*, 2008 SD 11, ¶ 19, 757 N.W.2d 756, 762.

### **CONCLUSION**

To the extent that the Order and Judgment is to be enforceable and recognized as a final judgment, it must be reversed for the circuit court to appropriately certify it as a final judgment. Further, on the merits of the Order and Judgment, Plowboy respectfully requests this Court to reverse the grant of summary judgment in favor of Patterson because there are genuine issues of material fact and remand with the instruction to analyze SDCL 31-25-1.1 under the statutory interpretation set forth in *State v. Tracy*.

### **REQUEST FOR ORAL ARGUMENT**

Plowboy hereby requests oral argument.

Dated: September 24, 2020.

GUNDERSON, PALMER, NELSON  
& ASHMORE, LLP

By: /s/ Marty J. Jackley  
Marty J. Jackley  
Attorneys for Defendant  
111 West Capitol Ave., Suite 230  
Pierre, South Dakota 57501  
Telephone: (605) 494-0105  
E-mail: mjackley@gpna.com

### **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with SDCL § 15-26A-66(4). The font is Times New Roman size 12, which includes serifs. The brief is 26 pages long and the word count is 8,427, exclusive of the Cover, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service. The word processing software used to prepare this brief is Microsoft Word and the word count from that program was relied upon in determining the word count of this brief.

Dated: September 24, 2020

GUNDERSON, PALMER, NELSON  
& ASHMORE, LLP

By: /s/ Marty J. Jackley  
Marty J. Jackley  
Attorneys for Defendant  
111 West Capitol Ave., Suite 230  
Pierre, South Dakota 57501  
Telephone: (605) 494-0105  
E-mail: mjackley@gpna.com

**CERTIFICATE OF SERVICE**

I hereby certify on September 24, 2020, a true and correct copy of **Appellant Plowboy LLC's Brief** was filed and served through U.S. Mail and email, upon the following individuals:

Robert C Riter  
Riter Rogers LLP  
319 S Coteau St.  
PO Box 280  
Pierre SD 57501  
r.riter@riterlaw.com

Dated September 24, 2020

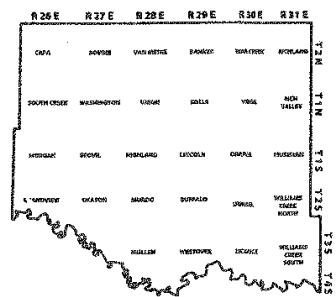
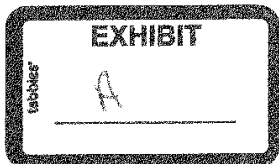
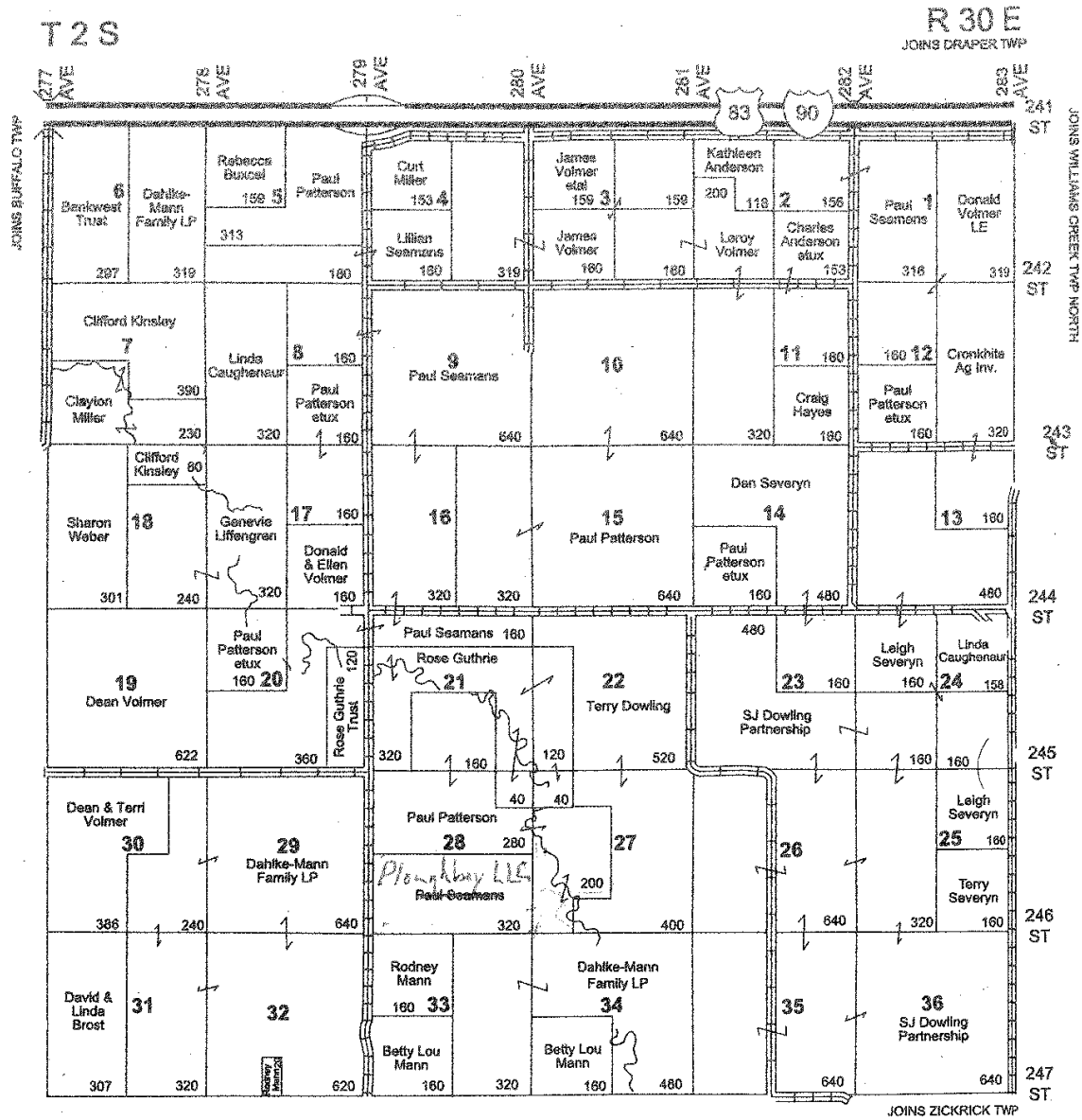
/s/ Marty J. Jackley  
Marty J. Jackley  
Attorneys for Defendant  
111 West Capitol Ave., Suite 230  
Pierre, South Dakota 57501  
Telephone: (605) 494-0105  
E-mail: mjackley@gpna.com

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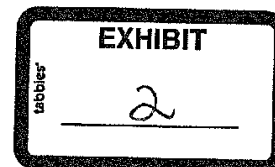
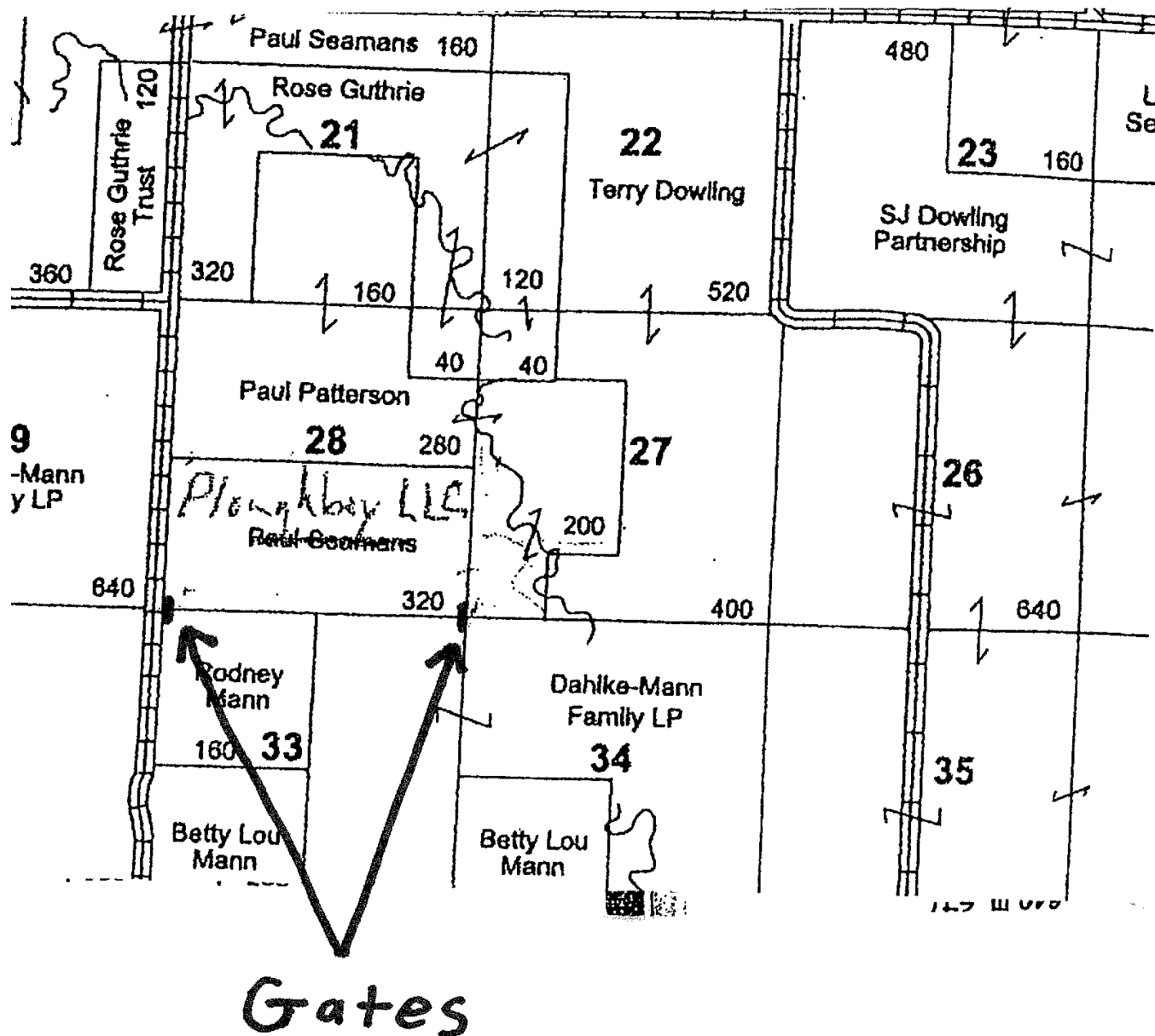
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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF JONES	)	SIXTH JUDICIAL CIRCUIT
PAUL PATTERSON,	)	37 CIV19-000012
	)	
Plaintiff,	)	
	)	
v.	)	STATEMENT OF UNDISPUTED
	)	MATERIAL FACTS
PLOWBOY, LLC,	)	
	)	
Defendant.	)	

Plaintiff, Paul Patterson, by and through his attorneys, Riter Rogers, LLP, of Pierre, South Dakota, and for his Statement of Undisputed Material Facts states and alleges as follows:

1. Paul Patterson is a resident of Jones County, South Dakota.
2. Plowboy, LLC is a South Dakota limited liability company with its principal place of business at 117 E. Capitol Avenue in Pierre, South Dakota, with land in Jones County, South Dakota; and part of its business includes paid hunting. (Affidavit of Paul Patterson, ¶5)
3. Paul Patterson is the owner of the following described property:  
  
W1/2 of SW1/4 of Section 27, Township 2 South Range 30, East of the Black Hills Meridian, Jones County, South Dakota  
  
(Affidavit of Paul Patterson, ¶2)
4. Plowboy, LLC is the owner of the adjacent property described as follows:  
  
S1/2 of Section 28, Township 2 South Range 30, East of the Black Hills Meridian, Jones County, South Dakota.  
  
as shown on Exhibit A attached to the Affidavit of Paul Patterson, which is incorporated herein by this reference. (Affidavit of Paul Patterson, ¶3)
5. On March 27, 2019, Defendant provided notice that it was its intent to fence the property line between the Plaintiff's and Defendant's property on the east-west section line of the property. Defendant also advised it was his intent to fence and

install a gate at each end of the township road south of its property pursuant to SDCL 31-25-1.1.

6. The section line township road south of Defendant's property is the only access the Plaintiff has to his property, which is immediately adjacent, and is an improved township road. The township road has commonly been used as a public right-of-way by Plaintiff and others, including the hunting public. (Affidavit of Paul Patterson, ¶¶6,7)
7. The township road has been altered from its natural state for the purpose of facilitating vehicular passage. The township road has installed thereunder a culvert purchased by Plaintiff, and as authorized by the Dunkel Township, to help facilitate the passage of traffic. (Affidavit of Paul Patterson, ¶¶8,9)
8. The township road has been graded to facilitate drainage and traffic. (Affidavit of Paul Patterson, ¶10)
9. The township road has also been improved by placing gravel on a portion of the road by the Defendant. (Affidavit of Paul Patterson, ¶10)
10. In April, 2019, Defendant contacted the Dunkel County Township to discuss petitioning the Board of Trustees to have the section line designated as a "no maintenance section line". The correspondence acknowledged the property was traversed by an extensive number of so-called "hunting trespassers". (Verified Complaint, ¶8)
11. Plaintiff objected to the position of the fence on the east side of Defendant's property being placed in the middle of the section line and objected to the gates being placed across the township road on the south side of Defendant's property. (Verified Complaint, ¶9)
12. Despite these objections, and without the authority of the Township or proper legal action vacating the section line, Defendant proceeded with the unauthorized placement of gates on the township road south of its property and Defendant also fenced down the middle of the section line between the east/west boundaries of the parties' land. (Affidavit of Paul Patterson, ¶13)
13. Despite repeated and due demand, Defendant has refused to remove the gates on either end of the township road. (Affidavit of Paul Patterson, ¶18)
14. It is inconsistent with South Dakota law for the Defendant, under the circumstances involved, to fence in the middle of a section line or to fence and gate the township road south of its property which is not an unimproved road.

15. Plaintiff and the public are deprived of important access rights protected by statute, the State Constitution and existing caselaw.

DATED this 30<sup>th</sup> day of April, 2020.

RITER ROGERS, LLP

By: 

Robert S. Riter

And: 

A. Jason Rumpca

PO Box 280

319 S. Coteau St.

Pierre, SD 57501

605-224-5825

Attorneys for Plaintiff

STATE OF SOUTH DAKOTA )  
 )SS  
COUNTY OF JONES )  
 )  
PAUL PATTERSON, )  
 )  
 )  
Plaintiff, )  
 )  
 )  
v. )  
 )  
 )  
FLOWBOY, LLC, )  
 )  
 )  
Defendant. )

IN CIRCUIT COURT  
SIXTH JUDICIAL CIRCUIT  
37CIV19-000012  
AFFIDAVIT OF PAUL PATTERSON

State of South Dakota )  
 )ss  
County of Hughes )

Paul Patterson, being first duly sworn, deposes and states as follows:

1. He is the Plaintiff in the above entitled matter and is a resident of Jones County, South Dakota.
2. He owns the W1/2SW1/4 of Section 27, Township 2 South, Range 30, East of the Black Hills Meridian, Jones County, South Dakota.
3. Adjacent to his property is land owned by Plowboy, LLC. That land is legally described as the S1/2 of Section 28, Township 2 South, Range 30, East of the Black Hills Meridian, Jones County, South Dakota.
4. See copy of plat book page 35 showing the Dunkel Township, attached hereto as Exhibit A.
5. Plowboy, LLC is a South Dakota limited liability company with its principal place of business at 117 E. Capitol Avenue in Pierre, South Dakota, with land in Jones County, South Dakota; and part of its business includes paid hunting.

6. These properties adjoin one another and on the south side thereof there is a township road which traverses from the north/south county road west of Defendant's property to the land of your Affiant, where I raise crops. My only access to that crop field is along the township road.

7. The section line township road has been commonly used as a public right-of-way by me and others, including the hunting public.

8. The township road has been altered from its natural state for the purpose of facilitating vehicular travel.

9. The township road had installed thereunder a culvert purchased by me, as authorized by the township board. Attached as Exhibit B is a copy of the township minutes of forty some years ago, authorizing the purchase of the culvert for placement under that road and attached as Exhibit C is a photograph of a portion of the culvert. Also attached as Exhibit D is a picture showing the general improvements to the section line road.

10. The township road has also been graded by the township to facilitate drainage and traffic. Also, the Defendant itself improved the township road by placing gravel on a portion of the road. See attached Exhibit E, which is a photograph showing the grading on the road.

11. These efforts of mine and the township board in past years were completed with the consent, agreement and knowledge of the entity which then owned the property listed in number three above.

12. More recently, however, the current Defendant contacted the Dunkel County Township to discuss petitioning the Board of Trustees to have the section line township road designated as a no maintenance section line. That effort was not successful.

13. Despite my objections and without authority of the township or proper legal action vacating the section line, the Defendant thereafter proceeded with the unauthorized placement of gates on the township road south of its property and also fenced down the middle of the section line between the east/west boundaries of the parties' land. Attached hereto as Exhibits F and G are recent pictures of the gates which Defendant has installed on the west end on this township section line road, and Exhibit H is a photograph of the gate which Defendant has installed on the east end of this township section line road.

14. Attached as Exhibits I, J, K and L are two pictures of the westerly gate, which is adjacent to the county highway, showing vehicles and machinery thereon.

15. I frequent the property with farm machinery, including tractors and drills to plant, equipment to apply fertilizer or herbicide, and ultimately with a combine to harvest the crops. I need to access through the gate on the west side.

16. When the Defendant closes the gate it has installed on the west side of the property on the section line, I am required to park my farm equipment on the main, regularly traveled county section line road, get off my equipment, open the gate and then return to the equipment that is on the road. That is not only inconvenient but it creates a danger and obstacle for the traveling public on the main road. See Exhibits I, J, K and L above.

17. Of course, on the east end where another gate has been installed by the Defendant, the process must be repeated; however, the traveling public is not put in danger at that location.

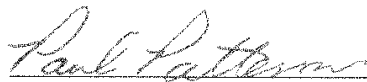
18. Despite repeated and due demand the Defendant has refused to remove the gates it installed on the ends of the township section line road. A broad view of a portion of the road looking west from my property is attached as Exhibit M.

19. There is no reasonable access to my property from any other direction.

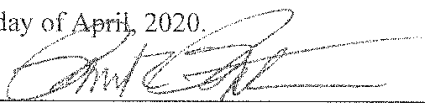
20. Attached as Exhibit N is a copy of SB 79, as it was introduced in the 2020 legislative session, along with pages 1 and 4 of the Senate Local Government Committee meeting minutes dated February 12, 2020 relative to their action defeating SB 79. This bill confirms an unsuccessful legislative effort to eliminate one of the two mandatory requirements imposed prior to fencing and closing gates on a township section line road.

Further your Affiant saith not.

DATED this 29<sup>th</sup> day of April, 2020.

  
Paul Patterson

Subscribed and sworn to before me this 29<sup>th</sup> day of April, 2020.

  
Notary Public  
My commission expires: Oct 23, 2021  
Notary Print Name: Robert C. Kitey, Jr.

(SEAL)

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF JONES	)	SIXTH JUDICIAL CIRCUIT
PAUL PATTERSON,	)	FILE NO. 37CIV19-12
	)	
Plaintiff,	)	
	)	
v.	)	DEFENDANT'S OPPOSITION
	)	TO PLAINTIFF'S
PLOWBOY, LLC,	)	STATEMENT OF UNDISPUTED
	)	MATERIAL FACTS
Defendant.	)	

COMES NOW the above entitled Defendant and for his opposition to the Motion for Partial Summary Judgment filed by Plaintiff, submits this statement of material facts as to which Defendant contends a genuine issue exists to be tried and submits his objections to the claimed Statement of Undisputed Material Facts filed by Plaintiff.

1. With respect to paragraphs 1-4 of Plaintiff's Statement of Material Facts (herein after PSMF), Defendant does not object and notes it does not entitle Plaintiff to partial summary judgment.

2. With respect to paragraph 5 of PSMF, Defendant admits that on March 27, 2019, Defendant provided legal notice of his intent to fence the property line between the Plaintiff's and Defendant's property on the east-west section line of the property. Defendant further admits that he advised of his intent to install a gate at each end of the trail. Pursuant to Plaintiff's request, four 20-foot oversized gates at each end of the trail, for an additional expense, were installed. Specifically, pairs of 20-foot swing gates were installed on each end for easy access by Defendant at an additional cost. *See* Affidavit of Rob Skjonsberg at ¶¶ 5, 15. At no times have the gates been locked or otherwise do they obstruct travel. *See* Affidavit of Rob Skjonsberg at ¶¶ 6, 18.



3. With respect to paragraph 6 of PSMF, Defendant denies. There is a genuine issue of material fact whether said road constitutes an improved road as well as a material issue of fact as to whether it satisfies the statutory requirement of “commonly been used as a public right-of-way.” There exists a further material issue of fact as to whether the hunting trespassing that occurred constitutes appropriate common use under the statute. Furthermore, based upon the positions being taken by Plaintiff, it would appear that both SDCL 31-22-7, as well as SDCL 31-25-1.1 permit the placement of an unlocked gate that does not materially obstruct travel, or at the very least create genuine issues of material fact for trial.

4. With respect to paragraph 7 of PSMF, Defendant admits that many years ago a culvert was placed on a section of the trail at issue. However, whether or not said culvert satisfies the statutory requirements for an improved or unimproved county road is a disputed material issue of fact preventing the issuance of summary judgment. *See* Affidavit of Rob Skjonsberg at ¶¶ 7, 8. Defendant further points out that he has placed no obstruction across the trail at issue and there is an erected and maintained unlocked gate which may be opened easily and providing suitable access on the trail. *See* Affidavit of Rob Skjonsberg at ¶ 8.

5. With respect to paragraph 8 of PSMF, Defendant denies that the Township Road has been graded to facilitate drainage and traffic or otherwise constitute an improved road. *See* Exhibit 5 to Defendant’s Answer to Complaint evidencing the trail. *See also* Affidavit of Rob Skjonsberg at ¶ 10; *see also* Exhibit 5 to Defendant’s Answer.

6. With respect to paragraph 9 of PSMF, Defendant denies that the Township Road has been improved by the placing of gravel on said Road for construction that has now been completed. *See* Exhibit 5 to Defendant’s Answer to Complaint evidencing the trail. *See also* Affidavit of Rob Skjonsberg at ¶ 10.

7. With respect to paragraph 10 of PSMF, Defendant admits to contacting the Dunkel County Township for either appropriate maintenance or a designation of “no maintenance section line.” Defendant further admits to expressing concern about “hunting trespassers” and further points out that it is Defendant’s position that hunting trespassers do not satisfy the statutory requirements set forth in SDCL 31-25-1.1. Furthermore, there is a genuine issue of material fact preventing the issuance of partial summary judgment as it would relate to as to whether or not hunting trespassers constitute or otherwise satisfies the common use requirement by the public. *See* Affidavit of Rob Skjonsberg at ¶ 11.

8. With respect to paragraph 11 of PSMF, Defendant admits that Plaintiff placed objections, but that they were not supported by the facts or the law. As established in the Affidavit of Rob Skjonsberg as well as these responses and photograph exhibits, there specifically exists a path for travel on Defendant’s side of the fence. To the contrary, Plaintiff is continuing to farm and obstruct approximately thirty-three feet to center on his side of the section line and fence. *See* Exhibit 5 to Defendant’s Answer to the Complaint. Accordingly, while travel is not possible on the thirty-three feet to center portion of the section line right-of-way on Plaintiff’s property, there is no man-made obstruction on Defendant’s thirty-three feet from center. *See* Exhibit 5 to Defendant’s Answer.

9. With respect to paragraph 12 of PSMF, Defendant denies. As already established in this opposition, Defendant is not obstructing travel on the section line, there exists a path as shown in Exhibit 5 of Defendant’s Answer, and the swing gates at issue are unlocked and oversized per Plaintiff’s own requests. *See* SDCL 31-25-1.1, *see also* SDCL 31-22-7. *See also* Affidavit of Rob Skjonsberg at ¶¶ 6, 18.

10. With respect to paragraph 13 of PSMF, Defendant admits that Defendant has refused to remove the swing gates on the trail as they are unlocked and are not creating an unlawful obstruction. *See* Affidavit of Rob Skjonsberg at ¶¶ 6, 18.

11. With respect to paragraph 14 of PSMF, Defendant denies. Defendant has not fenced the middle of the section line and there exists a trail to travel upon that is unobstructed. Furthermore, the obstruction of the section line is due to Plaintiff's farming the section line as demonstrated in Exhibit 5 of Defendant's Answer, as well as Plaintiff's cross-fencing of the section line. *See* Affidavit of Rob Skjonsberg at ¶¶ 20-22.

12. With respect to paragraph 15 of PSMF, Defendant denies. Again, Defendant has not obstructed the section line as there exists a trail to travel upon. *See* Exhibit 5 to Defendant's Answer. Furthermore, Defendant has not obstructed travel in that the swing gates are not locked, nor has Plaintiff claimed they were locked. *See* SDCL 31-25-1.1 and SDCL 31-22-7. *See also* Affidavit of Rob Skjonsberg at ¶¶ 6, 18.

Dated: May 27, 2020.

GUNDERSON, PALMER, NELSON  
& ASHMORE, LLP

By: /s/ Marty J. Jackley  
Marty J. Jackley  
Attorneys for Defendants  
111 West Capitol Ave., Suite 230  
Pierre, South Dakota 57501  
Telephone: (605) 494-0105  
E-Mail: mjackley@gpna.com

**CERTIFICATE OF SERVICE**

I certify that on May 27, 2020, a true and correct copy of **DEFENDANT'S  
OPPOSITION TO PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS**  
was electronically filed through South Dakota's Odyssey File and Serve Portal and served upon  
the following individuals:

Robert C. Riter  
Attorney at Law  
319 S. Coteau  
PO Box 280  
Pierre, SD 57501-0280  
*Attorney for Plaintiff*

By: /s/ Marty J. Jackley  
Marty J. Jackley

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF JONES	)	SIXTH JUDICIAL CIRCUIT
PAUL PATTERSON,	)	FILE NO. 37CIV19-12
	)	
Plaintiff,	)	
	)	
v.	)	AFFIDAVIT OF
	)	ROB SKJONBERG
FLOWBOY, LLC,	)	
	)	
Defendant.	)	

STATE OF SOUTH DAKOTA     )  
  ) SS.  
COUNTY OF HUGHES         )

Rob Skjonsberg deposes and states to the best of his knowledge and information as follows:

1. That Plowboy, LLC, for which I am a majority member, is the record owner of the land described as follows:

S1/2 of Section 28, Township 2 South Range 30, East of the Black Hills Meridian, Jones County, South Dakota.

2. There presently exists an unimproved trail on my side of the section line that is unobstructed. *See* Exhibit 5 to Defendant's Answer.

3. With respect to my property, livestock are a part of my as well as the adjoining landowner's farming practice requiring fencing and gates.

4. Before constructing the fence and gates at issue, I advised Plaintiff Paul Patterson of the need for fencing, requested that he pay his equal share, and inquired as to any special conditions that would assist or accommodate him.

5. Pursuant to Mr. Patterson's request, I installed four 20-foot swing gates as opposed to standard sixteen-foot gates in order to accommodate his machinery.

6. At no time have I locked said gates, nor do I intend to.

7. I do not believe that the facts and circumstances demonstrate that this is an improved road based upon both the lack of common usage and the lack of any meaningful alterations, as well as information obtained from the pertinent Township Board.

8. It is my understanding that approximately thirty-four (34) years ago, a culvert was installed; however, said culvert does not materially improve travel associated with the farm trail at issue.

9. During a recent construction project on my property, I had placed a limited amount of gravel in an isolated area to assist with the construction site, and not as a permanent improvement to the farm trail at issue.

10. Based upon information and belief, the Township Board does not treat nor has it otherwise designated the section line area or farm trail at issue as improved, nor does it maintain it.

11. The farm trail at issue is not “commonly used as a public right-of-way.” It is used a couple times a year by the Plaintiff and by hunting “trespassers” that do not have permission to hunt my land.

12. On repeated occasions, including but not limited to, on March 27, 2019, I provided notice of intent to fence and gate the property line between the Plaintiff’s and Defendant’s property, on the east-west section line of the property.

13. Prior to my placement of the fence, Plaintiff Paul Patterson farmed most of the section line right-of-way.

14. On or about May 20, 2019, prior to completing the fence, I provided Plaintiff with cost estimates for fencing, requesting one-half of the cost pursuant to South Dakota law.

15. On June 3, 2019, I advised Plaintiff the fencer was prepared and available to move forward and in order to accommodate Plaintiff's requests that would include much more expensive 20-foot locked swing gates, and that the fencing would be based upon the survey pins. Thereafter on or about June 28, 2019, the fence was constructed for an amount of \$9,218.67.

16. Plaintiff is continuing to farm and obstruct an approximated thirty-three feet to center of his side of the fence which includes sunflowers. *See* Exhibit 5 to Defendant's Answer.

17. While travel is not possible or at least realistic on the thirty-three feet to center portion of the section line right-of-way on Plaintiff Paul Patterson's property based upon his farming practices, there is no man-made obstruction to travel on the thirty-three feet from center on my side of the fence. *See* Exhibit 5 to Defendant's Answer.

18. The 20-foot swing gates requested by Plaintiff are primarily left open, and if shut, they are not locked, and do not constitute an obstruction.


19. On November 21, 2019, another neighbor moved cows adjacent to my property, and had I not had fencing with gates shut, those cattle would have been on and damaged my property, including my food plots.

20. In addition to Plaintiff's farming practice of farming to the fence and obstructing travel on his side of the fence, approximately 500 feet east of the unlocked gates in question, Plaintiff has the trail cross-fenced blocking all vehicle travel.

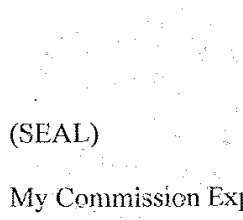
21. North of my unlocked gates, Plaintiff again has it cross-fenced completely obstructing any vehicle travel.

22. Approximately 800 yards further north, it is again cross-fenced by Plaintiff completely obstructing any vehicle travel.

Dated this 26<sup>th</sup> day of May 2020.

  
\_\_\_\_\_  
Rob Skjonsberg

Subscribed and sworn to before me this 26<sup>th</sup> May 2020.

(SEAL)  


  
\_\_\_\_\_  
Notary Public - South Dakota

My Commission Expires: January 17, 2025



STATE OF SOUTH DAKOTA ) IN CIRCUIT COURT  
 )SS  
COUNTY OF JONES ) SIXTH JUDICIAL CIRCUIT  
  
PAUL PATTERSON, ) 37CIV19-000012  
 )  
Plaintiff, )  
 )  
v. ) AFFIDAVIT OF PAUL PATTERSON  
 )  
PLOWBOY, LLC, )  
 )  
Defendant. )

State of South Dakota )  
 )ss  
County of Hughes )

Paul Patterson, being first duly sworn, deposes and states as follows:

1. He is the Plaintiff in the above entitled matter and is a resident of Jones County, South Dakota.

2. The culvert installed under the section line road forty (40) years ago and the grading completed on the road was necessary to ensure the road was regularly passable.

3. Despite his claim otherwise, I never discussed swinging gates with Mr. Skjonsberg, nor did I ever agree to installation thereof.


4. I have never installed cross fences on the township section line road running from west to the east along the south side of Defendant's property.

5. I have not requested that the township remove the gates, but rather have commenced this action requesting that action from this Court.

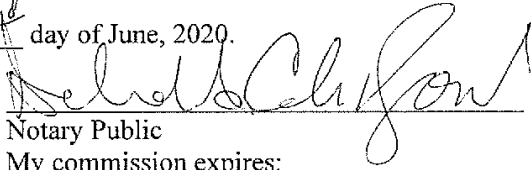
6. Exhibit 5 to Defendant's Answer does not show the land involved in this Motion but rather the north/south section line east of Defendant's property.

Further your Affiant saith not.

DATED this 2<sup>nd</sup> day of June, 2020.

  
Paul Patterson

Subscribed and sworn to before me this 2<sup>nd</sup> day of June, 2020.

  
Notary Public  
My commission expires: \_\_\_\_\_  
Notary Print Name: Deborah A. Clair-Raymond  
My Commission Expires 6-8-2023

(SEAL)

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF JONES	)	SIXTH JUDICIAL CIRCUIT
PAUL PATTERSON,	)	37CIV19-000012
	)	
Plaintiff,	)	
	)	
v.	)	ORDER GRANTING PLAINTIFF'S
	)	MOTION FOR PARTIAL SUMMARY
PLOWBOY, LLC,	)	JUDGMENT AND JUDGMENT AND
	)	ORDER FOR PLAINTIFF
Defendant.	)	

The above entitled matter having come on for hearing before this Court on June 5, 2020 at 9:30 a.m., in the Courtroom, in the Courthouse, in the City of Pierre, Hughes County, South Dakota (per agreement of counsel) upon Plaintiff's Motion for Partial Summary Judgment dated April 30, 2020 and filed herein, and the Plaintiff appearing in person and by and through his attorneys, Robert C. Riter and A. Jason Rumpca of Riter Rogers, LLP, and the Defendant appearing by its representative, Rob Skjonsberg, and its attorney, Marty J. Jackley of Gunderson, Palmer, Nelson & Ashmore, LLP, and the Court having considered all records and documents on file herein, having had ample opportunity to review the photographs which further demonstrate the section line road involved herein and this Court having also considered the pleadings submitted by the parties in support and opposition to the Motion for Partial Summary Judgment and good cause appearing therefore, it is hereby

ORDERED that the Plaintiff's oral Motion to strike the Supplemental Affidavit of Rob Skjonsberg filed by the Defendant on June 4, 2020 is hereby denied, but the Court does receive Exhibits 1 and 2 offered by the Plaintiff relative to that Supplemental Affidavit and the Motion to strike it from the record, and it is further

ORDERED that the issues presented herein involve the township section line road traversing from the west county road along the southerly border of Section 28, Township 2 South, Range 30, East of the Black Hills Meridian, Jones County, South Dakota to the eastern border of that section, and

WHEREAS, the rules of statutory construction confirm that a statute should be interpreted to mean what it says and under SDCL 31-18-1 there exists along every section line in this state a section line highway. Under SDCL 31-25-1, no fences can be erected and maintained across said highway unless the public body charged with that highway authorizes that fencing and in the present case, while the Defendant petitioned the township board, it was not granted authority to erect a fence or gates across the highway; and

WHEREAS, while SDCL 31-25-1.1 does authorize the erection of a fence, it is only across an unimproved county, township or section line highway. That statute states that an unimproved county, township or section line highway is a road not commonly used as a public right-of-way and never altered from its natural state in any way for the purpose of facilitating vehicular passage, and

WHEREAS, SDCL 31-25-1.1 also provides that if a party is statutorily authorized per that statute to erect a fence crossing an unimproved highway, wherever that fence crosses the highway the landowner shall erect and maintain an unlocked gate, which may be easily opened or provide other suitable access, and

WHEREAS, in the present case, the undisputed material facts confirm 1) the section line road has been commonly used by the Plaintiff for decades as a public right-of-way, 2) that the Plaintiff, in conjunction with the local township, paid for and installed a culvert under the road over thirty (30) years ago, 3) photographs of the culvert confirm it remains functioning

in all regards, 4) it is undisputed that, in conjunction with the landowner then owning Section 28, the road was graded in part to facilitate vehicular passage and 5) more recently, the Defendant itself placed gravel on a significant portion of the road as it leads toward the entry into Defendant's buildings, and

WHEREAS, the evidence is undisputed that the section line road has been altered from its natural state for the purpose of facilitating vehicular passage and furthermore, the section line road has been commonly used as a public right-of-way; thus, the Court concludes as a matter of law that the road is not an unimproved county, township or section line highway, and

WHEREAS, there exist no genuine issues of material fact and the Plaintiff is entitled to Partial Summary Judgment as a matter of law; and

THEREFORE this Court hereby

CONCLUDES that the Defendant has no authority to erect a fence across this section line road regardless of the type and nature of any gates it may install, and further

CONCLUDES that Plaintiff did not request the pertinent governing body, pursuant to SDCL Chapter 31-32, to compel removal of any obstructions on the road. Rather Plaintiff brought this action requesting that this Court determine and act upon whether the Defendant had authority to erect the fence and ultimately install gates across this section line road, and the Court further

CONCLUDES that the gate installed by Defendant was neither authorized by state law nor by action of a governmental body, and this Court further

CONCLUDES that this matter does not involve an isolated tract as impacted by SDCL Chapter 31-22, and this Court further

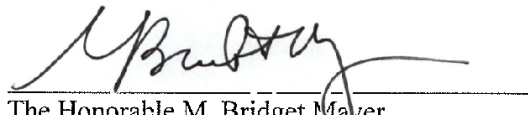
CONCLUDES, as a matter of law, under the undisputed material facts and pertinent law, that the gates installed by Defendant are not authorized since the road is not an unimproved section line road, and that Plaintiff's Complaint demanding removal of the same is appropriate under the circumstances, and the Court further

CONCLUDES and ORDERS that Plaintiff's Motion for Partial Summary Judgment shall be, and is hereby, in all respects granted, and it is herewith

ORDERED, ADJUDGED AND DECREED that Plaintiff is hereby granted Judgment requiring that Defendant remove the gates on both the west and east ends of the affected section line road as referenced above, and that it shall have twenty (20) days from the entry hereof to comply with this Court's Judgment and Order.

Signed: 7/13/2020 10:50:21 AM

BY THE COURT:

  
The Honorable M. Bridget Mayer  
Circuit Court Judge

Attest:  
Feddersen, Judy  
Clerk/Deputy



Filed on: 07142020 Jones

4 County, South Dakota 37CIV19-000012

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF JONES	)	SIXTH JUDICIAL CIRCUIT
PAUL PATTERSON,	)	FILE NO. 37CIV19-12
	)	
Plaintiff,	)	
	)	SUPPLEMENTAL
v.	)	AFFIDAVIT OF
	)	ROB SKJONSBURG
PLOWBOY, LLC,	)	
	)	
Defendant.	)	

STATE OF SOUTH DAKOTA )  
 ) SS.  
COUNTY OF HUGHES )

Rob Skjonsberg deposes and states to the best of his knowledge and information as follows:

1. On May 26, 2020, I executed an Affidavit in response to Plaintiff Patterson's Partial Motion for Summary Judgment.
2. On or about June 2, 2020, Plaintiff Patterson filed a second Affidavit requiring the filing of this Supplemental Affidavit.
3. With respect to paragraph 3 of the Affidavit of Paul Patterson, despite his assertions, we did discuss and he did request installation of the two sets of twenty-foot swing gates. In support of the assertion is Exhibit A, a text message from me to Plaintiff Patterson where I specifically provide "I will accommodate your request at 40 ft. Those gates will remain unlocked." See attached Exhibit A. Thereafter on April 25, 2019, at my direction, my attorney Marty J. Jackley, drafted correspondence to Plaintiff Patterson again confirming "Mr. Skjonsberg would account for your request for larger gates by placing in two, twenty-foot swing gates." See Exhibit B (correspondence of Attorney Jackley dated April 25, 2019). Thereafter, on June 3, 2019, my attorney Marty J. Jackley, reconfirmed with Plaintiff Patterson's new attorney, Margo

Exhibit 1

Northrup, "the fencer is prepared and available to move forward. In order to try to accommodate your client's previous request, they are including 20' unlocked swing gates, and are fencing from the pins. If this is not acceptable, or if you feel there are further reasonable steps that can be made please let me know asap." *See* Exhibit C (email of Attorney Marty J. Jackley dated June 3, 2019).

4. With respect to paragraph 2 of Mr. Patterson's Affidavit, the culvert in question does not appear to, at least presently, serve any purpose in relation to an improved road. Rather, approximately fifty-feet west of this culvert, Plaintiff Patterson attempted to drain a listed USFWS wetland last fall, where the area or trail in question can be impassable. *See* Exhibit D (photograph of Patterson draining wetland).

5. With respect to paragraph 4 of Mr. Patterson's Affidavit, there are clearly cross fences with no gates installed across the section line area in question. Exhibit E is a picture taken from the northeast fence line looking south. Plaintiff Patterson's property is on the left and my property is on the right. This is the north-south section line that Plaintiff is arguing. As shown on the left of the photo, it is cross fenced with no gate, and Plaintiff Patterson's farming further obstructs to the left of the fence line. *See* generally Exhibit E.


6. Similarly, Exhibit F is a photograph of the east-west trail facing east. Plaintiff Patterson clearly has this trail cross fenced approximately .2 tenths of a mile straight east of the unlocked gates. This very section line trail that Plaintiff is now litigating is clearly closed by Plaintiff Patterson's cross fencing .2 tenths of a mile from the gate. While my unlocked gates do not constitute an obstruction, he is obstructing with no gate. *See* generally Exhibit F.

7. Similarly, Exhibit G is a photograph taken from the northeast corner of my property, north of my eastern gate. Plaintiff Patterson owns both sides and is grazing the entire section line. *See* Exhibit G.

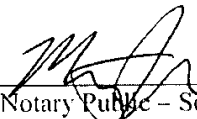


8. With respect to paragraph 6 of Mr. Patterson's Affidavit, Exhibit 5 to Defendant's Answer does show the land involved. I am submitting the following additional photographs to add further clarity. Exhibit H is a picture of the southeast corner of my property, facing north of my east gate. Plaintiff Patterson's property is on the right, and his crops are obstructing the section line, where on my left side to the extent a vehicle can or needs to travel, may do so unobstructed. *See* Exhibit H. Exhibit I is a picture of the southeast gate facing west. Plaintiff Patterson has the field planted. *See* Exhibit I. Exhibit J is a photograph facing west on the east-west trail, from the eastern gate. Again, this photo shows Plaintiff Patterson planting and obstructing the area on his side of the fence line. Exhibit J photo further shows that to the extent there exists a farm trail, it is unobstructed by me and there are unlocked swing gates. Exhibit K is a photograph of Plaintiff Patterson and his sprayer freely traveling on the east-west trail. I actually left the front (west gate) open for him and he was neighborly closing the east gate when he was done. *See* Exhibit K.

Dated this 4<sup>th</sup> day of June 2020.

  
\_\_\_\_\_  
Rob Skjonsberg

Subscribed and sworn to before me this 4<sup>th</sup> June 2020.

  
\_\_\_\_\_  
Notary Public – South Dakota

(SEAL) My Commission Expires  
January 17, 2025

My Commission Expires: \_\_\_\_\_

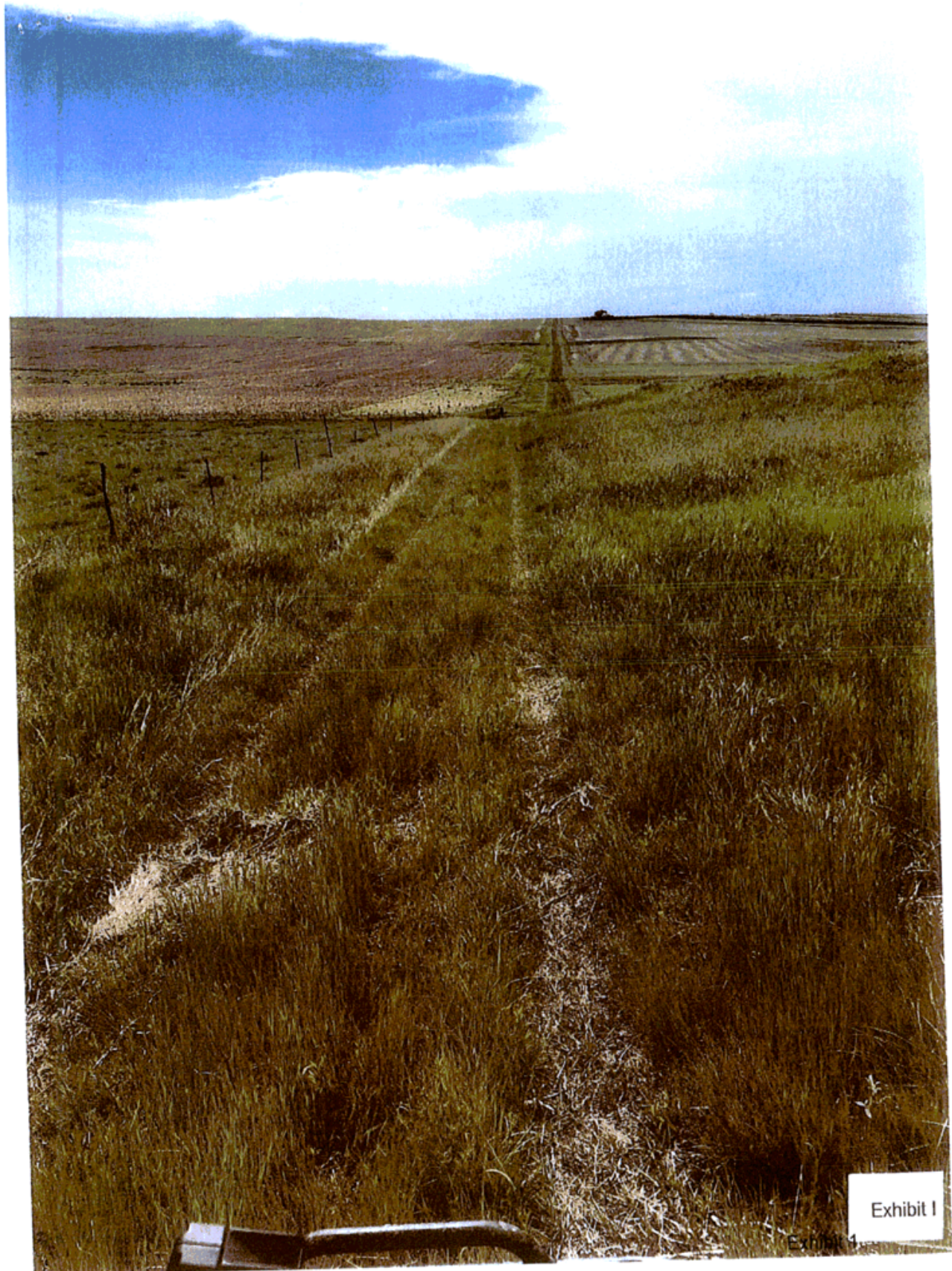


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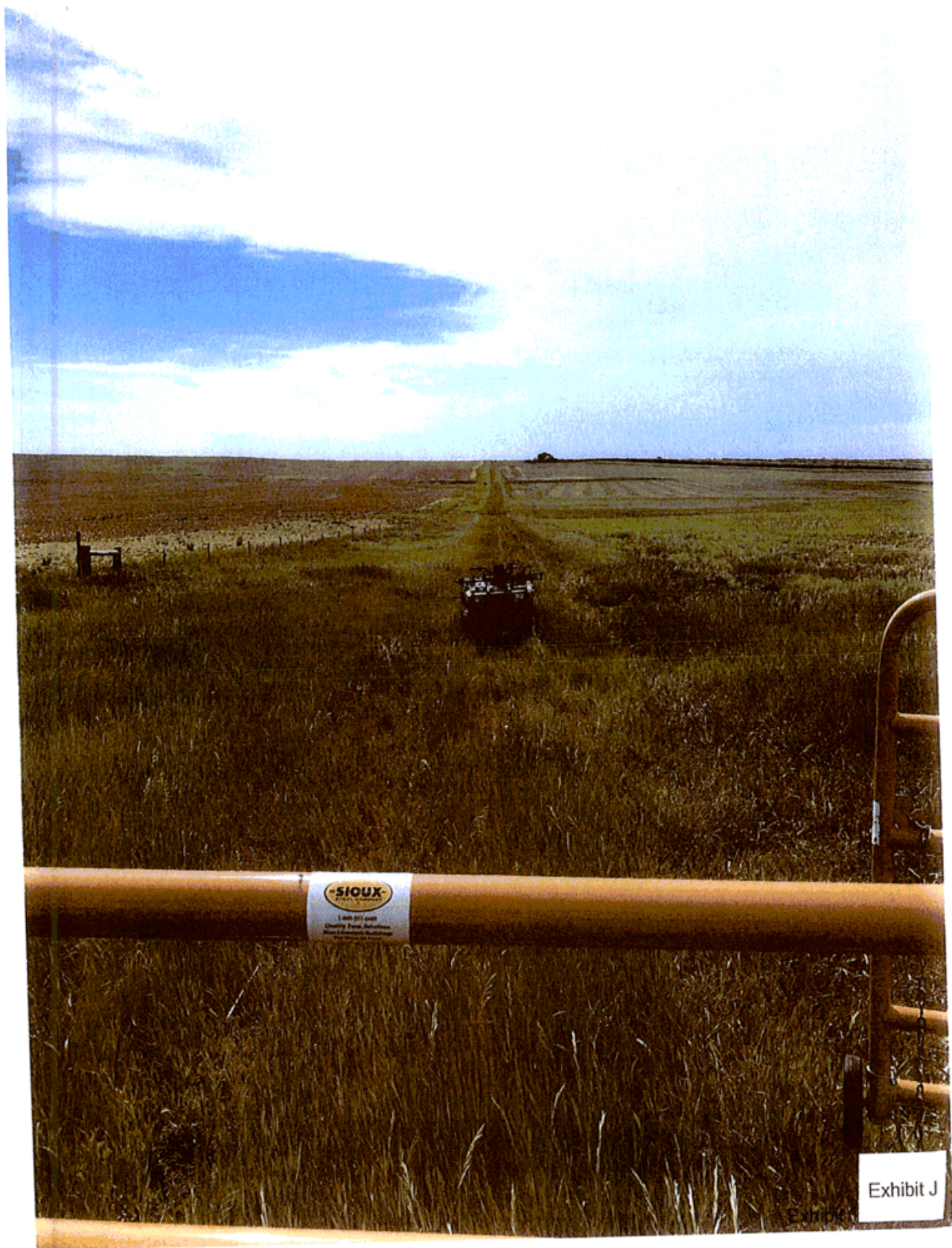












South Dakota Codified Laws

Title 31. Highways and Bridges (Refs & Annos)

Chapter 31-25. Fences, Cattle Ways, and Livestock Guards (Refs & Annos)

SDCL § 31-25-1.1

**31-25-1.1. Fences erected across unimproved section-line highways--  
Gates--Access to highways protected--Violation as misdemeanor**

Currentness

A landowner may erect a fence across an unimproved county, township, or section-line highway. For the purposes of this section an unimproved county, township, or section-line highway is any county, township, or section line not commonly used as a public right-of-way and never altered from its natural state in any way for the purpose of facilitating vehicular passage. At any point where a fence crosses such highway, the landowner shall erect and maintain an unlocked gate which may be opened easily or provide other suitable access to the highway. If the gate or other access is not large enough or if the gate does not open easily enough to satisfy the needs of those using the highway, the landowner shall erect a larger gate or a gate that can be more easily opened or provide other suitable access to the highway. The landowner shall erect the larger gate or the gate which opens easily or provide the other suitable access upon a request filed with the sheriff of the county in which the land is located by an adversely affected person. If a request is filed, the sheriff shall notify the landowner. The landowner shall comply with the provisions of this section within seven days of notice. A landowner who violates any of the provisions of this section is guilty of a Class 2 misdemeanor.

**Credits**

**Source:** SL 1984, ch 215, § 2.

Notes of Decisions containing your search terms (0)

[View all 4](#)

S D C L § 31-25-1.1, SD ST § 31-25-1.1

Current through 2020 Session Laws, Executive Order 20-31 and Supreme Court Rule 20-06

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South Dakota Codified Laws

Title 15. Civil Procedure

Chapter 15-6. Rules of Procedure in Circuit Courts (Refs & Annos)

VII. Judgment

15-6-54--Judgments--Costs

SDCL § 15-6-54(b)

15-6-54(b). Judgment upon multiple claims or involving multiple parties

Currentness

When multiple claims for relief or multiple parties are involved in an action, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

**Credits**

**Source:** SDC 1939 & Supp 1960, § 33.1704; SD RCP, Rule 54 (b), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966.

S D C L § 15-6-54(b), SD ST § 15-6-54(b)

Current through 2020 Session Laws, Executive Order 20-31 and Supreme Court Rule 20-06

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IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

---

NO. 29373

---

PAUL PATTERSON,

Plaintiff/Appellee,

vs.

PLOWBOY, LLC,

Defendant/Appellant.

---

Appeal from the Circuit Court  
Sixth Judicial Circuit  
Jones County, South Dakota  
Honorable M. Bridget Mayer

---

BRIEF OF APPELLEE PAUL PATTERSON

---

Attorneys for Plaintiff/  
Appellee  
Robert C. Riter  
A. Jason Rumpca  
Riter Rogers, LLP  
319 S. Coteau  
P. O. Box 280  
Pierre, SD 57501

Attorneys for Defendant/  
Appellant  
Marty J. Jackley  
Gunderson, Palmer, Nelson  
& Ashmore  
111 W. Capitol Ave., Ste. 230  
Pierre, SD 57501



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### **PRELIMINARY STATEMENT**

For the convenience of the Court, Appellee/Plaintiff, Paul Patterson is referred to as "Patterson"; Appellant/Defendant, Plowboy, LLC is referred to as "Plowboy"; documents from the record of the Jones County Clerk are cited as "R. \_\_\_\_"; Plowboy's Brief is cited as "PB \_\_\_\_"; Patterson's Appendix is cited as "App. \_\_\_\_"; and Plowboy's Appendix is cited as "PB. App."

### **JURISDICTIONAL STATEMENT**

Plowboy properly sets forth the status and jurisdiction of this matter before this Court.

### **STATEMENT OF LEGAL ISSUES AND AUTHORITIES**

- I. Whether to successfully resist a motion for summary judgment Plowboy is required to establish the elements sufficient to prove the section line road was unimproved.

The trial court's conclusion herein was supported by the undisputed material facts presented to it.

SDCL 15-6-54(b)

Lawrence County v. Miller, 2010 SD, 768 NW 2d 360

Powers v. Turner County, 2020 SD 60

- II. Whether the trial court erred when it concluded that no genuine issues of material fact were shown to counter proof that on the section line road the natural terrain had been enhanced to help facilitate the road's utility for common usage.

The court's decision that grading of the road by both parties and the township as well as the installation of a culvert were intentional enhancements for travel and supported common usage thereof.

SDCL 31-25-1.1

State v. Tracy, 539 NW 2d 327 (S.D. 1995)

Smith v. Sponheim, 339 NW 2d 899 (S.D. 1987)

III. Whether this court's granting of a discretionary appeal herein obviates the need to consider whether certification of the partial summary judgment was necessary.

This Court granted a stay on that portion of the partial summary judgment requiring removal of the gate and also accepted Plowboy's petition for a discretionary appeal, thus effectively obviating the need to examine the status of the partial summary judgment.

Skjonsberg v. Menard, Inc., 2019 S.D. 6, 922 NW 2d 784

Stoebner v. Konrad, 2018 S.D.74, 914 NW 2d 590

SDCL Chapter 21-8

SDCL 15-6-65(d)

#### **STATEMENT OF THE CASE**

Patterson filed a Complaint against Plowboy seeking an injunction, Restraining Order and Declaratory Ruling. He claimed Plowboy's fencing and gating of a section line road

on the south side of the latter's property was contrary to the law, which limited that activity to unimproved section line roads. (App. 9-12) Relying upon his claim that there had been intentional enhancements of the road's natural terrain to permit common usage for travel, Patterson filed a Motion for Partial Summary Judgment with a supporting Statement of Material Facts on April 30, 2020. (App. 1-4) The trial court granted Partial Summary Judgment concluding that the section line road was not an unimproved road and Plowboy thus had no authority to fence and gate it. (App 5-8) Therefore, the court required removal of the gate.

Plowboy petitioned for a discretionary appeal of that Order and this Court granted the petition and stayed the compelled removal of the gate.

#### **STATEMENT OF FACTS**

Patterson has reviewed the statement of facts included in Plowboy's Brief and responds to them as necessary. Certainly, many of the facts set out by Defendant are not facts material to the legal issues presented herein. Others are of a conjectural nature.

The photographs of the section line road are in the record. They show an improved graveled roadway from the north/south section line road up to and then into the Defendant's lodge. R. 47 (App. 24)

Furthermore, a culvert was installed on the section line road by authority of the township in 1976 or soon thereafter. The culvert was intended to and did alter the section line road to facilitate vehicular passage. R. 40, ¶¶8 & 9 (App. 18) A photograph shows the continued functionality of the culvert. R. 11 (App. 25)

The section line road was also graded to facilitate drainage and travel. R. 40, ¶10 (App. 18) and R. 96, ¶2 (App. 21) Those efforts by Patterson and the township board were completed with the consent, agreement and knowledge of the entity which then owned Plowboy's property. The exhibits confirm the benefits to travel created by the grading. R. 10 and R. 46 (App. 26 and 27)

Plowboy's effort to get the township to designate the road as a no maintenance section line was unsuccessful. R. 40, ¶12 (App. 18)

Plowboy's Statement of Facts suggest that the section line road contains no grade (PB 4), which is inconsistent with the undisputed facts (App. 2-4 and 25).

Despite Plowboy's statement in its facts (Id.) the township minutes confirm its participation in enhancing the road for travel (App. 31) as does Patterson's Affidavit (App. 17-20, ¶11)



Plowboy improperly attempts to include argument and reference to cases in its Statement of Facts (PB. 4 and 5). And it references a claimed response to a petition to vacate the section line road with no actual citation in the record. (PB. 5)

Plowboy also includes facts relative to discussions between the parties. (PB. 5 and 6) The claimed impact of them are denied and reference to them is improper. See, fn. 3 herein.

Plowboy also references the court's development of its Order but the same certainly speaks for itself. See, also, fn. 7 herein.

#### **PRELIMINARY STATEMENT**

The underlying statute upon which the decision in this case must rest, states in pertinent part<sup>1</sup>:

A landowner may erect a fence across an unimproved county, township, or section-line highway. For the purposes of this section an unimproved county, township, or section-line highway is any county, township, or section line not commonly used as a public right-of-way and never altered from its natural state in any way for the purpose of facilitating vehicular passage.

#### **ARGUMENT AND AUTHORITIES**

I. Under the Summary Judgment standard the burden is on the Plowboy to make a showing sufficient to

---

<sup>1</sup>SDCL 31-25-1.1 See App. 23.

establish the existence of the elements upon which it has the burden of proof.

Since the trial court granted partial summary judgment in favor of Patterson, the foundational discussion relates to the standards for summary judgments. This Court has recently stated its standard of review:

We must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine material issue for trial exists. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper. Domson, Inc. v. Kadrmas Lee & Jackson, Inc., 2018 S.D. 67, ¶10, 918 NW 2d 396.

As Domson confirms, the issue is whether there exists any basis which supports the trial court's ruling, in which case affirmance of summary judgment is proper.

In Klein v. Sanford USD Medical Center, 2015 S.D. 95, ¶11, 872 NW 2d 802, this Court confirmed that the nonmoving party must present specific facts showing a genuine material issue for trial exists. And these objective facts are not material "unless they would affect the outcome of the suit under the governing substantive law". At ¶29.  
  
(citations omitted)

In Hinrich v. Carpenter, 1997 S.D. 116, ¶18, 569 NW 2d 568, this Court held there must be "sufficient probative evidence [that] would permit a finding in [his] favor on more than mere speculation, conjecture, or fantasy".

(citation omitted) Plowboy herein fails to state any general issues of material fact in dispute, but rather, asserts generalities seeking to argue it should be able to present those claims at a trial. Merely saying something is so, does not suffice.

Also of consequence to our consideration is this Court's further clarification of the terms "moving" and "non-moving" parties. In that regard, this Court has made clear:

[w]hile we often distinguish between the moving and non-moving party in referring to the parties' summary judgment burdens, the more precise inquiry looks to who will carry the burden of proof on the claim or defense at trial. Entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Western Consolidated Co-op v. Pew, 2011 S.D. 9, ¶19, 795 NW 2d 390, and Lawrence County v. Miller, 2010 S.D. 60, ¶14, 786 NW 2d 360 (citations omitted).

In the present case, Plowboy has submitted that the road involved is an unimproved section line road. (App p. 16). The salient issue involved herein is whether Plowboy has the right to fence the section line road and gate it.

As later discussion confirms, that action can only be authorized if the road is an unimproved section line road. This burden of proof is imposed upon Plowboy. The obligation thus rests upon Plowboy as the party resisting partial summary judgment to place sufficient evidence in the record " . . . to support findings on all the elements upon which they have the burden of proof." A motion for summary judgment cannot be overcome by "mere general allegations and denials". Lawrence County, supra. (citation omitted) This Court required the resisting parties in Lawrence County to present facts rather than " . . . unsupported conclusions and speculative statements which do not raise a genuine issue of fact". Id. at ¶15. See, also, Hansen v. Big Stone Therapies, Inc., 2018 S.D. 60, ¶¶27 and 29, 916 NW 2d 151, and Powers v. Turner County, 2020 S.D. 60, ¶23.

The trial court herein concluded as a matter of law that no genuine issues of material fact existed. This conclusion should be reviewed de novo. Arnoldy v. Mahoney, 2010 S.D. 89, ¶14, 791 NW 2d 645. Hence, the question is if the trial court properly found there were no genuine issues of material fact and properly concluded that Plowboy had failed to establish the section line road was unimproved because it: a) was not commonly used as a public

right-of-way, and b) was never altered from its natural state in any way for the purpose of facilitating vehicular passage.

- II. The trial court properly found Plowboy had failed to confirm genuine issues of material fact as to whether the section line road was one not commonly used as a public right-of-way and one never altered from its natural state in any way for the purpose of facilitating vehicular passage.

The facts are uncontroverted that the road involved was located on a section line and it ran from a well maintained county road on the west of Plowboy's land to Patterson's property immediately adjacent to Plowboy's land on the east. Plowboy fenced the road and installed large metal gates. Plowboy did not petition the County Commission for authority under SDCL 31-25-1 to fence the section line highway. Had it done so and had the Commission so authorized, the road could have been fenced with the erection of gates, grates or both.

Another alternative for Plowboy was to proceed in a manner as it did herein, that is arguing that the section line highway was unimproved and thus, it was authorized under SDCL 31-25-1.1 to erect a fence across it.

In its Order granting Patterson Partial Summary Judgment, R. 149 (App. 5) the trial court concluded the undisputed material facts had confirmed:

- 1) The section line road had been commonly used by Patterson for decades as a public right-of-way,
- 2) That Patterson, in conjunction with the local township, paid for and installed a culvert under the road over thirty years ago,
- 3) Photographs of the culvert confirm it remained functioning in all regards,
- 4) In conjunction with the landowner then owning Plowboy's property, the road was graded in part to facilitate vehicular passage, and
- 5) Plowboy itself placed gravel on a significant portion of the road as it leads toward the entry to its building.

These factors militate against Plowboy's argument that it presented genuine issues of material fact sufficient to go beyond mere conjecture and speculation. Plowboy failed to produce facts sufficient to confirm the road was not commonly used as a public right-of-way and was never altered from its natural state in any way for the purpose of facilitating vehicular passage.

To support its argument against common usage, Plowboy makes assertions in its Brief that the trail is used by Patterson a couple of times a year, as well as by hunting

trespassers. (PB 4) That claim stands in stark contrast to the Affidavit Patterson filed herein wherein he stated:

I frequent the property with farm machinery, including tractors and drills to plant, equipment to apply fertilizer or herbicide, and ultimately with a combine to harvest the crops. R. 41, ¶15 (App. 19)

In that same Affidavit he spoke more generally as to common usage of that section line road by the public. R. 40, ¶7 (App. 18)

Plowboy countered with its claim Patterson used it only a couple times a year and "hunting trespassers" also used it. Of course, the definition of the hunting public who utilize that road, as acknowledged by Plowboy itself, is subject to an entirely different discussion as included in the modified statutory definition regarding hunting on public right-of-way. SDCL 41-9-1.3. The landowner to Plowboy's south does have a fence along the road. R. 46 (App. 27) It is interesting to note, however, that Plowboy has not fenced its property on the north side of the section line road, which it was certainly able to do if it was concerned about animals on its property. Likewise, it could fence out its tree belt just east of its lodge building, which has also not occurred. R. 50 (App. 28)

The second proof burden which Plowboy must also satisfy is that the section line road has never been

altered from its natural state in any way for the purpose of facilitating vehicular passage. The uncontested facts confirm a culvert purchased by Mr. Patterson was installed, as authorized by the township board. R. 40, ¶9 (App. 18) and R. 44 (App. 31) The photographs confirm its functionality by showing the culvert under the road and water located immediately adjacent to the outflow of the culvert. Plowboy responds that the culvert was old and its functionality was disputed. (PB. 4) Merely because a culvert is old does not impact its functionality as shown by culverts under roads in many areas of the state. Furthermore, like the trial court, one need only look at the photograph referenced above, to confirm its functionality does exist.

Why would Patterson have gone to the time and expense of adding a culvert if it was not necessary to assist in facilitating vehicular passage?

The section line road was graded by the township to facilitate drainage and traffic. R. 40, ¶10 (App. 18) That effort was completed with the consent, agreement and knowledge of the entity who then owned the property where the section line road was located. R. 40, ¶11 (App. 18) See, also, R. 46 (App. 27) showing the grading and the common vehicular use. The grading altered the trail for



the purpose of facilitating vehicular passage. R. 96, ¶2 (App. 21), R. 3, ¶7 (App. 10) and R. 11 (App. 25) The grading has not been disputed by Plowboy. Why would Patterson have participated in those activities and expenses if not to facilitate travel? Why would the prior owner have agreed to it and assisted in its accomplishment if he was not aware it helped with access on the road?

Plowboy references it as "possible grading" when in truth and in fact it is undisputed that grading of the section line road occurred. (PB. App p. 21) Plowboy failed to sustain its burden raising any genuine issues of material fact in that regard other than with mere speculation or guesswork. Again, merely saying it is so, does not create a genuine issue of material fact.

A review of the Affidavits of Mr. Skjonsberg, Plowboy's principal, fails to anywhere respond to the fact that the road was graded to facilitate traffic and the grading effort was completed with the consent, agreement and knowledge of the entity who then owned its property. Nor did it contest that the grading was completed to ensure the road was regularly passable.

Plowboy also agreed it placed a limited amount of gravel on the road although not intending it as a permanent improvement to the farm trail. See, also R. 9. Plowboy's

assertions that the record is bursting with factual disputes, is unsupported. What is undisputed is that the culvert was added to facilitate vehicular travel.

Plowboy seeks to skew the real question by claiming the gate is not an obstacle and because it is not an obstacle, there can be no legitimate complaint regarding its fencing and gating. (PB p. 23-25) Of course, that question is not presented by the statute involved.

When the legislature includes provisions in the law, they intend them to mean something. In the present situation, the requirement is that a person seeking to fence and gate across a section line road which it claims is unimproved must show both that the road 1) is not commonly used as a right-of-way, and 2) has never been altered in any way for the purpose of facilitating vehicular travel. Thormodsgard v. Wayne Townships Board of Supervisors, 310 NW 2d 157, 159 (S.D. 1981). This Court must assume the statute means what it says and the legislators have said what they mean. Globe v. Union Insurance, 2005 S.D. 40, ¶8, 695 NW2d 252. If the words and phrases in the statute have plain meaning, the Court need not resort to statutory construction, but rather shall declare the meaning of the statute as clearly expressed. Voss v. Schaefers, 1999 S.D. 105, ¶6, 598 NW 2d 550. And,

as the late Justice Steven Zinter reminded us in State Auto Insurance Co. v BNC, 2005 S.D. 89, ¶19, 702 NW 2d 379 when the emphasized language states the subject of the sentence and the two modifying clauses thereof are separated by the conjunction 'and' the two clauses are joined conjunctively, both modify the subject. Each clause must therefore be considered and met.

Also reflective of the dual requirement was SB 79 introduced during the 2020 legislative session. R. 56 (App. 37) The lead proponent for that bill testifying before the committee was the South Dakota Landowners & Outfitters Alliance. R. 58 (App. 38) The bill unsuccessfully sought to eliminate the second requirement currently imposed on an entity seeking to claim a section line road was unimproved.

If the road was either improved in any manner for vehicular travel or was commonly used by the public for travel, it is not an unimproved section line road. State v. Peters, 334 NW 2d 217 (S.D. 1983) and State v. Tracy, 539 NW 2d 327, 330 (S.D. 1995).

In Tracy, this Court discussed Smith v. Sponheim, 339 NW 2d 899 (S.D. 1987). Smith found improvements consisted of widening the road, grading the road, graveling it and installing culverts and a drainage ditch. As this Court in Tracy held “. . . if one can travel down a section line

because it is improved to facilitate such travel, it can be hunted upon." At p. 331. As this Court further stated, improvements are 1) "in the nature of intentional enhancement of the natural terrain's utility for travel", 2) "adaption which will permit travel where it was not previously possible", or 3) "common use of the section line, not a fortuitous crossing. . ." Id.

In this case a highway already exists in the eyes of the law as it is an unvacated section line. SDCL 31-18-1. In Sponheim, the status of the "road" in question was disputed as it was not on a section line. See, Tracy, fn. 6. However, the rationale in Sponheim is a useful tool for analysis here as in both matters, the issue of what constitutes "an improvement" versus mere use of the property, plays an integral part in determining the disposition of the case.

While Plowboy seems to argue that the improvements on the section line trail require that it be improved from the point of entry to the point of exit, (see, e.g. PB 21), Tracy does not support that position. Rather, in Tracy a deep marshy slough blocked the road and prevented full vehicular access. In the present case there is no showing the entire section line road cannot be accessed. Quite to the contrary, because of the grade established on the

section line road, the culvert installed under it to drain water and the effort by Plowboy itself to maintain and gravel a portion of the road, the entire road is accessible. R. 46 and 50 (App. 27 and 28)

Plowboy submits in its Argument (PB 21) that the road can be impassible. There is no testimony or evidence supporting that claim. Certainly it is not unreasonable for the trial court to conclude that water might accumulate from time to time on a small portion of improved section line roads. But that factor does not mean it is impassable. (R. 185)

As Tracy stated, the statute contemplates common use of the section line road, not a fortuitous crossing by a piece of machinery. At p. 331. In Tracy this Court made clear that as the statute then existed, if one could travel down a section line because it was improved to facilitate such travel, it could be hunted. Likely in response to Tracy, and to clarify SDCL 41-9-1.1, the 1996 legislature passed SDCL 41-9-1.3 dealing with rights to hunt along a section line road. That statute speaks to a well worn vehicle trail evidencing common usage or intentional alteration or adaption to enhance the terrain or permit vehicular travel where not previously possible.

That amendment to the law, which focuses on hunting, excised "and never altered in any way" from the prior statute. However, that language remains in SDCL 31-25-1.1, which is the pertinent statute herein. While the legislature apparently attempted to utilize the language in the Tracy decision for the statute dealing with hunting, SDCL 31-25-1.1 has not been so modified. Hence, the question presented is whether the section line road was "altered in any way".<sup>2</sup>

Plowboy posits that because the section line road does not connect to an improved road, why would it be commonly used as a public right-of-way? (PB. 18) Of course, Patterson commonly uses the road for his farm operations. It has been improved up to the area where it enters his property. Beyond that, it does not need to be improved as the map clearly indicates that just over the knoll the section line is abruptly intercepted by Bull Creek. (R. 118 and 139)

Despite Plowboy's effort to expand the question presented, it is also pertinent to the discussion that Mr.

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<sup>2</sup>See the thorough analysis by Professor Tom Simmons in 2 Great Plains Nat. Resources J. 240 (Fall, 1997). Professor Simmons suggests that the impact of the modifications to SDCL 41-9-1.3 probably lies somewhere between the Peters and Tracy decisions. At fn. 136.

Patterson's focus is upon the section line road as it traverses on the south side of the Plowboy's property, leading to Patterson's property. (PB. App. 18 and 21) That is the area in which the culvert was installed, the grading occurred and Plowboy's graveling of a portion of the road occurred, all intended to alter the road from its natural state to facilitate passage ultimately to Mr. Patterson's property.<sup>3</sup>

Furthermore, even Plowboy concedes that other members of the public use the road, although it calls them "hunting trespassers". There are other section line roads throughout the state similarly situated, where common usage also exists not only for convenience, but for important access purposes.

Neither Tracy, nor any other case from this Court, mandates that the entire section line road be improved, but rather only that the road be altered from its natural state in any way or the natural terrain is enhanced for travel. In Tracy hunters had to go around the area covered with

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<sup>3</sup>In its Brief, Plowboy raised negotiations that were claimed to have occurred. (PB 23) Clearly there is a disagreement on the scope and effectiveness of any negotiations but what is clear is that settlement negotiations are not admissible under SDCL 19-19-408. Hence, they are not proper for consideration in Plowboy's Brief, nor were they proper for consideration before the trial court.

water if they were driving but could walk through it.

There is no showing of that distinction herein.

Plowboy also raises an issue regarding a neighbor trailing cattle on the north/south road adjacent to the westerly boundary of Plowboy's property. (PB. App. 4 and 13) That argument is at best, misplaced. This Court has often held that the responsibility for trespass by cattle is upon the owner of the cattle, even if he or she is free from negligence. SDCL 40-28-4 and Hall v. Umiker, 209 NW 2d 361 (S.D. 1973). Had Plowboy been concerned about animals as opposed to hunters, it could easily have sought authorization to install a cattle guard using SDCL 31-25-2. It never filed such a petition.

Plowboy asserted that livestock was part of its farming practices but Plowboy has not fenced around its buildings, nor around its trees just east of its lodge, nor has it fenced on the north side of the section line road at issue herein. (App. 28)

Plowboy also argues that because the language in the statute speaks to a section line road which is "never altered from its natural state in any way . . ." it would include every trail where there was a rock removed from the path of the trail. (PB. App. p. 22-23) It invites this Court to improperly legislate. Wegleitner v. Satler, 1998



S.D. 88, ¶11, 582 NW 2d 688. While Plowboy may not be satisfied with the law as it exists, our 2020 legislature considered the pertinent statute in SB 79 and was well satisfied with its current language as evidenced by the sound rejection of an amendment thereto.<sup>4</sup> And the Court in Tracy has further focused upon the facts of particular consequence.

A. Whether the fence and gate is an obstruction of the section line road is not an issue.

The Defendant unsuccessfully attempts to raise an issue about whether an unlocked gate is an obstruction. Citing an Attorney General's opinion authored by his counsel, the Defendant speaks to the question of whether an unlocked gate on an improved section line is an obstruction which must be removed. (App. p. 23-25)<sup>5</sup> That discussion is not pertinent and fails to raise facts that would affect the outcome of this litigation under the governing

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<sup>4</sup>There is no claim by the Plowboy that the section line on Plaintiff's property was an improved road.

Also while Plowboy argued to the lower court the isolated tract statute (SDCL 31-22-7) was somehow applicable, it has abandoned it by not raising it in its Brief. R. p. 7 and 8.

<sup>5</sup>For a discussion from the Attorney General's office more applicable to the issues actually presented by the pertinent statutes involved herein, this Court is referred to 1987 AGR 125 (1987 WL 341030).

substantive law. Gul v. Center for Family Medicine, 2009 S.D. 12, ¶8, 762 NW 2d 629.

The question presented in this case is whether the section line road was unimproved. It is not whether a fence with a gate that can be opened is an obstruction. SDCL 31-25-1 states an improved section line can be fenced if the county commission so approves. SDCL 31-25-1.1 says that an unimproved section line can be fenced, with a gate included, but only if it is first concluded that the section line road is an unimproved right-of-way. If it is not an unimproved road, it can neither be fenced across nor gated. Hence, the question of whether or not a gate of the size and nature of the Plowboy's gate is an obstruction is of no consequence in this matter. It defies logic otherwise.<sup>6</sup>

Nonetheless the evidence confirms that the closed gate which Plowboy suggests seldom occurs interferes with Patterson moving equipment over to his property and also interferes with the traveling public utilizing the

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<sup>6</sup>Despite the trial court's clear enunciation at the Motion hearing, Plowboy persisted in its claim that the fence and gate need only be removed if satisfactory proof was shown that it was an obstruction on the section line road. R. 126-128) (App. 37-39)

north/south road on the west of Plowboy's property. R. 51-54 (App. 29-30)

III. This Court's grant of a Discretionary Appeal and an Order staying the gate removal obviates the need for certification as a final judgment.

The Verified Complaint filed herein raises two distinct issues. One involves the section line road south of the Defendant's property. The Motion for Partial Summary Judgment related specifically to that question.

The lower court concluded that without action by the County, Plowboy could not fence and gate the section line road. In that regard Patterson's Complaint had sought a declaratory ruling, an injunction and a restraining order.

The second issue raised in the Complaint, and in Counts I and IV of Plowboy's Counterclaim, involved the border fencing which Plowboy installed running up the middle of the section line boundary between the parties' land. R. 3 and 4, ¶¶10 and 23 (App. 11 & 12) and R. 19, 21 & 22, ¶¶ 14-20 and 29-36 (App. 14, 15 & 16)

Admittedly, certification that the partial summary judgment was a final judgment under SDCL 15-6-54(b) was not sought by either Patterson or Plowboy. Hence, while it may on its face not be considered a final judgment, this Court deemed the question presented worthy of a discretionary appeal. Furthermore, this Court entered an Order granting

a temporary stay on the gate removal. Hence, status quo has been maintained.

Patterson's Complaint sought an injunction and a restraining order requiring the removal of the fence and gates to protect Patterson and the public, as well as a ruling that Plowboy was not authorized to gate that section line road. In that regard, nothing in SDCL 15-6-65(d) nor SDCL Chapters 21-8 and 21-24, dealing with injunctions and restraining orders, appear to prohibit granting finality to the trial court's order nor demand more of that court.

The photographs attached to Mr. Patterson's first Affidavit are pertinent. R. 51-54 (App. 29-30) They show the closed gate and its impact upon the traveling public where the section line road meets the well traveled county road. And they certainly evidence the need for entry of the partial summary judgment preventing Plowboy's permanent installation of fencing and gating on the section line road.

By virtue of this Court's Order allowing the appeal, the issue presented by Plowboy as to the trial court's failure to certify the ruling as a final judgment appears moot as it has no practical affect upon the controversy now pending before this Court. Skjonsberg v. Menard, Inc., 2019 S.D. 6, ¶14, 922 NW 2d 784. The issues implicated by

the Order Granting Partial Summary Judgment are now before this Court for resolution. Furthermore, good argument can be made that a portion of that section of the partial summary judgment ordering removal of the gates was interlocutory in nature and not appealable as a matter of right and thus not dependent upon certification by the trial court regardless. Stoebner v. Konrad, 2018 S.D. 47, ¶12, 914 NW 2d 590.<sup>7</sup>

Accordingly, Patterson urges that this Court resolve the merits of the issue presented by the partial summary judgment in a manner consistent with the trial court's Order and compel Plowboy to act consistent with existing South Dakota statute and prior decisions of this Court as referenced above.

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<sup>7</sup>Plowboy has complained about Mr. Patterson failing to submit any Findings of Fact and Conclusions of Law on his Motion for Partial Summary Judgment. This Court has consistently held that separate Findings of Fact and Conclusions of Law are unnecessary in proceedings requesting a summary judgment. Veblen District v. Multi-Community Coop, 2012 S.D. 26, fn. 1, 813 NW 2d 161. The actual Order entered, however, did confirm the undisputed material facts and the law pertinent to those facts as presented.

## CONCLUSION

Plowboy has failed to satisfy its burden. The undisputed facts confirm intentional enhancements of the natural terrain's utility for travel. Tracy, at p. 331 Accordingly, the lower court properly concluded that there were no genuine issues of material fact and that as a matter of law the section line road was not an unimproved road under SDCL 31-25-1.1 and existing case law. Accordingly, since Plowboy did not have authority under existing law to fence and gate the section line, the trial court's partial summary judgment requiring removal should be affirmed.

## **REQUEST FOR ORAL ARGUMENT**

Patterson hereby requests oral argument.

DATED this 9th day of November, 2020.

RITER ROGERS, LLP

/s/ Robert C. Riter

By: \_\_\_\_\_  
Robert C. Riter

and: A. Jason Rumpca

319 S. Coteau - P. O. Box 280  
Pierre, SD 57501-0280  
605-224-5825  
Attorneys for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I, Robert C. Riter, certify that I served a copy of Appellee's Brief upon Defendant/Appellant's attorney by electronic means, as well as by mailing a true and correct copy of said Appellee's by first class mail to the following on the 9<sup>th</sup> day of November, 2020:

Marty J. Jackley  
Gunderson, Palmer, Nelson  
& Ashmore, LLP  
111 W. Capitol Ave. Ste. 230  
Pierre, SD 57501  
[mjackley@gpna.com](mailto:mjackley@gpna.com)

/s/ Robert C. Riter

---

Robert C. Riter

# APPENDIX

	Pages
1 Plaintiffs' Motion for Partial Summary Judgment. . . . .	1
2 Plaintiff's Statement of Undisputed Material Facts . . . . .	2-4
3 Order Granting Plaintiff's Motion for Partial Summary Judgment and Judgment and Order for Plaintiff. . . . .	5-8
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6 Affidavit of Paul Patterson - April 30, 2020 (less attachments) . . . . .	17-20
7 Affidavit of Paul Patterson - June 3, 2020 . . . . .	21-22
8 SDCL 31-25-1.1 . . . . .	23
9 Select photographs as attached to Affidavit of Paul Patterson and Verified Complaint . . . . .	24-30
10 Township Board Minutes. . . . .	31
11 SB 79 . . . . .	32-33
12 Portion of Transcript of Hearing Re: Motion for Partial Summary Judgment . . . . .	34-39



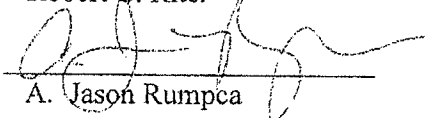
STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF JONES	)	SIXTH JUDICIAL CIRCUIT
PAUL PATTERSON,	)	37 CIV19-000012
	)	
Plaintiff,	)	
	)	
v.	)	MOTION FOR PARTIAL SUMMARY
	)	JUDGMENT
PLOWBOY, LLC,	)	
	)	
Defendant.	)	

COMES NOW, the above entitled Plaintiff by and through his attorneys, Riter Rogers, LLP, of Pierre, South Dakota, and hereby respectfully moves for partial Summary Judgment pursuant to SDCL § 15-6-56 to receive the judgment on the Complaint against Defendant declaring that Defendant has not satisfied his dual burden and thus, the gates on both ends of the township section line road involved must be removed. Plaintiff's Statement of Undisputed Material Facts, Memorandum of Law and Affidavit of Paul Patterson support this motion, and are incorporated by this reference.

Dated this 30<sup>th</sup> day of April, 2020.

RITER ROGERS, LLP

By:   
Robert C. Riter

And:   
A. Jason Rumpca

319 S. Coteau St.  
Pierre, SD 57501  
605-224-5825  
Attorneys for Plaintiff

STATE OF SOUTH DAKOTA        )  
  )SS  
COUNTY OF JONES            )  
  )  
PAUL PATTERSON,                )  
  )  
                          Plaintiff,        )  
  )  
v.                                )  
  )  
PLOWBOY, LLC,                 )  
  )  
                          Defendant.        )

IN CIRCUIT COURT  
  
SIXTH JUDICIAL CIRCUIT  
  
37 CIV19-000012  
  
STATEMENT OF UNDISPUTED  
MATERIAL FACTS

Plaintiff, Paul Patterson, by and through his attorneys, Riter Rogers, LLP, of Pierre, South Dakota, and for his Statement of Undisputed Material Facts states and alleges as follows:

- 1. Paul Patterson is a resident of Jones County, South Dakota.
- 2. Plowboy, LLC is a South Dakota limited liability company with its principal place of business at 117 E. Capitol Avenue in Pierre, South Dakota, with land in Jones County, South Dakota; and part of its business includes paid hunting. (Affidavit of Paul Patterson, ¶5)
- 3. Paul Patterson is the owner of the following described property:  
  
W1/2 of SW1/4 of Section 27, Township 2 South Range 30, East of the Black Hills Meridian, Jones County, South Dakota  
  
(Affidavit of Paul Patterson, ¶2)
- 4. Plowboy, LLC is the owner of the adjacent property described as follows:  
  
S1/2 of Section 28, Township 2 South Range 30, East of the Black Hills Meridian, Jones County, South Dakota.  
  
as shown on Exhibit A attached to the Affidavit of Paul Patterson, which is incorporated herein by this reference. (Affidavit of Paul Patterson, ¶3)
- 5. On March 27, 2019, Defendant provided notice that it was its intent to fence the property line between the Plaintiff's and Defendant's property on the east-west section line of the property. Defendant also advised it was his intent to fence and

install a gate at each end of the township road south of its property pursuant to SDCL 31-25-1.1.


6. The section line township road south of Defendant's property is the only access the Plaintiff has to his property, which is immediately adjacent, and is an improved township road. The township road has commonly been used as a public right-of-way by Plaintiff and others, including the hunting public. (Affidavit of Paul Patterson, ¶¶6,7)
7. The township road has been altered from its natural state for the purpose of facilitating vehicular passage. The township road has installed thereunder a culvert purchased by Plaintiff, and as authorized by the Dunkel Township, to help facilitate the passage of traffic. (Affidavit of Paul Patterson, ¶¶8,9)
8. The township road has been graded to facilitate drainage and traffic. (Affidavit of Paul Patterson, ¶10)
9. The township road has also been improved by placing gravel on a portion of the road by the Defendant. (Affidavit of Paul Patterson, ¶10)
10. In April, 2019, Defendant contacted the Dunkel County Township to discuss petitioning the Board of Trustees to have the section line designated as a "no maintenance section line". The correspondence acknowledged the property was traversed by an extensive number of so-called "hunting trespassers". (Verified Complaint, ¶8)
11. Plaintiff objected to the position of the fence on the east side of Defendant's property being placed in the middle of the section line and objected to the gates being placed across the township road on the south side of Defendant's property. (Verified Complaint, ¶9)
12. Despite these objections, and without the authority of the Township or proper legal action vacating the section line, Defendant proceeded with the unauthorized placement of gates on the township road south of its property and Defendant also fenced down the middle of the section line between the east/west boundaries of the parties' land. (Affidavit of Paul Patterson, ¶13)
13. Despite repeated and due demand, Defendant has refused to remove the gates on either end of the township road. (Affidavit of Paul Patterson, ¶18)
14. It is inconsistent with South Dakota law for the Defendant, under the circumstances involved, to fence in the middle of a section line or to fence and gate the township road south of its property which is not an unimproved road.

15. Plaintiff and the public are deprived of important access rights protected by statute, the State Constitution and existing caselaw.

DATED this 30<sup>th</sup> day of April, 2020.

RITER ROGERS, LLP

By:   
Robert S. Riter

And:   
A. Jason Kumpca  
PO Box 280  
319 S. Coteau St.  
Pierre, SD 57501  
605-224-5825  
Attorneys for Plaintiff

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF JONES	)	SIXTH JUDICIAL CIRCUIT
PAUL PATTERSON,	)	37CIV19-000012
	)	
Plaintiff,	)	
	)	
v.	)	ORDER GRANTING PLAINTIFF'S
	)	MOTION FOR PARTIAL SUMMARY
PLOWBOY, LLC,	)	JUDGMENT AND JUDGMENT AND
	)	ORDER FOR PLAINTIFF
Defendant.	)	

The above entitled matter having come on for hearing before this Court on June 5, 2020 at 9:30 a.m., in the Courtroom, in the Courthouse, in the City of Pierre, Hughes County, South Dakota (per agreement of counsel) upon Plaintiff's Motion for Partial Summary Judgment dated April 30, 2020 and filed herein, and the Plaintiff appearing in person and by and through his attorneys, Robert C. Riter and A. Jason Rumpca of Riter Rogers, LLP, and the Defendant appearing by its representative, Rob Skjonsberg, and its attorney, Marty J. Jackley of Gunderson, Palmer, Nelson & Ashmore, LLP, and the Court having considered all records and documents on file herein, having had ample opportunity to review the photographs which further demonstrate the section line road involved herein and this Court having also considered the pleadings submitted by the parties in support and opposition to the Motion for Partial Summary Judgment and good cause appearing therefore, it is hereby

ORDERED that the Plaintiff's oral Motion to strike the Supplemental Affidavit of Rob Skjonsberg filed by the Defendant on June 4, 2020 is hereby denied, but the Court does receive Exhibits 1 and 2 offered by the Plaintiff relative to that Supplemental Affidavit and the Motion to strike it from the record, and it is further

ORDERED that the issues presented herein involve the township section line road traversing from the west county road along the southerly border of Section 28, Township 2 South, Range 30, East of the Black Hills Meridian, Jones County, South Dakota to the eastern border of that section, and

WHEREAS, the rules of statutory construction confirm that a statute should be interpreted to mean what it says and under SDCL 31-18-1 there exists along every section line in this state a section line highway. Under SDCL 31-25-1, no fences can be erected and maintained across said highway unless the public body charged with that highway authorizes that fencing and in the present case, while the Defendant petitioned the township board, it was not granted authority to erect a fence or gates across the highway; and

WHEREAS, while SDCL 31-25-1.1 does authorize the erection of a fence, it is only across an unimproved county, township or section line highway. That statute states that an unimproved county, township or section line highway is a road not commonly used as a public right-of-way and never altered from its natural state in any way for the purpose of facilitating vehicular passage, and

WHEREAS, SDCL 31-25-1.1 also provides that if a party is statutorily authorized per that statute to erect a fence crossing an unimproved highway, wherever that fence crosses the highway the landowner shall erect and maintain an unlocked gate, which may be easily opened or provide other suitable access, and

WHEREAS, in the present case, the undisputed material facts confirm 1) the section line road has been commonly used by the Plaintiff for decades as a public right-of-way, 2) that the Plaintiff, in conjunction with the local township, paid for and installed a culvert under the road over thirty (30) years ago, 3) photographs of the culvert confirm it remains functioning

in all regards, 4) it is undisputed that, in conjunction with the landowner then owning Section 28, the road was graded in part to facilitate vehicular passage and 5) more recently, the Defendant itself placed gravel on a significant portion of the road as it leads toward the entry into Defendant's buildings, and

WHEREAS, the evidence is undisputed that the section line road has been altered from its natural state for the purpose of facilitating vehicular passage and furthermore, the section line road has been commonly used as a public right-of-way; thus, the Court concludes as a matter of law that the road is not an unimproved county, township or section line highway, and

WHEREAS, there exist no genuine issues of material fact and the Plaintiff is entitled to Partial Summary Judgment as a matter of law; and

THEREFORE this Court hereby

CONCLUDES that the Defendant has no authority to erect a fence across this section line road regardless of the type and nature of any gates it may install, and further

CONCLUDES that Plaintiff did not request the pertinent governing body, pursuant to SDCL Chapter 31-32, to compel removal of any obstructions on the road. Rather Plaintiff brought this action requesting that this Court determine and act upon whether the Defendant had authority to erect the fence and ultimately install gates across this section line road, and the Court further

CONCLUDES that the gate installed by Defendant was neither authorized by state law nor by action of a governmental body, and this Court further

CONCLUDES that this matter does not involve an isolated tract as impacted by SDCL Chapter 31-22, and this Court further

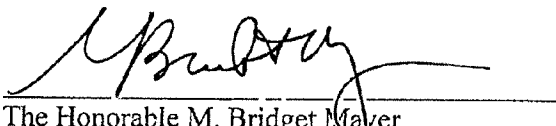
CONCLUDES, as a matter of law, under the undisputed material facts and pertinent law, that the gates installed by Defendant are not authorized since the road is not an unimproved section line road, and that Plaintiff's Complaint demanding removal of the same is appropriate under the circumstances, and the Court further

CONCLUDES and ORDERS that Plaintiff's Motion for Partial Summary Judgment shall be, and is hereby, in all respects granted, and it is herewith

ORDERED, ADJUDGED AND DECREED that Plaintiff is hereby granted Judgment requiring that Defendant remove the gates on both the west and east ends of the affected section line road as referenced above, and that it shall have twenty (20) days from the entry hereof to comply with this Court's Judgment and Order.

Signed: 7/13/2020 10:50:21 AM

BY THE COURT:

  
The Honorable M. Bridget Mayer  
Circuit Court Judge

Attest:  
Feddersen, Judy  
Clerk/Deputy



Filed on: 07142020 Jones

4 County, South Dakota 37CIV19-000012 App. 8



STATE OF SOUTH DAKOTA        )  
  )SS  
COUNTY OF JONES                )  
  ) IN CIRCUIT COURT  
PAUL PATTERSON,                 )  
  )  
                  Plaintiff,        )  
  ) VERIFIED COMPLAINT  
vs.                                 )  
  )  
PLOWBOY, LLC,                    )  
  )  
                  Defendant,      )

COMES NOW, the above entitled Plaintiff, and for his Complaint against the Defendant, states and alleges as follows:

THE PARTIES

- 1. Paul Patterson is a resident of Jones County, South Dakota.
- 2. Plowboy, LLC is a South Dakota limited liability company with its principal place of business at 117 E. Capitol Avenue in Pierre, South Dakota, with land in Jones County, South Dakota; and part of its business includes paid hunting.

THE BACKGROUND

- 3. Paul Patterson is the owner of the following described property:  
  
W1/2 of SW1/4 of Section 27, Township 2 South Range 30, East of the Black Hills Meridian, Jones County, South Dakota
  - 4. Plowboy, LLC is the owner of the adjacent property described as follows:  
  
S1/2 of Section 28, Township 2 South Range 30, East of the Black Hills Meridian, Jones County, South Dakota.
- as shown on attached Exhibit A and B, which is incorporated by this reference.
- 5. On March 27, 2019, Defendant provided notice that it was its intent to fence the property line between the Plaintiff's and Defendant's property on the east-west section line of the property. Defendant also advised it was his intent to fence and install a gate at each end of the township road south of its property pursuant to SDCL 31-25-1.1.

6. The Section line south of Defendant's property is the only access the Plaintiff has to his property and is an improved township road. The township road has commonly been used as a public right-of-way by Plaintiff and others, including the hunting public.

7. The township road has been altered from its natural state for the purpose of facilitating vehicular passage. The township road has a culvert authorized by the Dunkel Township to help facilitate the passage of traffic. The township road has been graded to facilitate drainage and traffic. The township road has also been improved by placing gravel on a section of the road by the Defendant. Attach Exhibits C, D and E, which are incorporated by reference, show a portion of the section line and the culvert.

8. In April, 2019, Defendant contacted the Dunkel County Township to discuss petitioning the Board of Trustees to have the section line designated as a "no maintenance section line". The correspondence acknowledged the property was traversed by an extensive number of so-called "hunting trespassers".

9. Plaintiff objected to the position of the fence on the east side of Plaintiff's property being placed in the middle of the section line and objected to the gates being placed across the township road on the south side of Defendant's property.

10. Despite these objections, and without the authority of the Township or proper legal action vacating the section line, Defendant proceeded with the unauthorized placement of gates on the township road south of its property and Defendant also fenced down the middle of the section line between the east/west boundaries of the parties' land.

11. It is inconsistent with South Dakota law for the Defendant, under the circumstances involved, to fence in the middle of a section line or to gate the improved township road south of its property.

12. Despite repeated and due demand, Defendant has refused to remove either the fence on the east/west property line or the gates on each end of the township road.

13. Plaintiff and the public are deprived of important access rights protected by statute, the State Constitution and caselaw.

#### INJUNCTION AND RESTRAINING ORDER

14. Plaintiff incorporates, by reference, each of the allegations of paragraph 1 through 13, inclusive.

15. Plaintiff and the hunting public have been irreparably harmed by Defendant's actions and failure to remove the fences and gates.

16. Any harm to Defendant is minimal compared to the irreparable harm inflicted upon the Plaintiff and the hunting public, especially where Defendant's self-help is in violation of established law and other remedies exist if Defendant's goal is to restrict access to either section line.

17. Given established statute and caselaw, there is a substantial probability that Plaintiff will prevail on the merits.

18. Public interest is protected by the relief requested.

19. The Defendant is not damaged by removing the gates and fencing placed on the respective section lines in violation of the law; however, Plaintiff stands ready to post such undertaking, pursuant to SDCL 15-6-65(c), as the Court may so direct.

20. No adequate remedy exists absent an injunction and restraining order to protect private and public rights.

#### DECLARATORY RULING

21. Plaintiff incorporates herein by this reference, each of the allegations of 1-20.

22. Defendant has cited SDCL 31-25-1.1 as legal authority to provide gates on the end of the township road. This statute applies to unimproved township roads.

23. Plaintiff requests a declaratory ruling that Defendant is not allowed to fence down the middle of the east-west section line boundary between the parties' properties.

24. Plaintiff requests a declaratory ruling that Defendant has failed to sustain its burden to legally establish the township road south of its property is an unimproved road. Hence, the Court should declare Defendant is not authorized to gate that township road.

#### NUISANCE

25. Plaintiff incorporates herein by this reference, each of the allegations of paragraphs 1-24.

26. Defendant fenced the section line highway south of his property which Plaintiff uses to access his property and placed gates upon the same.

27. The obstructions placed by Defendant on the highway were not authorized by State law or action of an authorized governmental body.

App. 11

28. The obstructions placed by the Defendant unlawfully interfere with, obstruct or tend to obstruct the section line highway which leads to Plaintiff's property.

29. The actions of the Defendant created a nuisance which is specifically injurious to Plaintiff and the traveling public and the Court should promptly cause the same to be abated or enjoined.

30. The Plaintiff is entitled to recover from the Defendant an amount sufficient to compensate him for the damages he has sustained as a result of Defendant's conduct as above described, to include all costs, expenses and attorney's fees incurred by Plaintiff to abate and enjoin the nuisance.

WHEREFORE, Plaintiff prays for Judgment against Defendant for the relief prayed for herein, the determination of the amounts of the undertaking, if any, for his attorney's fees, costs and expenses incurred herein, and for such other and further relief as to this Court may seem just and proper.

DATED this 31 day of July, 2019.

RITER, ROGERS, WATTIER &  
NORTHROP, LLP

By: Margo D. Northrup  
Margo D. Northrup  
Robert C. Riter  
319 S. Coteau – P. O. Box 280  
Pierre, SD 57501-0280  
605-224-5825  
Attorneys for Plaintiff

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF JONES	)	SIXTH JUDICIAL CIRCUIT
PAUL PATTERSON,	)	37CIV19-12
	)	
Plaintiff,	)	
	)	ANSWER AND
v.	)	COUNTERCLAIM
	)	
PLOWBOY, LLC,	)	
	)	
Defendant.	)	

Comes now Defendant Plowboy, LLC (herein after “Defendant”), by and through Marty J. Jackley of Gunderson, Palmer, Nelson & Ashmore, LLP, and for its Answer to Plaintiff’s Complaint and Counterclaim, states as follows:

- 1. Plaintiff’s Complaint fails to state a claim upon which relief can be granted and moves to dismiss.
- 2. Defendant denies each statement in Plaintiff’s Complaint, except for those matters that are specifically admitted or qualified.
- 3. With respect to paragraphs 1-4 of Plaintiff’s Complaint, admitted.
- 4. With respect to paragraph 5 of Plaintiff’s Complaint, admit that on March 27, 2019, Defendant provided notice and provided authority under SDCL 31-25-1.1. Defendant further states if the road is deemed an improved road through both alterations and common usage as a public right-of-way, it has legal authority for said gate because it does not constitute an impermissible obstruction.
- 5. With respect to paragraph 6 of Plaintiff’s Complaint, denied.
- 6. With respect to paragraph 7 of Plaintiff’s Complaint, denied.

12. The twenty-foot swing gates requested by Plaintiff are primarily left open, and if shut, they are not locked, and do not constitute an obstruction.

13. That Plaintiff leases the Defendant's property for agricultural purposes for \$7,390 per year. That Plaintiff has paid the first half of the 2019 rent in the amount of \$3,695, with the remainder due and owing. *See* Exhibit 6.

COUNT 1 – RECOVERY OF FENCING COSTS PURSUANT TO SDCL 43-23-6

14. That Defendant Plowboy, LLC, reasserts the previous paragraphs.

15. That on or about March 27, 2019, Defendant provided notice that it was its intent to fence the property line between the Plaintiff's and Defendant's property on the east-west section line of the property. *See* Exhibit 1A.

16. That on or about May 20, 2019, Defendant provided Plaintiff with an estimated cost of building the fence in the amount of \$9,989.15, excluding the cost associated with Plaintiff's cross fences continuing north.

17. That on or about June 3, 2019, Plaintiff was advised that the fencer was prepared to move forward and that he would be accommodated with his requested twenty-foot unlocked swing gates.

18. That on or about June 29, 2019, the fence was completed at a slightly lower cost of \$9,218.67.

19. Pursuant to SDCL 43-23-1 and SDCL 43-23-2, Plaintiff Patterson is liable for one-half of the expense of the erecting and maintaining the partition or boundary fence at issue in the Complaint and Counterclaim. *See* Exhibit 1A.

20. SDCL § 43-23-2 states:

**Duty of adjoining owner of land to build half of partition fence.**  
Unless otherwise agreed upon, if adjoining landowners are liable

- a. Defendant's fence is lawfully placed;
- b. That the section line is an unimproved township road and SDCL 31-25-1.1 provides legal authority to permit gates, or in the alternative, if it is determined to be an improved township road through both alteration and common usage as a public right-of-way, that the township shall make improvements to the same and that Defendant may use twenty-foot swing gates that are not locked nor otherwise obstruct any travel on said section line;
- c. That Defendant remove all obstructions on his side of the section line, including all cross fences and crops that prevent travel;
- d. That all obstructions, whether fences or crops, in said section line North to the county road be ordered cleared.

COUNT 4 – NUISANCE

29. That Defendant Plowboy, LLC, reasserts the previous paragraphs.

30. The property line between the Plaintiff and Defendant's property on the east-west section line of the property is obstructed by Plaintiff with crops and cross-section fences, and further obstructed all the way north to the county road.

31. That in the event the section line is deemed to be an improved road, the Defendant and the public have been irreparably harmed by Plaintiff's actions and obstruction of the section line to the county road with crops and cross fences.

32. Any harm to Plaintiff is minimal compared to the irreparable harm inflicted the Defendant and the public, especially where Plaintiff's self-help is in violation of established law and other remedies exist if Plaintiff's goal is to restrict access on the section line.

33. Given established statute and case law, there is substantial probability that Defendant will prevail on the merits.

34. Public interest is protected by the relief requested.

35. The Plaintiff is minimally damaged by removing obstructions to include crop and cross fences placed on the section line and in violation of the law, however, Defendant stands ready to post such undertaking, pursuant to SDCL 15-6-65(c), as the Court may so direct.

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36. To the extent the section line is deemed an improved road through both alterations and common usage as a public right-of-way, no adequate remedy exists absent an injunction and restraining order to protect public and private rights.

WHEREFORE, Defendant and Counterclaimant Plowboy, LLC, pray as follows:

1. For a dismissal of Plaintiff's Complaint;
2. For an award of damages in the amount of Plaintiff's one-half costs of the fencing in the amount of \$4,609.33;
3. For judgment against Plaintiff for breach or anticipated breach of the agricultural lease in the amount of \$3,695;
4. For a declaratory ruling that Defendant's fence and unlocked gates are lawful and do not otherwise constitute an inappropriate obstruction of a section line, and to the extent the section line is deemed an improved road through alteration and common usage as a public right-of-way, that Plaintiff be ordered to remove all obstructions of the section line including cross fences and crops;
5. To the extent the section line is deemed an improved road through alteration and common usage as a public right-of-way, that Plaintiff's obstructions of the section line constitute a nuisance for Defendant and the public and shall be removed;
6. To the extent the section line is deemed an improved road through alteration and common usage as a public right-of-way, for an injunction and restraining order against Plaintiff for the continued obstruction of the section line with cross fences and crops;
7. For Defendant's costs, attorney fees and interest where permitted by law;
8. For any such other relief as the Court may deem just and proper.



STATE OF SOUTH DAKOTA        )  
                                      )SS       IN CIRCUIT COURT  
COUNTY OF JONES                )       SIXTH JUDICIAL CIRCUIT  
  
PAUL PATTERSON,                 )  
                                      )       37CIV19-000012  
                                      )  
                  Plaintiff,        )  
                                      )  
v.                                 )       AFFIDAVIT OF PAUL PATTERSON  
                                      )  
PLOWBOY, LLC,                    )  
                                      )  
                  Defendant.       )

State of South Dakota )  
                              )ss  
County of Hughes        )

Paul Patterson, being first duly sworn, deposes and states as follows:

- 1.       He is the Plaintiff in the above entitled matter and is a resident of Jones County, South Dakota.
- 2.       He owns the W1/2SW1/4 of Section 27, Township 2 South, Range 30, East of the Black Hills Meridian, Jones County, South Dakota.
- 3.       Adjacent to his property is land owned by Plowboy, LLC. That land is legally described as the S1/2 of Section 28, Township 2 South, Range 30, East of the Black Hills Meridian, Jones County, South Dakota.
- 4.       See copy of plat book page 35 showing the Dunkel Township, attached hereto as Exhibit A.
- 5.       Plowboy, LLC is a South Dakota limited liability company with its principal place of business at 117 E. Capitol Avenue in Pierre, South Dakota, with land in Jones County, South Dakota; and part of its business includes paid hunting.

6. These properties adjoin one another and on the south side thereof there is a township road which traverses from the north/south county road west of Defendant's property to the land of your Affiant, where I raise crops. My only access to that crop field is along the township road.

7. The section line township road has been commonly used as a public right-of-way by me and others, including the hunting public.

8. The township road has been altered from its natural state for the purpose of facilitating vehicular travel.

9. The township road had installed thereunder a culvert purchased by me, as authorized by the township board. Attached as Exhibit B is a copy of the township minutes of forty some years ago, authorizing the purchase of the culvert for placement under that road and attached as Exhibit C is a photograph of a portion of the culvert. Also attached as Exhibit D is a picture showing the general improvements to the section line road.

10. The township road has also been graded by the township to facilitate drainage and traffic. Also, the Defendant itself improved the township road by placing gravel on a portion of the road. See attached Exhibit E, which is a photograph showing the grading on the road.

11. These efforts of mine and the township board in past years were completed with the consent, agreement and knowledge of the entity which then owned the property listed in number three above.

12. More recently, however, the current Defendant contacted the Dunkel County Township to discuss petitioning the Board of Trustees to have the section line township road designated as a no maintenance section line. That effort was not successful.

13. Despite my objections and without authority of the township or proper legal action vacating the section line, the Defendant thereafter proceeded with the unauthorized placement of gates on the township road south of its property and also fenced down the middle of the section line between the east/west boundaries of the parties' land. Attached hereto as Exhibits F and G are recent pictures of the gates which Defendant has installed on the west end on this township section line road, and Exhibit H is a photograph of the gate which Defendant has installed on the east end of this township section line road.

14. Attached as Exhibits I, J, K and L are two pictures of the westerly gate, which is adjacent to the county highway, showing vehicles and machinery thereon.

15. I frequent the property with farm machinery, including tractors and drills to plant, equipment to apply fertilizer or herbicide, and ultimately with a combine to harvest the crops. I need to access through the gate on the west side.

16. When the Defendant closes the gate it has installed on the west side of the property on the section line, I am required to park my farm equipment on the main, regularly traveled county section line road, get off my equipment, open the gate and then return to the equipment that is on the road. That is not only inconvenient but it creates a danger and obstacle for the traveling public on the main road. See Exhibits I, J, K and L above.

17. Of course, on the east end where another gate has been installed by the Defendant, the process must be repeated; however, the traveling public is not put in danger at that location.

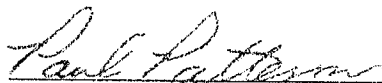
18. Despite repeated and due demand the Defendant has refused to remove the gates it installed on the ends of the township section line road. A broad view of a portion of the road looking west from my property is attached as Exhibit M.

19. There is no reasonable access to my property from any other direction.

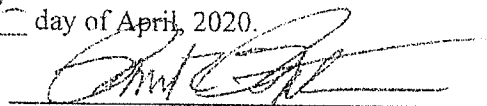
20. Attached as Exhibit N is a copy of SB 79, as it was introduced in the 2020 legislative session, along with pages 1 and 4 of the Senate Local Government Committee meeting minutes dated February 12, 2020 relative to their action defeating SB 79. This bill confirms an unsuccessful legislative effort to eliminate one of the two mandatory requirements imposed prior to fencing and closing gates on a township section line road.

Further your Affiant saith not.

DATED this 29<sup>th</sup> day of April, 2020.

  
Paul Patterson

Subscribed and sworn to before me this 29<sup>th</sup> day of April, 2020.

  
Notary Public

My commission expires: OCT 23, 2021

Notary Print Name: Robert C. Krey, Jr.

(SEAL)

State of South Dakota )  
 )ss  
County of Hughes )

1. He is the Plaintiff in the above entitled matter and is a resident of Jones County, South Dakota.


3. Despite his claim otherwise, I never discussed swinging gates with Mr. Skjonsberg, nor did I ever agree to installation thereof.

5. I have not requested that the township remove the gates, but rather have commenced this action requesting that action from this Court.

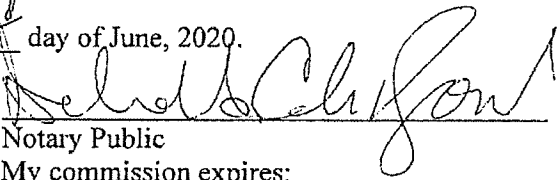
1

Further your Affiant saith not.

DATED this 2<sup>nd</sup> day of June, 2020.

  
Paul Patterson

Subscribed and sworn to before me this 2<sup>nd</sup> day of June, 2020.

  
Notary Public  
My commission expires: \_\_\_\_\_  
Notary Print Name: \_\_\_\_\_  
Deborah A. Clair-Raymond  
My Commission Expires 6-8-2023

(SEAL)

31-25-1.1. Fences erected across unimproved section-line highways--Gates--Access to highways protected--Violation as misdemeanor. A landowner may erect a fence across an unimproved county, township, or section-line highway. For the purposes of this section an unimproved county, township, or section-line highway is any county, township, or section line not commonly used as a public right-of-way and never altered from its natural state in any way for the purpose of facilitating vehicular passage. At any point where a fence crosses such highway, the landowner shall erect and maintain an unlocked gate which may be opened easily or provide other suitable access to the highway. If the gate or other access is not large enough or if the gate does not open easily enough to satisfy the needs of those using the highway, the landowner shall erect a larger gate or a gate that can be more easily opened or provide other suitable access to the highway. The landowner shall erect the larger gate or the gate which opens easily or provide the other suitable access upon a request filed with the sheriff of the county in which the land is located by an adversely affected person. If a request is filed, the sheriff shall notify the landowner. The landowner shall comply with the provisions of this section within seven days of notice. A landowner who violates any of the provisions of this section is guilty of a Class 2 misdemeanor.







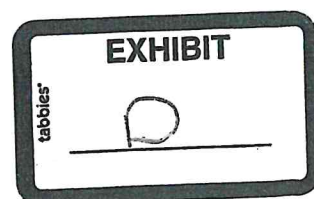


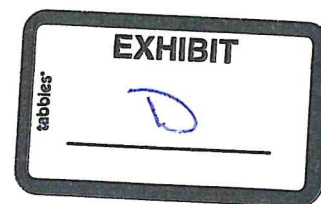




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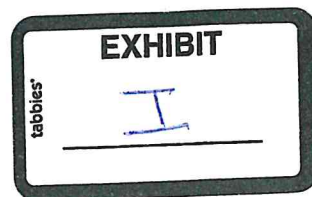
















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EXHIBIT

K

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tabbles



March 10, 1976

The annual township election was held March 10, 1976 at the Larry Koth residence. Five electors were present.

The clerk called the meeting to order with F.L. Fredricksen nominating Larry Koth as moderator. Earl Dahlke moved nominations ceased. Motion carried.

The Minutes ~~of~~ and Treasurer's Report were read and approved.

Don Cromwell nominated Larry Koth to a 3-year term as supervisor. Fred Fredricksen moved nominations cease. Earl seconded. motion carried.

Earl Dahlke nominated Paul Patterson as clerk. Don Cromwell moved nominations cease. F.L. Fredricksen seconded. Motion carried.

Paul Patterson nominated Don Cromwell for treasurer. Earl moved nominations cease. F.L. seconded. Motion carried.

Earl Dahlke moved to pay all bills. Larry Koth seconded. Motion carried.

Don moved to grade <sup>proper top pays half</sup> the dirt road on the north side of Section 2 & 3. Other ~~road work~~ <sup>West side</sup> designated: (1) Patch gravel along Sections 9, Section 11, (2) Blade off dirt roads. <sup>East side</sup> (3) Allow Paul Patterson to purchase one culvert to be placed on the southside of Section 28.

Don Cromwell moved to levee 1500. Larry Koth seconded. Motion carried.

~~Earl moved meeting adjourned.~~  
~~Earl seconded. Motion carried.~~

EXHIBIT

20.571.10

95th Legislative Session

852



2020 South Dakota Legislature

**Senate Bill 79**

*Introduced by: Senator Klumb*

1 An Act to modify provisions regarding the building of fences across certain  
2 unimproved highways.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That § 31-25-1.1 be AMENDED:

5 **31-25-1.1. Fences--Unimproved Section-Line Highways--Gates--Access--**  
6 **Notification--Violation as misdemeanor.**

7 A landowner may erect a fence across an unimproved county, township, or  
8 section-line highway. For the purposes of this section, an unimproved county, township,  
9 or section-line highway is any county, township, or section line not commonly used as a  
10 public right-of-way and never altered from its natural state in any way for the purpose of  
11 facilitating vehicular passage. At any point where a fence crosses such highway, the  
12 landowner shall erect and maintain an unlocked gate which may be opened easily or  
13 provide other suitable access to the highway. If the gate or other access is not large  
14 enough or if the gate does not open easily enough to satisfy the needs of those using the  
15 highway, the landowner shall erect a larger gate or a gate that can be more easily opened  
16 or provide other suitable access to the highway. The landowner shall erect the larger gate  
17 or the gate which opens easily or provide the other suitable access upon a request filed  
18 with the sheriff of the county in which the land is located by an adversely affected person.  
19 If a request is filed, the sheriff shall notify the landowner. The landowner shall comply  
20 with the provisions of this section within seven days of notice. A landowner who violates  
21 any of the provisions of this section is guilty of a Class 2 misdemeanor.

Calculators are not law. (§ 2-16-13.1)



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..... indicate deleted language.



Senate Local Government

Wednesday, February 12, 2020 7:45 AM

**SB 79 :** modify provisions regarding the building of fences across certain unimproved highways.

Presented by: Senator Joshua Klumb

Proponents: Matt Eldridge, Self, Midland, SD

Doug Abraham, South Dakota Landowners and Outfitters Alliance (Handout(s) 1,2)

Jeromy Pankratz, South Dakota Soybean Association

Brenda Forman, South Dakota Cattleman's Association

Representative Spencer Gosch

Opponents: Paul Patterson, Self, Draper, SD

Chris Hesla, Self, SDWF

George Vandel, South Dakota Waterfowl Association

Kody Kyriss, SD Association of Towns and Townships

Paul Lepisto, South Dakota Issac Walton League

John Simpson, Self, Pierre, SD

**MOTION:** DO PASS SB 79

Moved by: Cammack

Second by: Youngberg

Action: Failed by roll call vote (2-5-0-0)

Voting Yes: Cammack and Youngberg

Voting No: Ewing, Schoenfish, Wismer, Duhamel, and Phil Jensen

**MOTION:** DEFER SB 79 TO THE 41<sup>ST</sup> LEGISLATIVE DAY

Moved by: Wismer

Second by: Schoenfish

Action: Prevailed by roll call vote (6-1-0-0)

Voting Yes: Ewing, Schoenfish, Youngberg, Wismer, Duhamel, and Phil Jensen

Voting No: Cammack

**THE CHAIR DEFERRED SB 183 AND 180**

**MOTION:** ADJOURN

Moved by: Youngberg

Second by: Duhamel

Action: Prevailed by voice vote

Mary Kirk, Committee Secretary

\_\_\_\_\_  
/s/ PHIL JENSEN  
Phil Jensen, Chair

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1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT  
2 COUNTY OF JONES ) SS SIXTH JUDICIAL CIRCUIT  
3 )  
4 PAUL PATTERSON, ) 37CIV19-000012  
5 Plaintiff, ) TRANSCRIPT OF HEARING  
6 vs. ) RE: MOTION FOR PARTIAL  
7 PLOWBOY, LLC, ) SUMMARY JUDGMENT  
8 Defendant. )  
9 )

10 BEFORE: THE HONORABLE M. BRIDGET MAYER,  
11 Circuit Court Judge of the Sixth Judicial  
12 Circuit, in Pierre, South Dakota, on  
13 the 5th day of June, 2020.

14 APPEARANCES:

15 MR. ROBERT RITER  
16 MR. JASON RUMPCA  
17 Riter Rogers, LLP  
18 PO Box 280  
19 Pierre, South Dakota 57501;  
20 Counsel for the Plaintiff.

21 MR. MARTY JACKLEY  
22 Gunderson, Palmer, Nelson  
23 & Ashmore, LLP  
24 111 W. Capitol Ave, Suite 230  
25 Pierre, South Dakota 57501;  
Counsel for the Defendant.

-----  
23 Mona G. Weiger  
24 Official Court Reporter App. 34  
25 PO Box 1238  
Pierre, SD 57501  
605-773-3971

1 improved road, that gate shouldn't be locked. If it's  
2 an unimproved road, that gate can be locked.

3 I would point out to the Court that the Court  
4 has an affidavit from Rob Skjonsberg that that gate  
5 has never been locked and I don't believe in any of  
6 the filings in front of the Court would indicate this  
7 gate has ever been locked.

8 The actual obstructions in the road again are  
9 not an unlocked gate. They're Plaintiff's farming  
10 practices which the Court has photos of the sunflowers  
11 in the Answer and updated photos of the crop he just  
12 recently planted weeks ago. The Court has  
13 photographs, despite Plaintiff's contentions of the  
14 exact road, the exact location showing the  
15 cross-fences.

16 And finally, I think it's important to address  
17 it because it's been ignored by Plaintiff but the  
18 factual issues created by the isolated tract. I  
19 quoted the exact language out of Plaintiff's own  
20 affidavit establishing issues of material fact.

21 If you look at that isolated tract statute,  
22 common sense statute again says that if everybody's  
23 got cattle, you have a right to fence and you have a  
24 right to keep unlocked gates. That's consistent  
25 exactly with what the Defendant has done in this

1 at that because there's no issue about an isolated  
2 tract when there is a section line road leading to the  
3 property, which there is in this case.

4 What in effect they're trying to do is say we  
5 can gate it and we can fence it. And the argument  
6 then is if it's a reasonable obstruction, then you  
7 ought to allow us to impose a reasonable obstruction.  
8 But if you look at the statute that we've relied upon,  
9 Your Honor, or when you look at it, it makes it clear  
10 that the question is twofold.

11 Number one, if it is an unimproved section line  
12 road, then they can fence it and then if it's a  
13 reasonable circumstance, they can also gate it under  
14 certain circumstances. But if it's not an unimproved  
15 road, they can neither fence nor gate it and that's  
16 our argument.

17 As a matter of law, Your Honor, there are those  
18 two requirements that they show. They have not shown  
19 it. The law -- or the facts are quite to the  
20 contrary. This was a road commonly used by  
21 Mr. Patterson and perhaps others, might have been  
22 hunters. The hunters in Tracy -- the Tracy case  
23 doesn't say hunters can't use the section line road.  
24 In Tracy there was a great big area that was a slough  
25 and the hunter followed the section line but he had to

1 you want to respond? I know there's the normal ten,  
2 five, two.

3 MR. JACKLEY: I would think ten days is  
4 appropriate, Your Honor.

5 THE COURT: Is that acceptable, Mr. Riter?

6 MR. RITER: Certainly.

7 MR. JACKLEY: Ten days after his response;  
8 correct?

9 THE COURT: Yes. Instead of just ten, five,  
10 two, I'll give you -- we're all getting going on our  
11 tracts with COVID, coming in and we're all getting  
12 busier so if ten days is appropriate.

13 MR. JACKLEY: Your Honor, I recognize that you  
14 said we do get another opportunity to convince the  
15 Court, but just so that I'm clear on the Court's  
16 ruling, the Court ruled that it's an improved road.  
17 Is the Court ruling that an unlocked gate is an  
18 unlawful obstruction? Is that embodied in this ruling  
19 or is the Court addressing issue one?

20 THE COURT: I am addressing issue one and that  
21 gate shouldn't have been put up because of the nature  
22 of the road.

23 MR. JACKLEY: So the Court's ruling, just so  
24 I'm clear is, an unlocked gate is an unlawful  
25 obstruction and an interference. That's what the

1 Court's ruling? Because that's --

2 THE COURT: It shouldn't be there, period. So  
3 according to that road, you can't put it up so I don't  
4 know that I need to go there. I'll look at that  
5 provision when the proposed findings come in and you  
6 can certainly put that in there. I don't think I need  
7 to rule on that issue today. It should not be there,  
8 period, and I'm not going to go any further than that  
9 today.

10 MR. JACKLEY: Just so that I have a clear  
11 record, it is the Defendant's position that it is  
12 appropriate to place an unlocked gate on an improved  
13 county road in order to keep cattle out.

14 THE COURT: Are there cattle there now?

15 MR. JACKLEY: My understanding is the Court is  
16 disagreeing with that and ordering the removal of an  
17 unlocked gate on an improved county road. Is that the  
18 Court's ruling?

19 THE COURT: A couple things. I didn't hear  
20 anything about any cattle there now.

21 MR. JACKLEY: It's in the filings, Your Honor.

22 THE COURT: All right. Well, this particular  
23 road -- I'll look at the issue when your findings come  
24 in a little closer.

25 MR. JACKLEY: It's clearly in the affidavits

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Mona G. Weiger, Official Court Reporter 605-773-39

1 submitted.

2 THE COURT: But according to that statute, this  
3 gate can't be there, period.

4 MR. JACKLEY: Even open?

5 THE COURT: That's the way I'm reading the  
6 statute so go ahead and submit your findings.

7 You give me your objections.

8 You give me your proposals. I think that's the  
9 whole reason we do proposed findings of fact and  
10 conclusions of law, for me to make sure that I got  
11 this right. All right. And I will be looking at it  
12 closely because I am ruling from the bench here today  
13 and I'm not writing an opinion, because I know this  
14 issue is very important to both of you and I want to  
15 keep this moving forward.

16 So I do want to give you an opportunity if you  
17 want to file an intermediate appeal on this issue and  
18 ask that -- whatever you're going to do from here,  
19 whether you place a hold on me removing that gate from  
20 the Supreme Court or whatever.

21 MR. JACKLEY: If the Court's ruling is that  
22 it's not appropriate to place unlocked gates or open  
23 gates on an improved section line road, it will be our  
24 intent to appeal and I would request an order for the  
25 transcript.

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

---

No. 29373

---

PAUL PATTERSON,

*Appellee/Plaintiff,*

v.

PLOWBOY LLC,

*Appellant/Defendant.*

---

Appeal from the Circuit Court  
Sixth Judicial Circuit  
Jones County, South Dakota

---

The Honorable M. Bridget Mayer  
Circuit Court Judge

---

---

**REPLY BRIEF OF APPELLANT PLOWBOY, LLC**

---

*Attorneys for Defendants/Appellants*

Marty J. Jackley  
111 West Capitol Avenue  
Suite 230  
Pierre, SD 57501  
(605) 494-0105

*Attorneys for Plaintiff/Appellee*

Robert C. Riter  
A. Jason Rumpca  
319 South Coteau  
P.O. Box 280  
Pierre, SD 57501  
(605) 224-5825

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II.   The circuit court erred in granting partial summary judgment because it did not consider this Court’s interpretation of nearly identical statutory language related to unimproved roads and because it resolved genuine issues of material fact regarding whether the farm trail was an unimproved section line road that was unlawfully obstructed. ....	2
A.    The circuit court erred in finding that SDCL 31-25-1.1, which permits fences and gates on unimproved roads, does not authorize Plowboy’s gates because the section line farm trail is an improved road. ....	4
B.    Whether the unlocked gate is an obstruction was incorrectly analyzed and is a genuine issue of material fact that should have precluded the grant of partial summary judgment. ....	12
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### **Cases**

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## ARGUMENT

**I. The Order and Judgment, including its requirement that the gates be removed within twenty days, may not be immediately enforced and recognized as a final judgment because the ruling was not certified as a final judgment under SDCL 15-6-54(b).**

Regarding the first issue of whether the circuit court may recognize and seek to enforce the Order and Judgment, which addresses one claim in a case involving multiple claims, as a final judgment without certification under SDCL 15-6-54(b), Patterson acknowledges “certification that the partial summary judgment was a final judgment under SDCL 15-6-54(b) was not sought by either Patterson or Plowboy[.]” *See* Brief of Appellee Paul Patterson filed with this Court on November 9, 2020, at 23 (hereinafter “Patterson Brief at \_\_\_\_”). Patterson further indicates that “[b]y virtue of this Court’s Order allowing the appeal, the issue presented by Plowboy as to the trial court’s failure to certify the ruling as a final judgment appears moot as it has no practical [e]ffect upon the controversy now pending before this Court.” *See id.* at 24 (citing *Skjonsberg v. Menard, Inc.*, 2019 S.D. 6, ¶ 14, 922 N.W.2d 784).

Given this Court’s Order Granting Petition for Allowance of Appeal from Intermediate Order, which included a stay preserving the status quo pending appeal, Plowboy’s concerns regarding the finality of the judgment have been addressed and Plowboy acknowledges there is no longer a reason to address this issue if the Court desires not to do so.<sup>1</sup> *See* Order Granting Petition (July 23, 2020).

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<sup>1</sup> The enforceability of an uncertified final judgment as to a motion for partial summary judgment for one claim in a case involving multiple claims may be an issue of public importance worthy of review. *See Larson v. Krebs*, 2017 S.D. 39, ¶¶ 16-17, 898 N.W.2d 10, 16-17 (noting that “the public interest exception to the mootness doctrine . . . require[s]: ‘general public importance, probable future recurrence, and probable future mootness.’”) (quoting *Sedlacek v. S.D. Teener Baseball Program*, 437 N.W.2d 866, 868

**II. The circuit court erred in granting partial summary judgment because it did not consider this Court’s interpretation of nearly identical statutory language related to unimproved roads and because it resolved genuine issues of material fact regarding whether the farm trail was an unimproved section line road that was unlawfully obstructed.**

The primary issue is whether the circuit court erred in resolving genuine issues of material fact when concluding that the farm trail is not an unimproved road and that unlocked gates may not be placed across the trail. *See* Brief of Appellant Plowboy, LLC filed with the South Dakota Supreme Court on September 24, 2020, at 14-25 (hereinafter “Plowboy Brief at \_\_\_\_”). As stated in Plowboy’s Brief, pursuant to SDCL 31-25-1.1, unlocked gates may be erected and maintained across unimproved section line highways:<sup>2</sup>

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(S.D. 1989)). *Cf. O’Neill v. O’Neill*, 2016 S.D. 15, ¶ 35, 876 N.W.2d 486, 500, which states that:

[T]he right to appeal is by law limited to final decrees. And if, by an interlocutory order or decree, [a party] is required to deliver up property which he claims, or to pay money which he denies to be due, and the order immediately carried into execution by the [c]ircuit [c]ourt, his right of appeal is of very little value to him, and he may be ruined before he is permitted to avail himself of the right. It is exceedingly important, therefore, that the [c]ircuit [c]ourts ..., in framing their interlocutory orders, and in carrying them into execution, should ... abstain from changing unnecessarily the possession of property, or compelling the payment of money by an interlocutory order.

Cases, no doubt, sometimes arise, where the purposes of justice require that the property in controversy should be placed in the hands of a receiver, or a trustee be changed, or money be paid into court. But orders of this description stand upon very different principles from the interlocutory orders of which we are speaking.

(quoting *Forgay v. Conrad*, 47 U.S. (6 How.) 201, 205-06, 12 L.Ed. 404 (1848))

<sup>2</sup> Patterson proposes other options that Plowboy could have taken in lieu of installing unlocked gates across the trail at issue. *See* Patterson Brief at 9, 11, 20. However, SDCL 31-25-1.1 permits the landowner to install an unlocked gate in this type of situation, regardless of other possible options that may be available.

**31-25-1.1. Fences erected across unimproved section-line highways--  
Gates--Access to highways protected--Violation as misdemeanor.**

A landowner may erect a fence across an unimproved county, township, or section-line highway. **For the purposes of this section an unimproved county, township, or section-line highway is any county, township, or section line not commonly used as a public right-of-way and never altered from its natural state in any way for the purpose of facilitating vehicular passage.** At any point where a fence crosses such highway, the landowner shall erect and maintain an unlocked gate which may be opened easily or provide other suitable access to the highway. If the gate or other access is not large enough or if the gate does not open easily enough to satisfy the needs of those using the highway, the landowner shall erect a larger gate or a gate that can be more easily opened or provide other suitable access to the highway. The landowner shall erect the larger gate or the gate which opens easily or provide the other suitable access upon a request filed with the sheriff of the county in which the land is located by an adversely affected person. If a request is filed, the sheriff shall notify the landowner. The landowner shall comply with the provisions of this section within seven days of notice. A landowner who violates any of the provisions of this section is guilty of a Class 2 misdemeanor.

Without supporting authority, Patterson asserts that the burden of proof rests upon Plowboy to show that the farm trail is unimproved for purposes of SDCL 31-25-1.1. *See* Patterson Brief at 8. However, it seems that Patterson, as the plaintiff seeking removal of the unlocked gates, bears the burden of proof in this matter. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 51 (2005) (indicating that the burden of persuasion generally lies “on the party seeking relief.”); *Frank Stinson Chevrolet, Inc. v. Connelly*, 356 N.W.2d 480, 483 (S.D. 1984). Moreover, as the moving party for partial summary judgment, Patterson has the burden “to show clearly that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law[.]” *See Wilson v. Great N. Ry. Co.*, 83 S.D. 207, 212, 157 N.W.2d 19, 21 (1968).

Here, Patterson failed to meet either of these burdens and summary judgment was improperly granted. The Order and Judgment failed to account for this Court's earlier interpretation of language substantially similar to that in SDCL 31-25-1.1. Further, under the summary judgment standard where facts are viewed most favorably to Plowboy, the court incorrectly decided several genuine issues of material fact in favor of Patterson, including whether the trail had been "altered from its natural state" and whether the trail was "commonly used as a public right-of-way[.]" Cf. SDCL 31-25-1.1. These reasons support reversal of the court's grant of summary judgment.

- A. The circuit court erred in finding that SDCL 31-25-1.1, which permits fences and gates on unimproved roads, does not authorize Plowboy's gates because the section line farm trail is an improved road.

The circuit court, in factually concluding that the farm trail was not unimproved, effectively concluded that the trail was an "improved road". See R. 151 (App. 23). Yet the fact that the parties are presenting this Court with competing photographs of the condition of the farm trail, and competing views on whether the trail was commonly used as a public right-of-way, for a determination of whether the farm trail is improved, proves that there are questions of material fact not appropriately decided on summary judgment.

1. *A narrowed interpretation of SDCL 31-25-1.1 is appropriate when considering this Court's interpretation of substantially similar language in State v. Tracy, 539 N.W.2d 327 (S.D. 1995).*

At the outset, the phrase in SDCL 31-25-1.1, "never altered from its natural state in any way for the purpose of facilitating vehicular passage[.]" should be interpreted narrowly, consistent with this Court's interpretation of virtually identical statutory language in *State v. Tracy*, 539 N.W.2d 327 (S.D. 1995). In *Tracy*, and in the context of hunting within public rights of way, the Court concluded that "a section line is improved

for the purposes of ‘facilitating vehicular passage’ when the improvement is in the nature of intentional enhancement of the natural terrain’s utility for travel or adaptation which will permit travel where it was not previously possible.” *See id.* at 331.

Importantly, *State v. Tracy* concluded that its earlier case of *State v. Peters*, 334 N.W.2d 217 (S.D. 1983), defined “improved road” too broadly when concluding that “[a]ny alteration suffices[.]” *See Tracy*, 539 N.W.2d 327.<sup>3</sup> In *Peters*, the Court determined that a farm trail cleared of rocks and consisting of compacted tire tracks on a section line that was used by an individual for farming and ranching purposes was an improved road. *See* 334 N.W.2d at 220-21 (including photographs of the trail in dispute). However, shifting from that earlier position, this Court noted in *Tracy* that “mere travel along a road does not constitute an improvement.” *See Tracy*, 539 N.W.2d at 331.

Here, Patterson seems to advocate for a definition of “improved road” similar to that in *State v. Peters*, where “[a]ny alteration suffice[d].” *See Tracy*, 539 N.W.2d at 331. The lack of material or meaningful alteration left Patterson to argue that “there have been improvements and the law says that if there are improvements **in any way**, that they’ve altered it from the natural state for the purpose of facilitating vehicular passage and that has been done[.]” *cf.* R. 110 (10:15-19) (emphasis added). And

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<sup>3</sup> Patterson contends that Plowboy’s argument for a narrowed interpretation of the phrase “never altered from its natural state in any way” is an invitation for “this Court to improperly legislate.” *See* Patterson Brief at 20. However, Plowboy is merely recognizing this Court’s earlier, narrowed interpretation of that phrase as set forth in *State v. Tracy*. Further, a narrowed interpretation of that phrase is essential to avoid an absurd result. *See State v. Tracy*, 539 N.W.2d 327 (S.D. 1995). To construe otherwise would literally allow the act of removing one rock to transform section lines into improved roads and the removal of literally hundreds of unlocked gates across cattle country in South Dakota. *See* Plowboy Brief at 22. As further established by the record below, because livestock is a part of Plowboy’s as well as the adjoining landowner’s farming practices, fencing and gates are necessary. *See* R. 86 (¶3) (App. 15).

Patterson’s Brief advocates that “the question presented is whether the section line road was ‘**altered in any way.**’” *See* Patterson Brief at 18 (emphasis added). Likewise, the circuit court failed to acknowledge this Court’s narrowed interpretation of the language substantially similar to that found in SDCL 31-25-1.1. *See* R. 124 (HT 24:9-20). Ultimately, the farm trail at issue here should not be analyzed under that overly broad interpretation seemingly rejected by this Court in *Tracy*.

In an attempt to bolster its interpretation of the phrase “never altered from its natural state in any way . . .” within SDCL 31-25-1.1, Patterson stresses that the South Dakota Legislature, in its latest session, declined to amend SDCL 31-25-1.1 to remove that language from a determination of whether a section line is unimproved. Patterson Brief at 15. Senate Bill 79 proposed to strike that phrase, which would have left only the condition that the unimproved road not be commonly used as a public right-of-way in order to permit the installation of an unlocked gate. *See* R. 56. Ultimately, however, Senate Bill 79 failed before the Senate Local Government Committee. R. 58. With that background, Patterson contends that “our 2020 legislature considered the pertinent statute in SB 79 and was well satisfied with its current language as evidenced by the sound rejection of an amendment thereto.” *See* Patterson Brief at 21.

Perhaps the lack of materiality and the danger in relying on such matters to support the granting of summary judgment is best revealed by the committee hearing testimony wherein certain individual legislators explained their “nay” vote. Those legislators explained their vote against amending SDCL 31-25-1.1 not necessarily because they solely approved of Patterson’s view of the statute, or were “well satisfied with its current language”, but also because the statute was subject to pending litigation



and they wanted to see how it would play out in the court system. *See* Senate Local Government Committee Hearing, dated February 12, 2020, at 52:00, 59:09 to 1:00:25, *available at* <https://sdpb.sd.gov/SDPBPodcast/2020/slo19.mp3#t=1036>. Without more, there can be, and should be, no inference that the South Dakota Legislature approves of an overly broad interpretation of SDCL 31-25-1.1, or disproves of this Court’s interpretation of substantially similar language in *Tracy*.

2. *Disputed material facts exist regarding whether the farm trail is improved, including whether the trail is “commonly used as a public right-of-way” and whether the trail was “altered from its natural state in any way for the purpose of facilitating vehicular travel[,]” especially considering the narrowed interpretation of that language by this Court in State v. Tracy, 539 N.W.2d 327.*

Next, Patterson points to a number of facts as “undisputed” in support of his argument that summary judgment was properly granted in his favor. *See* Patterson Brief at 4. However, several of those facts were disputed by Plowboy through supporting affidavits, at least to the extent that those facts are now relevant as to the current status of the farm trail as improved or unimproved. Summary judgment was improperly granted because as the nonmoving party, the facts should have been viewed in the light most favorable to Plowboy, and “reasonable doubts should [have been] resolved against” Patterson. *See Robinson v. Ewalt*, 2012 S.D. 1, ¶ 7, 808 N.W.2d 123, 125.

Importantly, yet ignored by Patterson, the Township has not designated this farm trail as an improved road. *See* R. 43 (App. 1). In addition, and construed in the light most favorable to Plowboy, the Township does not maintain the farm trail. R. 87 (¶ 10) (App. 16). In his Brief, however, Patterson appears to pursue an inference that the Township considers the road as improved. Patterson relies upon his asserted fact that “Plowboy’s effort to get the township to designate the road as a no maintenance section

line was unsuccessful.”<sup>4</sup> Patterson Brief at 4. In a similar vein, Patterson contends that the Township has performed work on the road, in the form of grading and adding a culvert. *See, e.g.*, Patterson Brief at 12, 19. Effectively, the acceptance of Patterson’s asserted (and disputed) facts would seem to deem the farm trail as “opened”, “improved”, and quite possibly fully maintained due to no evidence that it has been designated as a “minimum maintenance” road. *Cf.* SDCL ch. 31-13 (discussing designations of full maintenance, minimum maintenance, and no maintenance roads); *Douville v. Christensen*, 2002 S.D. 33, ¶ 7 n.1, 641 N.W.2d 651, 653 n.1 (discussing the use of the terms “improved” and “unimproved” as opposed to “open”).

Patterson fails to address the absurdity of all resulting liability imposed on townships to maintain all section lines under its overly broad interpretation that an improved road exists upon the alteration of the section line **in any way**.<sup>5</sup> Here, it seems that under the circuit court’s ruling and Patterson’s position that the farm trail is an improved road, an obligation is placed on townships to construct and maintain the farm trail, even though the township has designated the farm trail as “unimproved[.]” *See R.*

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<sup>4</sup> It is unclear to Plowboy how any request to designate the farm trail as a “no maintenance” road, even if assumed to be made by Plowboy (which it was not), resolves the unlocked gate issue. It seems that there are full maintenance roads, minimum maintenance roads, and no maintenance roads, all which may qualify as improved roads under the standard set forth in *Douville v. Christensen*, 2002 S.D. 33, ¶ 7 n.1, 641 N.W.2d 651, 653 n.1 (defining “improved” as “intentional enhancement of the natural terrain's utility for travel or [an] adaptation which will permit travel where it was not previously possible.”). *See also* SDCL ch. 31-13.

<sup>5</sup> Although not acknowledging the potential liability imposed on townships if the farm trail is deemed an “improved road”, Patterson does address the liability on others if the unlocked gates are required to be removed and the neighbor’s cattle damage Plowboy’s fields. Patterson Brief at 20. There would be claims of trespass by cattle abound if all unlocked gates are required to be removed from section line farm trails like the trail at issue today.

43 (App. 1); *see also* SDCL 31-13-1 (“The board of township supervisors shall construct, repair, and maintain all of the township roads within the township except for section lines designated as no maintenance section lines pursuant to § 31-13-1.4 and roads designated as no maintenance roads pursuant to § 31-13-1.6. . . .”). If a township owes a duty to maintain roads that it designates as “unimproved”, it is questionable whether a section line exists that would not need to be maintained. And the Township here may certainly object to any ruling that its authorization of the purchase of a culvert over forty years ago results in its liability for an improved road.

In addition, Patterson’s argument assumes without evidence that any decision by the Township not to designate the trail as a “no maintenance” road was due to the Township’s classification of the farm trail as “improved.” Assuming facts and deciding genuine issues of material fact **in favor of the moving party** demonstrates the need to remand this matter for the proper application of the well-established summary judgment standard or for trial for the appropriate determination of genuine issues of material fact.

Next, in addressing whether the farm trail is “commonly used as a public right-of-way,” Patterson’s Brief itself highlights the factual dispute presented through competing affidavits. Patterson Brief at 10-11. Patterson notes Mr. Skjonsberg’s assertion “that the trail is used by Patterson a couple of times a year, as well as by hunting trespassers.” *See id.*; *see also* R. 87 (¶ 11) (App. 16) (Affidavit of Rob Skjonsberg, stating that the farm trail “is used a couple times a year by [Patterson] and by hunting ‘trespassers’ that do not have permission to hunt [Skjonsberg’s] land.”). *Cf.* SDCL 41-9-1 (generally requiring landowners’ consent). Patterson then counters that Mr. Skjonsberg’s assertion, indicating that Plowboy’s “claim stands in stark contrast to the Affidavit Patterson filed herein

wherein he stated:

I frequent the property with farm machinery, including tractors and drills to plant, equipment to apply fertilizer or herbicide, and ultimately with a combine to harvest the crops. R 41 ¶15 (App. 19).”

*See* Patterson Brief at 11.

Patterson’s own actions weigh against a determination that the section line is commonly used as a public right-of-way. As stated in Plowboy’s Brief, **Patterson himself has a cross fence with no gate that crosses a mere 500 feet east of Plowboy’s eastern gate, on the southern section line of neighboring Section 27, which is a continuation of that same section line on Section 28.** R. 179 (¶ 8) (App. 27); *see also* R. 79, 88 (¶ 20) (App. 17). In effect, Patterson complains of unlocked gates on Plowboy’s portion of the section line that Patterson wants to travel on, while on the other hand, **Patterson entirely excludes the public from traveling on Patterson’s portion of the section line** that leads to the county road. *See* Plowboy Brief at 21 n.10. This action by Patterson supports that the section line is not commonly used as a public right-of-way because Patterson himself has prevented the public from continuing to travel along the section line, rendering that section line impassable.<sup>6</sup>

In addition to the factual dispute of whether the farm trail is commonly used as a public right-of-way, there are also genuine issues of material fact regarding whether the

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<sup>6</sup> Patterson also challenges Plowboy’s claim that the farm trail itself can be impassable. Patterson contends that “[t]here is no testimony or evidence supporting that claim[.]” *See* Patterson Brief at 17. That contention fails to recognize the Affidavit of Mr. Skjonsberg, which indicates that “approximately fifty-feet west of [the] culvert, Plaintiff Patterson attempted to drain a listed USFWS wetland last fall, **where the area or trail in question can be impassable[.]**” *See* R. 178 (¶ 4) (App. 26); *see also* R. 185 (App. 29). And under the summary judgment burden, the disputed facts must be weighed in Plowboy’s favor.

farm trail has been altered from its natural state, in a narrowed sense of the phrase. Patterson contends that it is an undisputed fact that the farm trail has been graded. *See* Patterson Brief at 4, 12-13 (noting that “[t]he grading has not been disputed by Plowboy”). That fact, however, was specifically disputed by Plowboy. *Compare* R. 40 (¶ 10) (App. 7) (Patterson asserting that “[t]he township road has also been graded by the township to facilitate drainage and traffic”) *with* R. 82 (¶ 5) (App. 11) (Plowboy “den[ying] that the Township Road has been graded to facilitate drainage and traffic or otherwise constitute an improved road”) *and* R. 87 (¶ 10) (App. 16) (indicating that “the Township Board does not treat nor has it otherwise designated the section line area or farm trail at issue as improved, nor does it maintain it”). In addition, the photographs of the farm trail certainly call into question the grading of the farm trail in its entirety. *See* R. 10, 45 (App. 28), 185 (App. 29), 190 (App. 30), 191 (App. 31).

Also in support of his position that the farm trail has been altered to facilitate vehicular travel, Patterson emphasizes that with the consent of the Township, a culvert was purchased and installed on the farm trail over 40 years ago. R. 40 (¶ 9) (App. 7). However, in a competing affidavit, Mr. Skjonsberg indicates that “the culvert in question does not appear to, at least presently, serve any purpose in relation to an improved road[.]” R. 178 (¶ 4). With that in mind, a nonfunctioning culvert should not be relied upon to qualify a road as “facilitating vehicular passage.” *See* SDCL 31-25-1.1.

Moreover, to the extent the Township’s actions of authorizing Patterson to purchase a culvert in 1976 are relevant to an analysis of whether the farm trail is an improved road, the self-serving nature of the culvert should not be ignored. The Township Board, for which Mr. Patterson was elected and served as clerk at the time,

authorized Patterson to purchase a culvert to be installed on the section line leading to Patterson's own property. *See* R. 44; *see also* Patterson Brief at 4 (noting that "the township minutes confirm [the township's] participation in enhancing the road for travel[.]" and that "[t]he culvert was intended to and did alter the section line road to facilitate vehicular passage"). At a minimum, this fact undercuts any argument that the Township Board, by authorizing Patterson's purchase of the culvert, intended to improve the road for the benefit of the general public.<sup>7</sup> Ultimately, when viewed most favorably to Plowboy, the photographs and competing affidavits by Mr. Skjonsberg, as well as Patterson's own actions of preventing all travel on the continuation of the section line, support the denial of summary judgment.

B. Whether the unlocked gate is an obstruction was incorrectly analyzed and is a genuine issue of material fact that should have precluded the grant of partial summary judgment.

Finally, the Order and Judgment should be reversed so the circuit court may appropriately consider whether the unlocked gates are an unlawful obstruction. R. 151 (App. 23). The only asserted "obstruction" is that the unlocked gates "interfere[] with Patterson moving equipment over to [Patterson's] property and also interfere[] with the traveling public utilizing the north/south road on the west of Plowboy's property[.]" Patterson Brief at 22-23. And as noted in Plowboy's Brief, there is no evidence that the township has taken any action deeming the unlocked gate as an unlawful obstruction and the court's determination has replaced the township's authority to do so. *See* R. 151 (App. 23); *see* SDCL 31-32-9. Indeed, the South Dakota Legislature seems to have

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<sup>7</sup> The same can be said as to the "efforts by Patterson and the township board" in any grading of the road "to facilitate drainage and travel." *See* Patterson Brief at 4.

deemed it acceptable to place “barbed wire fence across any traveled road, whether the same be or be not a public highway,” so long as there is “an obstruction across said road outside of and not farther away from said fence than two rods, consisting of at least two boards or poles securely fastened to three upright posts[.]” *See* SDCL 31-32-5.

Patterson contends that the question of whether an unlocked gate is an obstruction “is not pertinent and fails to raise facts that would affect the outcome of this litigation under the governing substantive law.” Patterson Brief at 21-22. However, failing to address whether an unlocked gate is an obstruction inappropriately disregards the issue of public accessibility to section lines, which is directly at issue here. In 1871, the Territorial Legislature passed an act declaring “that hereafter all section lines in this territory shall be and are hereafter declared public highways as far as practicable[.]” *See Lawrence v. Ewert*, 21 S.D. 580, 114 N.W. 709, 710 (1908). SDCL 31-18-1 likewise recognizes that section lines are generally public highways. The Legislature “evidently intended to make every section line in the then territory and now state a highway over which the people of the state would have an easement and right of way subject to the qualifications therein contained for the purpose of passing from one section of the state to another[.]” *See Lawrence*, 114 N.W. at 710. “Declaring section lines ‘public highways’ means that they are roads which every citizen has a right to use[.]” *Id.*

As pointed out in Plowboy’s opening brief, this Court has recognized that generally, “section line rights-of-way cannot be obstructed by private citizens absent legal authority to do so[.]” *See Douville*, 2002 S.D. 33, ¶ 11, 641 N.W.2d 651. With this background, a fence crossing section lines (such as Patterson’s cross fence) that effectively closed those section lines by excluding the public has been held to unlawfully

obstruct the right of public access. *See Lawrence*, 114 N.W. at 710; *but see* SDCL 31-32-5 (seeming to permit barbed wire across traveled roads under certain conditions). Yet here, the court failed to address whether Plowboy’s unlocked gates obstructs that right of public access. *See* Plowboy Brief at 23-25; *see generally* R. 149-52 (App. 21-24). And “although there mere existence of a gate on a public highway may be the antithesis of public use, the practice has been statutorily recognized in the grazing lands of this state[.]” *Frawley Ranches, Inc. v. Lasher*, 270 N.W.2d 366, 370 (S.D. 1978) (citing SDCL ch. 31-25); *see also Knight v. Madison*, 2001 S.D. 120, ¶ 8, 634 N.W.2d 540, 543 (“[t]he fee owner of a road has the right to erect a gate to limit public or third-party access to the road, as long as this does not interfere with the ingress and egress rights of the easement holder.”). Weighing against any obstruction and interference, Patterson himself has used the trail for the past two growing seasons after installation of the unlocked gates that are oversized at Patterson’s request. *See* R. 88 (¶ 15) (App. 17) (discussing installation of gate and fence); R. 41 (¶¶ 15-17) (App. 8).

Although the right of public access is in play for a discussion of an obstruction of section line rights-of-way, the right of private property owners to maintain their cattle and crops on their own land should not be ignored. As recognized by this Court, “gates may serve a multitude of valuable purposes.” *See Block v. Drake*, 2004 S.D. 72, ¶ 25 & n. 5, 681 N.W.2d 460, 467 & n.5; *Vander Heide v. Boke Ranch, Inc.*, 736 N.W.2d 824, 839 (S.D. 2007). In South Dakota, with pastures and farmland throughout, gates are certainly a necessity. *See Frawley Ranches, Inc.*, 270 N.W.2d at 372 (recognizing that an individual’s request for fencing along the right of way was justified when the public road “cuts through a pasture used for grazing”, “[was] needed to prevent the wandering of



livestock”, and “[was] needed to prevent hunters, campers and hikers in four-wheel drive vehicles from trespassing[.]”). Accordingly, the court’s summary judgment ruling, which does not consider whether the unlocked gates on the farm trail unlawfully obstruct public access, should be reversed.

### **CONCLUSION**

SDCL 31-25-1.1 is aimed at the type of farm trail at issue in this case, where it is not an improved road subject to the local governing body’s authority, control, and liability, but it is also not a vacated section line. Unlocked gates on these farm trails appropriately balance the public’s accessibility to the section line right-of-way while permitting farmers and ranchers to use their private property in their operations.

The unlocked gates in this case are not obstructing public access, unlike Patterson’s cross fence of the section line right-of-way a mere 500 feet from the unlocked gate that Patterson now complains of. R. 88 (¶ 20) (App. 17). The lack of obstruction, questions of fact regarding the condition of the farm trail, and the potential resulting liability on local governments if these types of farm trails are deemed “improved” support the reversal of summary judgment.

Dated: December 9, 2020.

GUNDERSON, PALMER, NELSON  
& ASHMORE, LLP

By: /s/ Marty J. Jackley  
Marty J. Jackley  
Stacy R. Hegge  
Attorneys for Defendant  
111 West Capitol Ave., Suite 230  
Pierre, South Dakota 57501  
Telephone: (605) 494-0105  
E-mail: mjackley@gpna.com

### **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with SDCL § 15-26A-66(b). The font is Times New Roman size 12, which includes serifs. The brief is 15 pages long and the word count is 4,997, exclusive of the Cover, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service. The word processing software used to prepare this brief is Microsoft Word and the word count from that program was relied upon in determining the word count of this brief.

Dated: December 9, 2020

GUNDERSON, PALMER, NELSON  
& ASHMORE, LLP

By: /s/ Marty J. Jackley  
Marty J. Jackley  
Attorneys for Defendant  
111 West Capitol Ave., Suite 230  
Pierre, South Dakota 57501  
Telephone: (605) 494-0105  
E-mail: mjackley@gpna.com

**CERTIFICATE OF SERVICE**

I hereby certify on December 9, 2020, a true and correct copy of **Reply Brief of Appellant Plowboy LLC** was filed and served through email, upon the following individuals, with a hard copy forthcoming:

Robert C Riter  
A. Jason Rumpca  
Riter Rogers LLP  
319 S Coteau St.  
PO Box 280  
Pierre SD 57501  
r.riter@riterlaw.com

Dated December 9, 2020

/s/ Marty J. Jackley  
Marty J. Jackley  
Attorneys for Defendant  
111 West Capitol Ave., Suite 230  
Pierre, South Dakota 57501  
Telephone: (605) 494-0105  
E-mail: mjackley@gpna.com